

**BEFORE THE
U.S. DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, D.C.**

CONGESTION MANAGEMENT RULE)
FOR LAGUARDIA AIRPORT)

) Docket FAA-2006-25709
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**COMMENTS OF
THE REGIONAL AIRLINE ASSOCIATION**

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As if staggering fuel price increases, a weakened economy, a burdensome airline tax structure and a failure to provide a modern air traffic control system were not enough, the Federal Aviation Administration (“FAA”) is continuing to propose unlawful regulations intended to drive service by Regional Airline Association (“RAA”) members¹ out of LaGuardia International Airport (“LGA”) by imposing an oppressive and unprecedented auction tax on the right to take off or land at LGA. Despite overwhelming opposition to the FAA’s initial rulemaking proposal to discourage service by smaller aircraft at smaller cities, in apparent recognition of the unlawfulness of that proposal, FAA has now issued a Supplemental Notice of Proposed Rulemaking (“SNPRM”)

¹ Aerolitoral, Air Canada Jazz, Air Serv International, Air Wisconsin Airlines, AirNet Systems, American Eagle Airlines, Atlantic Southeast Airlines, Big Sky, Cape Air, Caribbean Sun Airlines, Chautauqua Airlines, Colgan Air, Comair, Commutair, Compass Airlines, Empire Airlines, Era Aviation, ExpressJet, Federal Express Corporation Feeder Aircraft Operations, Flight Options, LLC, GoJet, Grand Canyon Airlines, Great Lakes Airlines, Gulfstream International Airlines, Horizon Air, IBC Airways, Island Air, Mesa Airlines, Mesaba Airlines, New England Airlines, Piedmont Airlines, Pinnacle Airlines, Inc., PSA Airlines, Republic Airlines, Salmon Air, Scenic Airlines, Shuttle America Airlines, Skybus Airlines, Inc., Skyway Airlines, SkyWest Airlines, Trans States Airlines and US Airways Express.

proposing to use its contracting authority to auction slots as if they were excess FAA equipment, which is clearly unlawful, just as the original congestion pricing and auction proposal were unlawful. Moreover, the FAA's failure to provide complete and adequate information regarding its proposal and the time necessary to analyze that information renders its supplemental proposal procedurally unlawful for failure to provide due process to stakeholders.

RAA supplements its previous comments in this proceeding in further opposition to the FAA's latest effort to evade the legal requirements that preclude it from auctioning slots as part of its effort to reduce the number of flights operated by regional airlines at LGA to the detriment of communities that will lose service, the consumers who benefit from the competition provided by regional aircraft flights and the regional airlines, their employees and the manufacturers and lessors of regional aircraft.

1. Only recently, the FAA itself conceded in this very docket it "does not have the statutory authority to assess market-clearing charges for a landing or departure" and cannot use "market-based mechanisms, such as auctions or congestion pricing" to allocate slots.² As the Air Transport Association ("ATA") supplemental comments in this proceeding amply demonstrate, FAA can justify allocation-by-auction neither through the regulatory authority which provides its only means of controlling airspace access at all nor through its contracting power. As ATA explains, specific provisions in the 2008 Consolidated Appropriations Act preclude FAA from imposing new aviation user fees not specifically authorized subsequent to the Appropriations legislation, and longstanding precedent precludes FAA from imposing a tax-by-auction regime on slots

² See 71 Federal Register 51360, 51362-51363 (August 29, 2006).

since only Congress can levy taxes. FAA's contracting authority simply cannot be extended to FAA's regulatory functions or applied to license or permit "authorizations" issued by FAA for takeoffs and landings without specific statutory authority. While slots become the property of the airlines using them, they are not FAA "property" to be auctioned or sold, as ATA has explained. The Independent Offices Appropriations Act permits government agencies to charge fees only for services provided by the agencies themselves: in this case, administration of the slot allocation program at most. Given the patent unlawfulness of FAA's proposed auction, the potential disruption to airline operations caused by slot confiscation and sales to the highest bidder cannot be justified, particularly in these perilous times.

2. As RAA's initial comments in this proceeding demonstrated, FAA's objective of reducing the number of regional aircraft operating at LGA and thereby altering the service patterns and reducing service to smaller cities is itself unlawful since FAA lacks the authority to regulate the types of aircraft and routes to be served in air transportation. Since 70% of the airports in the U.S. receive their entire service by regional aircraft, the potential loss of service is significant. Moreover, on many routes the only way more than one airline can operate is through the use of regional aircraft by competing airlines. At a time when airlines are already entering or facing bankruptcy and terminating service because of staggering increases in fuel prices and difficult economic conditions, adding a punitive tax-by-auction at LGA would jeopardize regional airlines and the cities they serve. Rather than wasting its time promoting unlawful means of allocating slots and engaging in economic regulation, FAA should be concentrating on securing the resources needed to complete the NextGen system and continuing to take

steps to reduce delays in the New York area. Since the auction process (as opposed to the imposition of caps) will not provide one iota of improvement in congestion and delays and since FAA is not authorized to engage in economic regulation or to impose punitive taxes by contract through auction procedures, there is no basis for the FAA's auction proposal.

3. Despite the complete absence of a reasonable justification for the FAA's auction proposal, FAA has attempted to ramrod it through at the expense of due process and without regard to property rights of slotholders. Just before the end of the comment period FAA was still adding complex and complicated reports in the docket and refusing to grant interested parties time to analyze them as part of their comments in this proceeding. RAA supports ATA's arguments that the procedures adopted by FAA and its failure to provide timely information and explanations to the parties have deprived the parties of due process rights.

For the reasons stated in these comments and previous comments opposing slot confiscation and auctions, FAA should decide against adopting the proposals in its SNPRM, terminate this rulemaking and concentrate on efforts to enhance operations in the New York area.

Respectfully submitted,



Roger Cohen
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Regional Airline Association