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

Issued by the Department of Transportation  
on the 18th day of September, 2000

In the Matter of

**THE WENDELL H. FORD AVIATION  
INVESTMENT AND REFORM ACT  
FOR THE 21<sup>st</sup> CENTURY**

for exemptions from 14 C.F.R. Part 93,  
under 49 U.S.C. § 41716(a) and (b)

Served: September 21, 2000

Docket OST-2000-7175 - 33  
OST-2000-7176 - 31

**ORDER ON PETITION FOR RECONSIDERATION**

**SUMMARY**

By this order the Department grants a July 31, 2000, request by the Office of the President of the Borough of Queens (hereafter "the Borough President") to withdraw a motion that she filed on June 2, 2000, for reconsideration of Orders 2000-4-10 and 2000-4-11. Orders 2000-4-10 and 2000-4-11 granted certain exemptions from slot restrictions at LaGuardia Airport. While we are granting her request to withdraw her petition, her petition raised issues that are of great concern to the people living and working near LaGuardia and to airline passengers. We are therefore discussing those issues in this order, since we wish to clarify the likely effects of our earlier orders implementing Congress' directive authorizing additional flights at LaGuardia and the other slot-restricted airports.

**STATUTORY BACKGROUND**

On April 14, 2000, the Department issued two Orders granting exemptions from certain landing and takeoff restrictions (slot rules) at LaGuardia Airport, which is located in the Borough of Queens, New York City. These actions were taken pursuant to

Congressional direction in sections 41716(a) and 41716(b) of Title 49, United States Code.<sup>1</sup>

New 49 U.S.C. 41716(a) states in full:

Subject to section 41714(i), the Secretary shall grant, by order, exemptions from the requirements under subparts K and S of part 93 of title 14, Code of Federal Regulations (pertaining to slots at high density airports), to any air carrier to provide nonstop air transportation, using an aircraft with a certificated maximum seating capacity of less than 71, between LaGuardia Airport or John F. Kennedy International Airport and a small hub airport or nonhub airport – (1) if the air carrier was not providing such air transportation during the week of November 1, 1999; (2) if the number of flights to be provided between such airports by the air carrier during any week will exceed the number of flights provided by the air carrier between such airports during the week of November 1, 1999; or (3) if the air transportation to be provided under the exemption will be provided with a regional jet as replacement of turboprop air transportation that was being provided during the week of November 1, 1999. [Emphasis supplied.]

New 49 U.S.C. § 41716(b) states in full:

Subject to section 41714(i), the Secretary shall grant, by order, exemptions from the requirements under subparts K and S of part 93 of title 14, Code of Federal Regulations (pertaining to slots at high density airports), to any new entrant air carrier or limited incumbent air carrier to provide air transportation to or from LaGuardia Airport or John F. Kennedy International Airport if the number of slot exemptions granted under this subsection to such air carrier with respect to such airport when added to the slots and slot exemptions held by such air carrier with respect to such airport does not exceed 20. [Emphasis supplied.]

Section 41714(i), referenced in both the above provisions, establishes a 60-day process for the Department in handling slot exemption applications. Section 41714(i)(2) specifies that, as relevant to LaGuardia slot exemptions here at issue, within 60 days after receipt of such a request the Secretary shall either (a) approve it if it meets the statutory requirements; (b) request more information relating to the request to provide air transportation;<sup>2</sup> or (c) deny the request and state the reasons for denial.

<sup>1</sup> These sections were added by section 231 of the Wendell H. Ford Aviation Investment and Reform Act for the 21<sup>st</sup> Century, Public Law 106-181, April 5, 2000 ("AIR-21").

<sup>2</sup> Under section 41714(i)(1), the applicant is required to provide the names of the airports to be served, the times requested [i.e. the hourly slot periods within which the proposed operations would take place], and such additional information as the Secretary required. The Secretary did not add criteria for other information, except that enforceable certifications were required to ensure that the eligibility requirements

Section 41714(i)(4) states that, if the Secretary fails to take action within the 60 day period, then the request is deemed to have been approved on the 61<sup>st</sup> day.

Congress included provisions to mitigate the environmental harm that might be caused by its decision to authorize additional slot exemptions at LaGuardia and the other three slot-controlled airports. Congress specified that any service operated under this slot exemption authority must be with Stage 3 aircraft (the quietest category of aircraft), that priority would be given in making grants for airport noise compatibility planning and programs to the four high-density airports, and that the Department must study the airport area noise levels compared with the levels in the same areas before 1991.<sup>3</sup>

### **THE DEPARTMENT ORDERS**

The first order covered by the Borough President's petition, Order 2000-4-10 (Docket OST 2000-7176) granted slot exemptions at LaGuardia to each new entrant or limited incumbent air carrier<sup>4</sup> that applied for or thereafter applied for them, up to such number as, when added to the slots and slot exemptions already held by it at LaGuardia, did not exceed 20.

The second order, Order 2000-4-11 (Docket OST 2000-7175) granted such exemptions at LaGuardia to air carriers that had applied for them, or would subsequently apply for them, if they proposed to provide new or replacement service on a nonstop basis, using aircraft with a certificated maximum seating capacity of less than 71 seats, between LaGuardia and a small hub or nonhub airport.<sup>5</sup>

As Congress directed in AIR-21, the Orders imposed certain other conditions on the applying carriers, in particular that the aircraft being used to operate the flights must meet "Stage 3" requirements.

The Department's awards were further conditioned upon carriers affirmatively certifying that they met each and every one of the statutory criteria. False certifications are subject to enforcement action.

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were met. Note also that the provision for requesting more information is limited to "information relating to the [carrier's] request to provide air transportation."

<sup>3</sup> See e.g. new 49 U.S.C. §§ 41716(c), 47117(e)(3).

<sup>4</sup> For these purposes, a new entrant or limited incumbent air carrier is an air carrier or commuter air carrier that holds or operates (or held or operated since December 16, 1985) fewer than 20 slots and slot exemptions at LaGuardia. 49 U.S.C. § 41714(h).

<sup>5</sup> For these purposes, a nonhub airport is one that had less than .05 percent of the total annual boardings in the United States as determined under FAA's Primary Airport Enplanement Activity Summary for Calendar Year 1997. A small hub airport is one that had at least .05 percent, but less than .25 percent of the total annual boardings as determined under that same summary. 49 U.S.C. § 41714(h)(7), (h)(8).

Both of the Department's Orders stated that there was no requirement to prepare an environmental impact statement under the National Environmental Policy Act because federal statute (AIR-21) directed the actions to be taken if the specified criteria were met, and imposed short, mandatory deadlines for taking the actions. The Department interpreted the statutes as directory, giving it no discretion to impose other substantive criteria or process relating to slot exemption awards. The Department could not comply with AIR-21's provisions on slot exemptions while conducting, or causing to be conducted, an environmental assessment under the National Environmental Policy Act (NEPA).<sup>6</sup> In issuing the two Orders, the Department addressed the question as to whether an environmental analysis should be prepared. Footnote 1 of both Orders said:

Because AIR-21 directs such action to be taken if the specified criteria are met, and short, mandatory deadlines are imposed, there is no requirement to prepare an environmental impact statement under the National Environmental Policy Act. See, e.g. American Airlines v. Department of Transportation, 202 F. 3d 788 (5<sup>th</sup> Cir., 1999.)

#### **PETITION FOR RECONSIDERATION**

On June 2, 2000, the Borough President filed a "Motion for Permission to File Objections and Objections to Orders Granting Slot Exemptions at New York's LaGuardia Airport. The motion and objections are equivalent to a petition for reconsideration under the Department's Rules. 14 C.F.R. 302.14.<sup>7</sup>

The Motion requested permission to file an omnibus document containing objections to the large number of applications made to the Department in Dockets 2000-7175 and 2000-7176. According to the Borough President's calculations, carriers seeking to operate under the small hub/nonhub exemption authority had filed for a total of 538 slot exemptions per day. New entrants or limited incumbents sought an additional 70 exemptions. With LaGuardia thus facing the prospect of an additional 600 flights per day, the Borough President argued that there were "extraordinary circumstances" that supported receipt of her objections and reconsideration by the Department of its AIR-21 implementation orders.

The attached "omnibus document" noted that the addition of up to 608 additional flights per day at LaGuardia would have a significant impact upon the residents of Queens

<sup>6</sup> Cases such as Flint Ridge Development Co. v. Scenic Rivers Ass'n of Oklahoma, 426 U.S. 776 (1976), have held that a Congressional decision to impose a short mandatory deadline on an agency action means that NEPA's environmental impact statement requirements are inapplicable to that action.

<sup>7</sup> This section requires that petitions for reconsideration of a final order be filed within 20 days after service of the order, 14 C.F.R. § 302.14(a)(2). In this case, that would have been not later than May 9, 2000. Under 14 C.F.R. § 302.9(a)(2), the Department may permit a late filing where good cause for the failure to act on time is clearly shown. The Borough President did not offer any cause for the late filing.

County. Those impacts included airport noise, air pollution, safety risks, and increased levels of traffic congestion, all of which would be exacerbated by additional flights.

The Borough President asserted that the Department, in the past, had performed environmental assessments of increased operations at LaGuardia and nearby JFK, and argued that an "unbiased and comprehensive" environmental assessment should be performed here. She contended that the provision in AIR-21 mandating awards of slot exemptions at Reagan Washington National Airport contained language expressly exempting that process from compliance with environmental processing requirements, and the absence of such language in the section addressing New York Airports should be interpreted as indicating that Congress did not intend to "allow a precipitous increase in flight activity...in reckless disregard of any environmental considerations."

The Borough President also contended that the Department should not "abdicate its responsibility to ensure that AIR-21 is implemented in a safe and efficient manner." She urged the Department to affirmatively evaluate the applications, approving proposals only that would bring more service to the "underserved markets which really need it."

The Borough President further argued that congestion and delay were factors that should be considered, noting that - admittedly under prior law - the Department had specifically addressed those problems in denying a request by Spirit Airlines to add flights at LaGuardia.<sup>8</sup> On this point, she asserted that the proposed increase in flights would raise such issues as where gate space might be found, or of how long aircraft would have to wait to take off or land. Moreover, she claimed, many of the destinations proposed for service by one carrier were more than duplicated by others, and that new applications were being made for markets in which current flights are running less than 50 percent full. Thus, the Borough President asserted that carriers should not be permitted to "file applications which contain wish lists," but rather should be required to file legitimate business plans which the Department should review before approving applications.

The Borough President argued that an increase in operations would exacerbate safety concerns, such as runway mishaps and near-misses, at LaGuardia, claiming it to be a small airport at or near capacity. In this regard, she suggested that the Department limit the number of operations by smaller (and/or louder) aircraft, as by awaiting availability of 70-seat regional jets before proceeding with implementation of AIR-21.

Finally, the Borough President asserted that many of the applications were received from carriers already having a strong presence in the New York market, such that granting them would not accomplish a goal of encouraging competition in the market.

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<sup>8</sup> Department Order 95-8-38.

Replies were filed in both dockets by Legend Airlines, Midwest Express Airlines, Continental Express, and Delta Connection.<sup>9</sup> These parties all opposed the arguments made by the Borough President, and had common themes.

First, they generally argued that the Borough President filing, due May 9 at the latest, was not made until June 2, or three and one-half weeks too late. They further contended that good cause was not claimed to justify so late a filing. Thus, they asserted that the Department would be justified in rejecting the motion on procedural grounds.

Second, they tended to argue that their operations would be prejudiced if the Department were to reconsider its grant of exemptions to them. Based on AIR-21 and the Department's implementing orders, the carriers asserted that they had already committed aircraft and other resources to specific markets and flights. Destination cities and customers were already expecting service to be initiated on dates certain, expectations that would not be met if additional studies or procedural requirements were now to be imposed after-the-fact.

Third, they asserted that the language of sections 41716(a) and (b) mandated that the Department grant exemptions within 60 days to all carriers that met the prescribed criteria, leaving no discretion to the Department to subject applicants to more selective criteria or additional scrutiny. On this point, some argued that the Borough President's contention that exemptions should be limited to only those proposals that would bring more service to underserved markets was neither authorized nor permitted by AIR-21.

Fourth, they asserted that the Department correctly concluded that no environmental assessment was required under these circumstances. Because the language of AIR-21 decreed that applications would be automatically approved if not acted upon within the 60-day statutory deadline, the opposing parties argued that the statute could not be construed as requiring the Secretary to conduct the type of extensive environmental review urged by the Borough President.

Finally, they generally urged that the intent of AIR-21 was to transfer more of the LaGuardia scheduling and service decisions from regulators to carriers, and that in making those decisions carriers would be conscious of environmental, safety, delay, and congestion concerns.

No party filed in support of the Borough President's Motion and Objections.

On June 13, 2000, eleven days after the filing by the Borough President of her Motion and Objections with the Department, the City of New York and President of the Borough of Queens filed a petition for review in the United States Court of Appeals for the Second

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<sup>9</sup> Delta Connection accompanied its Answer with a Motion for Leave to File, which we will grant.

Circuit, docketed as No. 00-4124. The petition requested the Court to review and set aside Orders 2000-4-10 and 2000-4-11.

On July 31, 2000, the Borough President sent a letter to DOT Secretary Rodney E. Slater asking to “formally withdraw our motion for reconsideration.” The letter was not accompanied by any motion for leave to file, and did not cite any procedural or other legal authority requiring the Department to permit such a withdrawal. The Borough President’s letter otherwise restated a continuing objection to the orders and their implementation.

## DECISION

Because of the serious public policy concerns raised in the Borough President’s June 2 Motion, we will grant that Motion and permit her to file her Objections, which are equivalent to a Petition for Reconsideration. We will, however, grant her request to withdraw that petition. However, in view of the wide public interest in the potential impact of our orders and the likely increase in flights at LaGuardia, we will discuss those matters in this order.<sup>10</sup> The public interest is best served by our addressing them on their merits, even though the Borough President has chosen to withdraw her petition.<sup>11</sup>

## DISCUSSION

The Borough President’s Petition is premised both on anxieties and expectations. She fears that the addition of up to 608 additional operations per day at LaGuardia would pose serious issues of safety, airport capacity, delay, congestion, and environmental impact. And, she expects that the Department could, consistent with existing law, delay implementation of AIR-21’s slot reforms in order to conduct further studies, as well as restrict the number of operations to those that would bring service to markets that “really need” it.

We understand the concerns that the Borough President has expressed. While some congestion and delays may be experienced as new flights are introduced, we do not expect the number of exemptions carriers have been granted to translate into a comparable number of new operations. Most, if not all, of those carriers currently lack the aircraft,

<sup>10</sup> Under the Department’s established practice, withdrawal of a pleading filed with us requires our consent. We may deny such requests in the public interest. Employee Protection Program, Audit Report Disclosure, Order 84-2-51. A party that seeks to withdraw a motion should do so through a formal pleading served on the other parties, not by a letter to the Secretary. Under the circumstances, applying the normal procedural requirements in this case is not necessary to ensure fair treatment for the other parties.

<sup>11</sup> Although the City of New York and the Borough President have filed a petition for review of our Orders with the Second Circuit, we may still discuss the issues raised by the Borough President’s reconsideration petition. The Court has taken no action in the case, and the discussion in this order will not interfere with its ability to review our decision. American Farm Lines v. Black Ball Freight Service, 397 U.S. 532, 540-542 (1970); B.J. Alan Co. v. ICC, 897 F. 2d 561, 562, n.1 (D.C. Cir. 1990). The discussion should assist the parties and the public by describing the likely effects of the additional slot exemptions.

staff, and/or gate space they would need to utilize these exemptions. Moreover, established air traffic procedures and air traffic management initiatives, administered by the Federal Aviation Administration, will continue to ensure that only those flights that can be safely accommodated will be allowed to operate. Regardless of the slot exemptions granted, there is an operational capacity at each facility, based on existing conditions, that FAA will not permit to be exceeded. Those conditions include runway configuration, weather, and air traffic controller workload and equipment.

We have also considered the statutory interpretation arguments made by the Borough President's petition and her earlier filings in these dockets. We will not discuss them here, since she wishes to withdraw her petition and since the Court of Appeals will be addressing those issues. We remain convinced that AIR-21 requires us to grant slot exemption requests satisfying the statutory criteria without first conducting an environmental analysis under NEPA. In interpreting the AIR-21 slot exemption provisions applicable to LaGuardia and JFK, we considered the differences in language between those provisions and those applicable to other slot-controlled airports and concluded that the statute required us to act on LaGuardia and JFK exemption applications without subjecting them to a NEPA-type environmental analysis.

#### A. Background for the Liberalization of Slot Restrictions at LaGuardia Airport

LaGuardia is one of four United States airports currently designated as a "high density" airport (the others being Chicago O'Hare, Reagan Washington National, and John F. Kennedy). The designations date back to 1968, when they were proposed by the FAA due to perceived congestion and delay problems. As a "high density" airport, LaGuardia is subject to restrictions on the number of Instrument Flight Rule takeoffs and landings permitted each hour. In accordance with FAA regulations, at 14 C.F.R. § 93-Subparts K and S, LaGuardia is generally limited to 48 operations for air carriers, 14 for commuters, and 6 "other" (total 68) in any two consecutive 30-minute periods.

These slot limits have remained fixed since the mid-1980's, despite substantial advances since then in both traffic control technology and traffic management techniques. These advances made possible considerable additional growth in traffic at non-slot-controlled airports, which have identical concerns with safety, delays, and congestion.

According to the FAA airport enplanement data referenced in AIR-21,<sup>12</sup> among U.S. airports based on total enplaned passengers, LaGuardia ranks only twenty-first in size. O'Hare was second, JFK was tenth, and Reagan Washington National twenty-sixth. In other words, only four of the largest U.S. airports operate with slot limitations on the number of their operations. The airports without such limitations include airports busier

<sup>12</sup> See 49 U.S.C. section 41714(h)(7).

than LaGuardia – such as Atlanta Hartsfield, Los Angeles International, and Dallas/Ft. Worth.

It became increasingly apparent, by the early to mid-1990's, that slot controls were artificially restraining growth at LaGuardia and the three other airports, and that additional operations could be safely accommodated. In 1993 the National Commission to Ensure a Strong Competitive Airline Industry urged FAA to review the high density rule, "with the aim of either removing these artificial limits or raising them to the highest practicable level consistent with safety requirements."<sup>13</sup> The following year, the Clinton Administration responded by directing the Secretary of Transportation to examine the high density rule. In 1994, Congress also directed that the Department perform a thorough study on the rule and report its result,<sup>14</sup> and further authorized the Department to grant additional slots or slot exemptions from the rule at O'Hare, LaGuardia, and JFK airports for essential air service, and for foreign air transportation and new entrant carriers.<sup>15</sup>

The Department exercised that authority at LaGuardia, notably by awarding 30 slot exemptions to new entrant carriers through two orders in 1997 and 1998.<sup>16</sup> During the same period, 60 exemptions were awarded at O'Hare and 75 at JFK. The Department then had some discretion to grant or deny slot exemptions, since the grant of slot exemptions to new entrants required a public interest finding. 49 U.S.C. 41714(c). The Department took environmental concerns into account in determining whether to authorize additional flights at slot-restricted airports. See, e.g., Order 97-10-17 at 14.

Congress, in the AIR-21 legislation, adopted language that significantly liberalized the high-density restrictions. Congress weighed the potential beneficial and adverse effects of authorizing additional flights at the high-density airports, and determined that the public interest required that airlines meeting specified criteria should be awarded additional slot exemptions.

Somewhat different approaches were mandated for O'Hare, Reagan Washington National, and the two New York airports.

At O'Hare, the statute specified that slots would no longer be needed for international service at O'Hare effective May 1, 2000 (making them available for interstate or intrastate operations).<sup>17</sup> It narrowed the existing window on slot restrictions so as not to apply

<sup>13</sup> *Change, Challenge, and Competition*, Report of the National Commission to Ensure a Strong Competitive Airline Industry, August 1993, p. 9.

<sup>14</sup> Federal Aviation Administration Authorization Act of 1994 (P.L. 103-305), Sec. 206(c), 49 U.S.C. § 41714. The Department completed and submitted its Report to Congress in May, 1995.

<sup>15</sup> Federal Aviation Administration Authorization Act of 1994 (P.L. 103-305), Sec. 206(a)(1), (e).

<sup>16</sup> See Orders 97-10-17 and 98-4-22. The Court of Appeals affirmed Order 97-10-17 in *City of New York v. Slater*, 145 F. 3d 568 (2<sup>nd</sup> Cir. 1998).

<sup>17</sup> See new 49 U.S.C. §§ 41717(c), 41714(b)(4).

with respect to aircraft operating before 2:45 p.m. and after 8:14 p.m., effective July 1, 2001.<sup>18</sup> More significantly, all slot restrictions at O'Hare will be eliminated effective July 1, 2002.<sup>19</sup>

At Reagan Washington National Airport, the Department was directed to grant 24 additional exemptions – 12 for flights within 1,250 miles of the airport and 12 for flights beyond that distance.<sup>20</sup>

At LaGuardia and JFK, the statute specified that all slot restrictions would be eliminated as of January 1, 2007.<sup>21</sup>

At O'Hare, LaGuardia and JFK, essentially identical statutory provisions directed the Secretary to grant exemptions to any air carrier to provide new or replacement nonstop service, using an aircraft with fewer than 71 seats, to small hub or nonhub airports. In accordance with these directives, the Department issued substantively identical implementing orders for O'Hare, JFK, and LaGuardia on April 14, 2000.<sup>22</sup> The Order for O'Hare has not been challenged, although the Borough President has questioned the order for LaGuardia.<sup>23</sup>

Also at O'Hare, LaGuardia, and JFK, similar statutory provisions directed that the Secretary award exemptions to new entrant or limited incumbent carriers. At the New York airports, he was directed to grant such carriers such exemptions up to such number as, when added to the number of slots and slot exemptions the carrier already held, would not exceed 20. At O'Hare, he was directed to grant a total of 30 slot exemptions to new entrant and limited incumbent air carriers.<sup>24</sup> The Department issued implementing Orders for each airport.<sup>25</sup> Again, the Order for O'Hare has not been challenged; that for LaGuardia is the other of the two Orders that the Borough President has questioned here.

<sup>18</sup> See new 49 U.S.C. § 41717(a).

<sup>19</sup> See new 49 U.S.C. § 41715(a)(1).

<sup>20</sup> See new 49 U.S.C. § 41718. These exemptions were awarded in Orders 2000-7-1 and 2000-7-2, July 5, 2000.

<sup>21</sup> See new 49 U.S.C. § 41715(a)(2).

<sup>22</sup> Department Orders 2000-4-11 (LaGuardia), 2000-4-12 (JFK), 2000-4-14 (O'Hare).

<sup>23</sup> The Borough President's Motion and Objections relate to LaGuardia, but the Petition for Review filed by the City of New York and the Borough President in the United States Court of Appeals for the Second Circuit addresses both LaGuardia and JFK.

<sup>24</sup> See new 49 U.S.C. § 41717(c).

<sup>25</sup> Department Orders 2000-4-10 (LaGuardia), 2000-4-13 (JFK), and, for O'Hare, both 2000-4-15 and 2000-5-20. (Order 2000-4-15 established the procedures for applying for these awards, and Order 2000-5-20 awarded the exemptions.)

B. The Number of Slot Exemptions Granted Will Not Likely Translate into a Comparable Number of New Operations; Moreover, Carrier Decisions and FAA Air Traffic Procedures and Management Initiatives Will Conform the Number of Operations to Meet Capacity, Congestion, and Safety Needs.

The Department agrees with the Borough President that carriers have requested somewhat more than 600 slot exemptions at LaGuardia. Of these, 548 have been for smallhub/nonhub service subject to Department Order 2000-4-11, and 70 for new entrants/limited incumbents under Department Order 2000-4-10. The great majority of the small hub/nonhub requests are from three applicants: the Delta Connection carriers have requested 186 exemptions to serve 27 small hub/nonhub airports; U.S. Airways Express carriers have sought 156 to serve 25 small hub/nonhub airports; and Continental Express has requested 146 to serve 21 small hub/nonhub airports.

The Department does not expect the airlines to operate so many flights. In addition, the FAA will ensure that flights are limited to the extent necessary to maintain the safety of airline operations in the New York City area.

The Department believes that the unusually high number of new applications can be explained by the confluence of several factors. First, relatively few exemptions had been awarded at LaGuardia prior to the enactment of AIR-21, creating some pent-up demand for entry. Another factor relates to the advent of regional jets, and the new market opportunities they have created. These smaller jets are relatively new to the American market. They are fast supplanting turboprop aircraft on many routes, having greater range, more speed and comfort, and being less expensive to operate on many routes. The switch to regional jets is having a major impact on smaller and midsize markets, as they both stimulate additional traffic and permit service on additional routes to become more profitable.<sup>26</sup> Delta, Continental, USAirways and other major carriers have all made major financial commitments to purchasing these jets, generally through their commuter affiliates. These carriers are quickly deploying these aircraft as they receive them, seeking to take advantage of these new market opportunities.<sup>27</sup>

The regional jet service proposals of the three major applicants at LaGuardia have significant overlaps. For example, there are 15 cities, including such communities as Richmond, Virginia; Columbia, South Carolina; Portland, Maine; and Burlington, Vermont, that all three applicants propose to serve. The Department believes it highly unrealistic that most of these 15 cities could support competitive service by three major carriers at this time. Thus, we anticipate that one or more of the carriers will not activate

<sup>26</sup> See David J. Morrow, "Twilight of Turboprops?; Passengers Go Out of Their Way to Catch Jets," New York Times, p. C1, Feb. 18, 2000.

<sup>27</sup> See "Delta Connection to Serve LaGuardia from 21 More Cities," Atlanta Constitution, p. 3F, March 22, 2000.

their service proposals for some of these communities, or may discontinue service at some after finding it insufficiently profitable.

Further, carriers generally must arrange for gates, procure or reposition aircraft, and/or hire additional staff before they are able to begin flights. Flight schedules also have to be arranged. Further, the carriers themselves do not anticipate near-term startups on all routes. For example, although the Department did not request projected startup dates, Continental has indicated projected startup dates before March 2001 at only six of its requested cities, the other 15 being projected for "after" that date.

The Department's expectation that not all flights would be activated appears to be being borne out. As of September 7, the Federal Aviation Administration had received information regarding start-up dates for 264 new slot exemptions at LaGuardia for early November 2000.<sup>28</sup>

Most importantly, the Federal Aviation Administration has the responsibility of maintaining the safe operation of the air traffic control system. This determination is done independently of scheduled traffic demand, through the use of established air traffic procedures. These procedures, along with air traffic management initiatives, ensure that only those flights that can be safely accommodated will be allowed to operate. There is a determined capacity at each facility, based on existing conditions, that cannot and will not be exceeded. The determination of that air traffic control capacity reflects current operating conditions including runway configuration, weather, controller workload and equipment. The FAA is continuing to work with the airport authority at LaGuardia to ensure the safe arrival and departure of all aircraft there.<sup>29</sup>

Thus, Congress' decision to phase out slot controls at LaGuardia (and at JFK and O'Hare) means that airline operations at those airports, as at virtually every other airport in the United States, will no longer be subject to FAA slot regulations specifying how many flights may be scheduled each hour. Airline operations there will instead be limited by the same factors as limit them elsewhere: the availability of airport facilities, economic viability of routes, and the FAA's exercise of its overriding responsibility to ensure safety.

This Order is issued under authority delegated in 49 CFR 1.56a(f)(1).

<sup>28</sup> Orders 2000-4-10, at p. 3,4 and 2000-4-11, at p. 4, direct carriers to contact and consult with the FAA regarding the start-up dates for their operations. Some additional new approvals may of course be requested before November, however.

<sup>29</sup> The Borough President argued that, in the past, the Department solicited input from the FAA as part of the slot exemption review process, and that in the 1995 *Spirit* Order, concern was expressed regarding delays and congestion at LaGuardia. We have fully consulted with the FAA in connection with the AIR-21 legislation and in the representations being made here.

**ACCORDINGLY,**

1. The Department grants the motion of the President of the Borough of Queens, New York, to file a petition for reconsideration of Orders 2000-4-10 and 2000-4-11;
2. The Department grants the request of the President of the Borough of Queens, New York, to withdraw her petition for reconsideration of Orders 2000-4-10 and 2000-4-11;
3. We affirm the actions taken by the Department in Orders 2000-4-10 and 2000-4-11;
4. We grant all motions to file otherwise unauthorized documents; and
5. We shall serve a copy of this order on the parties in this docket.

By:

**FRANCISCO J. SANCHEZ**  
Assistant Secretary for Aviation  
and International Affairs

(SEAL)

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