

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

In the matter of:)
)
Notice of Proposed Rulemaking)
Congestion Management for)
John F. Kennedy International Airport)
And Newark Liberty International Airport) **Docket No. FAA-2008-0517**

COMMENTS OF THE AIR TRANSPORT ASSOCIATION OF AMERICA, INC.

Communications with respect to this document should be sent to:

DAVID A. BERG
Vice President & General Counsel
DOUGLAS K. MULLEN
Senior Attorney
Air Transport Association of
America, Inc.
1301 Pennsylvania Ave., N.W.
Washington, DC 20004
(202) 626-4000
dberg@airlines.org
dmullen@airlines.org

TABLE OF CONTENTS

I. Introduction..... 3

II. The FAA Is Not Legally Authorized To Reallocate Slots Through An Auction Mechanism..... 6

 A. The FAA Does Not Have Regulatory Authority To Conduct Slot Auctions 7

 B. The FAA Cannot Rely on its Property Management Authority To Conduct Slot Auctions 9

 C. The FAA Has No Other Source of Authority To Conduct Slot Auctions. 15

 D. The NPRM Raises Due Process and “Takings” Issues as Well..... 18

 E. JFK Option 2 Is Subject to the Same Legal Infirmities as JFK Option 1 22

III. The NPRM Has Nothing To Do With Congestion And Fails To Solve It 26

IV. The NPRM Lacks Fundamental Details And Proposes Conflicting Objectives..... 29

 A. The Auction Process is Not Yet Determined..... 31

 B. The NPRM Proposes Conflicting Objectives and Conflicts with the LaGuardia SNPRM 31

 C. This Proposal is Not Necessary to Develop a Secondary Market 34

 D. Miscellaneous 35

 E. This Proposal May Adversely Affect Small Communities..... 38

V. The Proposal Unfairly Discriminates Against U.S. Carriers..... 38

VI. The NPRM Fails to Meet APA Notice and Comment Standards and Therefore is Deficient 40

VII. The NPRM Fails to Meet the Requirements of Executive Order 12866..... 41

 A. The Entire IRE is Based on Uncertain Contingencies 42

 B. The IRE Uses the Wrong Baseline to Justify the Proposal..... 43

 C. The Initial Regulatory Evaluation Fails to Include the *Greatest* Cost of this Proposal.... 45

 D. Defining the life of a slot decreases its value 46

 E. The IRE Benefit Analysis is Fatally Flawed..... 47

 F. Miscellaneous Costs..... 47

VIII. Miscellaneous 48

IX. Conclusion..... 50

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

In the matter of:)
)
Notice of Proposed Rulemaking)
Congestion Management for)
John F. Kennedy International Airport)
And Newark Liberty International Airport) **Docket No. FAA-2008-0517**

I. Introduction

On May 21, 2008, the Federal Aviation Administration (“FAA”) issued a Notice of Proposed Rulemaking (hereinafter “NPRM” or “proposal”)¹ that purports to address longstanding congestion and delay at New York’s John F. Kennedy International Airport (“Kennedy” or “JFK”) and Newark Liberty International Airport (“Newark Liberty” or “EWR”). The NPRM follows FAA orders that imposed operational limits at JFK and EWR.² The NPRM proposes to continue the operational limits already in place at Kennedy and Newark Liberty and to implement an auction scheme that would confiscate ten or twenty percent of all slots and place those slots up for auction under very strict rules during the first five years of the proposal. The proposed rule would sunset in ten years and all slots would revert to the FAA. The NPRM does not indicate what would happen then.

^{1/} Congestion Management Rule for John F. Kennedy Airport and Newark Liberty International Airport, Notice of Proposed Rulemaking, 73 Fed. Reg. 29626 (May 21, 2008).

^{2/} Operating Limitations at John F. Kennedy International Airport; Notice of Order, 73 Fed. Reg. 8737, February 14, 2008 (as amended); Operating Limitations at Newark Liberty International Airport, 73 Fed. Reg. 29550. May 21, 2008.

On behalf of itself and its member airlines,³ the Air Transport Association of America, Inc. (“ATA”) respectfully submits the following comments setting forth the reasons why this proposal is bad policy and unlawful, including the invalidity of the FAA’s new claim of authority to implement auctions, the uncertainty the proposal would create unless withdrawn, and the devastating financial harm to air carriers, their shareholders and creditors that would result from the confiscation and auction of slots and their ultimate reversion to the FAA.

The fallout from such a poorly conceived and ill-advised FAA policy would be substantial, protracted and particularly unwelcome at the most difficult time for the airline industry since the aftermath of 9/11, affecting the livelihoods of air carrier employees, limiting the ability of air carriers and financial institutions to invest in New York service, unfairly discriminating against U.S. carriers providing international air transportation, and negatively impacting the economic vitality of small communities and other cities that rely on unimpeded air service.

ATA member airlines are extremely interested in reducing congestion and delays. Delays cost airlines billions of dollars annually, in addition to damaging customer good will. However, this proposal would do nothing to solve delays at Kennedy or Newark Liberty or airspace congestion in the New York region, and would simply raise false expectations while wreaking economic havoc. Despite the universally negative response⁴ to the LaGuardia NPRM,

^{3/} ATA airline members are ABX Air, Inc., AirTran Airways, Alaska Airlines, Inc., American Airlines, Inc., ASTAR Air Cargo, Inc., Atlas Air, Inc., Continental Airlines, Inc., Delta Air Lines, Inc., Evergreen International Airlines, Inc., Federal Express Corporation, Hawaiian Airlines, JetBlue Airways Corp., Midwest Airlines, Inc., Northwest Airlines, Inc., Southwest Airlines Co., United Airlines, Inc., UPS Airlines, US Airways, Inc.; ATA Airline Associate Members are: Air Canada, Air Jamaica Ltd., and Mexicana.

^{4/} Opposition to FAA’s LGA NPRM includes airlines, regional airlines, airports (including the Port Authority of New York and New Jersey), members of Congress, the Government of Canada, the City of New York, small communities, and various chambers of commerce. See Docket No. FAA-2006-25709; Opposition to FAA’s LGA SNPRM includes airlines, regional airlines, general aviation operators, airports (including the Port Authority of New York and New Jersey), and IATA.

the LaGuardia SNPRM and related “market-based” concepts, the FAA continues in what amounts to a forced march to test unproven economic theories that are unrelated to congestion, conflict with existing law and principles governing airlines and airports, and only *interfere* with a robust secondary market in slots.⁵ In fact, in a letter dated July 3, 2008, the FAA recognized the current voluntary secondary slot market promotes competition at all three New York area airports allowing for arms-length subleasing of operating rights.⁶

At a time of historically high fuel costs, an outdated air traffic control system, and severe financial stress,⁷ airlines and the public cannot afford this experiment. Even in the best of times the industry and the communities and customers we serve could not afford this experiment, especially since it is unrelated to the issue at hand – congestion and delays. We all are interested in reducing congestion and delays, but this proposal is not the solution and would impose undue burdens on passengers and carriers.

While a similar, indeed stronger, negative response from nearly all interested parties can be expected to this proposal (and FAA should heed this chorus), there are recognized, viable alternatives supported by many interested parties that address congestion and which can be readily implemented. For instance, the Department should focus on implementing the 77 New York Aviation Rulemaking Committee (“ARC”) recommendations,⁸ implementing the three stages of the New York/New Jersey/Philadelphia Metropolitan Area Airspace Redesign,⁹ and implement the critical modernization projects recently identified by the U.S. Department of

^{5/} See Initial Regulatory Evaluation page 41 (“The secondary slot market at JFK probably resulted in an improved slot allocation relative to a purely administrative program.”)

⁶ Letter from Kerry Long, Chief Counsel, FAA to Mr. Carl Nelson and Mr. Jeffery Ogar American Airlines, Docket No. FAA-2008-0656, July 3, 2008. Identical letters were sent to five other airlines which had joined with American seeking a temporary waiver of the use/lose requirement in place at slot controlled airports.

⁷ ATA has forecast a 2008 loss of \$7 – 13 billion for the U.S. airline industry.

^{8/} New York Aviation Rulemaking Committee Final Report, December 13, 2007.

⁹ FAA Record of Decision, New York/New Jersey/Philadelphia Metropolitan Area Airspace Redesign, September 5, 2007.

Transportation Inspector General (IG),¹⁰ most importantly NextGen, as soon as possible. Operational enhancements are truly the only way to deal with the congestion issue and the FAA, rather than spending time and resource on unrelated experiments, should use all of its time and resources on these operational enhancements. If these projects do not sufficiently relieve congestion, the Department could adopt a slightly modified version of the current order for JFK and EWR respectively,¹¹ similar to what the ATA proposed in our comments on the LGA SNPRM that would address congestion concerns and have more support than what the FAA has proposed. Under these circumstances, FAA should withdraw this NPRM and focus on the many needed modernization projects and adopt flexible regulations that permit a robust voluntary secondary market to determine the most efficient use of scarce resources.

II. The FAA Is Not Legally Authorized To Reallocate Slots Through An Auction Mechanism.

The FAA's claim of legal authority to reallocate slots through an auction mechanism marks a radical change in the agency's thinking. Less than two years ago, when it issued the NPRM in the LaGuardia proceeding, the FAA acknowledged formally and publicly – in no uncertain terms – that it “currently does not have the statutory authority to assess market-clearing charges for a landing or departure authorization” and, consequently, cannot employ “market-based mechanisms, such as auctions or congestion pricing” to allocate capacity at congested airports.¹² That statement is consistent with the position that the agency has adhered to for decades.¹³ And it reflects the views expressed by the Department of Justice as well.¹⁴ In this

¹⁰ Statement of The Honorable Calvin L. Scovel III Inspector General U.S. Department of Transportation before the Committee on Appropriations Subcommittee on Transportation, Housing and Urban Development, and Related Agencies United States Senate, April 17, 2008, CC-2008-070.

^{11/} See *Infra* Fn 2.

^{12/} See 71 Fed. Reg. 51360, 51362, 51363 (August 29, 2006).

^{13/} See 50 Fed. Reg. 52183 (December 20, 1985) (stating that an “auction mechanism was not proposed . . . because legislation would be required for the collection and disposition of the proceeds”); see also *Midwest*

NPRM, however, as it did in the LaGuardia SNPRM, the FAA has executed a sudden reversal and announced that it does have such authority after all. There has been no change in the law to create such authority, however, and the FAA's claim of newly found authority is, as shown below, incorrect.

A. The FAA Does Not Have Regulatory Authority To Conduct Slot Auctions

As it must, the FAA candidly acknowledged in the LGA SNPRM, that it cannot use its *regulatory* authority to implement a “market-based allocation method.”¹⁵ The same is true for JFK and EWR where the same “market-based allocation method” for slots has been proposed. There are two reasons for this. First, annual appropriations legislation (including the 2008 Consolidated Appropriations Act) prohibits the FAA from expending any funds “to finalize or implement any regulation that would promulgate new aviation user fees not specifically authorized by law after the date of enactment of [the appropriations legislation].”¹⁶ A regulation that provides for auctioning off the right to use navigable airspace would amount to the imposition of new “aviation user fees,” thereby violating this explicit prohibition. That alone is enough to vacate any claim of regulatory authority to allocate slots through an auction mechanism. But there is more.

Airspace Enhancement (MASE) Environmental Assessment, December 29, 2005, pp. 2-5 (stating that air travel congestion management cannot be implemented under existing law and policy, but would require the passage of legislation for which the necessary political consensus is unlikely “to be achieved in the foreseeable future”); *Final Environmental Impact Statement for New York/New Jersey/Philadelphia Metropolitan Area Airspace Redesign*, Volume One, July 2007, pp. 2-5 (stating that market-based approaches to congestion management, such as the “auctioning of landing and take-off rights . . . may necessitate appropriate legislative authority in order to be implemented by the FAA or by the airport proprietor”); *id.* (noting that “[l]egislative authority would be necessary to adopt user fees, whether or not market-based, for air traffic facilities and services”).

^{14/} See 50 Fed. Reg. 52180, 52183 (December 20, 1985) (reporting DOJ's view that “several unresolved legal questions make it impractical to use auctions [as a mechanism to allocate slots], citing in particular the Independent Offices Appropriations Act, 31 U.S.C. 9701 as an example”)

^{15/} 73 Fed. Reg. 20846, 20852 (April 17, 2008).

^{16/} See Consolidated Appropriations Act, 2008, P.L. 110-161, Section 103; see also 73 Fed. Reg. at 20852 (quoting language from prior appropriations legislation).

The statutory provision the FAA claims supports its regulatory proposal, 49 U.S.C. § 40103(b), provides the FAA only limited authority (1) to “*assign by regulation or order* the use of the airspace necessary to ensure the safety of aircraft and the efficient use of airspace”; and (2) to prescribe “*air traffic regulations* on the flight of aircraft (including regulations on safe altitudes) for . . . using the navigable airspace efficiently.”¹⁷ This language does not remotely suggest that the FAA can *auction* the right to conduct operations in navigable airspace. Quite simply, auctions do not “assign by regulation or order” the use of airspace.

Additionally, auctioning slots effectively amounts to the imposition of a tax designed to discourage airlines and their customers from using the navigable airspace at congested airports during peak periods.¹⁸ Since Congress “is the sole organ for levying taxes,”¹⁹ the FAA cannot impose charges that amount to a tax unless Congress has clearly expressed its intention to delegate such authority to the agency and articulated intelligible guidelines for making the assessments.²⁰ By no stretch of the imagination can 49 U.S.C. § 40103(b) reasonably be read as constituting such a delegation.

Recognizing these points, the FAA sought statutory authority from Congress to use market-based mechanisms such as congestion pricing and slot auctions as a means to allocate use of the navigable airspace. Thus far, however, Congress has not obliged – and until it does so the

^{17/} 49 U.S.C. § 40103(b)(1), (2) (emphasis added).

^{18/} See *National Cable Television Ass’n, Inc. v. United States*, 415 U.S. 336, 341 (1974) (observing that an assessment made to discourage an activity is in the nature of a tax). The user charge implicated in an auction bears no relation to the cost of conducting the auction. Nor is it a fee for the provision of air traffic control (“ATC”) services because, if it were, the charge would be made to all users of ATC services, not just to a small minority of such users. Moreover, ATC services are paid for out of funds raised through the excise tax on airline tickets. Thus, slot auction proceeds clearly could not be said to “be a reasonable approximation of the attributable costs which the [FAA] identifies as being expended to benefit the recipient.” See *National Cable Television Ass’n, Inc. v. FCC*, 554 F.2d 1094, 1106 (D.C. Cir. 1976). Since it is not “reasonably related to the individual cost” of conducting the auction or of providing ATC services to the airline involved, the user charge implicated in a slot auction would be a tax, not a fee. See *id.* at 1108.

^{19/} See *National Cable Television Ass’n, Inc. v. United States*, 415 U.S. at 340.

^{20/} See *Skinner v. Mid-America Pipeline Co.*, 490 U.S. 212, 218 (1989).

FAA, as the agency concedes, “cannot rely on a market-based allocation method under a purely regulatory approach.” 73 Fed. Reg. at 20852.

B. The FAA Cannot Rely on its Property Management Authority To Conduct Slot Auctions

To bolster its claim of authority to conduct slot auctions, FAA contends it may take “a bifurcated approach” that also relies on its property management authority. This “bifurcated approach” would work as follows: first, using its *regulatory* authority under 49 U.S.C. § 40103(b), “the FAA would establish a cap on operations [as necessary to ensure the safe and efficient use of navigable airspace] and address which [of the resulting] slots would revert to the FAA for reallocation.”²¹ Then, it “would use its *transaction authority* to allow for reallocation of slots via a market-based mechanism,” under which the slots would be leased for monetary compensation (or for nothing) to carriers wishing to conduct operations during the affected period.²² The FAA contends that this “transaction authority,” i.e., its “independent authority to dispose of property,”²³ can be found in –

- 49 U.S.C. § 106(l)(6), which authorizes the Administrator “to enter into and perform such contracts, leases, cooperative agreements, or other transactions as may be necessary to carry out the functions of the Administrator and the Administration”;
- 49 U.S.C. § 106(n), which authorizes the Administrator “to acquire . . . construct, improve, repair, operate, and maintain” specified types of facilities and other real and personal property as the Administrator considers necessary, and “to lease to others such real and personal property”; and
- 49 U.S.C. § 40110(a)(2), which authorizes the Administrator to “dispose of an interest in property for adequate consideration.”^{24/}

^{21/} 73 Fed. Reg. at 29631.

^{22/} *Id.* (emphasis added).

^{23/} *See* 73 Fed. Reg. 20846, 20852 (April 17, 2008).

^{24/} *See id.* Furthermore, because the FAA views the proposed slot auctions as a matter “relating to agency management . . . or to public property . . . or contracts,” it contends that the informal rulemaking requirements of

There are numerous flaws in this construct, which is little more than a thinly disguised attempt to circumvent the clear congressional prohibition against promulgating “new aviation user fees not specifically authorized by law.” . For one thing, even if these property-management authorities could properly be applied to slots – which, as shown below, is not the case – they would not provide a basis for leasing slots through an auction mechanism. This is because 49 U.S.C. § 106(1)(6) – which authorizes the FAA to enter into contracts, leases, and cooperative agreements – restricts that authority to those “contracts, leases, cooperative agreements, or other transactions *as may be necessary to carry out the functions of the Administrator and the Administration.*” (Emphasis added.) Here, the only FAA function – the first part of FAA’s so called bifurcated approach – is a *regulatory* function – *i.e.*, the exercise of authority under 49 U.S.C. § 40103(b) to regulate use of the navigable airspace in the interest of safety and efficiency.²⁵ Thus, the leases and cooperative agreements the agency proposes to use in implementing a slot auction system necessarily would be instruments for carrying out the FAA’s *regulatory* functions.²⁶ But, as the FAA concedes, Congress has specifically withheld *regulatory* authority to implement a market-based allocation method such as slot auctions, and for this reason property-management authority under 49 U.S.C. § 106(1)(6) (assuming for the

the Administrative Procedure Act (“APA”) do not apply. *See* letter of June 2, 2008 from Rebecca B. MacPherson to David A. Berg, quoting 5 U.S.C. § 553.

^{25/} Lest there be any doubt about this point, the terms of the draft Lease Agreements for Common, Limited, and Unrestricted Slots that the FAA has placed in the docket state explicitly that “[t]he purpose of this agreement between the lessor and lessee is *to allocate airport capacity more efficiently and mitigate congestion at John F. Kennedy Airport and Newark Liberty International Airport* through the creation and administration of Leases.” *See* Lease Agreement for Common Slots and Limited Slots, Article 2, Section a; Lease Agreement for Unrestricted Slots, Article 2, Section a. *See* Docket No. FAA-2008-0517-0008.1.

In fact, the FAA has no authority to “allocate airport capacity” through the creation and administration of leases or otherwise – because it does not own or have sovereignty over airport property and facilities. *Cf. New England Legal Foundation v. Massachusetts Port Authority*, 883 F.2d 157, 172 (1st Cir. 1989). All that the FAA can allocate is access to navigable airspace where use of the airspace has been constrained through the exercise of the FAA’s authority under 49 U.S.C. § 40103(b). That, of course, is a regulatory function.

^{26/} *Cf. Cleveland v. United States*, 531 U.S. 12, 20 (2000) (observing that the state’s “core concern [in issuing video poker licenses] is *regulatory*”) (emphasis in original).

sake of argument it can be applied to slots) cannot be used to implement indirectly a *regulatory* action that Congress has forbidden.

There are other problems with the FAA's legal theory as well. Prominent among these is the fact that while slots become property in the hands of the recipient airlines, they are not property in the hands of the FAA and therefore cannot be disposed of under 49 U.S.C. § 106(l)(6) & 106(n), and 49 U.S.C. § 40110(a).²⁷ Rather, slots – which the FAA describes as “reservations of airspace” or “authority to use the airspace.”²⁸ – are properly viewed as a *license*, permit, or other permission.²⁹ In this case, a permission to use navigable airspace during a designated hourly or half-hourly period when the FAA has constrained use of the airspace by exercising the authority

^{27/} Cf. *id.* at 15 (noting that a video poker license issued by the state may become property in the hands of the recipient but is not property in the hands of the state or municipal licensor); *id.* at 25 (stating that the Court does not “question that video poker licensees may have property interests in their licenses”).

^{28/} See Fed Reg. at 29631.

²⁹ The fact that slots may be created and allocated through rulemaking rather than adjudication does not detract from their status as licenses or permits, particularly “since the APA does not require an agency to use procedures in an adjudication that are more demanding than the procedures an agency must use in a rulemaking.” (R.J. Pierce, Jr., *Administrative Law Treatise*, § 8.1 at 530 (4th Ed. 2002)). An agency can issue “general permits” or conduct “permitting-by-rule” through a rulemaking that (1) establishes the criteria to qualify for the permit, and (2) implicitly issues the permit to all persons meeting those criteria (with or without the need for filing an individual permit application). (See, e.g., 40 C.F.R. §§ 122.2, 122.28 (defining and establishing the process and criteria for issuing general permits under EPA’s National Pollutant Discharge Elimination System). Agencies also can use their rulemaking authority to establish criteria that any license applicant must meet, see *United States v. Storer Broad. Co.*, 351 U.S. 192 (1956), and to adopt rules that affect existing licenses. See *Rombough v. FAA*, 594 F.2d 893, 897-98 (2d Cir. 1979) (upholding FAA rule mandating that pilots retire at age 60); see generally Stein, Mitchell, Mezones, ADMINISTRATIVE LAW, § 41.07 (2007)). As explained by the EPA Permits Improvement Team: “General permitting refers to a rulemaking-type process where requirements are developed . . . [that are] applicable to facilities or activities of substantially similar nature. General permit authorization is granted after a person registers with the permitting authority its intention to comply with the terms of the general permit. Permitting-by-rule . . . refers to authorization that does not require subsequent action either by the permit applicant or the permitting authority.” (*Final Draft of Concept Paper on Environmental Permitting and Task Force Recommendations* (July 1996), available at <<http://www.epa.gov/epaoswer/hazwaste/permit/pit/pitdoc.txt>>, last visited on May 28, 2008).

Such “permitting-by-rule” or “general permitting” is effectively the mechanism that the FAA has used when issuing slots in the past, and it is the mechanism that the agency proposes to use here. Licenses embodied in “common slots” would implicitly be issued to those carriers who meet the criteria set forth in the rule for holding “common slots,” while licenses embodied in “unrestricted slots” would be issued after the carrier applies for the license by submitting a bid in the slot auction. (The slot auction process could be viewed as an informal adjudication in which the governing criteria (e.g., highest bid price) were laid down in the rulemaking that established the slot program).

it actually does have under 49 U.S.C. § 40103(b) to cap the number of allowable operations.³⁰

As the Supreme Court has observed, this construct is characteristic of licensing schemes in “a typical regulatory program,” where “private actors may not undertake [a particular activity – in this case, conducting a take-off or landing operation in constrained airspace] without official authorization.”³¹

Here, the license or permit constituting a slot holding is “the product of Federal regulatory action” and is subject to conditions or encumbrances attached to the slot at the time it is issued by the agency to a particular carrier.³² In that respect, a slot can be viewed as a “limited asset [of the carrier] that the FAA created” through regulatory action.³³ Like other holders of governmentally issued licenses or permits, courts have held that a slot holder has a property interest in this “limited asset” and can transfer that interest for consideration in accordance with FAA rules.³⁴ But until granted to a private party, the right to use navigable airspace at a particular time is not (and never was) real or personal “property” of the FAA – just as other licenses or permits issued by other governmental authorities are not “property” of the issuing

^{30/} See Administrative Procedure Act, 5 U.S.C. § 551(8) (defining “license” as “an agency permit, . . . approval, . . . or other form of permission”); *Pan-Atlantic S.S. Corp. v. Atlantic C.L.R. Co.*, 353 U.S. 436 (1957) (describing the ICC’s grant of temporary authority to carriers by water in emergency situations as a license within the meaning of the Administrative Procedure Act); Stein, Mitchell, Mezines, ADMINISTRATIVE LAW, § 41.01 (2007) (observing that a license is a right or privilege to engage in conduct that would not be permitted without the license, and noting that the “conferment of a license does not create a contractual relationship between the issuing agency and licensee”).

³¹ *Cleveland v. United States*, 531 U.S. 12, 20 (2000)

^{32/} See 49 Fed. Reg. 23788, 23792 (June 7, 1984).

^{33/} See 73 Fed. Reg. at 29631.

^{34/} See, e.g., *In re Gull Air, Inc.*, 890 F.2d 1255, 1260 (1st Cir. 1989) (finding slots to be property of the bankrupt debtor’s estate, though they remain subject to the FAA’s “use or lose” regulations); *In re McClain Airlines, Inc.*, 80 B.R. 175, 178-79 (Bankr. D. Ariz. 1987) (same). A slot holder can possess a constitutionally protected property interest in the slot license even if the FAA purports to disavow transferring any such interest. See *Cleveland v. United States*, 531 U.S. at 25 & n.4 (“Notwithstanding the State’s declaration that ‘[a]ny license issued or renewed . . . is not property or a protected interest under the constitutions of either the United States or the state of Louisiana,’” the licensee may, as a matter of federal law, hold a constitutionally protected property interest in the license.).

agency, because they are the *product* of regulatory action.³⁵ Permits and licenses, the Supreme Court has made clear, “do not rank as ‘property’ . . . in the hands of the official licensor,” and “a government regulator [does not] part[] with ‘property’ when it issues a license.”³⁶ This true even when the license – unlike the slots at issue here – will generate a stream of revenue for the licensing agency once issued.³⁷ In short., a slot is not property of the FAA that it can lease pursuant to the property-management provisions of 49 U.S.C. §§ 106(l)(6) & 106(n) and 49 U.S.C. § 40110(a). Those provisions, which apply to the acquisition and disposition of the FAA’s real and personal property, were never intended to be used as an alternative to the exercise of the FAA’s regulatory licensing powers, and they have no application here.

The strained and awkward constructs of the FAA’s draft Lease Agreement for Common and Limited Slots illustrates this point. For one thing, the draft Lease does not identify the “property” being “leased” – leaving that to an Attachment, which has yet to be disclosed.. This description is missing because, as shown above, the FAA does not hold a property interest in a slot that can be leased under 49 U.S.C. §§ 106(l)(6) and 106(n). Rather, it *creates* a property interest *in the slot holder* when it exercises its regulatory authority and grants a license or permission to use constrained navigable airspace.³⁸ Moreover, the draft Lease contains many provisions that make no sense in this context. For example, Article 5 of the draft Lease says that “[f]ailure to abide by the Lease terms constitutes a default of the lease,” but there are no “Lease terms” with which the lessee is to abide. Similarly, Article 8 of the draft Lease purports

^{35/} See *Cleveland v. United States*, 531 U.S. at 20, 21 (describing licensing schemes as exercises of the state’s police and regulatory power). Since the FAA describes a slot as “an operating privilege” rather than a “property right” in the hands of a slot holder, see 14 C.F.R § 93.223(a), it is illogical for the FAA to contend that this “operating privilege” is “property” of the FAA.

^{36/} See *Cleveland v. United States*, 531 U.S. at 15, 20. While these statements related to the question whether a license is “property” in the hands of the governmental licensing agency for purposes of the federal mail fraud statute, there is no reason why a slot license would have a different status for purposes of the FAA’s property management authority.

^{37/} See *id.* at 22.

^{38/} See *Cleveland v. United States*, 531 U.S. at 15

to incorporate by reference various contract clauses from the FAA's Acquisition Management System ("AMS"), but this Lease is not a contract (since there are no reciprocal obligations)³⁹ – and most of the incorporated clauses (*e.g.*, 3.10.1-12 concerning changes in a fixed price contract, 3.10.6-1 regarding with termination of a fixed price contract for the convenience of the government, and 3.10.6-4 dealing with default under a fixed price supply and service contract) have absolutely no relevance to the subject matter and terms of this supposed "Lease." That is not surprising, because the AMS applies to the procurement by the FAA of products, services, and real property – not to a licensing program of the type involved in allocating slots.⁴⁰

The same awkwardness characterizes Article 9 of the draft Lease, which purports to incorporate the protest and contract dispute resolution procedures of 14 C.F.R. Part 17 as the means for resolving "contract disputes arising under or related to this contract." The Part 17 procedures, however, apply only to disputes arising under FAA contracts that are "subject to the AMS,"⁴¹ and, as noted, the AMS applies only to the FAA's procurement of products, services, and real property – none of which is at issue here. Article 9 also deals with filing deadlines for contract claims in Section (e) having no relevance to a purported lease of slots.

The fact that the FAA struggles unsuccessfully to come up with a credible form of "Lease" for the slots is telling: it underscores the fact that slots, as noted above, are not property that the FAA can "lease" as an exercise of its *transactional* authority to dispose of its own property. Rather, as discussed above, slots are a form of license or permit that the FAA can issue to a carrier pursuant to its *regulatory* authority under 49 U.S.C. § 40103(b) and that, in appropriate circumstances, it can withdraw or "revoke." In fact, the draft Lease uses precisely

^{39/} See Stein, Mitchell, Mezines, ADMINISTRATIVE LAW, § 41.01 (2007) (noting that the "conferment of a license does not create a contractual relationship between the issuing agency and licensee").

^{40/} See FAA Acquisition Management Policy, Section 3.1.1: Introduction; *id.*, Section 3.1.2: Applicability.

^{41/} See 14 C.F.R. § 17.3(g).

that term, stating in Article 5 that the “Lease may be *revoked* by the FAA as required for reasons of national security or the discharge of other sovereign responsibilities.” (Emphasis added.) The FAA’s use of this terminology is revealing, because a license or permit may be “revoked.” A lease, by contrast, would be “terminated.”

C. The FAA Has No Other Source of Authority To Conduct Slot Auctions.

Other than assessing fees to recoup its costs of administering a slot-licensing program under the Independent Offices Appropriations Act (which does not apply to the slot auction proceeds at issue here⁴²), the FAA may not charge for granting permission to use the navigable airspace unless Congress has given it special authority to do so – and Congress has given the FAA no such authority. This point is determinative, because when Congress intends to authorize an agency to conduct auctions of what might be viewed as a license to utilize a public resource, it does so explicitly – as it did at great length and in exquisite detail when it authorized the Federal Communications Commission to establish and implement a competitive bidding process to obtain the right to use the airwaves.⁴³ Here, by contrast, Congress not only has withheld any such authority, but has explicitly prohibited promulgating “new aviation user fees not specifically authorized by law.”

The only source of authority the FAA conceivably could invoke as a basis for levying slot allocation charges is the authority that all agencies enjoy under the Independent Offices Appropriations Act (“IOAA”), 31 U.S.C. § 9701, to charge recipients of special governmental services for the cost to the agency of providing those services. In this instance, the potential charge would reflect the cost to the FAA of allocating the slots. The slot auction revenues that are contemplated under the NPRM, however, have nothing to do with recouping the FAA’s costs

^{42/} See pp. 15-17, *infra*.

^{43/} 47 U.S.C. § 309(j).

of allocating slots. Instead, as noted above, they amount to a tax on carriers seeking access to constrained navigable airspace when the FAA caps operations at an airport.⁴⁴ For that reason, collection of the auction revenues would not be authorized under the IOAA.

Moreover, even if deemed to be a fee, the auction revenues would have no relation to – and clearly would exceed – the cost to the FAA of allocating the slots, thereby undermining any claim the FAA might make to be acting under IOAA authority. As the D.C. Circuit has observed, “the IOAA [which was designed to recoup costs] must be interpreted as limiting the [agency] to assessing fees at a rate which reasonably reflects the *cost of services performed* or the *expense* of other value transferred to the payor.”⁴⁵ Accordingly, “[a]n agency may not charge more than the reasonable cost it incurs to provide a service, or the value of the service to the recipient, *whichever is less*.”⁴⁶ Given the limited cost to the FAA of conducting a slot auction, that test would not be met here.⁴⁷

In any event, the IOAA cannot apply to slot auction revenues because, by its terms, the IOAA “does not affect a law of the United States . . . prohibiting the determination and collection of charges.”⁴⁸ Since the 2008 Consolidated Appropriations Act contains just such a prohibition, the IOAA could not be invoked as the basis for conducting slot auctions even if slot auction revenues otherwise fit within the terms of the IOAA (which they do not). Implicitly acknowledging these points, the FAA makes no claim that the IOAA provides a statutory basis

^{44/} See p. 8, Fn 18 *supra*.

^{45/} *National Cable Television Ass’n v. FCC*, 554 F.2d 1094, 1107 (D.C. Cir. 1976) (citing the legislative history of the IOAA, H.R. Rep. No. 384, 82d Cong., 1st Sess. 2-3 (1951)) (emphasis added). See also *Electronic Industries Ass’n v. FCC*, 554 F.2d 1109, 1114 (D.C. Cir. 1976) (observing that “the ‘value conferred’ measure of a valid fee [under the IOAA] means that the fee assessed cannot exceed the cost of the service rendered”).

^{46/} *Engine Manufacturers Ass’n v. EPA*, 20 F.3d 1177, 1180 (D.C. Cir. 1994) (emphasis added). The IOAA does not allow an agency to assess a fee that exceeds the lower of the cost to provide the service or the value of the service to the recipient in order to accomplish other public policy or public interest objectives. See *Seafarers Int’l Union of North America v. United States Coast Guard*, 81 F.3d 179, 183 (D.C. Cir. 1996).

^{47/} As noted later in these comments, the greatest costs of this proposal, excluded from the cost benefit analysis, are carrier costs in paying for slots at auction. See *infra* p. 44.

^{48/} 31 U.S.C. § 9701(c)(1).

for its slot auction proposal. Indeed, neither this NPRM nor the LGA SNPRM mentioned the IOAA at all. This is not surprising – since, more than two decades ago, the Department of Justice noted that, rather than authorizing the FAA to allocate slots through use of an auction mechanism, the IOAA makes it impractical to do so.⁴⁹

There is, in short, no statutory basis for the FAA to conduct slot auctions as a market-based means of allocating the use of navigable airspace. And, if there were, the FAA’s proposal still would be defective – because the FAA has no authority to determine how the auction proceeds would be used. Nothing in the Transportation Code or the IOAA authorizes the FAA to retain the auction proceeds and expend them on “congestion management in the New York City area,” as the agency proposes to do under the Newark Liberty proposal and JFK Option 1.⁵⁰ Indeed, as the Department of Justice pointed out in 1985, the IOAA likely would bar any such action.⁵¹ Instead, the auction proceeds under that Option (assuming a market-based auction were otherwise lawful) would belong to the United States Government and would have to be deposited into the general fund of the U.S. Treasury, as required by the Miscellaneous Receipts Statute, 31 U.S.C. § 3302(b).⁵² The FAA’s expenditure of auction proceeds without a congressional

^{49/} See 50 Fed. Reg. 52180, 52183 (December 20, 1985).

^{50/} See 73 Fed. Reg. at 29633.

^{51/} See 50 Fed. Reg. 52180, 52183 (December 20, 1985).

^{52/} See Opinion of the Comptroller General of the United States in *Matter of Pension Benefit Guarantee Corporation*, No. B-307849 (March 1, 2007), 2007 US COMP GEN LEXIS 45 (“Absent statutory authority to the contrary, the miscellaneous receipts statute requires agencies to deposit moneys received for the government [including moneys collected under the IOAA] into the federal Treasury.”); Opinion of the Comptroller General of the United States in *SBA’s Imposition of Oversight Review Fees on PLP Lenders*, No. B-300248 (Jan. 15, 2004), 2004 US COMP GEN LEXIS 13 (same); GAO, *Federal User Fees: A Design Guide* (GAO-08-386SP, May 2008) at 5 (fees collected under authority of the IOAA “are deposited in the general fund of the U.S. Treasury and are generally not available to the agency or the activity generating the fees”); *id.* at 26 n.51 (“Fees assessed by an agency under the authority of IOAA, rather than under a specific authorizing statute, must be deposited to the general fund of the U.S. Treasury and are not reserved for the agency or program that generated the fees, unless otherwise authorized by law.”).

appropriation, under any of the proposals, very likely would violate the Anti-Deficiency Act, 31 U.S.C. § 1341(a)(1), as well.⁵³

And there is another problem. The FAA claims it can rely on the Federal Grants and Cooperative Agreements Act to support its proposal.⁵⁴ But granting a license to use navigable airspace (or purportedly transferring a leasehold interest in a slot) is not the kind of transaction contemplated by the Federal Grants and Cooperative Agreements Act. Under that Act,

the principal purpose of the [cooperative agreement] relationship [must be] to transfer a thing of value to the State, local government, or other recipient to carry out a public purpose of support or stimulation authorized by a law of the United States instead of acquiring (by purchase, lease, or barter) property or services for the direct benefit or use of the United States Government.

31 U.S.C. § 6305. A slot transferred to a commercial airline is not being used “to carry out a public purpose of support or stimulation authorized by a law of the United States”; nor is it an alternative to the FAA’s acquiring the slot “for the direct benefit or use of the United States Government.” As stated elsewhere, the purpose of the transfer is to reallocate slots. Thus, the FAA’s reliance on the Federal Grants and Cooperative Agreements Act is misplaced, further illustrating that the grant of a license or permission to use constrained navigable airspace does not amount to the transfer of real or personal property owned by the FAA (or by the U.S. Government).⁵⁵

D. The NPRM Raises Due Process and “Takings” Issues as Well.

In addition to the other legal infirmities discussed above, the Newark Liberty proposal and JFK Option 1 raise serious constitutional due process and “takings” issues – because, under

^{53/} The FAA may be sensitive to this point, because Article 6 of the draft Lease Agreement for Unrestricted Slots does not say to whom the certified check of the winning lessee is to be made payable.

^{54/} See 73 Fed. Reg. at 29631.

^{55/} The fact that the FAA has prepared a draft Lease Agreement, rather than a Cooperative Agreement, as the instrument for conveying common and limited slots to carriers suggests that the agency recognizes that the Federal Grants and Cooperative Agreements Act is not applicable here.

these scenarios, the FAA would confiscate slots of incumbent carriers without providing them any compensation and without serving any legitimate (and authorized) governmental purpose. Over the years, incumbent carriers have invested large sums of money in terminal facilities, gates, servicing facilities, aircraft, and promotion of flight schedules at Newark Liberty and Kennedy – a point that the FAA acknowledges.⁵⁶ These investments were made by the carriers with the reasonable expectation that they would be able to continue operating at the airports on schedules that would allow them to make full and productive use of these assets..

At JFK, for decades carriers operating at JFK have bought and sold slots, made substantial investments in tangible assets, and developed/promoted their global network schedules based on the reasonable expectation that they would continue to retain the same operating rights in the future as they had in the past – or at least that those operating rights would not be taken from them and auctioned off to other carriers.

Likewise for decades carriers operating out of EWR have made substantial investments in tangible assets and developed/promoted their global network schedules based on the reasonable expectation that they would be able to continue offering the same full schedule of operations in the future as they had in the past. These investments have included development of one of the largest airline hub operations in the United States, which was built on the basis of the historical operations and schedule for this hub operation and to other non-hub airlines at EWR. Incumbent carriers at EWR made investments with the reasonable expectation that their right/ability to conduct a full schedule of operations at the airport would not be curtailed by a governmental decision to confiscate their operating rights in order to auction them off to others.

^{56/} See 73 Fed. Reg. at 29630, 29632 (referring to the importance of recognizing the “historical investments” that carriers have made at JFK and EWR).

Not only have airlines at both airports operated schedules over a historical period, the airlines at both airports are subject today to operating restrictions imposed by the FAA (albeit in separate orders) in the form of hourly caps and other regulations.

By confiscating slots from incumbent carriers and putting them up for auction, the FAA would be taking a portion of the carriers' intangible property at JFK and EWR (their slots and schedule of operations) and devaluing their tangible property at the airport (terminal, gates, aircraft, etc.), which generate revenue only when used to support the carriers' schedules of operations.⁵⁷ Such actions impair the value of the affected airlines, in some cases adversely impact financing and debt obligations, and impair the value of shares held by investors.

The Fifth Amendment to the U.S. Constitution prohibits the government from depriving a person of property "without due process of law" and from "taking" private property for "public use" without providing "just compensation." Both those strictures would be violated here. First, there would be a violation of the Fifth Amendment's due process guarantee because, as shown above, the FAA's slot auction scheme is not authorized by law. Accordingly, confiscating an incumbent carrier's slots and placing them up for auction does not serve a legitimate governmental purpose; hence, it would violate due process even if just compensation were provided.⁵⁸

^{57/} The Supreme Court has held that intangible property constitutes a form of "private property" entitled to protection under the Fifth Amendment's Takings Clause. *See Ruckelshaus v. Monsanto*, 467 U.S. 986, 1003-04 (1984) ("[t]hat intangible property rights . . . are deserving of the protection of the Taking Clause has long been implicit in the thinking of this Court"); *see also id.*, quoting *United States v. Gen. Motors Corp.*, 323 U.S. 373, 377-78 (1945) (the term "property," as used in the Takings Clause, denotes not only tangible, physical property, but also intangible property, including "the group of rights inhering in the citizen's relation to . . . physical [property], as the right to possess, use and dispose of [physical property]"). A carrier's flight schedule falls within this definition of intangible property in that it is an intangible, proprietary reflection of a carrier's right to use other, tangible property – such as aircraft, gates, terminal and other facilities – in order to provide air transportation services, as held out and advertised in its flight schedule.

^{58/} *See Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 542, 543 (2005). The FAA purports to be "puzzled" as to why *Lingle* is relevant here since the holding in that case did not reflect a determination that there was a "permanent physical invasion" of the claimant's property. *See* 73 Fed. Reg. at 20853, n.10. The proposition for which we rely on *Lingle* is that a due process violation may be found where a governmental restriction or taking of private

Even if auctioning off an incumbent's confiscated slots to the highest bidder were an authorized and legitimate governmental purpose, a Fifth Amendment violation would exist unless the carrier is compensated for this "taking" of its tangible and intangible property. As the Supreme Court noted in *Lingle*, a "taking" requiring just compensation can occur when there is a permanent physical invasion of a person's property,⁵⁹ when the governmental action deprives the owner of all economically beneficial use of the property,⁶⁰ or when the standards set forth in *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978), are met.⁶¹ Here, the FAA would take the right to conduct operations from incumbent airlines (which is the equivalent of permanently appropriating a person's physical property) and would deprive the carriers of all economically beneficial use of not just those slots but also the associated scheduled operations that are dependent on the continued holding of those slots. Just compensation would be due for the "taking" of these intangible assets.

In addition, by confiscating slots and putting them up for auction, the FAA would significantly impair the value of the tangible assets in which the carriers made large "historical investments"⁶² with the reasonable expectation of being able to continue conducting operations at JFK and at EWR. That impairment of value would constitute a compensable regulatory taking under the standards set forth in *Penn Central*, which call upon a court to consider (1) the economic impact that the regulatory action has on the claimant, (2) the extent to which it has interfered with reasonable investment-backed expectations, and (3) "the character of the

property does not serve a "public use" or substantially advance a legitimate governmental objective. That would be the situation if the FAA confiscates an incumbent's slots in order to auction them off without having any authority to do so, as it proposes to do here.

^{59/} See *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. at 538, citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

^{60/} See *id.*, citing *Lucas v. South Carolina Coastal Council.*, 505 U.S. 1003, 1019 (1992).

^{61/} See *id.* at 538-39.

^{62/} See 73 Fed. Reg. at 29630.

governmental action.”⁶³ A compensable taking under the first two *Penn Central* factors could be made out because of the critical role JFK and EWR play for incumbent carriers – both as an origin/destination point for direct air traffic and a feeder connection for domestic and international networks as well as a major launching point for several carrier global operations. Confiscating existing peak period operating rights in that context would have a substantial negative impact on the airlines’ revenues and would significantly impair the value of the large investments they have made over the years with the reasonable expectation of being able to continue serving JFK and EWR on schedules that maximize the value of their investments in their operations. Moreover, the “character of the governmental action” in this instance (*Penn Central*’s third factor) would strengthen a “takings” claim – because, as noted above, the FAA has not been authorized to reclaim slots for the purpose of putting them up for auction.⁶⁴

E. JFK Option 2 Is Subject to the Same Legal Infirmities as JFK Option 1.

While the foregoing analysis is directed specifically at the FAA’s Option 1 for JFK and the EWR proposal (where the auction proceeds would be retained by the FAA, which says it would use the funds to manage congestion in the New York City area), much of it also applies to JFK Option 2 (where the original slot holder would be allowed to keep the proceeds net of the FAA’s auction-related expenses). As with Option 1, the FAA cannot rely on its “transaction authority” to support Option 2 – because that Option amounts to the forced sale of slots by unwilling airline sellers, not the transfer of a property interest from the FAA to a carrier. Since there is no sale or lease of FAA-owned property, the agency cannot invoke its property-management authority under 49 U.S.C. §§ 106(l)(6) & 106(n) as a statutory predicate for the

^{63/} See *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. at 538-39, citing *Penn Central* at 124.

^{64/} Cf. *Nat’l Wildlife Fed’n v. ICC*, 850 F.2d 694, 698 (D.C. Cir. 1988) (agencies are not empowered to take private property in a manner Congress has not authorized).

transaction.⁶⁵ Nor could the FAA rely on the IOAA as authority for JFK Option 2, because the auction proceeds, which are being retained by the original slot holder, obviously do not constitute a charge made to recoup the cost of special services being provided by the agency.

That leaves only the FAA's basic regulatory authority under 49 U.S.C. § 40103(b) as a potential statutory basis for JFK Option 2. But that provision has never been viewed as a basis for implementing a market-based auction mechanism in the past – and with good reason. Administrative authority to “assign by regulation or order the use of the airspace necessary to ensure the safety of aircraft and the efficient use of airspace” does not imply that slots may be assigned by a market-based auction rather than by administrative “regulation or order” – particularly since use of a market-based auction is not necessary to ensure the efficient use of airspace.⁶⁶ While Congress preserved the FAA's “authority for safety and the movement of air traffic” when it phased out the High Density Rules at O'Hare, LaGuardia, and JFK in the AIR-21 legislation, 49 U.S.C. § 41715(b)(1), it certainly did not expand that authority to encompass the use of slot auctions or other forms of congestion pricing.

In the NPRM, the FAA refers to the congressional policy set forth in 49 U.S.C. § 40101(a)(6) of “placing maximum reliance on competitive market forces and on actual and potential competition” as justification for use of a market-based auction system.^{67/} By its terms, however, the policies set forth in 49 U.S.C. § 40101(a) apply to the exercise of the *Secretary's economic regulatory authority under 49 U.S.C. Chapters 411-421*, not to the exercise of the

^{65/} Moreover, if JFK Option 2 did involve a disposition of FAA-owned property, the Miscellaneous Receipts Statute, 31 U.S.C. § 3302(b), presumably would require that the net proceeds be deposited into the general fund of the U.S. Treasury, rather than being turned over to the carrier from which the auctioned slot was taken.

^{66/} If it were, the FAA presumably would not allow “unrestricted” slots purchased at auction to escape the strictures of the “use-or-lose” rule, as it proposes to do. *See* proposed 14 C.F.R. § 93.170(a), 73 Fed. Reg. at 29644.

^{67/} *See* 73 Fed. Reg. at 29630.

FAA's authority under 49 U.S.C. § 40103(b), which is limited to those actions "necessary to ensure the safety of aircraft and the efficient use of airspace."

In any event, JFK Option 2 does not "plac[e] maximum reliance on competitive market forces and on actual and potential competition." Instead, it distorts the operation of market forces and constricts competition – by forcing unwilling sellers to transfer slots they would prefer to retain, and by precluding them from bidding on those slots in the forced auction sale. Such heavy-handed governmental intervention is the antithesis of "placing maximum reliance on competitive market forces." Moreover, there is no reason to expect that the FAA's proposed auction mechanism would enhance competition or facilitate new entry, because the highest bidder at the auction may very well be the largest incumbent carrier at the airport. If the FAA truly wishes to place maximum reliance on competitive market forces, it would provide for an unconstrained secondary market where *willing* buyers and *willing* sellers are free to negotiate mutually beneficial transactions.

While the "takings" issue would be less pronounced under JFK Option 2 (where slot holders would receive the net proceeds of the slot auction sales) than under JFK Option 1, a "takings" claim would exist under JFK Option 2 as well – because the net auction proceeds would not reflect the full value of what is being taken from the slot holder. For one thing, the auction proceeds paid to the slot holder would be reduced by the FAA's costs of conducting the auction. Given the difficulties of establishing a very complex auction mechanism from scratch, testing it, and educating prospective bidders as to its operation – all within a period of just six months – the FAA's auction-related costs are likely to be very substantial.⁶⁸ The amount deducted from auction proceeds to cover those costs is likely to be substantial as well, so that the

^{68/} See Comments of Daniel M. Kasper and Darin N. Lee, LaGuardia SNPRM, Docket No. FAA-2006-25709-0127, (June 16, 2008), pp. 22-24.

net proceeds paid to the slot holder would be far less than the value of the slot as determined in the auction.

Moreover, the amount paid for the slot in the auction would not represent the full value of the slot to the carrier from which it was taken, as evidenced by the fact that the carrier was not willing to sell the slot voluntarily at that price. As noted above, a carrier's slot holdings enable it to realize the full expected return on its investment in tangible property at the airport (terminal, gates, aircraft, etc.), which generate revenue only when used to support the carriers' schedule of operations. Depriving a carrier of its slot holdings at JFK impairs the value of the carrier's investment in this tangible property, as well as the investment it has made in developing network operations that mesh with those slots and in promoting its schedule of operations, which depend on the use of those slots. The devaluing of these tangible and intangible assets would not be fully reflected in the price that a second carrier bids for the slots taken from the first carrier.⁶⁹ Thus, the auction proceeds would not reflect the value of the property effectively being taken by the forced auction sale of a carrier's slots even before the FAA's substantial auction-related costs are deducted. And, under JFK Option 2, these impacts would affect twice as many slots as under JFK Option 1, because 20 percent of an incumbent's limited slots would be taken under JFK Option 2 versus 10 percent under JFK Option 1.⁷⁰

Finally, a taking would also result if, as the FAA proposed, all slots revert back to the FAA after 10 years. The FAA does not have the authority to seize slots for congestion pricing purposes and

⁶⁹ The price paid also would be limited because of the short term nature of the lease, which would be between 5 and 10 years; after that the slot would revert to the FAA rather than the original airline. Thus, it would be impossible for an airline to recover its investments in its operations or the true value of the confiscated slots to an incumbent airline.

^{70/} The fact that, under both alternatives being considered, all slots would revert back to the FAA ten years after the rule takes effect gives rise to additional prospective "takings" issues and makes the implementation of an effective and efficient secondary market in slots even more problematic.

a complete confiscation of all slots similarly would negatively impact airlines revenues, schedules, and investments.

* * * *

In sum, the FAA’s newly contrived “bifurcated approach” to reallocating slots through a market-based auction mechanism that relies on the agency’s “transaction” authority to accomplish regulatory objectives is illogical, internally inconsistent, and – most importantly – unlawful. The FAA has correctly understood for more than two decades that it lacks statutory authority to employ “market-based mechanisms, such as auctions or congestion pricing” to allocate capacity at congested airports.⁷¹ There have been no statutory changes in the last two years that would justify reaching a different conclusion. The FAA should, therefore, abandon its effort to cobble together from miscellaneous provisions of current law a statutory basis for taking action that Congress has forbidden.⁷²

III. The NPRM Has Nothing To Do With Congestion And Fails To Solve It

While the FAA claims the purpose of the NPRM is to address congestion at JFK and EWR, the stark reality of the NPRM is the FAA has failed to demonstrate how its proposal will achieve any significant or meaningful relief from congestion. That burden is on the FAA when proposing this rule. Clearly, the FAA’s real purpose is allocating slots, which is not solving or addressing congestion.⁷³ The only congestion-related measures included in this proposal are the cap on operations, which is already in place under the JFK and EWR orders.⁷⁴ That is it, and the FAA has not articulated how its auctions would translate into achievement of the delay

^{71/} See 71 Fed. Reg. 51360, 51362, 51363 (Aug. 29, 2006).

^{72/} In addition to the legal infirmities of the FAA’s proposal discussed above, there is a question whether the slot auction system would be compatible with U.S. Government obligations under Article 9, Sections 1 and 2 of the United States-Canada Air Transport Agreement, which provides, *inter alia*, that user charges imposed on the airlines of the other Party “shall be just, reasonable, and not unjustly discriminatory.”

^{73/} IRE page 64 (“Previously the FAA has noted that the main objective of the present rulemaking is to establish operating caps and promote the efficient allocation of slots at JFK and EWR”).

^{74/} See 73 Fed. Reg. 3915, Jan. 18, 2008; 73 Fed. Reg. 14552, March 18, 2008.

management goals that have been outlined in the NPRM or, indeed, why the NPRM is worth the staggering costs, burdens and risks that are created by it. The FAA has a responsibility to justify the necessity, costs and other burdens of the substantial regulatory action that it would take under the NPRM, and the FAA has failed to do so fundamentally. The FAA has declared it is taking measures to address New York airspace congestion and what it is actually doing in the NPRM is engaging in dangerous experimental confiscation and reallocation of slots, which is a specious approach hardly constituting any action to reduce congestion, where genuine solutions lie elsewhere. Thus, the predicate on which this NPRM was issued, namely, to create a regulatory solution to congestion, is missing and the rulemaking is inherently defective under the requirements of the Administrative Procedure Act.

Indeed, while the FAA devotes its resources to these New York area rulemakings and continues down the road of bad policy and unlawful auctions, there are some reasonable and readily available measures that the FAA could take to significant effect New York area congestion without the drastic slot reallocation measures it proposes in the NPRM.

As the FAA recently stated in the New York/New Jersey/Philadelphia Metropolitan Area Airspace Redesign (Airspace Redesign).

The basic air traffic environment for the New York/New Jersey/Philadelphia Metropolitan Area airspace was designed and implemented in the 1960s...and has not been adequately modified to address changes in the aviation industry...The Airspace Redesign Project is critical to enhance the efficiency and reliability of the airspace structure and the Air Traffic Control system for pilots, airlines, and the traveling public.⁷⁵

⁷⁵ FAA Record of Decision, New York/New Jersey/Philadelphia Metropolitan Area Airspace Redesign, September 5, 2007, p 1-3.

The FAA estimates that implementation of the 18 separate Airspace Redesign projects in three phases will take five years.⁷⁶

Likewise, the U.S. Department of Transportation Inspector General, Calvin Scovel III, testified that the FAA is heavily invested in several projects that will modernize outdated programs, a top priority given “...the formidable challenge of operating and maintaining an increasingly strained system...”⁷⁷ The IG pointed to several modernization projects that will take an enormous amount of time and money to successfully implement, including ADS-B, En Route Automation Modernization (ERAM), Airport Surface Detection Equipment, Model X (ADSE-X), and Air Traffic Management (ATM). At the same time, the IG noted the FAA must stay focused on these modernization projects because they face several ongoing challenges, including automation with ERAM and communications, navigation, and surveillance challenges with ADS-B.⁷⁸

In each of these statements of Department policy, detailing several methods of dealing with congestion, there is no mention of using auctions. Simply put, auctions are not even on the radar of true congestion management initiatives, which focus on more efficient operations.

These measures could be undertaken without the enormous cost and risk to airlines, investments in New York service or the communities that rely on New York service. The FAA should simply retain the current orders at JFK and EWR, and focus on true congestion management initiatives allowing a free secondary market to determine the reallocation of resources. This is, by far, the better course for the FAA to take in addressing congestion. It is ironic that the FAA seeks to establish a “free” secondary market, but chooses to do so by

⁷⁶ Id. at 5.

⁷⁷ Statement of The Honorable Calvin L. Scovel III Inspector General U.S. Department of Transportation before the Committee on Appropriations Subcommittee on Transportation, Housing and Urban Development, and Related Agencies United States Senate, April 17, 2008, CC-2008-070, p1.

⁷⁸ Id. at p. 22.

confiscating slots, forcing the sale of certain slots under severely limiting rules, and approving or disapproving every auction sale. Under these circumstances, the FAA should withdraw the NPRM to signal a genuine willingness to engage with airlines and other members of the public on working on actual solutions to New York area congestion rather than to continue the FAA's myopic persistence to institute its theory of slot confiscation and auctions.

As discussed in the flawed cost estimates of this proposal, the NPRM would have a grave impact on financial market stability, customer loyalty, and small communities. First, introducing involuntary confiscation of slots in the New York region would create waves of instability in the financial markets tied to those slots. Without any discussion at all – in the NPRM or in the Initial Regulatory Evaluation – the FAA marches forward with a proposal that would upset financing and collateralization of assets (operating rights) that carriers rely on. As this country has seen in other markets, such as housing, instability can and would severely limit access to funds and investment. Second, carriers invest a substantial amount of time and money building customer loyalty. This proposal's involuntary confiscation of slots will undoubtedly impact carriers' regular schedules that customers rely on. Disruption of regular service jeopardizes customer preferences for travel and loyalties. Finally, as discussed in section IV, disruption of a carrier's schedule also jeopardizes service to small communities. Given that the FAA will choose half of the limited slots, it may well choose slots used for small community service with no assurances that an auction winner will continue such service. For all these policy reasons, FAA should rethink this proposal before it creates instability it has not contemplated or addressed in the either the LGA SNPRM or the JFK/EWR NPRM.

IV. The NPRM Lacks Fundamental Details And Proposes Conflicting Objectives

In the NPRM, the FAA proposes the same slot restrictions at JFK under either option and EWR; caps of 81 operations per hour at each airport and one or two slots per hour reserved for unscheduled operations. One unscheduled operation per hour may be designated for a public charter operation at either airport (and under either option for JFK). Slots would continue to be defined in 30 minute increments, consistent with the JFK and EWR orders. The NPRM proposes a minimum usage requirement, and would withdraw certain slots not used at least 80% of the time over a consecutive two-month period. Carriers would be authorized to sublease slots and slots could be traded on a one-to-one basis but without compensation.

The NPRM describes three types of slots⁷⁹: (1) common slots leased by the FAA to a carrier for the length of this rule (ten years); (2) limited slots leased by the FAA to a carrier but which would expire and be auctioned in the first five years of the rule, and; (3) unrestricted slots allocated to a carrier by auction.

The FAA proposes adopting one of two different auction processes; the EWR process and JFK Option 1 are the same, JFK Option 2 is different. Under both options a carrier retains 20 common slots until the rule sunsets in ten years. Under EWR and JFK Option 1, ten percent of the slots above the initial 20 are designated as limited slots; under JFK Option 2, 20 percent above the initial 20 are designated as limited slots. Under both options, the carrier would choose half of its limited slots to be auctioned and the FAA would choose the other half. All limited slots would be put up for auction over the first five years of the rule.

The mechanisms to accomplish many of the auction processes, such as choosing which common slots would be designated as limited slots are described in a “technical report”⁸⁰ placed

^{79/} See proposed § 93.162.

^{80/} See 73 Fed. Reg. 29632 and Docket No. FAA-2006-25709-0098, “Technical Report: Categorization and Allocation of Limited Slots. Addendum to Supplemental Notice of Proposed Rulemaking: Congestion

in the LaGuardia docket and referred to in the this NPRM. The following section identifies many crucial substantive provisions that are incomplete, conflicting, and/or practically impossible to accomplish and argues against adopting this rushed experiment.

A. The Auction Process is Not Yet Determined

The auction process described in the NPRM and technical report raises more questions than answers. Without a clear understanding of the auction process, it is impossible to effectively comment. This is an extraordinary shortcoming for a matter that is so fundamental to the outcome of this proceeding. Many of the provisions conflict and create competing policy implications. The technical report was created by NEXTOR, an FAA contractor hired to assist with congestion pricing theories and simulations. NEXTOR developed the technical report in an attempt to explain the auction process.⁸¹ As discussed elsewhere, this technical report is a placeholder for the contractor services the FAA will acquire.⁸² The FAA has not yet issued a request for proposal for the auction services, so it is impossible for the public to have notice and comment on the proposed auction process.⁸³ Even NEXTOR's efforts to describe the process are unclear and confusing.

B. The NPRM Proposes Conflicting Objectives and Conflicts with the LaGuardia SNPRM

The NPRM proposes to sunset the final rule after ten years. If this is the best solution for the congestion problem at JFK and EWR, then why is this plan implemented on a temporary

Management Rule for LaGuardia Airport, Docket No. FAA-2006-25709, RIN 2120-AI70" (herein after "technical report").

^{81/} See 73 Fed. Reg. 29632.

^{82/} See IRE, p. 61 ("Regarding the cost of the auction, the FAA is in the process of undertaking a market survey of potential contractors capable of designing and implementing an auction by December 2008.")

^{83/} See Federal Aviation Administration Presolicitation Notice Number 6814, published June 20, 2008 located at https://www.fbo.gov/index?s=opportunity&mode=form&tab=core&id=9431710041ebc0450729d71ccdb697a6&_cv_iew=0

basis? There is no discussion of why a sunset makes sense, other than to say that conditions change over time and the FAA would reevaluate it at the expiration of this rule.

The NPRM seeks to create a forced secondary market by proposing two different options; one that would revoke ten percent of slots, a second that would revoke twenty percent of slots. What is not clear is that if the FAA believes that ten percent of existing slots are enough to create a secondary market under JFK Option 1, why did it propose a second option?

The proposal also allows a carrier to bid in an auction on its own limited slots for EWR and JFK Option 1, but prohibits a carrier from bidding on its own slots in JFK Option 2.⁸⁴ However, the FAA offers no justification for this prohibition. If the FAA truly wants to create a robust secondary market, it does not make sense to impose artificial controls that are intended to direct a government-generated outcome, the very antithesis of a market solution. This is especially troubling because the holder of a limited slot in JFK Option 2 may have the greatest incentive to retain the slot based on established service; why would the FAA limit the number of bidders and possibly the most interested bidder? The public should not have to guess at the FAA's motivations and/or policy objectives. If a slot is not successfully placed, it is "retired" for one year until the next auction. This creates inefficiency in the system since the slot would be better utilized by the holding carrier than simply retiring it.

The NPRM definition of "new entrant," is confusing and inconsistent with the WSG. A "new entrant" is defined as "...any carrier that is administratively allocated a total of 8 or fewer slots at JFK or Newark Liberty, respectively, during controlled hours at any point during the duration of the rule."⁸⁵ In addition, the preamble discussion of a new entrant attempts to add terms not included in the definition. Specifically the preamble states "The agency is proposing

^{84/} Compare proposed § 93.165(c) for JFK Option 1, and Option 2.

⁸⁵ Proposed § 93.162.

that carriers lose their new entrant status if, at any point during the duration of the proposed rule, the FAA assigns a total of more than eight Common or Limited Slots *on a particular day*. Thus, if a carrier were awarded six Common Slots *on a given day of the week*, it could only be eligible for assignment of two more slots for that day through the WSG before losing its new entrant status.” [emphasis added] Clearly the preamble contemplates the definition of a new entrant under the WSG, which includes a carrier holding less than 5 slots on any particular day.⁸⁶ However, the regulatory text makes no mention of a slot on a per day basis and this substantive difference would require additional notice if the FAA seeks to adopt a different definition of “new entrant.”

The proposal is not clear on the use of a limited slot up until the time a slot is auctioned. Proposed section 93.164(c) states “A carrier may continue to use a Limited Slot that has reverted to the FAA until the date of the auction.” This indicates that should a slot not receive a bid and the slot reverts to the FAA, the carrier may use the slot until the date of auction. However, proposed section 93.165(c)(5) creates ambiguity by stating “Any Slot receiving no responsive bids will be retired until the next auction,” and implying a carrier may not use a slot reverting back to the FAA. The very next sentence supports continued use of the slot by stating “An affected Carrier will be allowed to use the Limited Slot until the effective date of an award to a Carrier as an Unrestricted Slot.” This is another example of conflicting rule text which denies the public notice and opportunity to comment and signals the rushed nature of this proposal.

The NPRM seeks to provide carriers with limited property rights in common slots, which could be collateralized or subleased to another carrier for consideration.⁸⁷ However, these are not clear rights, because the lease terms and conditions were not disclosed in the proposal and

⁸⁶ IATA World Scheduling Guidelines 15th edition, December 2007, section 6.8.1.4, p. 23.
^{87/} 73 Fed. Reg. 29631.

are only partially set forth in the draft Lease Agreements. Moreover, many of the proposed lease terms make no sense since they relate to a traditional lease by the FAA (not from the FAA) of real or personal property.

Finally, the proposal states it is not the role of the government either to dictate particular business models or to constrain a market,⁸⁸ yet the current proposal runs directly counter to these principles. First, the FAA would artificially constrain a secondary market by imposing auction mechanisms and strict – but as yet unknown - rules. Second, the FAA would also require each carrier to submit all lease terms and conditions and all bids for approval or disapproval.⁸⁹

Asserting authority to approve any secondary market transaction, forced or voluntary, smacks of a highly controlled secondary market. Finally, the proposal even restricts one-for-one trades by prohibiting any other type of consideration.⁹⁰ Since a highly valued slot could demand more than just a one-slot trade, such a restriction impedes market forces.

C. This Proposal is Not Necessary to Develop a Secondary Market

The FAA acknowledges that a blind secondary market would also facilitate new entrant access, but believes that the existing secondary market alone is not sufficient to provide opportunities for new or increased access.⁹¹ In addition, the Initial Regulatory Evaluation (IRE) acknowledges that current and past secondary slot markets have resulted in improved slot reallocation, but such reallocation is not enough for the FAA.⁹² The IRE also acknowledges that subleasing is already taking place.⁹³ Finally, the FAA confirmed a vibrant secondary market currently exists in the

^{88/} 73 Fed. Reg. 29630.

^{89/} 73 Fed. Reg. 29635.

^{90/} 73 Fed. Reg. 29634.

^{91/} Id.

^{92/} IRE page 41.

^{93/} Id.

New York region, in denying six airlines request to suspend the current use or lose requirements during this time of high fuel prices and carrier schedule reductions the FAA stated:

In the event that any air carrier does not intend to use the [operating] authority itself, there is a secondary market at each of the affected airports, permitting air carriers to lease the operating rights to another carrier for a period of time. In this way, air carriers can recoup the market value of the operating authority and retain the flexibility to resume service upon the expiration of the leasehold interest. This option would continue to promote competition, whereas a simple suspension of minimum usage requirements would ultimately result in decreased service and higher fares for the flying public.⁹⁴

D. Miscellaneous

Common and Limited Slots could be withdrawn under the proposed use-or-lose provision or for operational reasons, but Unrestricted Slots obtained in an auction could not be withdrawn for failure to meet use-or-lose requirements or for operational reasons.⁹⁵ Therefore, a carrier that acquires a slot via auction and operates it for 90 days can cease operation and sit on the unused slot for the remainder of the rule without fear of withdrawal – creating unused capacity and inefficiency. This is inconsistent with current practice; slots purchased or leased in the voluntary secondary market today are subject to "use-or-lose" requirements despite the fact that consideration was paid to acquire or them. This is also inconsistent with the theoretical intent of the proposal.

⁹⁴ See *Infra* Fn 6.

⁹⁵ See proposed § 93.170(a).

The proposal also excludes helicopters from air traffic rules for arrival and departure at JFK and EWR.⁹⁶ However, in allocating airspace, helicopters should be included in this proposal since they take up valuable ATC services.

Depending on the option or airport, 90 or 80 percent of slots at JFK and 90 percent of slots at Newark Liberty would be grandfathered as common slots based on the FAA summer 2008 schedule. This basis does not take into account trade needs for an operational schedule – a carrier could hold unmatching times or hold more arrivals than departures. Slots utilized by third parties via transfers would go back to the holder of record and therefore may not reflect necessary operational trades. The remaining 10 or 20 percent would be categorized as limited slots and designated proportionally to a carrier’s presence at the airport. The FAA would notify a carrier of its limited slots no later than the rule’s effective date. Yet in order to have compliant schedules on the effective date of the rule, carriers would need to know their limited slots no later than 90 days before the effective date.

The FAA would publish its intent to conduct an auction on a particular day and announce the auction procedures, soliciting comments on those procedures. A mock auction and training session would be held in advance of each auction. The FAA intends to conduct one auction per year with all slots going to their new parties at change of season in March, but the FAA does not indicate when the auction would take place or how much notice would be given.

Carriers would be required to report a series of flights under a single slot number rather than the slots in a time period in aggregate. This is unclear; would carriers have to advise the FAA of the slot number/flight number correlation in advance of an operation?

Despite the FAA’s characterization of slot rights as leases, these are not voluntary leases in substance. First, a carrier has no choice but to enter into this “lease” with the FAA. A lease

^{96/} See proposed § 93.161(a).

usually involves two willing parties who voluntarily agree, after arms length negotiations, to a transaction that benefits both parties. That is not the case here. Second, the FAA states it can, and reserves the right, to add lease terms and condition unilaterally.⁹⁷ Third, even a sublease of slots from one carrier to another is subject to the provisions of the carrier's original lease agreements with the FAA.⁹⁸ These types of inconsistencies create conflicting policy objectives and lead the public to believe that this proposal was not fully developed and was rushed to publication.⁹⁹

Another perverse outcome of this proposal results when an incumbent, in fact, values a limited slot more than any other operator, but is forced to relinquish it, because the FAA designates the slot for auction. The only way the slot could eventually reside with the operator that places the highest value and greatest use, is if the winning bidder is willing to sublease to the incumbent. This auction and sublease process undermines FAA's theory that through this proposal, slots will theoretically be held by the operator that places the highest value on a slot. The assumption that the carrier could continue operating in that time frame assumes that the "winner" of the slot in the auction doesn't really want the slot or doesn't value it as highly as the incumbent and is willing to sublease it to the incumbent.

Finally, a carrier winning an auction, may not have the gates, office, or other needed facilities to use a slot. A carrier may also have a difficult time renting or purchasing these assets.

^{97/} 73 Fed. Reg. 29635.

^{98/} See proposed § 93.168(a).

^{99/} See 73 Fed. Reg. 29634 Fn 15 ("The FAA is not waiting until this rule is finalized to award the contract, because this proposal and the two orders contemplate potentially conducting the first auction before the end of the year."). Also, the concept of retiring slots was excluded from the proposal without an explanation. In the LGA SNPRM the FAA decided in Option 1 to propose to retire an additional four percent of slots over the first five years of the rule, which would have the effect of lowering the cap at LGA to below 75. The FAA did not propose this in LGA Option 2. In comparing the proposals, the FAA did not propose this additional four percent retirement for EWR or JFK in either option and did not discuss this difference at all. This begs the question whether the additional four percent retirement was mistakenly included in the SNPRM.

E. This Proposal May Adversely Affect Small Communities

The NPRM certifies that the proposal would not have a significant impact on a substantial number of small entities. In doing so, it states “We have reviewed population statistics for every city served from JFK and Newark Liberty in August 2007 (the base for initial allocation of slots under the proposal) and found none with a population of less than 50,000.”¹⁰⁰ However, a review of schedules from Newark Liberty reveals service from at least two carriers to Bangor, Maine and Burlington, Vermont; based on Census data, each city has a population less than 50,000. Based on this information, the FAA must redo its Regulatory Flexibility Determination to determine what impact this proposal may have on small communities. This is especially important given there are small communities served by Newark Liberty and JFK and FAA could choose one or more of these operations in its random selection of limited slots for revocation or retirement. In addition, the FAA needs to square its statement in the IRE that “in January 2008 (on a weekday) there were 121 round trips to and from small communities”¹⁰¹ with the Regulatory Flexibility determination at 73 Fed. Reg. 29640, that JFK and Newark Liberty served no city with fewer than 50,000 in population. The analyses in the NPRM use metrics that are inconsistent with those used in the IRE. For example, the NPRM uses a metric of service to communities with less than 50,000 in population, while the IRE uses the metric of whether a community is served by a small hub or non-hub. In addition, the NPRM uses the metric of August 2007 while the IRE uses January 2008. These inconsistent statements and analyses are important to understanding the purported justification for the NPRM and the ability to provide meaningful comment, particularly regarding the impact on small communities.

V. The Proposal Unfairly Discriminates Against U.S. Carriers

^{100/} 73 Fed. Reg. 29640.

^{101/} IRE page 66.

The New York-New Jersey region is an extremely desirable destination for foreign businesspeople and leisure travelers. Further, large volumes of air cargo move through this region. For these reasons, there is a high concentration of non-U.S. airlines providing non-stop and connecting service (both passenger and cargo) to numerous destinations in Europe, the Middle East, Asia, Africa, India, Central and South America, Mexico, the Caribbean, and Canada. Not surprisingly, both airports are essential to U.S. airlines providing international air transportation. In the highly competitive field of international air transportation, service to/from New York is critical to achieving success.

This NPRM unfairly discriminates against U.S. airlines and places them at a competitive disadvantage compared to foreign airlines. First, the threshold for grandfathering slots is at a level where no foreign carrier will have any slots confiscated.¹⁰² Second, *any* foreign carrier, whether or not they currently operate at JFK or Newark Liberty today, are eligible to bid on reallocated slots. Third, the NPRM is completely devoid of any discussion of why this proposal selectively applies to foreign carriers or the reasons DOT decided to confiscate slots only from U.S. airlines and also grant any foreign airline the ability to bid on slots. There is no basis in law, treaty or federal policy for giving non-U.S. airlines preferential treatment.

It is also obvious that non-U.S. airlines contribute to congestion and delays in the New York region and that they will benefit from the caps imposed at Newark Liberty and JFK, yet the NPRM protects non-U.S. airlines from the costs and operational burdens the NPRM imposes. Thus, on its face, the NPRM does not apply equally to all airlines.¹⁰³ As a matter of fairness, and to avoid tipping the scales in favor of non-U.S. airlines, all aircraft operators should participate in

¹⁰² IRE p. 10, Fn 6.

¹⁰³ In addition, another potential inequity may result from the application of proposed 93.166(f)(3), which does not define the term “schedule constraints.” U.S. carriers would also be at a disadvantage if the FAA were to interpret this provision to give priority to foreign carriers that are slot controlled at foreign destinations.

alleviating congestion. As we stated elsewhere, the IATA *Worldwide Scheduling Guidelines*, which the NY ARC recommended DOT adopt wholesale (not piecemeal as this proposal contemplates), provides a globally accepted mechanism for managing congestion. It has been tried, tested and proven to be a fair and efficient mechanism for managing congestion with sufficient flexibility to respond to local operational and policy concerns. We urge the FAA to utilize this process in lieu of this proposal and any other airport at which a serious congestion problem exists.¹⁰⁴

VI. The NPRM Fails to Meet APA Notice and Comment Standards and Therefore is Deficient

The Administrative Procedure Act (“APA”) requires a notice of proposed rulemaking to include, among other things, “either the terms or substance of the proposed rule or a description of the subject and issues involved.”¹⁰⁵ The purpose of the required notice is to provide interested persons with the opportunity to participate in the rulemaking through submission of written data, views, or arguments.¹⁰⁶ To obtain meaningful participation from the public, courts have consistently held that an NPRM must “fairly apprise interested persons” of the issues in the rulemaking.¹⁰⁷ The proposal here lacks several fundamental details and that exclusion deprives the public of a description of the terms and substance of the rule and prevents the public from being fairly apprised of the issues in this rulemaking.

For example, the NPRM describes leasing slots to carriers with mandatory terms and conditions; violation of those slot terms may result in default.¹⁰⁸ However, DOT provides no

¹⁰⁴ The Department may consider slight modifications to the WSG such as new entrant exceptions.

^{105/} 5 U.S.C. § 553(b)(3).

^{106/} See 5 U.S.C. § 553(c).

^{107/} *United Steelworkers v. Marshall*, 647 F.2d 1189, 1221 (D.C. Cir 1980) (*quoting* *American Iron & Steel Inst. v. EPA*, 568 F.2d 284, 293 (3d Cir. 1977)).

^{108/} See draft lease agreement, Article 5, Docket No. FAA-2008-0517-0008.

description of potential lease terms and conditions, the definition of default, or what the consequences of a default may be in the NPRM.¹⁰⁹ Without time to review and develop comments on lease terms and conditions it is impossible for the public and regulated parties to provide meaningful input and participate in this rulemaking.

Another vital omission from the proposal is a description of the auction process. It is impossible for the public to comment on an auction process that the FAA has not disclosed and which it has said it will not disclose.¹¹⁰ This obstinacy is surprising given the FTC's position that it is critically important for the public to review and comment on an auction design.¹¹¹ This lack of clarity extends to the IRE, which is based entirely on a technical report created by a current FAA contractor that will not be the contractor ultimately designing and conducting auctions for the FAA. Given the lack of cost estimates not only does this proposal fail an Executive Order 12866 review, but it also fails to give sufficient notice on the costs and benefits of rule for purposes of the APA.

VII. The NPRM Fails to Meet the Requirements of Executive Order 12866

The NPRM fails to meet the requirements of Executive Order 12866 (E.O. 12866) and therefore should be withdrawn. E.O. 12866 requires an agency to “assess all costs of available regulatory alternatives” and “propose and adopt a regulation only upon a reasoned determination

¹⁰⁹ As discussed in section II, page 13, the draft lease agreement contains no terms or conditions and would be best used as a document governing FAA acquisition of real property.

¹¹⁰ See Letter from Rebecca B. MacPherson, Assistant Chief Counsel of Regulations, Federal Aviation Administration to David A. Berg, Vice President & General Counsel, Air Transport Association of America, Inc., June 2, 2008, Docket No. FAA-2008-0517-0008.2, p. 1 (“...the auction procedures that would be used to auction any new or reverted slots are not the subject of the proposed rulemaking, which is why the FAA continues to believe that these procedures need not be subject to notice and comment within the context of the Administrative Procedure Act.”)

¹¹¹ See Comments of the Federal Trade Commission, Bureau of Economics Comment, Supplemental Notice of Proposed Rulemaking Concerning Congestion Management at New York LaGuardia Airport, Docket No. FAA-2006-25709-0124, June 17, 2008, p. 16 (“...an auction's performance depends critically on the details of its design. Not only should the design be tailored to the specific features of the industry, *but the design should be vetted publicly*” (emphasis added)); Letter from David A. Berg, Vice President & General Counsel, Air Transport Association of America, Inc., to the Honorable Robert Sturgell, Acting Administrator, Federal Aviation Administration, July 10, 2008, Docket No. FAA-2008-0517-0016.1.

that the benefits of the regulation justify its costs.”¹¹² As discussed below, the IRE is not a reasoned determination because it is based solely on a contingency that will most likely dramatically change. In addition, the benefits are mostly due to an existing cap, not the proposed auctions, and the costs exclude the greatest cost of all, which is carrier participation in an auction. Finally, the FAA failed to consider and perform a cost benefit analysis on regulatory alternatives. Any of these flaws individually violate E.O. 12866; combined they mandate that the FAA start from scratch.

A. The Entire IRE is Based on Uncertain Contingencies

The IRE attempts to justify this proposal by estimating that the present value of net benefits of improved slot allocation falls between \$256 and \$267 million for JFK and between \$207 and \$218 million for Newark Liberty from 2009-2019.¹¹³ The IRE underestimates the costs of this proposal to be between \$11 and \$22 million each for JFK and Newark Liberty, due to the “design, implementation and participation in an auction of slots.”¹¹⁴ However, all of these estimates are pure conjecture because the FAA has not determined the type of auction it would hold, the vendor it would use to design and provide auction services, or the cost of such services. As of the end of the comment period, the FAA has not issued a request for proposal for auction services.¹¹⁵ The FAA issued a second presolicitation notice for auction services, still asking several questions which make it clear that most of the auction process is still *undetermined*.¹¹⁶ In fact, the FAA is now “carefully” considering completely changing the auction design they proposed in the LaGuardia SNPRM, which is further evidence that any cost

^{112/} Exec. Order No 12866 58 Fed. Reg . 51735 (Oct. 3, 1993).

^{113/} 73 Fed. Reg. 29637; IRE page iv.

^{114/} 73 Fed. Reg. 29637; IRE page iv.

^{115/} *See supra* note 83.

¹¹⁶ *Id.*

estimates included in the NPRM or IRE are subject to radical change at a moment's notice.¹¹⁷

Despite this lack of certainty, the FAA is willing to assign costs that most likely will change. For example, according to the FAA's schedule, it hopes to issue a request for proposal, decide on a contractor, and expects a contractor starting from scratch to have all facets of an auction system (including design, auction rules, auction procedures, software, training of the FAA and carriers, and testing all of the above) up and running in less than six months.¹¹⁸ All this must be accomplished for an auction process never tested or tried in the aviation industry, anywhere in the world. One can only imagine the manpower and costs that would be added to the FAA's proposed plans in order to accomplish this goal in record time.

Despite the FAA's efforts to redefine the OMB standard for estimating costs, this completely transparent estimate cannot be used as the basis to justify this proposal. Contributing to this uncertainty is the auction methodology described in the docket as a technical report developed by NEXTOR. The FAA hired NEXTOR to develop mock congestion pricing scenarios, but it will not be the auction services provider.¹¹⁹ Without even a request for proposal or a contractor proposal, it is impossible to estimate costs.¹²⁰

B. The IRE Uses the Wrong Baseline to Justify the Proposal

¹¹⁷ See Federal Aviation Administration Presolicitation Notice Number 6814, published June 20, 2008, https://www.fbo.gov/index?s=opportunity&mode=form&tab=core&id=9431710041ebc0450729d71ccdb697a6&_cv_iew=0 stating "The FAA recognizes that it is critical that an appropriate auction design be considered when choosing an auction mechanism to allocate the limited-life slots at these three airports. Therefore, FAA is carefully considering the issue of auction design and is seeking additional market survey input with respect to using a sealed-bid second price auction as the method to allocate the limited-life slots." [The first presolicitation notice proposed using a "ascending clock auction with package bidding (often called a combinatorial clock auction," see FAA Presolicitation Notice Number 6506, published March 14, 2008]

^{118/} See Id.; IRE page 61 ("...FAA is in the process of undertaking a market survey of potential contractors capable of designing and implementing an auction by December 2008.").

^{119/} IRE p 23.

^{120/} In fact, the FAA received only one response to its presolicitation notice for auction services, indicating there will not be much competition or underbidding for these services, and as of the comment period closing date, no responses to the FAA's second presolicitation notice published on June 20, 2008. See *supra* note 83.

Aside from the fact that the entire cost benefit analysis (“CBA”) is based on conjecture, the IRE also uses the wrong baseline in an effort to justify this proposal. The IRE uses the most unlikely situation possible, to create the greatest theoretical benefit possible, to justify this proposal. The IRE uses a less regulated JFK and Newark Liberty as the basis of the CBA.¹²¹ Instead of using the situation at JFK or Newark Liberty today with a cap or at least the HDR in existence from 1969 to 2006, the FAA uses a no cap scenario most likely to create a benefit. There is no justification for choosing a no cap scenario for a cost benefit analysis. Since the FAA admits the reason there have been various regulatory schemes at JFK and Newark Liberty because of congestion problems, it is completely unreasonable to use a baseline the FAA would never adopt. Such an unreasonable baseline is the only way the IRE can get to the supposed 25% reduction in average delay per operation at JFK and 23% reduction in average delay per operation at Newark Liberty.¹²² This leads to an assessment of benefits that is solely based on the value of imposing caps and not at all on the proposed auction.

Not only is the wrong baseline used, but the IRE does not even consider the most likely scenario should the FAA not adopt this proposal, which is a JFK and Newark Liberty with a scheme similar to the current order (a cap with a few slight modifications, such as a voluntary secondary market). At the very least, given the untested nature of this proposal, the FAA should evaluate a range of options, including a totally unregulated JFK and Newark Liberty (the current IRE baseline), JFK under the HDR, each airport under its current order, and Options 1 and 2. Such a range would give a realistic view of possible costs and benefits at JFK and Newark Liberty.

^{121/} IRE p iv.
¹²² IRE p iv, v.

The FAA states that looking forward all three New York area airports will maintain caps.¹²³ If this is true, it is even less clear why the IRE uses an unrealistic baseline with two airports without a cap, contradicting the overall NYC plan.

C. The Initial Regulatory Evaluation Fails to Include the *Greatest* Cost of this Proposal

The IRE substantially undervalues the costs associated with this proposal. First, the proposal states “The major costs of this proposed rule are the costs to the public and private sectors of designing, implementing and participating in the auction.”¹²⁴ This statement ignores the largest cost of this proposal, which is the cost of a slot paid at an auction. The IRE states those costs are mere “transfer payments,” transferring an asset from one carrier to another and thus not constituting an economic cost of the proposal.¹²⁵ However, this logic ignores the fact that absent the confiscation of a slot and mandatory auction, there would be no carrier auction costs. Auction costs not included in the FAA analysis include: (1) the cost to a carrier losing the value of a slot taken by the FAA under either option; (2) the cost to a carrier forced to pay cash for a slot;¹²⁶ (3) the costs incurred by a destination city for disruption of service; (4) the costs to passengers and carriers that must reserve a flight elsewhere, either temporarily or permanently, depending on whether existing service continues to a particular destination after a slot is auctioned or retired. Newark Liberty and JFK Option 1 of the NPRM undervalue these costs the greatest, as all funds from an auction flow from a buyer to the FAA in what amounts to a new user fee. The IRE never explains how a payment under Newark Liberty or JFK Option 1 from a carrier to the government could possibly be defined as a “transfer payment.” Even under

^{123/} IRE p. 19.
^{124/} IRE page viii.
^{125/} IRE page 30.
¹²⁶ See proposed § 93.165(c)(1).

proposed Option 2 for JFK, where a carrier may recoup some portion of slot value, after the FAA subtracts an amount to pay for the auction, disruption of a carrier schedule and disruption of service to the destination city impose costs. The value of a lost slot under item number one above includes both lost collateralization of the asset and the costs of disrupting a carriers existing service. The FAA failed to include or assign any value to these costs. Excluding this cost is especially troublesome given a carrier would not be able to bid on a slot it holds.

D. Defining the life of a slot decreases its value

The FAA seeks to limit a carrier's property interest in a slot by imposing a lease with a maximum term of 10 years.¹²⁷ The fact that the FAA seeks to define the life of a slot and choose some slots for revocation enters uncertainty of future operations at JFK and Newark Liberty. Such uncertainty would have a chilling effect on any value given to slots and gates in relation to capital flow and collateralization. The short-term nature of the proposal and the Government's inclination to change historic processes could create a lack of confidence by financial institutions in slots as collateral and reduce or eliminate a carrier's ability to fully collateralize the asset. Adopting this proposal could remove another mechanism some airlines use to obtain financing. Loss of another financing vehicle could spell economic disaster for some carriers, at time when continued financing is needed most. Before considering whether this proposal is justified under a cost benefit analysis, the FAA must consider and include all losses, reduction in value, and lost opportunity an individual carrier may face in securing financing tied to slots at JFK and Newark Liberty.

In addition, as the NY ARC noted, both the airlines and the Port Authority have billions of dollars of debt and other financing tied to service levels and disruption and uncertainty created by an auction proposal would result in economic disaster to the industry. Additionally, many air

^{127/} See definitions of common slot and limited slot under proposed § 93.162.

carriers have long term leases at the New York airports that have legal liability attached and auctions could cause default on these leases; in the worst case, bankruptcy.

E. The IRE Benefit Analysis is Fatally Flawed

The IRE is also fatally flawed because it vastly overestimates the benefits of this proposal. The delay/congestion reduction benefits of the proposal are related to the caps and not at all associated with auctions. For instance, the FAA even states in the IRE that a cap alone is responsible for benefits of approximately \$686 million for JFK and \$705 million for EWR and this does not include downstream delay cost savings.¹²⁸ Benefits from the caps alone are more than double than the flawed estimated benefits from improved slot allocation.¹²⁹

In addition to the conflicting benefits determination, the IRE excluded the downstream costs of delay that are avoided due solely to a cap because the FAA is in the process of revising its methodology to assess these types of costs and prefers to exclude them pending completion of its work in this area.¹³⁰ This is no excuse for excluding a whole category of benefits. What is not clear is why the IRE did not include the downstream cost savings due to caps using the old methodology with a note stating the FAA is likely to change its methodology. The benefits demonstrated with a cap only scenario illustrate why the FAA should expand the cost and benefits for analysis to include other options that are likely to be the most cost beneficial.

F. Miscellaneous Costs

Several additional items were excluded from the IRE and should be included in any subsequent CBA. For instance, the IRE fails to include costs associated with changing ground facility demands (e.g., baggage handling, gates, etc.). The IRE also states "... a change in

^{128/} IRE page 37.

¹²⁹ The IRE lists estimated benefits from auctions between \$256 million and \$267 million at JFK and between \$207 million and 218 million at EWR from 2009 to 2019, IRE at iv.

^{130/} IRE p37.

resource allocation improves economic efficiency if, net of costs, society as a whole is willing to pay more for the new bundle of goods and services than it was for the bundle produced at the baseline allocation of resources.”¹³¹ The FAA never explains how it determined society is willing to pay more in the form of increased fares and what “new” bundle of goods this rule creates. The economic efficiency sought in this proposal is a huge *assumption, not a fact* given auctions have not been tried, tested or proven. Finally, some carriers have already paid for slots on a secondary market; this proposal may result in a carrier losing a slot for which it already paid full value.

Additional costs not included in the IRE which must be considered before determining whether the benefits of this proposal justify the costs: 1) operator foregone revenue from expected services; 2) loss of jobs due to a carrier's reduced flight levels; 3) loss of additional slots due to the DOT’s ill-conceived selection scheme that does not consider slots as pairs but rather individual elements, the pull of a 0900 arrival and 1800 departure could realistically mean the loss of the unintended and not mandated 1000 departure and 1700 arrival; 4) loss of utilization on the assets that are purchased as long-term investments with anticipated utilization, 5) loss of passengers not just from the loss of a single flight (if a pair of slots were confiscated) but also from passengers who will move to other carriers loyalty programs, and; 6) loss of or failure of an airline’s ability to meet corporate volume agreements due to service level reductions; 7) FAA’s audit expenses to review funds withheld from auction proceeds.

VIII. Miscellaneous

Under the NPRM paperwork reduction act analysis, the estimated paperwork burden is totally flawed, underestimated and must be completely reworked and published to give the public

^{131/} IRE p 40.

opportunity to comment on an estimate and analysis that is even close to reality. For instance, the proposal states for JFK the “Total First Year Hourly Burden-320 Hours” and over a ten-year period the burden is 1,032 hours.¹³² Likewise, for Newark Liberty the “Total First Year Hourly Burden-640 Hours” and over a ten-year period the burden is 582 hours.¹³³

However, just adding up the burden hours FAA lists in the PRA analysis section far exceeds the totals in the summary section. The PRA analysis includes the following burdens:¹³⁴

Draft Regulation	PRA Annual Analysis Burden JFK	PRA Total Annual Burden JFK	PRA Annual Analysis Burden EWR	PRA Total Annual Burden EWR
93.164(c)(2)	320		640	
93.165(c)	0		0	
93.166(b)-(c)	0		0	
93.168(d), (d), (f)	285		174	
93.169(b), (d)	285		174	
93.171	0		0	
93.172(a)-(b)	462		234	
	1352	320	1222	640

The PRA total burden is underestimated by at least a factor of two, these totals use a completely underestimated burden of 1.5 hours per submittal, and do not include two estimates for burdens FAA intends to provide in the future.¹³⁵ The total burden over the course of ten years is only exacerbated.

The incomplete numbers presented in the PRA analysis verifies our comments in the LGA rulemaking that realistically, management of this program will take at a minimum 50% of a management employee’s time and could require a full time employee depending on the final rule. If a carrier participates in more than one program, i.e. at LGA and JFK, the burden will be

¹³² 73 Fed. Reg. 29639.

¹³³ Id.

¹³⁴ 73 Fed. Reg. 29638-29639.

¹³⁵ Section 93.165(c) is to be assigned a value in the future; section 93.166(b)-(c) incorrectly was assigned no value; section 93.172 includes only a partial value, additional burden will be made available in the future, See 73 Fed. Reg. 29638-29639.

even greater. Additionally, there will be significant outside legal counsel time and fees associated with negotiating, drafting, executing and continually monitoring the "official" secondary trading transactions, leases and subleases that are currently done "unofficially" that are not included in this PRA analysis.

This proposal also violates Executive Order 12866 sections 4 and 5, because it was not included in a "Unified Regulatory Agenda" or in a "Regulatory Plan." Section 4(b) of Executive Order 12866 requires each agency to "prepare an agenda of all regulations under development or review" with a description including "at a minimum, a regulation identifier number, a brief summary of the action, the legal authority for the action, any legal deadline for the action, and the name and telephone number of a knowledgeable agency official." In addition, Section 4(c) of E.O. 12866 requires each agency to "prepare a Regulatory Plan (Plan) of the most important significant regulatory actions that the agency reasonably expects to issue in proposed or final form in that fiscal year or thereafter," include summary information, and forward the Plan to the Office of Information and Regulatory Affairs, Office of Management and Budget on June 1st of each year. Based on OMB publicly available information, the FAA did not including this proposal in either its Unified Regulatory Agenda or in its Regulatory Plan as required by the executive order.¹³⁶

IX. Conclusion

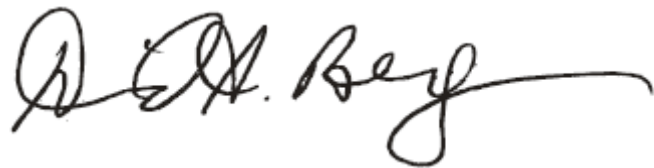
The FAA's proposal to implement slot auctions at Newark Liberty and JFK is unnecessary as far as managing congestion is concerned, is ill-advised as a matter of policy, and is unlawful to boot. Under current conditions and for the foreseeable future, it appears that a congestion management program at Newark Liberty and JFK is needed in order to avoid

¹³⁶ See OMB website: <http://www.reginfo.gov/public/do/eAgendamain> lacking any summary of this proposal under "Department of Transportation."

unacceptable delays in the New York-New Jersey air management region and beyond. However, congestion management can be accomplished, as it has been in the past, without resorting to unauthorized and ill-conceived “market-based” experimentation in one of the nation’s busiest air corridors. The flying public, DOT, Congress, and carriers all share the goal of improving performance in the northeast. The NY ARC pointed in the right direction: we should all focus on implementing the ARC’s recommendations for alleviating congestion in the New York-New Jersey area.

Dated: July 21, 2008

Respectfully submitted,

A handwritten signature in black ink that reads "D.A. Berg". The signature is fluid and cursive, with a long horizontal flourish extending to the right.

David A. Berg
Vice President & General Counsel
Air Transport Association of America, Inc.
1301 Pennsylvania Avenue, NW
Washington, DC 20004
202-626-4000
dberg@airlines.org