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Via Electronic Mail and First Class Mail

Kerry B. Long
Chief Counsel
Federal Aviation Administration
800 Independence Ave., S.W., Room 900
Washington, D.C. 20591

Re: Opposition to Request for Waiver of Minimum Slot Usage Requirements

Dear Kerry:

On behalf of our client Virgin America Inc. (“Virgin America”), we respectfully oppose the May 8, 2008 petition of American Airlines, Delta Air Lines, Northwest Airlines, United Airlines, AirTran Airways, and US Airways (collectively, the “Joint Carriers”), to waive current and proposed minimum slot usage requirements for the entire Winter 2008/2009 season at DCA, EWR, JFK, LGA, and ORD because of an increase in fuel prices. For the following reasons, Virgin America submits that the Joint Carriers’ request is anti-consumer, contrary to precedent, and without merit. Accordingly, it should be denied.

First, the Joint Carriers fail to meet the requisite standards for any waiver of the slot minimum usage requirement at each of these airports. When the FAA implemented the waiver provision in 1986, it did so to accommodate sudden and unforeseen events, citing “government regulations, airport construction, partial closure of an airport, unusual weather, involuntary grounding of aircraft, and air traffic delays.”¹ The Joint Carriers’ request points to no new regulation, airport construction, airport or runway closure, unusual weather, aircraft grounding, or air

¹ 51 Fed. Reg. 21708, 21713 (Jun. 13, 1986). Indeed, the current waiver provision at 14 C.F.R. 93.227(i) states, “Examples of conditions which could justify waiver under this paragraph are weather conditions which result in the restricted operation of an airport for an extended period of time or the grounding of an aircraft type.”

traffic delay, and instead complains about the sustained, current high price of jet fuel. As the Joint Carriers and FAA are well aware, the price of jet fuel, while actually declining to \$3.73/gallon from \$3.82/gallon in the last week, has been rising steadily for the last sixteen months.² On its face, the rule governing waivers does not extend to cyclical economic factors, much less sustained increases in airline operating costs over a prolonged period of time.

Second, grant of the Joint Carriers' request is fundamentally at odds with the purposes of minimum slot usage requirements, which are efficiency and competition. When the FAA adopted the use-or-lose rule in 1985, it noted the important public policy objectives of allocating scarce slots according to their most efficient use, stating: "The use-or-lose provision in this rule prevents the holding of 'pocket' slots for speculative purposes and serves to maximize utilization of airport capacity."³ As the Department of Justice commented during the FAA's rulemaking on this provision: "a use-or-lose provision may be necessary to prevent large carriers or several large carriers from 'hoarding' slots in an attempt to restrict service to drive up fares or to keep smaller competitors from entering into or expanding in certain markets."⁴

The Joint Carriers are simply trying to have it both ways: (1) dropping service to small-and mid-sized communities; and (2) asking the government, in effect, to sanction the "baby sitting" of these slots to prevent new competition from entering their more lucrative markets. While the Department ought not to interfere with any airline's plans to drop routes where it cannot make a profit, it should not countenance efforts to waste extraordinarily valuable assets by allowing slots to go unused, or worse, prevent new entrants or limited incumbents from putting those limited slots to a much higher and better use.⁵ This is just the kind of anti-efficiency, anti-

² Over the past sixteen months, the price of jet fuel has risen approximately 123%, with a monthly average increase of 13%. Department of Energy, U.S. Energy Information Administration.

³ 50 Fed. Reg. 52180, 52189 (Dec. 20, 1985).

⁴ Id. at 52188. The FAA reiterated this concern when it increased the minimum slot usage requirement at High Density Rule airports to 80%: "This higher percentage should encourage carriers to hold no more slots than their markets demandThe 80% requirement thus accomplishes the twin objectives of improving efficiency and increasing potential access for new entrants without substantially disrupting existing air service." 57 Fed. Reg. 37310 (Aug. 18, 1992).

⁵ To be clear, Virgin America does not question and, indeed, commends, legacy carriers for removing inefficient, smaller aircraft that burn more fuel per available seat mile, carry less people, and take up the same or even more taxiway, runway, and airway space than Virgin America's new A320 and A319 aircraft.

competitive result that the Department and FAA sought to avoid in increasing use-or-lose requirements.

Third, the Joint Carriers' overly broad waiver request is directly contrary to recent FAA precedent involving remarkably similar requests. Less than three years ago, the FAA considered and denied a waiver based on Hurricane Katrina and "record fuel costs."⁶ There, the Regional Airline Association ("RAA") requested a waiver of minimum slot usage requirements for RAA members at JFK, LGA, and DCA for the Winter 2005/2006 time period.⁷ In denying the request, then-Chief Counsel Andrew Steinberg stated:

Because, however, many of the circumstances cited in your petition go to long-standing and fundamental obstacles to airline profitability, and are not specific to Katrina, I do not find that the criteria in section 93.227(j) have been satisfied.⁸

The Air Transport Association, which represents the Joint Carriers, has long acknowledged this "long-standing and fundamental obstacle" to airline profitability, stating:

People are willing to travel by air these days, but it's with the expectation of far lower prices than once paid — largely because, in addition to intense inter-airline competition, travelers may opt for other forms of transportation, carpooling, videoconferencing, or not traveling at all. This has played out in particular on shorter-haul routes, where the airport experience has become more uncertain and substitutes such as buses, cars or trains abound. Even

⁶ 70 Fed. Reg. 57350 (Sep. 30, 2005).

⁷ Then, as now, US Airways joined in the request, emphasizing the increased costs of fuel, and adding that a waiver would give it "scheduling and operational flexibility . . . to rationalize its services as much as possible." JetBlue Airways opposed the requested waiver as "overly broad," noting that given existing demand for scarce slots at these airports, under-utilized slots should be returned to the FAA for redistribution. 70 Fed. Reg. 57350.

⁸ As the Joint Carriers and FAA are well aware, slot minimum usage waivers have been infrequent, of limited duration, and narrowly crafted. See e.g. FAA Notice of Slot Usage Waiver (Feb. 27, 2003), 68 Fed. Reg. 9109 (granting four day slot usage waiver at high density airports following severe winter storm); Letter from FAA Deputy Chief Counsel J. Whitlow to K. Tourek, Senior Vice President, National Airlines (Sep. 27, 2002) (denying waiver request given rebound in traffic at high density airport following attacks of September 11th).

where successful, fare increases have paled in comparison to the magnitude of the sustained rise in jet fuel.⁹

As several industry analysts have observed,¹⁰ financial pressures facing the airline industry will likely continue for some time. This inability of carriers to recoup the sustained rise in jet fuel prices may well justify other public policy choices, like tax relief or halting diversion of oil to the Strategic Petroleum Reserve,¹¹ but it does not justify wholesale waiver of minimum slot usage requirements for an entire season.

Fourth, rather than provide sufficient evidence that meets the standard for a waiver, the Joint Carriers cite to the FAA's decision to waive usage requirements in the months immediately following the September 11, 2001 terrorist attacks, claiming that fuel prices constitute a similar, recent extraordinary event. As the Department is well aware, however, the post-September 11th environment of massive security disruptions, dramatically reduced demand for air travel, and mass layoffs are not present here.

Indeed, when the Department waived slot usage requirements after the attacks of September 11th, it noted that operations at the airports were "below the number of allocated slots and slot exemptions."¹² In contrast to a steep fall in air travel demand during the months immediately following September 11th, demand at all five of the airports where the Joint Carriers seek a waiver is robust and growing: (1) LGA enplanements are up 5.0% year-over-year; (2) JFK enplanements are up 18.9%; (3) EWR enplanements are up 8.3%; (4) ORD enplanements are up 5.8%; and (5) DCA enplanements are up 8.5%.¹³

⁹ See <http://www.airlines.org/economics/energy/fuel+QA.htm>.

¹⁰ See JPMorgan North America Corporate Research—U.S. Airlines; Battle of the Balance Sheets; New Ests & Ratings (May 19, 2008), noting that an improved airline earnings forecast is "difficult to reconcile absent heroic fuel declines or unprecedented demand." *Id.* at 1. The report also noted that "[a]t current fuel prices, we simply see little reason for this to be the [airline] downturn that breaks from past precedent." *Id.* at 7.

¹¹ In response to the sustained, multi-year rise in oil prices, the ATA has long called for such action. See, e.g., http://www.airlines.org/news/releases/2004/news_5-19-04.htm.

¹² 67 Fed. Reg. 10249, 10250 (Mar. 6, 2002).

¹³ DOT Bureau of Transportation Statistics, "Airport Snapshots" for 12 months ending February 2008.

Furthermore, in the aftermath of the September 11th attacks, the air traffic control system was completely shut down, and flight restrictions remained in effect at DCA for a prolonged period. A new agency was born, issuing a multitude of new security regulations that severely disrupted air travel. When the FAA imposed and then extended its post-September 11th slot usage waiver in early 2002, it was careful to note that “additional factors [were] involved in an individual airline’s decision to operate flights at the [] airports ... includ[ing] new security requirements, aircraft utilization plans, passenger demand, and other operational issues that may temporarily preclude the full use of slots while the air traffic system and the aviation industry adjust to the changing aviation environment.”¹⁴ Here, no new highly disruptive major regulations exist. Passenger demand for air travel remains strong, and operational issues do not “temporarily preclude” the full use of slots.

We are unaware of any waivers the FAA has granted for cyclical economic trends since the use-or-lose provision was introduced in 1986. Unquestionably, the price of jet fuel presents formidable challenges to airlines, and will likely push carriers to further reduce capacity, trim costs, and exploit new revenue opportunities. While other public policy decisions might be justified to address long-term airline profitability challenges, Virgin America respectfully submits that this does not present a reason to waste a scarce asset or shut out a new competitor. At bottom, the reasons offered by the Joint Carriers do not rise to the level of a “sudden” or “temporary” or “highly unusual and unpredictable condition” permitting the FAA to waive a minimum usage requirement designed to foster efficiency and competition.

Fifth, the Joint Carriers’ argument that the “interim rule” limiting operations at ORD between 2004 and 2006 did not contain a use-or-lose provision is misplaced. Even there, the FAA stated that future ORD congestion management rulemakings might include such a provision.¹⁵ Indeed, the 2006 final rule for ORD, which now controls slot usage and reallocation at that airport, includes a minimum usage requirement nearly identical to those in place (or proposed) at DCA, EWR, LGA, and JFK. 14 CFR §93.21. That the FAA, at its discretion, may have declined to include a use-or-lose provision in an interim, temporary order at ORD is of little consequence

¹⁴ 67 Fed. Reg. 10249.

¹⁵ Docket FAA-2004-16944 (Aug. 19, 2004), at 35.

to the Joint Carriers' extraordinary request.¹⁶ Indeed, in proposing usage waivers, the FAA tellingly suggested a far more restrictive test than that suggested by the Joint Carriers:

The proposed rule would allow for limited waivers of the minimum usage requirements in the event that the carrier experiences an unusual and unpredictable condition that prevents it from using the slot for at least five consecutive days. If weather conditions prevented operations, for example, an operator might be granted a waiver of the use-or-lose provisions.¹⁷

Here, of course, no carrier is being "prevented" from operating a flight at a congested airport for which it holds a slot. For good and various economic reasons, these Joint Carriers actually have the right and ability, but no longer the economic interest, in operating certain flights. In contrast, Virgin America and likely other potential competitors have a great economic interest in serving these airports, but absent slot allocations or exemptions, new competitors cannot obtain the right to operate more flights to these key airports because the FAA "capped" them to prevent operational delays.¹⁸

As the FAA recently noted in its New York congestion-related rulemaking:

¹⁶ Of course, in citing the ORD "interim rule," the Joint Carriers not only ignored the more recent ORD rule, but the FAA's current and most recently proposed restrictions at the other airports subject to their request. LGA, which has been under a similar interim, temporary order pending the FAA's completion of a final congestion management rule, is subject to a use-or-lose provision. 71 Fed. Reg. 77584 (Dec. 27, 2006). Most recently, in establishing flight caps and proposing additional restrictions and slot auctions at JFK and EWR, the FAA adopted similar use-or-lose requirements. See 73 Fed. Reg. 29550 (Mar 21, 2008) (limiting EWR scheduled operations and imposing use-or-lose provision); 73 Fed. Reg. 3510 (Jan. 18, 2008) (limiting JFK scheduled operations and imposing use-or-lose provision); 73 Fed. Reg. 29626 (May 21, 2008) (proposing new congestion management rules at EWR and JFK, including use-or-lose provision).

¹⁷ 73 Fed. Reg. 29636.

¹⁸ Moreover, the Joint Carriers' proposed time period for the waiver – through March 2009 – should be viewed with skepticism. With fuel prices unlikely to decline significantly before that time, it is highly probable that the Joint Carriers will seek to extend any waiver, arguing that a continued "financial emergency confronting the industry" necessitates a continuation of rewarding incumbents who hoard valuable slots. The effect would be to ignore consideration of the highest and best use of a scarce asset through competitive mechanisms to determine what is in the public interest.

Congress has directed the Department to place “maximum reliance on competitive market forces and on actual and potential competition.” 49 U.S.C. 40101(a)(6). The ability of carriers to initiate or expand service at the airport is hindered, in large part, by the imposition of a cap. Not only is the FAA required to assure the efficient use of the NAS, but it must do so in a manner that does not penalize all potential operators at the airport by effectively shutting them out of the market. Such an approach would not only ignore the inherently valuable nature of an airspace usage assignment, but allows a select few to profit from a governmental interest to the detriment of their competitors and the public as a whole.¹⁹

Sixth, the Joint Carriers’ attempt to analogize the extraordinary waiver of slot restrictions with DOT’s recent decision allowing United to defer its planned SFO-Guangzhou service is equally unpersuasive (as is any comparison to the recent joint petition of seven legacy carriers for a blanket waiver of the Department’s dormancy requirements).²⁰ As the Department is well aware, the dormancy waiver at issue in United’s request involved a single long haul international flight to a fixed point, not the several hundred daily slots for which the Joint Carriers seek to change the rules.

Finally, the Joint Carriers’ argument that a waiver will “have a positive impact on DOT/FAA efforts to reduce congestion and delay” is weak and insufficient to justify the sweeping relief sought. Delays at these airports already are subject to strict administrative caps with slot auction proposals (opposed by many of these same carriers) designed to manage delays. The Joint Carriers now posit that a waiver will allow them to “adjust schedules that could further reduce congestion,” yet nothing is stopping them from doing so today.

As the Department is aware, the Joint Carriers may today freely cut capacity and adjust their schedules--they just cannot do so for a two month period and hoard their slots. If the Joint Carriers are reluctant to adjust schedules because of the use-or-lose provision, then they are not efficiently utilizing slots according to the slots’ best economic uses. The Department should not sanction slot hoarding at the expense of new entrant and limited incumbent opportunities at high-demand airports.

¹⁹ 73 Fed. Reg. 20853 (Apr. 17, 2008).

²⁰ Joint Application of Alaska, American, Continental, Delta, Northwest, United, and US Airways, in Docket OST-2008-0181 (Jun. 3, 2008).

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In short, the steady and protracted increase in fuel prices over the past sixteen months does not justify wholesale waivers of slot minimum usage requirements at five of the most important, high-demand airports in the country, over an entire Winter season. Already, the large percentages of relatively small aircraft operations at these highly congested airports represents a waste of scarce assets.²¹ To permit these Joint Carriers to officially retain their slots, when excess demand exists from carriers like Virgin America, would be arbitrary and capricious, inconsistent with the waiver standard and precedent, and bad public policy.

For the foregoing reasons, Virgin America respectfully urges the Department to deny the Joint Carriers' petition for a waiver of the minimum slot usage requirements.

Sincerely,



Kenneth P. Quinn

²¹ Currently, Regional Jets and Turboprop Jets account for more than 59.3 percent of the total weekly departure flights at DCA, 51.4 percent at LGA, 49.8 percent at ORD, 40.7 percent at EWR and 28.1 percent at JFK. "Airport Departures and Seats by Aircraft Type," AVIATION DAILY (May 27, 2008).