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# Testimony of Edward P. Faberman
# Executive Director, Air Carrier Association of America

## Before the

## U.S. House of Representatives
## Committee on Transportation and Infrastructure
## Subcommittee on Aviation
**Regarding**

## *"Congestion Management in the New York Airspace"*

## June 18, 2008

**UNITED STATES HOUSE OF REPRESENTATIVES**

**COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE**

**Congestion Management in the New York Airspace**

**June 18, 2008**

**STATEMENT OF EDWARD P. FABERMAN**

**EXECUTIVE DIRECTOR, AIR CARRIER ASSOCIATION OF AMERICA**

Good morning Chairman Costello, Ranking Member Petri, and Members of the House Transportation and Infrastructure Subcommittee on Aviation.

I am very pleased to be here today to talk about issues that are critical to the nation's air carriers, communities throughout the country, and to the traveling public. My name is Ed Faberman and I am Executive Director of the Air Carrier Association of America. The ACAA and its low-fare carrier members are dedicated to providing affordable airfare travel options to all American travelers who receive significant benefits when low-fare options are available in their communities.

We thank this Committee for holding this hearing, for your dedication to enhancing the nation's ATC system, and for supporting the growth of air commerce and airline competition. We are at a point in time that if steps are not taken to ensure that the dream of deregulation will remain an essential part of U.S. airline service, we may see the disappearance of travel options for millions of travelers.

We note statements on these issues by committee members:

Chairman Oberstar:

The House Subcommittee on Aviation (May 14, 2008) – "[A] reduction in competition [is] likely to lead to higher fares, a deterioration in service, and financially weakened survivors."

Hearing of Subcommittee on Aviation (March 18, 1999) "deregulation has saved the traveling public $12 billion a year. And the answer to much of the woes that we are hearing today is competition, not necessarily more regulation…The Department has to be vigilant to assure that there is competition for carriers, because competition is the best way to assure that they clean up their own act."

Ranking Member Mica

House Subcommittee on Aviation (July 12, 2006) – "It is clearly in the best interest of consumers for the invisible hand of the marketplace, not the heavy hands of Congress or federal bureaucrats, to set air fares and service options."

Subcommittee Chairman Costello:

"Competition is what is keeping prices reasonable today. If you eliminate competition, the fewer airlines you have, the fewer choices people have."

February 15, 2008 NBC News broadcast.

Subcommittee Ranking Member Petri

House Subcommittee on Aviation (April 25, 2007) "Overall, airline deregulation has brought better service and lower prices to the majority of communities around this Country."

These statements support the need for the Department of Transportation to take immediate steps to ensure that true competition will continue.

We appreciate the situation faced by Secretary Peters and Acting Administrator Sturgell in addressing delay and congestion issues that are once again plaguing the industry and disrupting the travel plans. We are glad to be discussing these issues alongside D.J. Gribbin and representatives of the Port Authority and other carriers. Unfortunately, these are not new issues.

What year was this statement made:

"Throughout the year, there were strong indications that the airport and airway system was on the verge of saturation, especially within the so-called golden Triangle -- Chicago, New York and Washington. Flight delays were far beyond mere annoyance and inconvenience. Time spent in holding patterns became all too frequent. For example, traveling between New York and Washington sometimes took as long as four hours. The airports serving all three of these cities and the airway system connecting them were simply congested during too many hours each day. This deplorable situation was

uppermost in the minds of local and federal transportation officials, including DOT/FAA, and local airport operators. And in the minds of airline and their passengers. Everyone agreed that airport and airway capacity in critical areas of the nation needed to be increased, but there was no consensus as to how soon this could be accomplished, or exactly what to do in the meantime."

THIS STATEMENT DESCRIBED CONDITIONS IN 1968!!

During the fall of 1968, the Secretary and the Acting Administrator of the FAA expressed the belief that governmental action limiting operations at some of the busiest airports would probably become necessary. Unfortunately, those restrictions have now been in place for **40 years.**[1]

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[1] FAA has on multiple occasions in the past addressed growing congestion problems. Unfortunately, the fixes developed have closed markets and limited competition. In 1968, the Acting Administrator of the FAA (Notice of Proposed Rule Making and Notice of Public Hearing; 33 FR 12580, September 5, 1968) stated:

> Delays of varying magnitude are encountered at many terminal areas... Congestion at these terminals frequently requires the imposition of traffic flow restrictions creating backup delays throughout the air transportation system. A reduction in air traffic delays can be accomplished only by increasing the capacity of the system or decreasing the demands placed upon it. Certain changes in air traffic and airport procedures and practices are already planned by the FAA to increase aircraft handling capacity.

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On November 9, 1969, as a response to the delays in terminal areas, the FAA established the high density rule. When the rule was promulgated, the FAA stated, "the rule should be considered to be only a temporary solution." Unfortunately, thirty-nine years later the high density rule remains in place at Ronald Reagan Washington National Airport ("National") and La Guardia Airport ("LaGuardia") and may have to be reinstated at other airports to prevent continued delays.

The FAA addressed delays/congestion in 1984 and 1987:

> There can be little doubt that our nation's air transportation system is currently facing a substantial delay problem. According to DOT, airlines and travelers suffered 39,000 delays of more than 15 minutes in July of this year alone...It

While we agree that it is important to reduce delays and congestion throughout the system and create a method of distributing airport capacity for the long term, immediate steps must also be taken to ensure that airline competition and deregulation do not become only memories of a system that used to exist. If immediate steps are not taken to strengthen competition, we will forever lose those critical options.

The airline industry is at a defining point in its history. We have recently seen several low cost carriers file for bankruptcy and cease all operations. At the same time, airline costs are out of control and they continue to rise. As this happens, barriers to entry increase.

While we are supposed to have open markets and a deregulated system, as a result of the significant increase in operations added by the dominant carriers at EWR, JFK, and LGA, all New York airports are once again closed to competition (ORD is also closed to entry). After closing these airports, the Department has not taken the necessary, corresponding steps to promote entry and competition.

Airports that are slot controlled have less low fare service and competition than most other airports in this country. Legacy carriers control 95% of the slots at LGA, EWR and ORD. At LGA, small carriers are limited to 10 roundtrips.

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is premised on the view that a significant part of the delays stems from the hubbing practices of various carriers that results in the concentration of many flights within a short period of time every day...We tentatively concluded, however, that airline scheduling practices were a significant source of delays, since airlines appeared to be scheduling more flights at peak periods at major airports that could be accommodated by the available taxiways, runways, and airspace...Our show-cause order relied upon the excess schedules operated at Atlanta and Boston to show that airline scheduling practices cause much of the delay problem. [Docket 42410, "Application For Discussion Authority and Prior Board Approval of Carrier Agreements to Integrate Schedules," Order 84-8-129], "Order Granting Discussion Authority," August 31, 1984]

We find that the discussions are necessary to help alleviate the serious inconveniences caused the traveling public by the worsening delay problem, and that the discussions should therefore be approved and granted antitrust immunity. We are reluctant to authorize carrier schedule discussions, but the worsening delay problem demands that action be taken to help alleviate the problem. We believe that scheduling discussions are the only available alternative that can be {Docket 44634, "Discussion Authority For Carrier Agreements to Shift Schedules," Order 87-3-39, "Final Order Granting Discussion Authority," March 11, 1987]

The one "closed" airport that has competition is JFK because the Department took specific action to provide JetBlue (formerly New Air) with significant entry at the airport when it first started its operation.[2]

When addressing closed airports, the Department has on multiple occasions emphasized the importance of preserving competition.

At the NY Scheduling Meeting (October 23, 2007), Secretary Peters stated:

> "I am not in favor of a system that limits competition, nor do I want to reduce the ability of new entrants to fly into New York."

FAA and DOT have repeatedly emphasized the importance of increased competition and frequently stated that establishing a competitive environment is a priority.[3] The LaGuardia Airport Congestion Management NPRM highlighted that

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[2] JetBlue has a major presence at JFK because in Order 99-9-11 (September 16, 1999), the Department granted New Air Corporation (now JetBlue) 75 slot exemptions at JFK. In that order, the Department clearly emphasized the importance of low-fare competition at airports dominated by legacy carriers:

> The GAO's 1996 study, Airline Deregulation: Barriers to Entry Continue in Several Key Domestic Markets (the GAO Report), stated that "control of slots by a few airlines greatly deters entry at key airports in Chicago, New York and Washington," We made clear our support for increased competition and our willingness to invoke available tools to promote competition when we stated in our January 6, 1997, response to the GAO Report that "the Department intends to be more receptive to considering competition as a factor in granting slot exemptions to new entrants under the exceptional circumstances criterion."
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> As we noted earlier, many authorities, including members of Congress, have concluded that the High Density Rule is a serious barrier to entry, which has had a dampening effect on domestic airline competition.
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> * * * *
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> JetBlue's business plan is to bring to the New York metropolitan area and many of its short- and medium-haul communities of interest a route system of price-competitive transportation services comparable to those that Southwest Airlines has brought to other cities throughout the nation. It is indisputable that Southwest has had a singularly positive effect on fare competition in literally every market it has chosen to serve. In many other markets, other low-fare new entrants have also had a salutary impact on domestic fares. Wherever those carriers have gone, fare competition has followed and traffic has increased, in many cases dramatically.

[3] Promoting entry and competition is also an essential mandate placed on the Department by Congress when it enacted the Airline Deregulation Act of 1978 49 U.S.C. 1301 – which charges the Department with facilitating new entry and competition in the airline industry. Under 49 U.S.C. § 40101:

> (a)...the Secretary of Transportation shall consider the following matters, among others, as being in the public interest and consistent with public convenience and necessity.

there is clear statutory authority to promote competition when allocating slots/operating authorizations:

> Keeping available a variety of adequate, economic, efficient, and low-priced air services; placing maximum reliance on competitive market forces and on actual and potential competition; avoiding airline industry conditions that would tend to allow at least one air carrier unreasonably to increase prices, reduce services, or exclude competition in air transportation; encouraging, developing, and maintaining an air transportation system relying on actual and potential competition; encouraging entry into air transportation markets by new and existing air carriers and the continued strengthening of small air carriers to ensure a more effective and competitive airline industry. (Docket FAA-2006-25709, 71 Fed.Reg. 51360, Aug. 29, 2006.)

The "Notice of Alternative Policy Options for Managing Capacity at LaGuardia Airport and Proposed Extension of the Lottery Allocation," June 12, 2001 (Docket 2001-9852), stated:

> It is DOT's intention to develop a full array of public policy tools to develop a comprehensive aviation strategy that focuses on ways to reduce delays, improve airport capacity management, enhance competition, and promote the efficiency of the overall aviation system.
>
> The option should be flexible enough to allow policy makers the opportunity to address certain policy goals such as ensuring air carrier competition and service to small communities.

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(7) The prevention of unfair, deceptive, predatory, or anti-competitive practices in air transportation and the avoidance of

A. unreasonable industry concentration, excessive market domination, and monopoly power; and other conditions;

B. that would tend to allow one or more air carriers unreasonably to increase prices, reduce services, or exclude competition in air transportation.

(9) The encouragement, development, and maintenance of an air transportation system relying on actual and potential competition to provide efficiency, innovation, and low prices, and to determine the variety quality, and price of air transportation services.

We are not operating in an environment where costs are stable – rather costs, including fuel, security and facility expenses, continue to significantly increase. Smaller carriers are not in a position to take extra steps at all airports to manage costs because they may have limited operations and facilities at those airports. Therefore, the costs for smaller carriers are higher at many airports. To manage those costs, it is essential that these carriers are allowed to expand their presence at these critical airports.

Although the Department has repeatedly stated that one of its primary objectives is to promote competition, it has not taken steps to increase the small percentage of flights operated by low-fare carriers at closed airports.

The current allocation system which is based on grandfathering of the slots while allowing each slot holding carrier to determine to whom and under what conditions they would lease or sell slots is anti-competitive.

As part of its "solution" to address congestion and entry at the New York airports, the Department has proposed a market approach that includes an auction. The comment period for the auction proposal closed this week, and various parties oppose the auction notice. Many questions remain about the Department's auction proposal. We understand the concerns raised by a number of parties with auctions.

We believe that it may be appropriate to consider market approaches as a longer term solution. As we review market approaches, however, immediate steps must be taken to make sure competitive options survive the current situation faced by the industry. As large carriers announce a reduction in operations at major airports, the elimination of aircraft from their fleets and possible mergers, now is the time to withdraw slots and facilities and make them available to carriers with small numbers of slots. Before a market mechanism is implemented, the Department must first make slots available to smaller carriers. To do this, the Department should withdraw some slots held by carriers holding more than seventy-five (75) slots as of January 1, 2008 and distribute those slots to limited incumbents operating aircraft with at least 110 seats

that do not have codeshare arrangements or are partially owned by another carrier at the same airport that holds more than twenty slots.

We agree that market approaches should be considered if they promote competition. While the current Department Market Mechanism Notice would take slots from incumbents to redistribute them, it will not necessarily lead to the growth of competition. Allowing carriers with hundreds of slots to bid on slots against a carrier with 20 slots is unlikely to result in significant changes in slot ownership and will not increase competition. Moreover, it would be difficult for a carrier with a few operations at an airport to spend millions of dollars to outbid dominant carriers and still offer low fares.

After providing slots to smaller carriers, we do no object to the consideration of market mechanisms. To be considered, market approaches need to first enhance competition and any procedure to sell or lease slots must ensure that all carriers have a chance to bid on operating authorizations. Therefore, a blind mechanism must be implemented. As the Department of Justice has stated, incumbents with market power "will always have an incentive to outbid an equally efficient entrant for any slots offered." The Department commented:

> "Indeed, an incumbent with market power may well be able to outbid a <u>more</u> efficient entrant, simply because maintaining market power is more profitable than entering a competitive market…once a potential buyer's identity is known to the seller, the seller has every incentive to seek out an incumbent airline that would be willing to offer more money to maintain its market power than the entrant would be willing to apply to erode it."[4]

The Department of Justice also noted:

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[4] Comments of the United States Department of Justice regarding the Notice of Alternative Policy Options for Managing Capacity at LaGuardia Airport and Proposed Extension of Lottery Allocation, Docket No. FAA-2001-9854, p.6.

> First, the mechanism chosen should ensure efficient allocation of scarce capacity at LGA, with slots going to their most productive use. Second, the mechanism chosen should permit competition to flourish. Allowing entrants to compete in a competitive primary market for the purchase of slots will increase the chances that more efficient entrants are able to acquire the slots they need. In order to promote a vibrant and competitive airline system, the scarce LGA capacity should be allocated in a way that encourages rather than discourages competition. Comments of the U.S. Department of Justice, June 20, 2002, Docket 2001-9854.

To promote competition, the following requirements must be implemented as part of any market approach:

- First, provide slots to limited incumbents.
- Second, reserve some number of slots only for new entrants and limited incumbents.
- Third, establish a blind sale/transfer allocation system for any proposed sale or lease of slots.

**Conclusion**

This Committee has played an active role in improving the nation's aviation system and in opening doors to competition and travel options for consumers. The ACAA applauds statements supporting competition made by Committee Members and on actions taken by the Committee. We thank you for holding these hearings. We are anxious to work with the Committee and the Administration to address issues that significantly impact carriers, passengers and communities.

It is essential that we create a first rate system that makes flying easier and safer. At the same time we must continue the dream of deregulation. All actions taken must ensure that competition is not blocked. Some of the actions being taken to address delays and congestion could forever close the door on competition and prevent the growth of small carriers at major airports. Special care must be taken to ensure that this does not happen. Our dream of deregulation is to create a high tech, safe, "delay free" and secure system that maximizes consumer choices and ensures that low fares

are available to all. Let's not make that dream just a memory. Instead, together let's make this dream become a reality.

We look forward to working with you on this and all matters. Thank you.