

THE PORT AUTHORITY OF NY & NJ

**John F. Kennedy International Airport,
LaGuardia Airport and Newark Liberty International
Airport**

**NOTICE OF
PROPOSED ACTION**

Issued: August 4, 2008

TAKE NOTICE THAT, The Port Authority of New York and New Jersey (“the Port Authority”) proposes to take the action described herein with respect to John F. Kennedy International Airport (“JFK”), LaGuardia Airport (“LGA”) and Newark Liberty International Airport (“EWR”), and solicits comments from all interested parties on such proposed action:

Summary of Proposed Action:

The Port Authority proposes to prohibit any flights at JFK, LGA and EWR conducted pursuant to permission granted through a federal sale or auction of such permission conducted without authorization of Congress because such sale or auction would have a material adverse effect on airport operations, airline service, ticket prices, destinations served, customer service, consumer choice, and overall passenger demand, and would be unlawful absent Congressional authorization.

Comment submission:

Date for submission of comments: Comments will be received until 5:00 P.M., Eastern Time, on August 18 , 2008.

Addresses: Comments regarding the proposed action may be submitted using any of the following methods:

Mail: The Port Authority of New York and New Jersey
Public Affairs Department
225 Park Avenue South
New York, New York 10003

Hand Delivery or Courier: The Port Authority of New York and New Jersey
Public Affairs Department
225 Park Avenue South
New York, New York 10003

Facsimile:

Attn: Port Authority Public Affairs Department
347-402-6415

E-mail:

PublicComments@panynj.gov

Privacy Notice:

Submission of any comment shall constitute a waiver of any claim of confidentiality or privilege as to that comment and its contents.

Background: Since 1973

History of Congestion Management at the New York City Metropolitan Area Airports

The United States Department of Transportation (“DOT”) has previously maintained that volume restrictions should be placed on scheduled airline flight operations at JFK, LGA and EWR to meet a serious transportation need or to achieve an important public benefit. Such flight restrictions were stated to be necessary to reduce flight delays at these airports.

Congestion and delay had been managed at JFK and LGA by means of the High Density Rule (“HDR”) as a temporary rule from 1969 through 1973, and as a permanent rule beginning in 1973. The HDR established the number of take-offs and landings during certain hours; and in order to operate during the restricted hours, a carrier needed a reservation, commonly known as a “slot.” On April 5, 2000, Congress enacted the Wendell H. Ford Aviation Investment and Reform Act of the 21st Century (“AIR–21”). AIR–21 provided for termination of the HDR at JFK and LGA on January 1, 2007, and directed the DOT to grant exemptions for certain flights from the HDR’s operational limits prior to the HDR’s termination. As a result, flight delays at LGA substantially increased. The FAA responded by limiting LGA operations to 75 scheduled operations per hour (plus 6 unscheduled operations primarily used by the general aviation community) beginning January 31, 2001. (65 Fed. Reg. 69126, November 15, 2000). The number of AIR–21 slot exemptions at LGA was restricted to a total of 159 a day between the hours of 7 A.M., and 9:59 P.M., Eastern Time. AIR–21 slot exemptions at LGA were allocated by lottery. The termination date of the restriction on the number of AIR–21 slot exemptions and the lottery allocation was extended several times. Effective January 1, 2007, with the expiration of the HDR all of the former slot distinctions and AIR-21 slots expired. However, a new Order was implemented that extended the hourly operational limits until such time as a permanent mechanism was put in place.

The FAA’s response to delays that were experienced at JFK during the summer of 2007 was a series of actions culminating in the issuance by the FAA of a temporary Order that limited scheduled flight operations at JFK to domestic and foreign air carrier operations then serving the airport. This Order generally capped scheduled operations at 81 per hour. The effective dates of the temporary Order are 6 A.M., Eastern Time,

March 30, 2008, through 11:59 P.M., Eastern Time, October 24, 2009. 73 Fed. Reg. 3519 (Jan. 18, 2008), as amended 73 Fed. Reg. 8737 (Feb. 14, 2008).

The FAA's response to delays experienced at EWR during the summer of 2007 was imposition of a similar "interim rule" that restricted air carrier movements to 83 per hour and non-scheduled activity to two movements per hour, except between 12 Noon and 10 P.M., Eastern Time, when non-scheduled activity was restricted to one movement per hour. The cap expires 11:59 P.M., Eastern Time, October 24, 2009. 73 Fed. Reg. at 29628 (May 21, 2008).

DOT maintains that these actions are temporary responses to the airlines' desire to regularly schedule flights in numbers that exceed each airport's capacity during peak operating hours. DOT also maintains that these actions relieve the substantial inconvenience to the traveling public caused by excessive congestion-related flight delays at the airports, reduce the average length of delays, and provide for a more efficient use of airspace.

The Role of the Port Authority

As articulated in the Flight Delay Policy adopted by the Port Authority's Board of Commissioners in February of this year, the Port Authority is committed to the goal of providing its customers with safe, fast and efficient air travel. Passengers rely on Port Authority airports for leisure travel and business travel serving regional industries, such as finance, media and tourism that drive the New York City metropolitan region's economic growth. Last year, the region's three major airports – JFK, LGA, and EWR – handled more than 109 million passengers and 2.7 million tons of cargo. The combined impact of aviation operations, airport investment and tourism resulted in almost half a million jobs, \$20.5 billion in wages, and more than \$57 million in annual economic activity.

Unfortunately, flight delays at these airports are among the worst in the country and the FAA has acknowledged that it cannot achieve significant capacity increases to reduce these delays in the near term. Instead of fully implementing a process to provide long-term solutions, which would serve to mitigate congestion and delay, the FAA has implemented restrictive limits on the number of flights per hour at JFK, EWR and LGA and has proposed the use of slot lease auctions to allocate and/or reallocate such limited flight opportunities at these airports.

As operator of JFK, LGA and EWR, the Port Authority has the proprietary right and responsibility to allocate gate and terminal facilities. In addition, the Port Authority is responsible for overall management of groundside facilities used by JFK, LGA and EWR airlines, passengers, employees, contractors and others. Allocation, reallocation, and/or changes in the total number of slots or operating authorizations at JFK, LGA and EWR will inevitably directly impair the Port Authority's exercise of these airport proprietor's rights and responsibilities.

Slot Auctions

The FAA has issued two notices proposing to implement rules which would remove slots from existing holders of such operating authority and re-issue such slots to a "lessee" through a monetary auction. Supplemental Notice of Proposed Rulemaking

Concerning Congestion Management at New York LaGuardia Airport, issued April 14, 2008, appearing at 73 Fed. Reg. 20846 (April 17, 2008) Docket No. FAA-2006-25709; Notice of Proposed Rulemaking Congestion Management Rule for John F. Kennedy International Airport and Newark Liberty International Airport, issued May 21, 2008, appearing at 73 Fed. Reg. 29626 (May 21, 2008). Reallocating of slots addresses neither airport or airspace capacity, nor conditions of congestion and delays.

The FAA lacks the legal authority to conduct the proposed slot auctions. The FAA itself has correctly recognized that it lacked the power to implement operating authority lease auctions. For example, in 2006, in addressing congestion and delay conditions at LGA, the FAA stated:

[A] legislative proposal to Congress . . . will seek authority to utilize market-based mechanisms at LaGuardia in the future. Such legislation would be necessary to employ market-based approaches such as auctions or congestion pricing at LaGuardia because the FAA currently does not have the statutory authority to assess market-clearing charges for a landing or departure authorization. If Congress approves the use of market-based mechanisms as we plan to propose, a new rulemaking would be necessary to implement such measures at LaGuardia.

71 Fed. Reg. 51360, 51362 (Aug. 29, 2006) (emphasis added); *accord, id.* at 51363 (“The FAA currently does not have full legislative authority to employ [auctions or congestion pricing] at LGA or at other airports Consequently, we are seeking the legislative authority to conduct auctions or congestion pricing.”).

Thus, as properly recognized by the FAA itself, the agency lacks the statutory authority to lease slots at rates determined by auction.

The FAA relies on the Federal Aviation Act, 49 U.S.C. §§ 106(l)(6) and 106(n), as the grant of legislative authority to the auction slots, as well as 49 U.S.C. 40110(a)(2); 73 Fed. Reg. at 29631. These provisions do not vest the FAA with the authority to auction or lease slots.

Allocating capacity through auctions does not address congestion and delay, and thus, if implemented would not relieve or mitigate these conditions. The Port Authority has long maintained that there are several key policy goals that should be addressed in considering proposed solutions to the problem of airspace congestion in the New York region: (1) delay mitigation; (2) efficient use of scarce aeronautical resources; (3) preservation of service to small communities; and (4) accommodation of new entrant airlines. The Port Authority believes that implementation of DOT’s slot lease auction proposals will not address these goals because:

1. Auctions of flight operation slots, particularly when coupled with caps on permitted flight operations, would not assist in reducing congestion and delays, but instead only allocate, or reallocate, existing capacity, which has already been reduced by FAA limitations on flight operations at affected airports.

2. Auctions of slots will adversely affect air service to smaller communities that is typically delivered by airlines using planes, which carry fewer passengers than planes which provide service to larger communities. By its nature, such small community

service does not produce revenue sufficient to provide a financial incentive to airlines to use slots for such service, in comparison to service to larger communities.

3. Allocation or reallocation of flight operation slots that are not coordinated with the allocation or reallocation of scarce groundside resources through slots would severely constrain the airport proprietor's management and allocation of those resources, *e.g.*, by impeding the airport proprietor's ability to enter into lease arrangements that are mutually advantageous to airlines, the airport and the customers they serve.

4. Auctions will also not result in the accommodation of new entrants because such entrants typically are less financially able to successfully participate in an auction process.

Additionally, auctions, as an economic drain on air carriers and air travelers, will operate as a disincentive to airline investment in airports and would result in an increase in ticket prices that will adversely impact consumer choice. An analysis of the impact of slot auctions on ticket prices has indicated that the price of a ticket purchased for an auctioned flight could increase by 12% due to the cost of the auction to the carrier.

Proposed Action:

Based on the foregoing, and pursuant to the Flight Delay Policy adopted by the Board on February 21, 2008, the Port Authority proposes to take the action described in the Proposed Notice of Action set forth below:

THE PORT AUTHORITY OF NY & NJ

**John F. Kennedy International Airport,
LaGuardia Airport and Newark Liberty International
Airport**

**[PROPOSED]
NOTICE OF ACTION**

TAKE NOTICE THAT, as of the effective time and date stated herein, The Port Authority of New York and New Jersey ("the Port Authority") takes the following action with respect to John F. Kennedy International Airport ("JFK"), LaGuardia Airport ("LGA") and Newark Liberty International Airport ("EWR"):

1. The Port Authority declares that flight departures or arrivals at JFK, LGA and EWR shall not be conducted pursuant to a slot or similar authorization to conduct a flight operation, issued by auction or similar process which has not been authorized by the United States Congress because such unauthorized sale or auction would have a material adverse effect on airport operations, airline service, ticket prices, destinations served, customer service, consumer choice, and overall passenger demand, and would be unlawful absent Congressional authorization.

2. During the term of, and pursuant to, this Notice of Action, the Port Authority will not consent to any lease, sublease, use of terminal space or hardstands at any

terminals, handling agreement, or common use gate assignment, or enforce any forced accommodation or requesting airlines provisions at JFK, LGA and EWR, if such consent or enforcement would result in, or be associated with, a violation of this Notice of Action.

3. This Notice of Action does not apply to emergency flight operations.

4. This Notice of Action does not apply to flight operations conducted pursuant to a slot, or similar authorization, existing as of the date of the Proposed Notice of Action for this Notice of Action, including a slot, or similar authorization, which is subsequently acquired by one airline directly from another airline through a commercial, or other form of, sale, trade, lease or transfer transaction.

5. This Notice of Action shall be effective as of 12:01 A.M., Eastern Time, _____, 2008.

Dated: _____, 2008