

**BEFORE THE
DEPARTMENT OF TRANSPORTATION
WASHINGTON, D.C.**

Application of)	
)	
EASTWIND AIRLINES, INC.)	
)	
For an exemption from Subparts K and S)	Docket No. OST-99-4979
of 14 CFR Part 93 (Slot Restrictions at New)	
York LaGuardia Airport) as to provide nonstop)	
service between:)	
)	
Boston & New York LaGuardia Airport)	
Ronald Reagan Washington National Airport)	
& New York LaGuardia Airport)	
)	

**MOTION FOR LEAVE TO FILE A ANSWER AND
ANSWER OF THE OFFICE OF THE QUEENS
BOROUGH PRESIDENT, CITY OF NEW YORK**

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**MOTION FOR LEAVE TO FILE A ANSWER AND
ANSWER OF THE OFFICE OF THE PRESIDENT,
BOROUGH OF QUEENS, CITY OF NEW YORK**

I. MOTION FOR LEAVE TO FILE AN ANSWER

The President of the Borough of Queens, City of New York (“Borough President”), hereby moves for leave to file an Answer to the Application by Eastwind Airlines (“Eastwind”) for an exemption pursuant to 49 U.S.C. § 41714(c) from the limitation on operations at LaGuardia Airport in New York City (the “High Density Rule”).

Eastwind did not serve the Borough President with a copy of its application when all other parties were served, although they did send a copy of their application to the Borough President, noting that we have participated in every other recent proceeding on applications for High Density Rule slots at LaGuardia. As with these prior applications, if the Department grants Eastwind’s petition there would be significant adverse impacts upon the residents of Queens County, and there is no other party who can adequately represent their interests in this proceeding.

Queens County, which is the home of both LaGuardia Airport and John F. Kennedy International Airport, has a population of almost two million individuals. The thousands of jobs generated by these airports produce many benefits for Queens County, but the residents of this borough also bear many burdens from the close proximity of the airports, including safety issues, increased vehicle traffic, air pollution and aircraft noise.

The Borough President is elected by and represents the entire county, and works closely with the aviation industry to balance the economic and transportation benefits of that industry with the negative impacts on residents. The unique perspective of this office makes the Borough President’s

views on this matter critical to the decision making process. Since one of the standards by which the application will be judged is whether granting the exemption is in the “public interest”, it is essential that the Secretary be able to consider the views of the people of Queens County, where LaGuardia Airport is located. The Department has granted previous motions by this office on substantially the same grounds to intervene in other applications and has recognized the unique role and expertise of the Borough President with regard to these matters.

Accordingly, it is respectfully requested that the Secretary accept this Answer to Eastwind’s application, and that the issues raised in this Answer be considered by the Secretary in deciding whether to grant that application.

II. ANSWER

A. SUMMARY OF ARGUMENT

Eastwind is requesting an exemption so that it can initiate an additional 20 flights beyond the current limit imposed by the Federal Aviation Administration (“FAA”) without incurring the cost of purchasing available slots. The Borough President opposes the granting of these slots on both procedural and substantive grounds.

First, the Borough President will argue that the Department’s procedures for awarding slots is fundamentally flawed and is being conducted contrary to the explicit directives of the statute and of federal law.

Second, even if the Department were to successfully argue that it had the right to grant

exemptions, Eastwind must meet a two-part statutory test pursuant to 49 U.S.C. § 41714(c): showing that an authorization for 20 additional flights at the already overcrowded LaGuardia Airport is in the public interest and demonstrating that there are exceptional circumstances warranting the granting of the application. Eastwind has failed to satisfy either of these requirements, and accordingly the application should be denied.

B. BACKGROUND

1. The High Density Rule

Queens County is the home of both LaGuardia Airport and John F. Kennedy International Airport. These two airports together handle about 700,000 flights carrying 53 million passengers per year, and these flights impose a tremendous burden upon the almost 2 million residents in this borough. Specifically, local residents must suffer from a disproportionate amount of aircraft noise, congestion, delays and pollution, and these airport-related impacts have been a constant problem in Queens County for many years.

In 1968, in order to combat the extreme delays caused by the overwhelming demand for service to LaGuardia and four other heavily used airports, the FAA adopted the “High Density Rule”, which limits the number of flights at “high density” airports during particular hours.¹ The High Density Rule provided tremendous relief to both air travelers and local residents from the problems that had been caused by airspace congestion, and the rule remains the only protection that airline passengers and residents have against a return to the problems that plagued the air traffic system in

¹ 14 C.F.R. Part 93, Subpart K.

the 1960s.

2. The Statutory Test for High Density Rule Exemptions

In 1994, the United States Congress ordered USDOT to undertake a study of the High Density Rule.² In addition, during the time period of the study *only*, Congress authorized USDOT to grant exemptions under very narrow circumstances, and established a two-part test for evaluating slot exemption applications.³

a. The “Public Interest” Test

The first part of the statutory test requires a showing that the additional flights are in the “public interest”.⁴ To meet this portion of the test, an airline seeking an exemption initially must demonstrate that public benefits would result from the additional flights, such as: (1) the institution of new service, or new non-stop service, where none previously existed; or (2) a substantial reduction in airfares in a market which is dominated by a single carrier or which otherwise lacks meaningful price competition. If the applicant makes this showing, then those potential benefits must be weighed against any potential adverse impacts on the public, including: (1) an increase in aircraft noise; (2) more flight delays; (3) a worsening of vehicular traffic congestions; (4) a decrease in safety resulting from more congested airspace; and (5) the adverse health impacts from increased air pollution.

² 49 U.S.C. §41714(e).

³ 49 U.S.C. §41714(c).

⁴ *Id.*

If the Department determines that the adverse impacts from the flights outweigh any possible positive benefits, then the Department must deny the slot exemption application. In the alternative, if the applicant demonstrates that the benefits outweigh the burdens of the new service, then the Department must address the second part of the statutory two-part test.

b. The “Exceptional Circumstances” Test

The second part of the test requires the applicant to demonstrate that “exceptional” circumstances warrant the granting of the application.⁵ Although Congress did not specify what would constitute an exceptional circumstance, the factors for this second test cannot be the same as those in the public interest test.⁶ The Department must judge each application on the unique characteristics that distinguish it from other pending and potential applications.

c. Alternative Means of Providing the Same Service

Finally, the Department must make a determination that, even if all of the above criteria are met, there is still a threshold need to provide the service through the use of exemptions to the High Density Rule. This need can be determined by analyzing the following factors:

1. Alternative Airports and Alternative Times: The applicant must demonstrate that it is unable to provide service to the destination through another airport which is *not* covered by the High Density Rule, or to the requested airport during hours that are not slot controlled. Obviously, if the service can be provided to an alternate airport, or during hours that are not covered by the High Density Rule, then there is no need at all for the slot

⁵ *Id.*

⁶ See discussion *infra* at notes 27-34.

exemption, and the application must be denied.

2. Purchase or Lease of Slot: The applicant must also demonstrate that it cannot obtain the necessary slots from an existing holder, either through purchase or lease. Specifically, the applicant should provide: (1) copies of its written communications to existing slot holders, setting forth the terms of its offers to purchase or lease slots; (2) copies of any responses received, including responses setting forth terms different from those offered; and (3) an analysis of the financial impact on ticket prices if the applicant amortized the cost of any purchase or lease over a ten-year period. Without this information, the Department will not be able to determine whether the applicant should be required to purchase or lease slots on the buy-sell market.

3. Reallocation of Slots: If the applicant demonstrates that it cannot provide service to another airport or at the requested airport during non-slot-controlled hours, that the cost of purchasing or leasing the slots would cause ticket prices to become uncompetitive, then the Department will have to decide whether to grant a new slot, or to reallocate an existing slot. If there are existing slots which are being underutilized, then the Department should withdraw those slots and should award them to the new applicant. If there are no underutilized slots, then “exceptional circumstances” exist and new slots can be awarded.

C. PROCEDURAL ERRORS BY THE DEPARTMENT

1. The Time Period for USDOT to Grant Additional Slots Has Expired

As noted above, Congress granted USDOT the power to grant slot exemptions only as part of the mandate to study the High Density Rule in the Federal Aviation Administration Reauthorization Act of 1994. Pursuant to that federal law, USDOT was directed: (1) to determine whether technological and procedural improvements to the air traffic control system made it possible to eliminate the High Density Rule; and (2) to evaluate the impact that the elimination of the rule would

have on airspace congestion, delays, noise, competition, safety and profitability.⁷ Congress required USDOT to submit a report by January 31, 1995, and to commence a rulemaking proceeding and issue a final rule based upon the results of the study.⁸

Although Congress granted USDOT the power to grant exemptions to the High Density Rule during the period of the study, Congress specifically required that any slot exemptions that were granted must expire on the date on which the final rule became effective. Congress directed that the notice of rulemaking be issued no later than August 1, 1995, and that the final rule be issued within 90 days after the close of the public comment period. As a result, the final rule should have become effective on November 29, 1995, and therefore all prior exemptions should have terminated and USDOT's power to grant further exemptions statutorily expired on that date.

Contrary to this statutory direction, the Department never commenced a rulemaking on this issue, and thus a final rule was never issued (perhaps because the 1995 study concluded that the eliminating of the High Density Rule would have a net negative impact at both LaGuardia and Kennedy Airports). With the time period granted by Congress for the granting of exemptions to the rule having expired, there is no statutory basis for the granting of any additional slots, and AccessAir's exemption application must be denied.

The Department, in its most recent order,⁹ challenged the Borough President's prior assertion

⁷ 49 U.S.C. § 41714(e).

⁸ 49 U.S.C. § 41714(e)(2) and (f).

⁹ *Application of AccessAir Holdings, Inc., America West Airlines, Inc., Chautauqua Airlines, Inc., Pro Air, Inc., Spirit Airlines, Inc.*, Order 98-10-29 (October 27, 1998).

of the Department's lack of statutory authority to continue to award slots for the above stated reasons.¹⁰ The Department admitted its direct violation of a Congressional directive, but sidestepped the issue and claimed that this failure did not impact on its authority to grant exemptions. However, the Department's defense of its actions is flawed and its citations inapposite.

In the key case cited,¹¹ the Supreme Court held that the failure of an agency to follow a procedural prerequisite to an action mandated by Congress through the use of the term "shall" did not necessarily prevent the agency from continuing to act. The court cited the principle that the public interest cannot be prejudiced by the negligence of agency staff.¹² When less drastic remedies are available for a failure to meet a statutory deadline, such as remedies under the Administrative Procedure Act, and Congress did not impose a particular consequence for this failure, the Court was reluctant to assume that Congress intended for the agency to lose the power to act.¹³ However, the Court noted that making such a determination required a review of the legislative history to determine Congress' intent.¹⁴

The situation here is easily distinguishable from the cited cases. Here, there is no remedy to force the Department to issue the required rule. As for Congress giving a consequence of the failure to act, we submit that since the power was intended to expire when the rule was issued on a particular

¹⁰ *Id.* at 9.

¹¹ *Brock v. Pierce County*, 476 U.S. 253 (1986).

¹² *Id.* at 260 citing *U.S. v. Nashvill, C. & St. L. R. Co.*, 118 U.S. 120 (1886).

¹³ *Id.* at 260.

¹⁴ *Id.* at 258.

date, failure to meet that deadline would lead to the logical conclusion that the temporary power to grant exemptions must eventually expire. Otherwise, the statute would have to be read to give a permanent power of exemption with no need for rulemaking at all — a clearly absurd reading.

The power to grant exemptions from the high density rule was intended by Congress to be for a *limited duration*. This is evident by Congress explicitly stating that the power would expire upon the release of a revised rule. Congress' intent was that, after studying the High Density Rule, the agency would conduct a full public process to determine the sense of the affected public, members of Congress, industry and others before making any long term changes in the status quo. Nonetheless, during the rulemaking process, even one with a definitive time limit, there might be some meritorious potential exemptions to the High Density Rule which, if delayed, would prejudice the public interest. Congress therefore created a *limited* ability of the agency to grant exemptions. This power was never intended to be used indefinitely or without proper public input.

Instead, however, the Department has, by its own admission, failed to start, let alone complete, the required rulemaking. It then claims, contrary to the explicit language in the statute, that its authority to grant exemptions was not tied to the rulemaking at all. By doing so, it voids the express will of the legislature by creating for itself a power which runs indefinitely.

In each of the cases cited by the Department, the courts looked at the overall legislative scheme and the intent of the legislature in meeting the public interest. Here, it is clear that Congress intended that any power to grant exemptions be a temporary one, pending the creations of a long term solution during rulemaking which would include the development of a full record with input from the

public and Congress. Absent that process, Congress did not intend for the Department to continue to have this power and its continued use is *ultra vires*.¹⁵

2. USDOT Must Hold an *Ashbacker* Hearing Before Granting Any Additional Slots

In *Ashbacker Radio Co. v. F.C.C.*, 326 U.S. 327 (1945), the United States Supreme Court held that where multiple parties have applied for a limited federal right and the applications are mutually exclusive, the federal agency may not grant the right to one applicant without providing a consolidated review of all applications. The *Ashbacker* doctrine has been followed by the Department in other contexts, such as the grant of international route authority, where a comparative review occurs before any awards are made.

In the *Frontier Airlines* decision, the Department decided to expand upon its existing statutory authority for review of slot exemption applications by applying a more relaxed scope of review than the standard set forth by Congress. In doing so, the Department made clear that some applicants who meet the new standard would still not receive exemptions, because only a limited number of slots were available. As stated by the Department:

Even though we are expanding the use of our exemption authority, it is clear that we cannot grant all of the applications that might be made under this statute. We emphasize, therefore, that the number of available slots is very limited, and we may have to apply our guidelines on an increasingly more restrictive basis or even deny applications that otherwise meet the standards

¹⁵ Legislative intent overrides agency interpretations. See *Norfolk & Western Ry. Co. v. American Train Dispatchers Assn.*, 111 S.Ct. 1156 (1991), *Lever Bros. Co. V. U.S.*, 877 F2d 101 (D.C. Cir. 1989).

set forth in this order.¹⁶

Then, in *AccessAir Holdings*, the Department explicitly stated that it would grant no more than a total of 30 slot exemptions at LaGuardia Airport, stating:

We previously placed all parties on notice, and we emphasize there again, that the number of available slot exemptions is very limited and that we may have to deny applications that otherwise meet the standards we have established for the grant of such exemptions. More specifically, to assure that any new operations we may authorize will not have a significant impact on traffic, flight delays or noise, we are adhering in this order to the limit of thirty slot exemptions at LaGuardia on which we based the related environmental assessment cited [the *Frontier Airlines* order].¹⁷

In *Frontier Airlines* and *AccessAir Holdings*, the Department awarded all 30 slots that had been subject to the required environmental analysis. Subsequently, AirTran Airways returned four of those slots to the Department, and those slots were reallocated to Pro Air, Inc. and Spirit Airlines, Inc.¹⁸

However, the Department has taken a haphazard approach to slot allocation. Instead of announcing a limit on available slots, seeking applicants and setting a deadline, the Department addresses each application as it is submitted. Airlines continue to make applications to add flights at both LaGuardia and Kennedy Airports, and the Borough President anticipates that there may be additional slot requests for these airports in the near future. Due to the complex interrelationship

¹⁶ *Applications of Frontier Airlines, ValuJet Airlines and AirTran Airways*, Order No. 97-10-17 (October 24, 1997)(hereinafter referred to as “Frontier Airlines”), page 5.

¹⁷ *AccessAir Holdings*, Order 98-22-4, pages 4-5.

¹⁸ *Access Air Holdings, Inc. et al.*, Order 98-10-29 (October 27, 1998).

between the airspace used at LaGuardia and Kennedy, as well as the joint noise, congestion, delay and safety impacts throughout Queens County, a slot granted at one airport necessarily will reduce the availability of a slot at the other airport.

Because slot exemptions at Kennedy Airport and LaGuardia Airport are a limited federal right, and because not all applications can be granted, the Department must analyze all of the pending requests and determine which airlines, if any, have demonstrated both that the additional flights would be in the public interest and that exceptional circumstances exist. If the airlines that meet the statutory test are seeking to add more flights such that the current limit on exemptions would be exceeded, then the requests are mutually exclusive, and the Department must undertake a comparative proceeding under *Ashbacker* to choose the best applications before it can award any slots. If the Department instead grants some applications without deciding others, or without comparing the relative benefits and burdens of the different proposed flights, then it will have violated the Supreme Court's mandate in *Ashbacker*.

D. THE STATUTORY FRAMEWORK HAS BEEN SUBVERTED

Assuming *arguendo* that the Department still has the statutory power to grant slot exemptions, and that the Department holds the required *Ashbacker* hearing, it is clear that no slots should be awarded to Eastwind because Eastwind clearly fails to meet the statutory requirements for the granting of an exemption from the High Density Rule. First, the additional flights would have a net negative impact, and therefore are not in the "public interest". Second, Eastwind has failed to make any showing of "exceptional circumstances".

1. Balancing of Interests

Any airline seeking an exemption from the High Density Rule must demonstrate that the new proposed service would be in the “public interest.” Specifically, the applicant must show that the expected benefits from the new service outweigh the significant adverse impacts that would result from the granting of the slot exemption applications. Indeed, the Department has explicitly recognized that it must balance potential public benefits against “adverse effects of authorizing the proposed service, including flight delays, added noise, increased highway congestion, and adverse health ramifications.”¹⁹

The Borough President recognizes that the Department completed an Environmental Assessment in October 1997, finding that up to 30 additional flights at LaGuardia Airport would have no significant environmental impact. The Department also determined that these 30 flights would not adversely impact flight delays or aviation safety, and then issued two orders granting 30 slot exemptions to five different air carriers.²⁰

Accordingly, the Borough President will not reiterate here the arguments that we have previously raised regarding the adverse noise, safety, pollution, delay and traffic impacts that additional flights will have in New York City, including in response to the 1997 application filed by

¹⁹ *AccessAir Holdings*, Order 98-4-22, page 14.

²⁰ *Environmental Assessment and Finding of No Significant Impact for Exemptions from 14 CFR Part 93, Subparts K and S for operations at O’Hare and LaGuardia Airport*, United States Department of Transportation (October 24, 1997)(hereinafter referred to as “Environmental Assessment”); *Frontier Airlines*, Order 97-10-17 (October 24, 1997); *AccessAir Holdings*, Order 98-4-22 (April 21, 1998).

AccessAir.²¹ Instead, the Borough President simply refers the Department to those prior answers and incorporates the arguments made therein by reference.²²

2. Factors to be Considered in the Public Interest Test

Nevertheless, even though the Department has previously indicated that up to 30 additional flights will not have a “significant” adverse impact, the Department still is required by law to undertake a balancing of the positive and negative consequences that would result from *every* application for slot exemptions as part of the public interest test. *Any* increase in the number of flights at LaGuardia Airport inevitably will obviously increase noise, delays, pollution, traffic and safety. Notwithstanding the rejection by the Department, in a prior decision, of our assertion that increasing the number of flights at LaGuardia will have an adverse safety impact, the Department fails to examine the logical consequences of its own counter-argument.

The Department stated that the existing traffic management system “limits demand to operationally safe levels,”²³ and that the FAA “continues to apply the full variety of air traffic control programs and procedures for ensuring safety independently of the limits imposed by the High Density

²¹ See *Answer of the Office of the Queens Borough President, City of New York*, Docket No. OST-97-2442 (May 15, 1997); *Answer of the Office of the Queens Borough President, City of New York*, Docket No. OST-97-2557 (June 4, 1997); *Consolidated Answer of the Office of the Queens Borough President, City of New York*, Docket No. OST-97-2870, OST-97-2885, OST-97-2932, OST-97-2970, OST-97-2984, OST-97-3086, OST-97-3087 (December 3, 1997).

²² The Borough President respectfully reserves the right to submit additional arguments relating to the adverse impacts on local residents if the Department indicates that it may grant more than the 30 total slots that were the subject of the Environmental Assessment.

²³ *Frontier*, page 14.

Rule and regardless of any changes to that rule or any slot exemptions that the Department may grant.”²⁴ It is no secret, however, that the “full variety of air traffic control programs and procedures” includes *delaying* flights that are scheduled to land, *diverting* flights to other airports, and *refusing to allow flights to take off* when the airspace gets too crowded.

The Borough President respectfully submits that the Department cannot ignore its obligation to consider aviation safety as part of its “public interest” analysis, simply because it knows that the FAA air traffic controllers will *cancel, redirect or delay* flights when the airspace has reached its safety limits. Congress explicitly *requires* the Department to examine safety as a factor in the public interest analysis.²⁵ *Nor can the Department assert that there is no safety issue because the controllers will simply delay flights, and at the same time assert that the increased number of flights will not cause delays.* To the contrary, the Department must consider the potential implications on the air traffic control system -- looking at both safety and delay impacts *in combination -- before granting*

²⁴ *AccessAir*, page 16.

²⁵ 49 U.S.C. §40101. The statute reads, in pertinent part:

[T]he Secretary of Transportation shall consider the following matters, among others, as being in the public interest ...

- (1) assigning and maintaining safety as the highest priority in air commerce.
- (2) before authorizing new air transportation services, evaluating the safety implications of those services.
- (3) preventing deterioration in established safety procedures, recognizing the clear intent, encouragement, and dedication of Congress to further the highest degree of safety in air transportation and air commerce, and to maintain the safety vigilance that has evolved in air transportation and air commerce and has come to be expected by the traveling and shipping public. ...

additional flights. Indeed it was due to the FAA's imposition of its air traffic controls and procedures (*ie. delaying flights*) that led to the imposition of the High Density Rule in the first place.

Half of the remaining factors that Congress mandated the Department to consider in its evaluation of the public interest relate directly to introducing low fare competitive services:

(4) the availability of a variety of adequate, economic, efficient, and low-priced services without unreasonable discrimination or unfair or deceptive practices.

...

(9) preventing unfair, deceptive, predatory, or anticompetitive practices in air transportation.

(10) avoiding unreasonable industry concentration, excessive market domination, monopoly powers, and other conditions that would tend to allow at least one air carrier or foreign air carrier unreasonably to increase prices, reduce services, or exclude competition in air transportation.

...

(12) encouraging, developing, and maintaining an air transportation system relying on actual and potential competition —

(A) to provide efficiency, innovation, and low prices; and

(B) to decide on the variety and quality of, and determine prices for, air transportation services.

(13) encouraging entry into air transportation markets by new and existing air carriers and the continued strengthening of small air carriers to ensure a more effective and competitive airline industry.²⁶

3. Exceptional Circumstances Test is Separate and Distinct from the Public Interest Test

In its application, Eastwind does not distinguish between its obligation to meet the public interest test and its *separate and distinct* obligation to meet the exceptional circumstances test. This

²⁶ *Id.*

is not surprising because in the Department's recent orders, the Department has also failed to do so. It is an axiom of statutory construction that when two tests are provided in a statute, both of which must be met, they cannot be interpreted by the agency to mean the same thing. Provisions cannot be interpreted such that they render superfluous other provisions in the same act.²⁷

In *Frontier Airlines*, the Department turned the exceptional circumstances test on its head and said that it would expand the definition of exceptional circumstances to consider factors relating to the "need for [low fare] competitive service in a market,"²⁸ and specifically added the following factors to its exceptional circumstances evaluation: (1) favoring proposals using Stage 3 aircraft, (2) a reasonable expectation of economic viability of the service, and (3) a premium on new non-stop services and new low-fare competitive services when there is single carrier service or no meaningful competition.²⁹ However, these factors are not proper for use in evaluating whether exceptional circumstances exist.

The Stage 3 requirement is made moot by the Airport Noise and Capacity Act of 1990³⁰ which requires *all* operations to meet Stage 3 noise requirements by the end of this calendar year. Thus this factor, while pretending to address some noise complaints, in fact does nothing to

²⁷ *Freytag v. CIR*, 111 S.Ct. 2631 (1991). *See also U.S. v. Nordic Village, Inc.*, 503 U.S. 30 (1992) (statute should be construed in such fashion so that every word has some operative effect); *Boise Cascade Corp. V. U.S.E.P.A.*, 942 F.2d 1427 (9th Cir. 1991); *R.E. Dietz Corp. V. U.S.*, 939 F.2d 1 (2nd Cir. 1991) (cardinal principle of statutory construction is to give effect to every clause and word of a statute when possible).

²⁸ *Frontier Airlines* at 3.

²⁹ *Frontier Airlines* at 4.

³⁰ 49 U.S.C. §47521 et seq.

distinguish one application from any other and cannot be a basis for a finding of exceptional circumstances. In any event, the net addition of flights still increases noise over not adding flights (including both DNL levels and, perhaps more importantly, the number of single event noise levels which, as they increase in number, have a highly significant impact that the Department has ignored in all of these applications).

The second factor, of a “reasonable expectation” that the proposed service would be operationally and financially viable is a threshold public interest question³¹, not a matter of “exceptional circumstances.” Similarly, the third factor, and the entire rationale about the need for low fare competitive service is clearly contained in the statutory mandate for evaluating the public interest test.³²

The Department’s interpretation created, in effect, a new rule, which goes against the plain reading of the statute. Citing unnamed “members of Congress, numerous community groups, new entrant airlines” and a GAO report, the Department says that it was criticized for being too timid in issuing exemptions and should issue more. The Department’s self-selected collection of critical statements deliberately excluded those members of Congress, community and industry groups and local governments from the jurisdictions of the airports subject to the rule, no doubt because they would have opposed relaxing the rule. There was no formal process of gathering input from the

³¹ The list of public interest factors which the Department must consider includes “placing maximum reliance on competitive market forces and on actual and potential competition — (A) to provide the needed air transportation system; and (B) to encourage efficient and well-managed air carriers to earn adequate profits and attract capital, considering any material differences between interstate air transportation and foreign air transportation.” 49 U.S.C. 40101(6).

³² See text at note 26, *supra*.

public. The Department simply chose those opinions which would justify its own predetermined decision to weaken the rule. This action effectively constituted unauthorized rulemaking in violation of the intent of Congress, which expressly mandated that the agency follow the Administrative Procedures Act in determining a long term solution to the limits on competition created by the High Density Rule.

If the decision by the Department to treat the exceptional circumstances test as effectively identical to the public interest test is not reversed, the Department will have, by agency action alone, eliminated a Congresssionally-mandated requirement for to granting an exemption from the High Denisty Rule. In effect, the second statutorily required test will have been rendered superfluous. Such an interpretation is untenable.³³

Given that the Department's new test for exceptional circumstances does not meet the statutory requirement, it must now be determined what standard for exceptional circumstances should be applied. According to Merriam-Webster's On-Line Dictionary, exceptional means "rare" or

³³ A statute must be interpreted, if possible, to give each word some operative effect. *Walters v. Metropolitan Educational Enterprises, Inc.*, 519 U.S. 202,644, on remand *E.E.O.C. v. Metropolitan Educational Enterprises, Inc.*, 111 F. 3d 133 (1997). *See also*, *U.S. v. Alaska*, 117 S.Ct. 1888, *reh. den.* 118 S.Ct. 19 (1997) and *Gustafson v. Alloyd Co.,Inc.*, 513 U.S. 561, *on remand* 53 F.3d 333 (1995) (Supreme Court will avoid interpretation of statute that renders some words altogether redundant); *Kawaauhau v. Geiger*, 118 S. Ct. 974 (1998) (Supreme Court is hesitant to adopt interpretation of congressional enactment which renders superfluous another portion of that same law); *Asiana Airlines v. F.A.A.*, 134 F.3d 393 (D.C.Cir. 1998) (cardinal principle of interpretation requires court to construe statute so that no provision is rendered inoperative or superfluous, void or insignificant).

“deviating from the norm.”³⁴ Since, as noted above, the legislative intent must be understood as creating two distinct tests, the plain meaning of “exceptional” must be used. Certainly, exceptional cannot mean the same arguments that *every* applicant puts forth. It is incumbent upon each applicant to distinguish itself from all other possible applications by showing why its situation is unique. If an applicant faces the same challenges in creating service as every other new entrant, then, by definition, its circumstances are not exceptional.

E. EVALUATION OF THE APPLICATION

1. Eastwind Has Failed to Meet Either the Public Interest or the Exceptional Circumstances Test in Order to Warrant the Granting of Slot Exemptions

Even if the Department continues to use its faulty standard to evaluate exceptional circumstances, Eastwind has failed in its attempt to justify its service. Every applicant over the last several years has claimed that they will increase competition, lower fares, use Stage 3 aircraft be financially viable, and be environmentally benign. All have claimed that they were unable to purchase or lease slots. If by claiming that the provision of new, non-stop competitive service was enough to justify an award of slots based on exceptional circumstances, then *every* discount airline seeking to add service from *any* city in the United States not currently served by a discount airline would be automatically entitled to additional slots, and that clearly is not what Congress intended. This argument simply cannot be used to justify an “exceptional circumstance.”

Eastwind also completely fails to demonstrate that there is no real competition for service

³⁴ <http://www.m-w.com/>. The plain meaning of a word is conclusive, unless it conflicts with the legislative intent. *U.S. v. Ron Pair Enterprises, Inc.*, 489 U.S. 235 (1989).

between LaGuardia and Boston and Washington, D.C. and that this lack of competition accounts for comparatively high fares. First, Eastwind provides no hard evidence for its anecdotal assertion that there are separate markets for each of the New York City-area airports. Indeed, in the past, other airlines seeking slots certainly have made the opposite assertion for the purpose of serving the New York City-Boston market.³⁵ In fact, service to alternative airports is an important federal goal and is one of the stated public interest factors which the Department must review before granting a slot exemption.³⁶ There are over 200 non-stop flights every day between New York City and Boston on 6 airlines. Similarly, there are over 200 flights between New York City and Washington (over 100 to National and over 100 to Dulles) on 6 airlines. There is no reason to believe that an additional 10 flights to each of these cities will have any impact whatsoever on the market.

As to the cost of travel on the shuttle flights, there are many possible explanations. First, the shuttles provide a high level of frequent service, with the availability of back ups. They cater mostly to affluent and business travelers, do not require advance ticketing and offer participation in frequent flier bonus programs. The higher fare may simply reflect a premium for a premium service. For value-minded travelers, the many alternatives available from other carriers provide ample competition. Since the Department, has stated that the number of available slot exemptions is extremely limited and it

³⁵ See *Joint Application of Pan American World Airways, Inc. and Carnival Air Lines, Inc.*, OST-97-2885.

³⁶ “[E]ncouraging air transportation at major urban areas through secondary or satellite airports if consistent with regional airport plans of regional and local authorities, and if endorsed by appropriate State authorities — (A) encouraging the transportation by air carriers that provide, in a specific market, transportation exclusively at those airports; and (B) fostering an environment that allows those carriers to establish themselves and develop secondary or satellite airport services.” 49 U.S.C. 40101(8).

will only grant exemptions to enhance low fares where there is a true lack of competition, it is obvious that with 6 airlines and well over 400 flights serving these markets, Eastwind's application should be denied.

Eastwind also claims that its service will not "exacerbate airport congestion or adversely affect the environment," but provides no demonstrative evidence that all of flights will merely displace back-up flights. Indeed, back up flights are not scheduled, and respond only to demand, unlike Eastwind's flights which will operate on a set schedule. It is inevitable that there will be a net increase in the number of flights, all in the peak hours when operations fill every available slot and are already subject to delays. Indeed, Eastwind claims that it will stimulate the market and create "substantial additional traffic."³⁷ This is inconsistent with Eastwind's claim that it will merely displace existing services.

Eastwind's claims of financial viability cannot be evaluated because Eastwind has not provided any data about its operations and the market to make a meaningful judgment, preferring to assert merely that it will take traffic from existing carriers and expand the market enough to operate at a profit.

Finally, Eastwind claims that it has been unable to obtain slots at LaGuardia "despite diligent efforts."³⁸ This argument has been made by every slot applicant, none of which, including Eastwind, have provided any evidence to the Department of their attempts to do so. In any case, this problem is certainly not unique or exceptional and should be addressed by the Department separately by

³⁷ Application at 8.

³⁸ Application at 12.

reallocating existing slots if the Department believes that they are being misused or poorly utilized by existing slot holders in a manner not consistent with the public interest.

On the other hand, adding 10 daily flights in each direction during overburdened peak hours will have a severe impact on the quality of life for tens of thousands of Queens residents. Each additional take-off and landing generates significant noise. The increasing frequency of these single-events is reaching intolerable levels, The already overcrowded skies above Queens will become even more so and traffic and air pollution will increase if these flights are permitted. Finally, flights during peak hours *already* operate at such tight headways that *any* deviation from scheduled service leads to a cascade of delays. It will be impossible to add 20 peak operations without causing significant and extensive delays to other flights.

Accordingly, the Borough President respectfully submits that the public benefits from the proposed service is minimal, and certainly are outweighed by the negative noise, safety, delay, pollution and traffic burdens that would be imposed on the residents of Queens County. Although Eastwind's inability to meet the "public interest" test requires the denial of its slot exemption application, it is also clear that the application fails to meet the second part of the two-part test, because there are no exceptional circumstances warranting the granting of slots.

2. Eastwind Has Also Failed to Show That it Cannot Provide Service Without An Exemption from the High Density Rule

Having failed to meet either the public interest or the exceptional circumstances tests, Eastwind has failed in its burden to justify its request. Even, assuming *arguendo*, if the Department

somehow found that Eastwind met *both* the public interest and the exceptional circumstances tests as outlined above, a proper analysis of the application also must review issues such as whether the applicant can offer service to a non-slot-controlled airport, whether the applicant can purchase slots on the buy-sell market, and whether slots can be reallocated in order to avoid violating the High Density Rule. Considering all of the relevant factors together, Eastwind's application must be denied.

a. Eastwind Can Provide Service to an Alternate Airport

First, there is no basis for granting a slot exemption if the applicant is able to serve the intended destination through another airport which is *not* covered by the High Density Rule. In the present case, Eastwind can simply operate its proposed flights to Newark Airport rather than LaGuardia Airport, or can operate to Kennedy Airport during hours not governed by the High Density Rule.

Eastwind asserts that the other two New York airports do not provide a viable alternative for the average shuttle passenger.³⁹ However, while it may well be true that many business travelers prefer LaGuardia, many of these travelers are more concerned with frequent service than discount fares. The Department has never made a finding that LaGuardia and Newark Airports serve different markets within the New York metropolitan area *for all purposes*. Instead, the Department has merely quoted assertions placed into the record in various dockets that some travelers from Manhattan find LaGuardia more convenient than Newark.

However, the market for traveling between New York and Boston and Washington

³⁹ Application at 6.

constitutes many segments, arriving from different parts of the City. Travelers to and from Manhattan, for example, choose flights from both LaGuardia and Newark Airports on the basis of price and availability, since both airports are equally convenient. Both airports are about 30 minutes from midtown Manhattan by taxicab or bus, and recent efforts by the Port Authority, which operates both airports, will make it easier to get to Newark from Manhattan by rail. Newark is particularly attractive to travelers coming from the lower Manhattan business district. Travelers from the Bronx, Westchester, Brooklyn, Staten Island and even Queens use both airports as well, and the remarkable growth and success of Continental Airlines belies any claims that competitive service to New York City cannot be provided to Newark Airport. For many travelers originating or going to Brooklyn and Long Island, Kennedy is a preferable airport to LaGuardia. In any case, as discussed above, Newark and Kennedy can and do provide significant competitive service to the shuttle operations.⁴⁰

b. Eastwind Failed to Show that it Cannot Purchase or Lease Slots on the “Buy-Sell” Market

Eastwind has not submitted sufficient information to determine whether it also can obtain slots for its proposed service through purchase or lease. Eastwind is basing its application, in part, on a promise that it will offer lower fares to New York City, and it therefore must show that the cost of the slots would eliminate that competitive advantage. If, on the other hand, Eastwind can provide competitive prices by spreading the cost of the slots over a number of years, then it should be required to obtain the slots on the buy-sell market, and should not be provided with free slots by the

⁴⁰ See text at notes 35-36, *supra*. As discussed in note 36, *supra*, one of the required factors that the Department *must* consider as part of the public interest test is the use of alternative airports servicing the same metropolitan area.

Department.

Accordingly, the Department should require Eastwind to submit documentary information setting forth the terms of any offers that it has made to purchase or lease slots, as well as the responses to those requests. The Department will then be able to determine the impact of the cost of a slot, amortized over a ten-year period, on the fares that would be charged by the applicant. If Eastwind cannot or refuses to provide this information, then its application must be denied. *See Spirit Airlines*, Order No. 95-8-38, page 8 (failure of airline parties to provide any more than “a limited amount of evidence regarding slot availability” made it “impossible for [USDOT] to properly weigh this issue”).⁴¹

c. The Department Can Reallocate Underutilized Slots to Eastwind

Even assuming that Eastwind were able to demonstrate that it could not simply add flights at Newark Airport, could not add flights at Kennedy Airport during non-slot-controlled hours, and could not feasibly purchase or lease slots and provide competitive service, then the Department still

⁴¹ The Department discussed this issues in its *AccessAir Holdings* decision, but misconstrued the Borough President’s argument on this point. *AccessAir Holdings*, page 19. The Borough President is *not* asserting that the buy-sell market is the “exclusive means” for airlines to obtain slots, nor do we claim that Department can grant slots only if they are “unavailable” on the buy-sell market, nor do we deny that the major carriers have the power to price potential competitors out of the market. To the contrary, the Borough President simply asserts that the Department should require applicants to submit sufficient documentary evidence upon which the Department can determine whether slots are available for purchase, and if so, whether the price of the slots, amortized over time, will prevent the new entrant from offering competitive fares to potential passengers. If the applicant fails to provide that information, or if the evidence submitted shows that the competitive fares can be charged even including the costs of the slots, then the Department should require the applicant to purchase or lease the slots.

must determine whether it should award a slot exemption or should reallocate a slot from an existing holder.

In its *Frontier Airlines* decision, the Department referred to GAO's recommendation that the Department periodically withdraw some grandfathered slots to create a pool of available slots that can be made available to new entrant carriers, and the Department stated that it was "assessing this course, as well as other slot-related options, as a means of stimulating new price competition."⁴² The Department repeated this statement in *AccessAir Holdings*, decided almost and stated that it was still "assessing that alternative".⁴³

The Borough President respectfully submits that the time has come for the Department to take affirmative action to institute some form of slot reallocation. It is well known that the existing slots at LaGuardia and Kennedy Airports are not all used to capacity, and that slot holders seek to preserve their slots through leasing agreements with commuter airlines. It simply is not fair to force local residents to bear the burden of an increased number of flights, when the exact same benefits of increased service and reduced fares can be achieved by reallocating existing slots.

By using its reallocation powers, the Department will be able to achieve all of the benefits that would accrue from the additional service, without increasing the number of flights at the airport, and therefore without adding to the noise, pollution, congestion, safety and delay problems suffered by the community. As a result, before determining that "exceptional circumstances" exist warranting

⁴² *Frontier Airlines*, page 5, footnote 12.

⁴³ *AccessAir Holdings*, page 17.

the granting of new slots, the Department must first seek to reallocate those slots that are not being used to capacity.

CONCLUSION

For the reasons set forth above, the time period for the granting of exemptions from the High Density Rule has expired. Even if USDOT still has the power to award additional slots, the application submitted by Eastwind fails to meet the “public interest” test because the proposed service would provide minimal benefits, and any such benefits would be outweighed by the adverse impacts on the local community. In addition, the application fails to meet the “exceptional circumstances” test because the factors the Department might otherwise consider as exceptional are covered under the requirements for meeting the public interest (which Eastwind failed to meet) and there are no unique characteristics which distinguish Eastwind from other proposed services. Furthermore, Eastwind could offer the same service from Newark or Kennedy Airports and Eastwind has not demonstrated that it cannot purchase or lease the requested slots on the open market. In any case, the Department does not need to grant new slots because it can simply reallocate existing underutilized slots. Finally, if USDOT believes that the statutory test has been met, then it must hold an *Ashbacker* hearing to compare Eastwind’s request with other slot requests that have been or may be filed.

Accordingly, the request by Eastwind for an exemption from the High Density Rule at LaGuardia Airport should be denied in its entirety.

Respectfully submitted,

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CERTIFICATION OF SERVICE

I hereby certify that I served a copy of the foregoing Motion and Answer of the President of the Borough of Queens on January 21, 1999 by first class mail, postage prepaid, to each of the parties on the service list below:

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