



1776 K Street, N.W., 9<sup>th</sup> Floor, Washington, DC 20006  
(202) 719-7420 (Telephone) (202) 719-7049 (Facsimile)  
[www.aacaal.com](http://www.aacaal.com)

April 3, 2008

Docket Operations  
U.S. Department of Transportation  
M-30, Room W12-140  
1200 New Jersey Avenue, S.E.  
Washington, DC 20590-0001

**Re: Docket No. FAA-2008-0221**  
Operating Limitations at Newark Liberty International Airport

The Air Carrier Association of America (“ACAA”) submits these comments on the proposed order (the “Order”) limiting scheduled operations at Newark Liberty International Airport (“Newark”).

With this Order, the Federal Aviation Administration (“FAA”) proposes to close Newark to any new flights or airlines. If adopted, Newark would join LaGuardia Airport and John Kennedy International Airport as closed airports in the New York/New Jersey area. As a result of these actions, a carrier with limited operations wishing to add flights to the New York City area would be forever blocked from offering competitive options to New York consumers.

Additionally, the FAA proposes to lease new capacity pursuant to an auction process. ACAA opposes any auction of new capacity if the auction is open to everyone. To even be considered, an auction should apply to 50%

of all slots at an airport and should use a weighted formula when determining bids.

The Department of Transportation (“Department”) under the leadership of Secretary Peters has taken needed steps to expand travel options for American travelers within the United States and throughout the world. Secretary Peters along with Acting FAA Administrator Sturgell have also taken actions to reduce congestion and delays throughout the New York area. Those are important steps that will help all travelers.

Additionally, the Department has taken critical steps to open international markets through Open Skies agreements so that U.S. and foreign carriers can increase international operations. That is good news for large numbers of travelers and destinations. HOWEVER, while Open Skies is allowing flights from the U.S. to markets around the world, U.S. markets are closing. Thus, the home of airline deregulation is closing its markets while markets outside the U.S. are opening. While it is essential to control and minimize congestion and delays, the spirit of airline deregulation requires that U.S. markets remain open at all times to domestic competition.

ACAA believes that any procedures put in place to limit operations at Newark and any “closed” airport in the New York area or other parts of the country must meet the following objectives:

1. Manage the ATC system and the airport to limit congestion and delays.
2. Maximize use of airport facilities to increase use of passenger flow;
3. Increase existing airport and federal revenues from existing operations; and

4. Maximize competitive options at the airport and allow carriers with limited operations at the airport to expand. This needs to include:
  - a. Withdrawing operations from the carriers with more than 5% of operations and awarding additional slots to carriers with limited operations; and
  - b. Rejecting use of Worldwide Scheduling Guidelines

#### I. Proposed Order

The Proposed Order states that:

The FAA is issuing this proposal as a result of persistent congestion and delays at EWR during the peak operating hours, as well as a dramatic projected increase in flight delays at the airport during the summer of 2008 if proposed schedules were implemented as requested by carriers. We intend this proposed limitation on scheduled operations to relieve the substantial inconvenience to the traveling public caused by excessive congestion related flight delays at the airport, which magnify as they spread through the National Airspace System. This proposal will ensure that projected delays do not increase significantly and provide for a more efficient use of the nation's airspace. The final Order would take effect at 6:00 a.m. Eastern Time, on June 1, 2008 and would expire at 11:59 p.m., Eastern Time, on October 24, 2009.

The Order also notes that as new capacity (capacity above 81 operations per hour) becomes available, as operating authorizations ("OAs") are returned to the FAA voluntarily or under the use-or-lose provision, or unallocated OAs become available, such capacity will be leased pursuant to an auction process.

ACAA opposes an auction of new capacity that is open to all on an equal basis. To even be considered, an auction should apply to 50% of all slots at an airport and should use a weighted formula when analyzing bids to encourage opportunities for limited incumbents.

Operations at Newark Airport are dominated by a single airline -- Continental Airlines ("Continental")--which holds approximately 72.5%<sup>1</sup> of all operations at the airport. Newark is Continental's primary hub airport. Continental has expanded operations at Newark adding large numbers of operations during the past few years. Few airports in the country, and certainly none of the congested/closed airports in the country, have one carrier controlling so many operations as Continental controls at Newark. Although Continental originally added operations at Newark to expand its hub to compete with other expanding hubs, additional operations by Continental have resulted in closure of the airport.

The operators controlling the majority of flights at Newark, along with their alliance partners, also dominate the other two congested New York airports -- LaGuardia Airport and JFK International Airport. Therefore, they control the entire New York/New Jersey market.

---

<sup>1</sup> Newark has a total of approximately 3,912 daily flights with the following carriers holding the largest number of operations:

Continental	2833	72.5%
American Airlines	193	5.0%
United Airlines	125	3.2%
Delta Airlines	113	2.9%
US Airways	92	2.4%
Northwest Airlines	83	2.1%
JetBlue Airlines	77	1.9%

## II. New York Airports

In order to operate a competitive airline operation, airlines need access to critical business/leisure markets particularly in the New York/ New Jersey area. With the closure of Newark Airport, all three New York/New Jersey airports are now closed to new entrants and therefore, closed to competition. It is difficult to imagine a deregulated environment with all New York airports closed.

As Secretary Peters stated on March 27, 2008 at Phoenix Sky Harbor Airport at the International Aviation Symposium:

Deregulation, liberalization, and globalization are propelling demand for air travel and air cargo to record heights. And the changes ahead are even more staggering.

We expect more than one billion airline passengers a year in the United States by 2016.

It is already beginning. This week alone, American, Continental, Delta, Northwest, United, US Airways, and Air France all add new flights between the U.S. and London's Heathrow Airport, as our landmark Open Skies Plus agreement with the EU makes restrictions on trans-Atlantic travel a thing of the past.

The U.S. now has more than 90 Open Skies partners around the world.

With our tremendous progress in opening world aviation markets, the United States is more connected to the world than ever before, and the biggest winners are the millions of people who now enjoy greater freedom and more affordable options to travel.

x x x x

I have never been a fan of heavy-handed government approaches like caps. But we have an obligation to travelers to do everything in our power to prevent a repeat of the horrors they experienced last summer.

We can begin by unleashing the power of the market to better allocate capacity and steer investment. Pricing is the quickest and most effective approach to help spread flights throughout the day and alleviate congestion at peak hours. It can generate new revenues that airports can use to expand and accommodate the forecasted passenger growth. And properly pricing air traffic services to costs can help ensure the most efficient use of existing airports, airfields, and airspace and provide the surest path to expand capacity and put desperately needed technology in place.

### III. The Importance of Competition

The Department has taken critical steps to open international markets through Open Skies agreements so that U.S. and foreign carriers can increase international operations. This is good news for large numbers of travelers and destinations. HOWEVER, while Open Skies is allowing flights from the U.S. to markets around the world, U.S. markets are closing. Therefore, travelers within the U.S. are not enjoying “greater freedom and more affordable options to travel.” While it is essential to control and minimize congestion and delays, U.S. markets must remain at all times open to domestic competition. Thus, the home of airline deregulation is closing its markets while markets outside the U.S. are opened. It is in the public interest to have open markets around the world and in the United States.

ACAA agrees that additional steps need to be taken to address operational problems caused by a significant increase in flights at congested

airports. ACAA applauds the Department for opening world markets. However, when operations are limited at major airports, it is absolutely critical that competition be preserved and that the world's largest airlines and alliances not be allowed to control airports while those airports are closed to growth by small carriers.

The importance of preserving competition is consistent with the following statement made by Secretary Peters when she addressed the October 23, 2007 New York Scheduling Meeting:

“I am not in favor of a system that limits competition, nor do I want to reduce the ability of new entrants to fly into New York.”

Unfortunately, the Newark Proposed Order will reduce competition and reduce the ability of new entrants and limited incumbents to fly to the New York/New Jersey area. The answer is not temporary caps that will over time become permanent and will immediately reduce competitive options.

The carriers that already dominate the New York/New Jersey airports should not be allowed to use congestion problems as a means to block access and guarantee their future dominance. It is clear that congestion must be addressed to alleviate the delay problems experienced throughout the New York/New Jersey area. However, steps must also be taken to resolve this issue in a way that does not block domestic competition. Healthy competition is critical for the airline industry and for consumers. As stated in a Department Notice on LGA:

It is DOT's intention to develop a full array of public policy tools to develop a comprehensive aviation strategy that focuses on ways

to reduce delays, improve airport capacity management, enhance competition, and promote the efficiency of the overall aviation system.<sup>2</sup>

As to suggestions that small carriers do not require special access provisions because they can purchase or bid for slots operating authorizations, the Department of Justice (“DOJ”) has noted that limited incumbents are not able to purchase slots because legacy incumbents with market power “will always have an incentive to outbid an equally efficient entrant for any slots offered.” In comments submitted to FAA, the DOJ stated:

“Indeed, an incumbent with market power may well be able to outbid a more efficient entrant, simply because maintaining market power is more profitable than entering a competitive market...once a potential buyer’s identity is known to the seller, the seller has every incentive to seek out an incumbent airline that would be willing to offer more money to maintain its market power than the entrant would be willing to apply to erode it.”<sup>3</sup>

A carrier with hundreds of slots at an airport would pay much more for an available slot than a carrier attempting to enter the airport or a carrier looking to grow with a few additional operations. The carrier with dozens of flights could spread those costs over all of those operations. Moreover, an incumbent carrier paying to keep a competitor out of a market believes it would be making a “good investment.”

---

<sup>2</sup> Notice of Alternative Policy Options for Managing Capacity at LaGuardia Airport and Proposed Extension of the Lottery Allocation, June 12, 2001 (Docket 2001-9852).

<sup>3</sup> Comments of the United States Department of Justice regarding the Notice of Alternative Policy Options for Managing Capacity at LaGuardia Airport and Proposed Extension of Lottery Allocation, Docket No. FAA-2001-9854, p. 6.

This is a major reason why it is unlikely that a market mechanism that allows all carriers to bid on newly available slots (if they ever become available) would result in small carriers gaining any access.

### III. Slot Limitations Have Been in Place for Forty Years

Some may actually believe that the steps proposed to control operations at Newark may be only needed for a short period of time – October 24, 2009. The FAA has on multiple occasions in the past addressed “growing” congestion problems by issuing short term measures. Unfortunately, these short term measures have closed markets and blocked competition for 38 years.

In 1968, the Acting Administrator of the FAA stated:

Delays of varying magnitude are encountered at many terminal areas...Congestion at these terminals frequently requires the imposition of traffic flow restrictions creating backup delays throughout the air transportation system.

A reduction in air traffic delays can be accomplished only by increasing the capacity of the system or decreasing the demands placed upon it. Certain changes in air traffic and air procedures and practices are already planned by the FAA to increase aircraft handling capacity. (Notice of Proposed Rule Making and Notice of Public Hearing; 33 FR 12580, September 5, 1968).

On November 9, 1969, as a response to the delays in terminal areas, the FAA established the high density rule. When the rule was promulgated, the FAA stated, “The rule should be considered to be only a temporary solution.”

Just as these temporary rules have become permanent so will the proposed restrictions placed at Newark become permanent.

#### V. Proposed Process to Provide Access

To ensure that competition and deregulation will not be eliminated, ACAA proposes that the following steps be taken to address Newark operations.

1. Merge to ATC System and Newark to limit congestion and Delay

FAA needs to continue to explore all options for addressing improved use of airspace in congested areas. In addition, the agency needs to closely examine significant increases of operations by dominant carriers and the increased use of regional jets which impacts operations. FAA has had to close a number of airports – LGA, O’Hare, JFK, and now EWR, because incumbent carriers have added large numbers of flights knowing that such actions would close those airports.

2. Maximize use of airport facilities to increase use of passenger flow

As a result of the increased use of regional jets, large numbers of regional jets are accommodating fewer passengers. For example, a gate that accommodates 50-seat regional jets five times per day will accommodate a much smaller number of passengers than a gate that accommodates 130 seat aircraft five times a day. In order to better utilize gates and facilities and to maximize airport revenues, pricing mechanism must be put in place to increase passenger numbers at all.

Legacy carriers have flooded the “closed” airports with regional jet service to close the airport to competition. The FAA’s “Notice of Alternative Policy Options for Managing Capacity at LaGuardia Airport and Proposed Extension of the Lottery Allocation,” June 12, 2001 (Docket 2001-9852), stated:

Hourly schedules beyond capacity compounded operational issues since delays starting in the early morning hours frequently impact later flights. By November 2000, carriers had added about 300 exemption flights and the hourly scheduled allocation exceeded 100 in peak hours. Between April 2000 and November 2000, the average daily operations increased by over 22 percent and the average daily delays increased by over 230 percent.

However, there are other factors that must also be considered which may have contributed to congestion and delay at LGA. For example, in recent years there has been a continuing trend toward using smaller aircraft for the provision of scheduled service at LGA. In fact, over the last six years there has been a significant increase in the use of smaller aircraft serving LGA. For example, as Table 2 illustrates, in April 1996, 26.54% of all air carrier operations were conducted by aircraft of 77 seats or less. By April 2001 this percentage had increased to 36.7%. While the use of small aircraft has promoted service to small communities, these aircraft may have also contributed to the congestion and delay experienced at LGA while accommodating fewer passengers than larger aircraft. A proper balance between access and airport

congestion must be struck if LGA's limited resources are to be used as efficiently as possible.

At LGA, regional jets now account for approximately 50% of all operations, including flights to medium and large hubs. For flights between closed airports and medium and large hubs, preference must be given for use of those slots to carriers operating large aircraft.

3. Increase existing airport and federal revenues from existing operations

When a major airport such as Newark is closed to additional traffic, it is essential that the airport and the federal government receive maximum funding from those operating at the airport. Airports closed by FAA have large numbers of regional jet operations that result in significantly smaller amounts of funding flowing to the federal government and to the airport operators. In order to maximize funding that could help expand airport facilities and enhance the airspace system, all operators at those airports should pay set amounts for landing fees, excise taxes and passenger facility charges. For example, a 50 seat regional jet operating to a large hub should pay additional landing fees since it is blocking larger aircraft from operating at that airport. That would allow the airport to obtain additional landing fees that it cannot currently collect. Moreover, the regional jet operator should also be charged additional PFCs and excise taxes since if a larger aircraft was operated, the fees would be higher because additional passengers would travel and more fees would be collected. This is the type of market approach that should be utilized to address congestion. This approach would apply to all operations unlike implementation of an auction system that only applies to new operations.

4. Maximize competitive options at the airport and allow carriers with limited operations at the airport to expand. This needs to include:

- a. Withdrawal of operations from the carriers with more than 5% of daily operations to allow carriers with less than 50 operations to expand.

In order to ensure the benefits of competition and consumer choices, the Department needs to designate 10% of the operations of carriers that operate 5% or greater of the total operations at Newark to be withdrawn and placed into a pool to allocate to limited incumbent carriers (those with less than 50 total flights.) If those slots are not requested and allocated to carriers with limited operations, the carrier holding them would continue to operate them. This would allow some additional competition while longer term solutions are considered.

- b. Rejection of Worldwide Scheduling Guidelines not a solution

Adoption of the Worldwide Schedules Guidelines for domestic service would not enhance competition or promote the efficiency of the overall aviation system. Reasonable opportunities for new entry and expansion of limited incumbents must be kept available, but using the Worldwide Schedule Guidelines would allow competition to be controlled by a handful of the world's largest airlines.

The Worldwide Scheduling Guidelines were designed to deal with limited competing requests for *foreign* air carrier access to capacity constrained airports and were *not* intended to allocate domestic traffic and thus have never been used for that purpose. The carriers that already dominate Newark should not be allowed to use the Worldwide Scheduling Guidelines to block access. Government imposed restrictions must not reward carriers that have created the very congestion at issue by further closing the door to other carriers who wish to enter and compete at the New York/New Jersey airports. The Worldwide Scheduling Guidelines or other similar restrictions should not be approved for domestic flights at domestic airports because they will block the ability of small carriers to continue new entry and growth. Closing airports to entry in this way would be a mistake that would hurt consumers and communities. It has repeatedly been demonstrated that blocking limited incumbents from growth results in less competition, higher ticket prices and fewer travel options for passengers.

In a perfect world, all carriers would be able to add as many flights as they desired in order to meet demand, and hopefully such a system will eventually come about. In the meantime, we must remember that adoption of the Worldwide Scheduling IATA Guidelines would neither enhance competition nor promote the efficiency of the aviation system.

## **Conclusion**

The Department of Transportation and the Federal Aviation Administration have played an active role in improving the nation's aviation system and in opening doors to competition and travel options for consumers. The ACAA applauds those efforts.

It is essential that we create a first rate system that makes flying easier and reduces congestion. At the same time, we must continue the dream of deregulation. All action taken must ensure that competition is not blocked. A proposal to address delays and congestion by closing Newark Airport and auctioning off any new capacity would close the door on competition and impede the growth of small carriers. Special care must be taken to ensure that this does not happen. Our dream is to create a high tech, safe, "delay free" and secure system that maximizes consumer choices and ensures that low fares are available to all.

Public interest will not be served if a few carriers are allowed to increase their stranglehold over all New York/New Jersey airports while their competitors are blocked from entering the airport. Moreover, there is no public interest in letting the nation's largest carriers decide which competitor may enter this closed market and thus prevent other carriers from adding service to markets the largest carriers dominate.

The Department's proposed auction of "newly" available slots would also prevent competition. It is doubtful any auction would work, but if one was put in place, it would have to include larger numbers of slots and measures to prevent the largest carriers from dominating the auction, as previously explained.

Steps must be taken to allow competitive opportunities at Newark. Steps have been taken around the world in this regard, but not at Newark. Regulatory decisions have been repeatedly postponed because "future

Docket Operations  
U.S. Department of Transportation  
April 3, 2008  
Page 16

rulemaking” will address the issue. Now that the rule is being written, the FAA should not delay decisions any further. Action must be taken.

THEREFORE, the Air Carrier Association of America respectfully requests that the Department take action to improve competition at Newark by amending the Proposed Order to include in the Final Order provisions set forth above including withdrawing and redistributing slots and encouraging use of larger jets.

These actions should be completed as soon as possible.

The Department has long emphasized the importance of competition at all airports. The Final Order, if amended as proposed here by the ACAA, presents the perfect opportunity for the Department to change the environment at Newark by improving access to limited incumbents and thereby producing full competitive opportunities for all while at the same time limiting congestion problems. Now is the time to promote true competition, enhance airline deregulation and bring “Open Skies” to Newark Airport and other closed domestic airports.

Very truly yours,



Edward P. Faberman  
Executive Director