DSC certifies that the projected annual revenues as a result of the proposed transaction will not exceed those that would qualify it as a Class III carrier.

DSC states that it expects the transaction to be consummated no earlier than 30 days after the filing of the notice. The earliest this transaction can be consummated is March 4, 2010, the effective date of the exemption (30 days after the exemption was filed).

If the verified notice contains false or misleading information, the exemption is void *ab initio.* Petitions to revoke the exemption under 49 U.S.C. 10502(d) may be filed at any time. The filing of a petition to revoke will not automatically stay the effectiveness of the exemption. Stay petitions must be filed no later than February 25, 2010 (at least 7 days before the exemption becomes effective).

An original and 10 copies of all pleadings, referring to STB Finance Docket No. 35351, must be filed with the Surface Transportation Board, 395 E Street, SW., Washington, DC 20423–0001. In addition, a copy of each pleading must be served on Thomas F. McFarland, Thomas F. McFarland, P.C., 208 South LaSalle Street, #1890, Chicago, IL 60604–1112.

Board decisions and notices are available on our Web site at *http:www.stb.dot.gov.*

Decided: February 12, 2010.

By the Board, Rachel D. Campbell, Director, Office of Proceedings.

Andrea Pope-Matheson,

Clearance Clerk.

[FR Doc. 2010–3059 Filed 2–17–10; 8:45 am]

BILLING CODE 4915–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

[Docket No. FAA–2010–0109]

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

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

SUMMARY: Delta Air Lines and US Airways submitted a joint waiver request from the prohibition on purchasing operating authorizations (“slots” or “slot interests”) at LaGuardia Airport (LGA). The carriers requested the waiver to allow them to consummate a transaction in which Delta would transfer 42 pairs of slot interests to US Airways at Ronald Reagan Washington National Airport (DCA), international route authorities to São Paulo and Tokyo; and terminal space at the Marine Air Terminal at LGA. US Airways would transfer 125 pairs of slot interests to Delta at LGA, and would lease an additional 15 pairs of LGA slot interests with a purchase option, together with terminal space in LGA’s Terminal C. We have evaluated the proposed transaction and tentatively determined that, while the proposed transaction has a number of benefits, a grant of the waiver in its entirety would result in a substantial increase in market concentration that would harm consumers. Accordingly, while we have tentatively decided to grant Delta Air Lines’ and US Airways’ joint waiver request in part, we have tentatively determined that the public interest would best be served by creating new and additional competition at the airports to counterbalance the potential harm to consumers. To achieve that goal, our proposed waiver would require the divestiture of 14 pairs of slot interests at DCA and 20 pairs of slot interests at LGA to new entrant and limited incumbent carriers.

DATES: Comments on the FAA’s proposed grant of the petition for waiver with conditions must clearly identify the docket number and must be received on or before March 22, 2010.

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

- *Government-wide docketing system:* Go to *http://www.regulations.gov* and follow the instructions for sending your comments electronically.
- *Mail:* Send comments to the Docket Management Facility; US Department of Transportation, 1200 New Jersey Avenue, SE., West Building Ground Floor, Room W12–140, Washington, DC 20590.
- *Fax:* Fax comments to the Docket Management Facility at (202) 493–2251.
- *Hand Delivery:* Bring comments to the Docket Management Facility in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Privacy Considerations: We will post all comments we receive, without change, to *http://www.regulations.gov,* including any personal information you provide. Using the search function of our docket Web site, anyone can find and read the comments received into any of our dockets, including the name of the individual sending the comment (or signing the comment for an association, business, labor union, *etc*). You may review the Department of Transportation’s complete Privacy Act Statement in the **Federal Register** at 65 FR 19,477–78 (Apr. 11, 2000).

Reviewing the Docket: To read background documents or comments received in this matter, go to *http://www.regulations.gov* at any time or go to the Docket Management Facility in Room W12–140 on the ground floor of the West Building at 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Rebecca MacPherson, Assistant Chief Counsel for Regulations, by telephone at (202) 267–3073 or by electronic mail at *Rebecca.macpherson@faa.gov.*

SUPPLEMENTARY INFORMATION: The FAA currently limits the number of scheduled and unscheduled operations during peak hours at LaGuardia Airport by virtue of an order that the FAA published in December 2006 and subsequently amended (Order).[1] The High Density Rule (HDR)[2] limits scheduled and unscheduled operations at Ronald Reagan Washington National Airport. Because of the operating limitations, slots at LaGuardia and at Reagan National Airports are a scarce resource.

Two air carriers, Delta and US Airways, have proposed an exchange of slot interests at these two airports.[3] This exchange, which could potentially impact as many as 182 round-trip operations[4] at the two airports, would qualify as a purchase under both the Order and the HDR.[5] The carriers consider the slot interest exchanges to be part of an integrated transaction because the sale of US Airways’ slot interests to Delta at LGA is conditioned upon the purchase by US Airways of Delta’s slot interests at DCA.

The Order currently does not allow for the purchase and sale of slot interests at LaGuardia. Instead, it contains a provision that limits carriers

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

[2] 14 CFR part 93, subparts K and S.

[3] The parties would also exchange terminal facilities at LaGuardia, and Delta would transfer two foreign route authorities to US Airways.

[4] 280 operating authorizations at LaGuardia and 84 slots at Reagan National.

[5] 14 CFR Section 93.221.

to leases and trades to another carrier for the duration of the Order, which presently expires October 29, 2011.[6] The only way for a carrier to sell or purchase a slot interest at LaGuardia is through a waiver of the Order.

We reviewed this transaction as a result of the request by the parties for a waiver to the Order. Our ultimate decision with respect to the waiver request will be limited in scope. Our proposed grant of the waiver would transfer to Delta the same interests in the transferred US Airways' slots at LaGuardia that US Airways currently holds, under the terms of the Order. The waiver will not grant either carrier, or any transferee of divested slots, an interest in the slots that will extend beyond the term of the existing Order. Our proposed waiver does not limit the existing rights of any other carrier to dispose of its interests in slots at either affected airport.

The proposed transaction is unique in scope and scale. We have evaluated the competitive impact of the transaction in this case because of its size and scope and its anticipated impact on two of our country's most congested and prominent airports. We are proposing conditional divestitures in this case because of the unusual size of the transaction, which dramatically enhances the respective market position of Delta at LaGuardia and US Airways at Reagan National Airport, the reduced competitive incentives that the carriers would have at the respective airports, and the potential for use of the transferred slot interests in an anticompetitive manner. We have not determined that an analysis of the impact of a transaction on competition or the imposition of targeted remedies is appropriate or necessary for future transfers of slot interests, and our tentative conclusions in this matter should not be interpreted to impose such a requirement. Our tentative waiver should not be read to prejudice or predetermine any long-term policy decisions relating to congestion management at either of the affected airports.

The FAA is authorized to grant an exemption from the Order when the Administrator determines the "exemption is in the public interest." 49 U.S.C. 40109. *See Starr* v. *Federal Aviation Administration,* 589 F.2d 307, 311 (7th Cir. 1978). The Order (as well as the HDR) was issued pursuant to the FAA's authority to "develop plans for the use of the navigable airspace" and "assign by regulation or order the use of the airspace necessary to ensure the safety of aircraft and the efficient use of airspace." 49 U.S.C. 40103(b)(1). Further, the Administrator is authorized to "modify or revoke an assignment when required in the public interest." *Id.* The FAA has tentatively decided to grant the carriers' waiver request, subject to the conditions described in this Notice.

In considering what is in the public interest in this instance, the FAA is guided by the policy goals prescribed for the Secretary in 49 U.S.C. 40101(a)(4), (6), (10–13) and the pro-competition policies followed by Congress in adopting legislation on matters such as slot exemptions and airport grant programs. *See, e.g., Delta Air Lines* v. *CAB,* 674 F2d 1 (D.C. Cir. 1982); *Congestion and Delay Reduction Rule at Chicago O'Hare International Airport,* 71 FR 51,382, 51,388–90 (Aug. 29, 2006) (O'Hare Rule). These pro-competitive policies derive from the Airline Deregulation Act of 1978 and direct the Secretary to consider, as in the public interest, placing maximum reliance on airline competition and opportunities for new entrant airlines. In our O'Hare Rule, we relied on these pro-competitive policies in granting preferential treatment to new entrant and limited incumbent airlines in assigning new or withdrawn slots (termed "arrival authorizations"). *Id.;* 14 CFR 93.30. We noted that the "courts have approved the Secretary's reliance on the pro-competition policies in allocating slots under the HDR. *Northwest Airlines* v. *Goldschmidt,* 645 F.2d 1309, 1315 (8th Cir. 1980)." And, in response to the congestion caused by AIR–21 slot exemptions at LaGuardia, we issued orders that allocated those slot exemptions and "took into account the need to promote competition." See 66 FR 41,294 (Aug. 7, 2001) and 67 FR 65,826 (Oct. 28, 2002).

The pro-competitive policies of the Airline Deregulation Act emphasize the interests of the traveling public in having available "low-priced services," "entry into air transportation markets by new and existing air carriers," "actual and potential competition," and in avoiding "unfair * * * or anticompetitive practices in air transportation," and "unreasonable industry concentration, excessive market domination [or] monopoly powers * * * in air transportation," 49 U.S.C. 40101(a)(4), (6), (9), (10), (11), (12) and (13). *See Morales* v. *Trans World Airlines, Inc.,* 504 U.S. 374, 378 (1992) (Congress enacted the Airline Deregulation Act in 1978, which loosened its economic regulation of the airline industry after determining that " maximum reliance on competitive market forces' would best further 'efficiency, innovation, and low prices' as well as 'variety [and] quality * * * of air transportation.' "); *American Airlines* v. *Wolens,* 513 U.S. 219, 230 (1995); *Air Transport Ass'n of America, Inc.* v. *Cuomo,* 520 F.3d 218, 222 (2d Cir. 2008).

In addition to the pro-competitive policies of the Airline Deregulation Act, Congress also directed the Secretary to consider, as being in the public interest, matters that maintain and improve the health of the aviation industry such as "[encouraging] efficient and well-managed air carriers to earn adequate profits and attract capital," "developing and maintaining a sound regulatory system that is responsive to the needs of the public," and "promoting, encouraging, and developing civil aeronautics and a viable, privately-owned United States air transport industry." 49 U.S.C. 40101(a)(6)(B), (7), and (14). Furthermore, service to small communities is another important public interest factor. 49 U.S.C. 40101(a)(11) and (16).

The carriers assert that their petition should be granted because it would benefit each of the carriers (e.g., it would facilitate Delta building a domestic hub at LGA and US Airways enhancing its network at DCA), would produce more efficiencies at LGA (e.g., Delta plans to use jet aircraft in place of US Airways' turboprops), would provide new and enhanced service to small communities, and would benefit consumers through enhanced network connectivity by Delta at LGA and US Airways at DCA. The FAA has evaluated the potential impact on air traffic operations at the respective airports, and it believes there will be little to no impact on the agency's ability to manage traffic at either airport. Based on our review of the petition, we tentatively find that much of the request meets the public interest standards of ensuring the efficiency of use of the navigable airspace and warrants a waiver. Additionally, the transaction would satisfy the public interest objectives related to promoting a viable domestic airline industry, encouraging well-managed carriers, and attracting capital and protecting service to small communities.

We also tentatively find that it would further the pro-competitive public interest factors to condition the waiver on making certain slot interests available to new entrant and limited incumbent carriers, as explained more fully below. Our waiver would require Delta and US Airways, respectively, to divest 14 pairs of slot interests at DCA and 20 pairs of slot interests at LGA.

[6] 74 FR at 51,654 (ordering paragraph A.5).

The divestiture of the respective DCA and LGA slot interests would occur through sales to U.S. or Canadian carriers that have, as of the date of any final decision granting a waiver, less than five percent of the total slot interest holdings at DCA or LGA respectively, do not code share on flights to or from DCA or LGA with any carrier that has five percent or more slot interest holdings, and are not subsidiaries, either partially or wholly-owned, of a company whose combined slot interest holdings are equal to or greater than five percent at DCA or LGA, respectively. Thus, a carrier having less than five percent of slot interest holdings at DCA and not involved in a code-share relationship at DCA with a carrier holding five percent or more of the DCA slot interests as of the date of any final decision granting a waiver would be eligible to purchase divested DCA slots, even though that carrier has five percent or more of the LGA slot interest holdings, and *vice versa*.

We are including both Canadian and U.S. air carriers in the class of new entrant and limited incumbent carriers eligible to purchase the divested slots. The Air Transport Agreement between the U.S. and Canada provides generally that the U.S. Government treats Canadian airlines in the same way as it treats U.S. airlines, for purposes of slot allocation at slot-regulated airports.

The "public interest" standard provides the Administrator with broad powers to condition waivers. The Administrator is expressly authorized to "take action [he] considers necessary to carry out [the Air Commerce and Safety part of Title 49 U.S.C.]" and to prescribe orders as appropriate. 49 U.S.C. 40113(a), 46105(a). It is not uncommon for federal agencies to condition grants of waivers or exemptions upon meeting certain public interest requirements. *Winter* v. *Natural Resources Defense Council,* 129 S.Ct. 365, 371 (2008) (Navy granted an exemption from the Marine Mammal Protection Act for training exercises conditioned on adopting mitigation procedures); *Clifford* v. *Peña,* 77 F.3d 1414, 1416 (D.C. Cir. 1996) (waiver of Merchant Marine Act for domestic ship operator to operate new foreign flag vessels conditioned on certain operating requirements); *National Small Shipments Traffic Conference, Inc.* v. *C.A.B.,* 618 F.2d 819 (D.C. Cir. 1980) (CAB has broad discretion to grant exemptions to promote price competition).

Furthermore, in carrying out the Secretary's airline economic regulatory oversight, the Department previously has found that the public interest may require conditions upon the approval of a transaction, including divestitures of slots and/or other assets, such as route authority. *See, e.g., U.S.-U.K. Alliance Case,* DOT Order 2002–1–12 (January 25, 2002) (tentative grant of conditional approval and antitrust immunity to an alliance of domestic and foreign air carriers, based in part on a finding that the divestiture by American Airlines and British Airways of London Heathrow Airport slots and access to necessary ground facilities to U.S. competitors, was required in the "public interest"); *Joint Application of American Airlines, Inc. and Trans World Airlines, Inc. for Approval of Transfer of Certificates (U.S.-London Routes*), DOT Order 91–4–46 (April 24, 1991) (finding that the "public interest" permits the approval of the transfer of certain TWA route authority, by sale, to American and requires the disapproval of other route authority transfers contemplated by TWA's agreement with American); *Pacific Division Transfer Case,* DOT Order 85–11–67 (October 31, 1985) (approval of United's acquisition of Pan American's Pacific route authority on the condition that the "public interest" may require that United surrender its Seattle/Portland-Tokyo/Osaka authority should the Department so order in a future proceeding).

Further, the Department has amended route certificates to delete authority upon a finding that the "public convenience and necessity" so requires. *See Central Zone-Caracas/Maracaibo Venezuela Service Case,* DOT Order 83–4–49 (March 9, 1983); *American-Eastern/Continental Route Transfer,* DOT Order 90–5–5 (April 26, 1990). The conditions we tentatively adopt on our waiver of the slot transaction are based on our concerns that approving the waiver in full would hinder competition at the two airports and disadvantage the traveling public.

Entry is constrained at both DCA and LGA. The HDR adopted at DCA limits hourly instrument flight operations by air carriers, commuters and other airlines, as prescribed in 14 CFR part 93, subpart K; allocation of DCA slots is governed by 14 CFR part 93, subpart S; and nonstop flight operations at DCA are limited by a 1,250 mile perimeter under 49 U.S.C. 49109 and 14 CFR part 93, subpart T. *See City of Houston* v. *Federal Aviation Administration, et al.,* 679 F.2d 1184 (5th Cir. 1982). The HDR notes that "slots do not represent a property right but represent an operating privilege subject to absolute FAA control. Slots may be withdrawn at any time to fulfill the Department's operational needs * * *." 14 CFR 93.223. As noted, the FAA Order addressing congestion at LGA also caps flights at that airport; LaGuardia is also constrained by a locally imposed 1,500 mile perimeter. *See Western Air Lines* v. *Port Authority of N.Y. and N.J.,* 817 F.2d 222 (2d Cir. 1987).

It is well-accepted that the secondary slot market at the slot-controlled airports has not resulted in robust entry by new entrants or expansion by limited incumbents. *See Airport Business Practices and Their Impact on Airline Competition,* FAA/OST Task Force Study, at 32 (Oct. 1999); *Secretary's Task Force on Competition in the U.S. Domestic Airline Industry* (1990) at 2–27 noting incumbent carriers have the potential to exert market power in slot pricing, creating a barrier to entry. The Government Accountability Office (GAO) also found that new entrant air carriers were unable to gain access to the slot-controlled airports in a predictable manner and with sufficient slots to provide meaningful competitive service and that incumbent carriers tended to hoard excess slots which they may lease to related airlines. *Airline Competition: Industry Operating and Marketing Practices Limit Market Entry,* GAO/RCED–90–147 (Aug. 29, 1990). The congressionally-created National Commission to Ensure a Strong Competitive Airline Industry also found that the HDR limited competition. *A Report to the President: Change, Challenge and Competition* (Aug. 1993). Congress attempted to redress the problems faced by new entrants in accessing slots at reasonable prices by directing the Department to grant exemptions from the HDR (but not at DCA) to new entrant airlines and only "when in the public interest, and the circumstances exceptional." 49 U.S.C. 41714(c). The GAO subsequently expressed concern that the HDR limited competition and erected barriers to entry, even given the "exceptional circumstances" criteria for slot exemptions. *Barriers to Entry Continue to Limit Competition in Several Key Domestic Markets* (GAO/RCED 97–4, Oct. 1996). Congress directed a study by the National Academy of Sciences, National Research Council's Transportation Research Board that found "many fundamental concerns" with the slot rules including slot-hoarding by incumbent airlines (who use the slots to build networks and realize economies of scope) to restrict entry and expansion by competitors, and it found that the slot-controlled airports are among the highest-priced in the country. *Entry and Competition in the U.S. Airline Industry: Issues and Opportunities* at 11, 113 (TRB, 1999). In 2000, Congress directed a multi-year

phase out of the HDR at John F. Kennedy International, LaGuardia, and O'Hare International Airports. 49 U.S.C. 41715. It found that the HDR constituted a barrier to improved service particularly by new entrant airlines and for service to smaller airports, harmed the traveling public by reducing competition, and inflated prices. H.R. Rep. No. 106–167 (1999). However, as noted in the LGA Order, it was necessary to impose quotas on flights there to reduce delays and congestion. And, although Congress, in 2000 and 2003, loosened the slot controls slightly at DCA (by directing the Secretary to grant "beyond-perimeter" and "within-perimeter" exemptions, 49 U.S.C. 41718), the number of slot exemptions operated by new entrant low-cost carriers pales in comparison to those operated by the dominant incumbent airlines.

If the proposed transaction were approved as presented to the Department, the transaction would lead to significantly increased concentration at DCA for US Airways and at LGA for Delta, regardless of whether the measure is calculated in numbers of departures or slots. Based on February 2010 schedules, US Airways would raise its share of departures at DCA from 47 to 58 percent. US Airways' share of slot interests at DCA (including regional affiliates) would increase from 44 percent to 54 percent, making it by far the dominant carrier. American, with its affiliates, would be a distant second at 14.5 percent.

As a result of the transaction, Delta would ascend to a dominant position at LGA, raising its share of departures from 26 percent to 51 percent. Delta's share of slot interests at LGA would more than double, growing from 24 percent to 49 percent.[7] LGA would transition from an airport with three competing carriers of similar size to one dominant carrier (Delta).

Stated another way, US Airways and its affiliates at DCA and Delta at LGA would become three times, and almost two-and-one-half times, respectively, the size of their closest competitor, a factor that limits the extent to which other incumbent competitors can exert competitive pressure and discipline fares. That limitation is further compounded here by the fact that low-cost carriers—those creating the most competitive impact—have only a 3.3 percent share of slot interest holdings at DCA and a 6.8 percent share of slot interest holdings at LGA. Studies of the domestic U.S. airline industry demonstrate that entry by low-fare carriers dramatically lowers fares and increases the volume of passengers carried in a market.[8]

Overall, consumers at these airports may be harmed by the loss of nonstop service, the loss of a nonstop competitor, or the transfer of nonstop monopoly service to a more dominant carrier. While the carriers have made public some of their new intended services, including new service to small communities, they have not released all intended service changes.

However, it is apparent that if the proposed transaction is approved, the carriers will increase the number of markets they serve on a monopoly or dominant basis. As the two carriers reposition at LGA and DCA, there is no assurance that all markets currently being served by the departing carrier will be maintained by the new carrier. Further, in a number of instances the departing carrier served a market on a monopoly or dominant basis—so that if the new carrier opts to serve that market it will similarly be on a monopoly or dominant basis. Here, to argue that simply replacing one carrier in a specific market with another has a neutral overall impact ignores the greater economic dominance that would result from the transaction.

The Department tentatively concludes that the proposed transaction is likely to result in higher fares for consumers in certain domestic markets subject to the perimeter rules at both DCA and LGA. Numerous economic studies of the domestic U.S. airline industry have shown that reducing the number of nonstop carriers in a market, especially in short-haul markets like those here, directly affects the level of fares.[9] If the slot transaction was to be approved as proposed and US Airways and Delta were to increase their presence at DCA and LGA respectively, the competitive environment would become significantly more concentrated. The carriers would likely rely on their increased dominance to maintain or enhance their premium fare structure in markets served at both airports. Furthermore, slot restrictions at both airports substantially hinder proportional increases in competition by other carriers, and higher fares will be sustainable due to the carriers' increased market power at both airports. This tentative conclusion is supported by an analysis of the carriers' past behavior in similar markets at both airports.

Even today, before the transaction is implemented, US Airways and Delta charge higher relative fares where they operate monopoly or dominant routes from airports where they have a strong presence. This is especially true at DCA and LGA. US Airways, holding the highest current share of slot interests and departures at DCA, charged on average 124 percent of the Standard Industry Fare Level (SIFL), a cost-based index that the Department has used historically to assist in its evaluation of pricing. However, in markets where it held a 95 to 100 percent share of nonstop departures, US Airways charged substantially more. Delta, having a less strong position at LGA than US Airways at DCA, tends to price more competitively, averaging only 89 percent of the index figures with its current slot interest holdings. While we anticipate that Delta's increased market share after the transaction would permit it to increase the percent of SIFL associated with its service at LGA, our findings of relatively higher existing levels of competition at LGA influenced our tentative determination to require fewer divestitures proportionately at LGA than at DCA.

In comparison, at Washington Dulles International Airport (IAD), the average of all carriers' fares vs. SIFL is 77 percent, and at Thurgood Marshall Baltimore-Washington Airport (BWI) the figure is 65 percent. The fares of the largest carrier at IAD, United Airlines, average 90 percent of SIFL, while those of the largest carrier at BWI, Southwest Airlines, average 65 percent.

At Newark Liberty International (EWR), the average of all carriers' fares vs. SIFL is 71 percent, and at JFK the figure is 57 percent. The fares of the largest carrier at EWR, Continental Airlines, average 71 percent of SIFL, while those of the largest carrier at JFK, JetBlue, average 57 percent. The NYC/

[7] Includes Northwest and Comair.

[8] See, *e.g.,* Oster, Jr., Clinton V. & Strong, John S. (2001) at 24. "Predatory practices in the U.S. Airline Industry." Working Paper, US DOT.

[9] See, *e.g.,* Kamita, "Analyzing the Effects of Temporary Antitrust Immunity: The Aloha-Hawaiian Immunity Agreement," *Journal of Law and Economics* (2009); Peters, "Evaluating the Performance of Merger Simulation: Evidence from the U.S. Airline Industry," 49 *Journal of Law and Economics* at 627 (2006); Joskow, Werden, and Johnson, "Entry, Exit and Performance in Airline Markets, 12 *International Journal of Industrial Organization* at 457 (1994); Borenstein, "The Evolution of U.S. Airline Competition," 6 *Journal of Economic Perspectives* at 45 (1992); Borenstein, "Hubs and High Fares: Airport Dominance and Market Power in the U.S. Airline Industry," 20 *Rand Journal of Economics* at 344 (1989); Brueckner, Dyer and Spiller, "Fare Determination in Hub and Spoke Networks," 23 *Rand Journal of Economics* at 309 (1992); Morrison and Winston, "Enhancing Performance in the Deregulated Air Transportation System," 1989 *Brookings Papers: Microeconomics* at 61 (1989); Oster, Jr., Clinton V. & Strong, John S., "Predatory practices in the U.S. Airline Industry." At Working Paper, US DOT at 6 (January 2001); Gimeno, 20(2) "Reciprocal Threats in Multimarket Rivalry: Staking out 'Spheres of Influence' in the U.S. Airline Industry," *Strategic Management Journal* 101 at 110.

Washington airports that have the largest proportion of low-cost carriers consistently provide lower fares.

The Department also considered whether the three airports in the New York area, and the three in the Washington area, effectively constitute the same market for all passengers, such that if fares are perceived to be rising too high at one airport, the harm would be mitigated by consumers simply shifting to the other two. Department analysts, evaluating passenger ticket data that contained actual fare information, looked at whether the three airports at New York and the three in Washington were effective substitutes for each other, and concluded that they were not. In analyzing both overlap and all markets at the airports, they found that yields (i.e., revenue per passenger mile) were substantially different among the airports. Specifically, they found that the average yield in all markets at BWI is 48 percent less than DCA, and the average yield in all markets at Dulles is 37 percent less than DCA. (Yield at DCA is 27 cents per mile, vs.17 cents at Dulles and 14 cents at BWI.) Similarly, the average yield at JFK is 28 percent less than at LGA, and Newark is 9 percent less than at LGA. (Yield at LGA is 20.5 cents per mile, vs. 18.7 cents at EWR and 14.7 cents at JFK.) If the airports were effective economic substitutes for all passengers, we would expect to see a greater self-equalizing of yields and the yield spreads would not differ so significantly.

The Department also found that the differences in the level of yields at area airports tended to correlate with the level of low cost carrier operations. Thus, passengers pay more for nonstop service of equivalent distance at DCA and LGA than at alternative airports that have sizable LCC competition. For example, for trips out to 1000 miles, passengers at LGA pay 23% more on average than those at JFK ($147 vs. $120 each way). Passengers at DCA pay 64% on average more than those at BWI ($184 vs. $113 each way).

Under their proposal, Delta and US Airways are not committing to any particular markets for defined periods. They would be free, as is any other carrier, to discontinue routes that are being proposed and to initiate new routes elsewhere. Thus, they could, if they so chose, use their added slot interests to target smaller competitors, for example by increasing their roundtrips in competitive markets and "sandwiching" competitor flights. With relatively few slot interests of their own, competitors—especially the low-cost carriers at DCA that are tied to specific markets through slot exemption awards—may be unable to successfully respond.

The competitive harm resulting from this transaction as proposed would occur not just at the city-pair level, but at the network or airport level as well, especially given our conclusion that alternative airports are not perfect substitutes for service at DCA and LGA. An appropriate remedy for this transaction must address this broader competitive harm, given (1) that Delta and US Airways are currently the number one and number two competitors at DCA and that Delta is the most likely potential carrier to compete with US Airways in any market out of DCA; (2) the absolute regulatory cap on operations/entry at both airports; and (3) the dramatic increase in dominance of US Airways at DCA and Delta at LGA that would result from the transaction.

The combination of increased airport concentration, an increase in the number of monopoly or dominant markets in which increased pricing power can be exercised, and the potential for use of transferred slot interests in an anticompetitive manner underlie our proposal here for a limited number of divestitures.

At DCA, we are proposing to require a divestiture of 14 pairs of slot interests. We project that, in the "bundles" (that is, pairs of slot interests) proposed, this would enable new entrant/limited incumbent competitors to initiate and/or increase service in one large market or multiple smaller markets. It would limit the increase in US Airways' share of slot interests at DCA to a total of 50.8 percent, and increase the new entrant/limited incumbent share to 6.5 percent.

At LGA, we are proposing that 20 pairs of slot interests be divested. With the authorization bundles as proposed, we project that these would enable limited incumbents to strengthen their existing presence in up to three markets and/or allow new entrants to initiate new service in up to four new markets. Such a divestiture would limit the increase in Delta's share of slot interests to 45.3 percent, and increase the new entrant/limited incumbent share to 10.3 percent. The proposed slot interest divestitures at LGA and at DCA would allow the parties to realize almost all of their purported benefits while providing opportunities for greater competition at those airports and reducing the likelihood that increased concentration of slot interests will reduce competition at those airports.

Our proposed divestiture of 14 pairs of slot interests at DCA would be a condition of our waiver of the LGA Order and is not an amendment to the HDR that is effective at DCA. We are tentatively requiring this divestiture to address our concerns with the merits of the waiver application before us. The waiver application itself conditions a sale of Delta's DCA slot interests with a sale of US Airways' LGA slot interests. The waiver request states:

> The transfer of the [280 LaGuardia Operating Authorizations to Delta] is an integral part of a beneficial and efficiency-enhancing transaction * * *. For its part, US Airways will acquire 84 Delta slots at DCA * * *. (at 1).

Proposed Remedies

The FAA proposes to remedy the anticompetitive effects of the proposed slot interest exchange waiver request by requiring Delta and US Airways to dispose of 14 pairs of slot interests at DCA and 20 pairs of slot interests at LGA to U.S. or Canadian air carriers having fewer than five percent of total slot holdings at DCA and/or LGA, do not code share to or from DCA or LGA with any carrier that has five percent or more slot holdings, and are not subsidiaries, either partially or wholly-owned, of a company whose combined slot interest holdings are equal to or greater than five percent at LGA and/or DCA. Carriers that would not qualify include those who are involved in a code-share relationship at DCA/LGA with carrier(s) that also would not qualify as of the date of the Notice.

Use of a five percent standard for purposes of this transaction is proposed because carriers having slot interest holding shares above that point have a minimum level of competitive service sufficient to affect pricing in the market.[10] Restricting eligibility to these "less than 5 percent" carriers would assist new or small non-aligned carriers in defending themselves against increasingly dominant competitors, which, with the benefit of additional slot interests, could pursue anticompetitive strategies such as significantly increasing existing services in any new entrant/limited incumbent/low-cost/non-aligned carrier market. These new or limited incumbent carriers offer the prospect of increased efficiencies and innovations to the markets, such as through better utilization of ground staff, equipment, and facilities. They could also increase throughput at these constrained airports by adding more seats per departure than proposed by US Airways and Delta, which are relying on regional affiliates for a large proportion of their proposed new flying at DCA and LGA. Moreover,

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

new entrants and those limited incumbents at the respective airports could bring alternative business models and new competition to the slot constrained airports so long as they have a sufficient number of slot interests to establish sustainable patterns of service.[11]

Based on FAA slot holding data, incumbent carriers at DCA that would qualify under these limitations are AirTran and Spirit. At LGA, incumbent carriers that would qualify are AirTran, JetBlue, Southwest, and Spirit. In addition, of course, any U.S. or Canadian carrier not currently holding slot interests at the respective airports and otherwise meeting the criteria would be eligible under our proposal.

We propose that the slot interests be sold by the carriers and that the proceeds of the sales be collected and retained by the carriers. We are tentatively selecting this method, rather than one whereby the FAA would withdraw the slots and reallocate them by lottery (or similar means) to new entrant and limited incumbent carriers. Through a sale, the petitioning carriers may maximize the value of the slot interests as they initially intended. The carriers at LGA hold a possessory slot interest that may be leased in a secondary market for a period of time, and at DCA they may sell their slot interests also in the secondary market. By proposing to allow divestitures of the slot interests through sales, we are permitting the carriers to monetize their interests.

In order to achieve our goal of affording consumers the opportunity to realize new competitive service at LGA and DCA, we propose to place a 60-day time limit on US Airways' and Delta's sales of the slot interests. Should the carriers not succeed in selling those slot interests within the 60-day time period, we propose to withdraw them from Delta and US Airways and hold them in abeyance while we consider options for their future use.

We also propose precluding the carriers purchasing the slot interests acquired pursuant to this proceeding from re-selling, or leasing, them to any carriers that are not eligible under the terms of the final action we take in this proceeding. This restriction will help to ensure that the traveling public will receive the benefits of the service and price competition provided by the new entrant/limited incumbent carrier that purchased the slot interests. Additionally, these slot interests will be subject to the same minimum usage requirements as provided in the LGA Order and HDR, however, we propose to waive the use or lose requirements for a period of up to six months in order for the new entrant/limited incumbent to start up service at new markets or add service to existing markets. Our waiver would assure an eligible purchaser of a slot interest at LGA that we would waive the LGA Order prohibition against a purchase of a slot interest at the time of the sale, in order to facilitate the completion of the transaction. We would entertain requests by the purchaser to accommodate slides to assist the carrier's schedule. We seek comment on the conditions described above.

We also seek comment on the means by which the carriers may sell the slot interests to the new entrant/limited incumbent carriers described above. One option is for the carriers to engage in private sales of the slot interests. Under this option, the FAA would require biweekly reports of the efforts to sell the slot interests, the identity of carriers contacted, the prices offered, and the terms (if any) reached.

Another option would be to permit the sale of the slot interests to the new entrant/limited incumbent carriers on a cash-only basis, through a website managed by the FAA, in which the FAA would specify a bid closing date and time and the purchasers' identities would not be revealed. The FAA would forward the highest qualifying bid to the selling carrier. The FAA would require the selling carrier to accept the forwarded bid or to reject it within three business days.

A third option would allow the carriers to provide notice of the availability of the slot interests to the new entrant/limited incumbent carriers through a website managed by the FAA. The FAA would provide an opening date, closing date and time by which offers for the slot interests must be received. US Airways and Delta would be able to negotiate the consideration and other terms of the sale with the eligible purchaser. Once the sale was consummated, the carriers would provide the FAA with information concerning the terms of the sale as well as other offers received and names of bidders.

We request comments on these variations of the "bulletin board" approach.

We also propose to bundle the package of slot interests for sale so as to enable an eligible carrier to purchase sufficient slots to operate competitive service, with times spread across the day. The slot interests to be divested must be air carrier slot interests, and slot times at DCA were chosen based on the divested slot interests as a total percentage relative to the transaction. Fourteen pairs of slot interests constitute 33.3 percent of slots involved in the transaction, and that percentage was spread amongst Delta's planned slot divestitures (by hour) to US Airways as evenly as possible across the hours between 0700 and 2159. Slot interests in the 0600, 2200, and 2300 hours are currently available from the FAA and therefore were not included in the list of slots to be divested. At DCA, we propose that the carriers bundle the pairs of slot interests as follows:

Bundle	Number of slots
A	8 pairs.
Bundle A slot times: 0700 (2), 0800 (1), 1000 (2), 1100 (1), 1200 (1), 1300 (1), 1400 (2), 1500 (1), 1600 (2), 1900 (1), 2000 (1) 2100 (1)	
B	6 pairs.
Bundle B slot times: 0700 (1), 0900 (2), 1100 (1), 1200 (1), 1300 (2), 1700 (1), 1800 (1) 1900 (1); 2000 (1), 2100 (1)	

Slot interest times at LGA were chosen based on the divested slot interests as a total percentage relative to the transaction. Twenty pairs of slot interests constitute 14.29 percent of slots involved in the transaction, and that percentage was spread across US Airways' planned slot divestitures (by hour) to Delta as evenly as possible across the hours between 0600 and 2159.

At LGA we propose the following bundling of 20 pairs of slot interests:

Bundle	Number of slots
A	8 pairs.
Bundle A slot interests: 0600D (1), 0700D (1), 0800A, 0800D (total of 2 in 0800), 0900A (1), 1000D (1), 1100A (1), 1200D (1), 1300A (1), 1400D (1), 1500A (1), 1600D (1), 1700A (1), 1800D (1), 2000A (1), 2100A (1)	
B	4 pairs.
Bundle B slot interests: 0700D (1); 0900A (1); 1000D (1); 1300A (1), 1400D (1), 1700A, 1700D (total of 2 in 1700), 2000A	
C	4 pairs.
Bundle C slot interests: 0600D (1), 0800A (1), 0900D (1), 1100A (1), 1200D (1), 1500A (1), 1600D (1), and 2000A (1)	
D	4 pairs.

[11] See, *e.g.,* Oster, Jr., Clinton V. & Strong, John S. (2001). "Predatory practices in the U.S. Airline Industry." Working Paper, US DOT.

Bundle	Number of slots
Bundle D slot interests: 0700D (1), 1000A (1), 1100D (1), 1300A (1), 1400D (1), 1800A (1), 1900D (1), and 2100A (1)	

Operating authorizations at LGA are designated as arrivals (A) or departures (D), and defined on the half hour at LGA (e.g., 0700 to 0729; 0730 to 0759), but information on the transaction provided by Delta was specific only to hourly increments.

The bundles are structured so as to permit eligible carriers to enter or add frequencies in markets with sufficient operations to effectively compete. We do not propose to require the purchasers of the slot interests to operate in specific markets or types of markets, as this would deprive the acquiring carriers of the flexibility to deploy their assets based on prevailing market conditions. However, we would propose to prohibit purchasers from alienating slot interests acquired pursuant to this proceeding to any carriers who are not eligible under the terms of our final action in this proceeding.

The agency has placed a copy of the waiver request and the January 29, 2010 letter from Delta's senior vice president and general counsel in the docket along with other public correspondence on this matter. The FAA invites all interested members of the public to comment on the waiver request, the proposed grant of the waiver, the proposed conditions to the waiver, and the proposed divestiture remedies. We also seek comment on alternative divestiture remedies to ensure value to the selling carriers and expedited sale so that the traveling public may realize the benefits of the competition to be produced by the new entrant/limited incumbent carriers.

Issued in Washington, DC, on February 9th, 2010.

James W. Whitlow,

Acting Chief Counsel.

[FR Doc. 2010–3109 Filed 2–12–10; 4:15 pm]

BILLING CODE 4910–13–P

TENNESSEE VALLEY AUTHORITY

Meeting of the Regional Resource Stewardship Council

AGENCY: Tennessee Valley Authority (TVA).

ACTION: Notice of meeting.

SUMMARY: The TVA Regional Resource Stewardship Council (RRSC) will hold a meeting on Thursday, March 4, and Friday, March 5, 2010, to consider various matters.

The RRSC was established to advise TVA on its natural resource stewardship activities. Notice of this meeting is given under the Federal Advisory Committee Act (FACA), 5 U.S.C. App. 2.

The management of the Tennessee Valley reservoirs and the lands adjacent to them has long been integral components of TVA's mission. As part of implementing the TVA Environmental Policy, TVA is developing a Natural Resource Plan (NRP) and Environmental Impact Study (EIS) under the process established by the National Environmental Policy Act (NEPA) that will help prioritize techniques for the management of TVA's sustainable land use activities, natural resource management activities, recreation and water resource protection and improvement activities. TVA would like to utilize the RRSC as a key stakeholder group throughout the EIS period to advise TVA on the issues, tradeoffs, and focus of environmental stewardship activities. At the March meeting, TVA will be seeking advice from the Council on issues regarding the scope of the study and the preliminary draft alternatives that will support the Draft EIS and direction of the study. TVA will also be seeking recommendations and advice on the NRP objectives and activities that complement the use of public lands with the protection of these natural resources.

The meeting agenda includes the following:

1. Introductions.

2. Natural Resource Plan Background, Components of the Plan, Preliminary Draft Alternatives.

3. RRSC Discussion Topic: Natural Resource Plan scope, preliminary draft alternatives included in the components of the NRP (*e.g.,* Natural Resource Management, Reservoir Lands Planning, Water Resources, and Recreation) and uncertainties impacting the development of various portfolios and scenarios.

4. Public Comments.

5. Council Discussion and Advice.

The TVA RRSC will hear opinions and views of citizens by providing a public comment session. The public comment session will be held at 10 a.m., EST, on Friday, March 5. Persons wishing to speak are requested to register at the door by 9 a.m. on Friday, March 5 and will be called on during the public comment period. Handout materials should be limited to one printed page. Written comments are also invited and may be mailed to the Regional Resource Stewardship Council, Tennessee Valley Authority, 400 West Summit Hill Drive, WT–11 B, Knoxville, Tennessee 37902.

DATES: The meeting will be held on Thursday, March 4 from 8:30 a.m. to 4:30 p.m., and Friday, March 5, from 8 a.m. to 12 noon, EST.

ADDRESSES: The meeting will be held at the Auditorium of the TVA Headquarters at 400 West Summit Hill Drive, Knoxville, Tennessee 37902, and will be open to the public. Anyone needing special access or accommodations should let the contact below know at least a week in advance.

FOR FURTHER INFORMATION CONTACT: Beth Keel, 400 West Summit Hill Drive, WT–11 B, Knoxville, Tennessee 37902, (865) 632–6113.

Dated: February 10, 2010.

Original signed by:

Anda A. Ray,

Senior Vice President and Environmental Executive, Environment and Technology, Tennessee Valley Authority.

[FR Doc. 2010–3050 Filed 2–17–10; 8:45 am]

BILLING CODE 8120–08–P

TENNESSEE VALLEY AUTHORITY

No FEAR Act Notice

Summary: 5 CFR part 724.202 requires that each Federal agency provide notice to its employees, former employees, and applicants for employment about the rights and remedies available under the Antidiscrimination Laws and Whistleblower Protection Laws applicable to them within 60 calendar days after September 18, 2006, and annually thereafter. Each agency must publish the initial notice in the **Federal Register.**

No FEAR Act Notice

On May 15, 2002, Congress enacted the Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002, which is now known as the No FEAR Act. One purpose of the Act is to require that Federal agencies be accountable for violations of antidiscrimination and whistleblower protection laws. Public Law 107–174, Summary. In support of this purpose, Congress found that "agencies cannot be run effectively if those agencies practice or tolerate discrimination." Public Law 107–174, Title I, General Provisions, section 101(1).

The Act also requires this agency to provide this notice to Federal employees, former Federal employees and applicants for Federal employment to inform you of the rights and protections available to you under