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

14 C.F.R. PART 93
Docket No. FAA-1999-4971
Notice No. 99-20

COMMENTS OF CANADIAN AIRLINES INTERNATIONAL LTD.

Canadian Airlines International Ltd. ("Canadian" or "Canadian Airlines") hereby submits comments on the Federal Aviation Administration's ("FAA") Notice of Proposed Rulemaking ("NPRM"), No. 99-20, to amend FAA regulations governing takeoff and landing slots and slot allocation procedures at certain High Density Traffic Airports ("HDRs") to conform to the 1995 U.S./Canada Bilateral Agreement ("Bilateral Agreement" or "Bilateral").

The FAA proposes to amend its regulations, *inter alia,* by converting certain international slots held by U.S. and Canadian carriers to domestic slots and by establishing a regulatory base level of slots for Canadian carriers. Canadian Airlines submits that the proposed amendments to the FAA regulations are not consistent with the Bilateral Agreement and favor large U.S. airlines at the expense of Canadian airlines and other small new entrant carriers. The NPRM should not become a final rule unless an additional rule or Special Federal Aviation Regulation is introduced to allow for an overall increase in slot allocations at HDRs.

I. THE PROPOSED AMENDMENTS TO THE FAA REGULATIONS ARE NOT CONSISTENT WITH THE BILATERAL AGREEMENT

A. The 1995 U.S./Canada Bilateral

In 1995, Canada and the United States entered into a Bilateral Agreement, which, provides:

> Canadian and United States airlines shall be subject to the same system for slot allocation at United States high density airports as are U.S. airlines for domestic services.

Air Transport Agreement between the Government of the United States of America and the Government of Canada, Annex II, Section 1, ¶ 1.

The Bilateral Agreement's intent was to guarantee fair and equal treatment of U.S. and Canadian carriers by ensuring that slot holdings would be acquired by Canadian carriers on a nondiscriminatory basis as compared to U.S. carriers.

B. Canadian's Slot Allocation

At O'Hare Airport, Canadian Airlines initially received six (6) slots as a result of the Bilateral. Since that time, Canadian repeatedly has applied for additional slots at O'Hare under the FAA's slot allocation procedures and consistently has been refused. Accordingly, since 1995, Canadian Airlines has operated a mere three flights per day between Chicago and all of Canada.[1] Canadian's slot allocation at O'Hare is so minimal that it currently qualifies as a new entrant (limited incumbent) carrier under 14 C.F.R. § 93.213(a)(5) because it holds or operates

[1] These winter season flights are designated as: CP221/CP215 Toronto-Chicago-Vancouver at 655 and 845; CP 225/CP215 Toronto-Chicago-Toronto at 725 and 845; and CP214/CP213 Vancouver-Chicago-Vancouver at 1150 and 1830.

fewer than 12 slots at O'Hare.[2] Canadian currently holds only 8% of the total sots allocated in the Chicago/Canada transborder market.

C. The FAA's Proposed Amendments

The FAA's proposed amendments seek to reclassify certain international slots held by Canadian carriers as domestic. As a quid pro quo, the FAA proposes that an equal number of international slots held by U.S. carriers also be reclassified as domestic. The NPRM states that by reclassifying slots from international to domestic, both U.S. and Canadian operators will benefit because both will have enhanced flexibility to manage their scheduling at HDRs. 64 Fed. Reg. at 2088.

Reclassifying the slots, however, will put Canadian carriers at an inherent disadvantage because they would not have access to the same array of slot utilization opportunities as U.S. carriers inasmuch as Canadian carriers are permitted to use their domestic slots for only one purpose -- transborder service between the U.S. and Canada. U.S. carriers, on the other hand, could use their domestic slots for international service, domestic service or transborder service to Canada. *See* 64 Fed. Reg. at 2088 (The "proposed 'conversion' to domestic status would provide affected [domestic slot] holders with increased scheduling flexibility; as domestic slots, they can be used for U.S./Canada transborder service, any other domestic service, or for international service"). As a result, the FAA's proposal intrinsically favors U.S. carriers because the proposed change will provide U.S. carriers slots with a higher

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[2] 14 C.F.R. § 93.213(a)(5) defines limited incumbent carrier as an "air carrier or commuter operator that holds or operates fewer than 12 air carrier or commuter slots, in any combination, at a particular airport...".

utility. The net effect would make transborder slots more valuable in the *hands* of U.S. carriers and, therefore, more expensive for Canadian carriers to acquire.

In addition to the above inequitable result, under the proposal, Canadian carriers also will lose the ability to apply for international slots, since the NPRM amends 14 C.F.R. § 93.217 [3] to exclude from that section the allocation of international slots at HDRs for transborder service operations solely between HDRs and Canada. Ironically, this proposal would not affect the allocation of international slots to non-Canadian foreign-flag carriers for continuation flights originating or terminating outside the U.S. 64 Fed. Reg. at 2089. In other words, non-Canadian foreign-flag carriers would continue to have access to international slots for transborder service between HDRs and Canada, whereas Canadian carriers would be restricted to the use of domestic slots for the same service. Domestic slots are virtually nonexistent. International slots, although scarce, are more readily available. Eliminating the use of international slots for transborder service between HDRs and Canada will significantly impede the ability of Canadian carriers (and U.S. carriers) to provide service to Canada. Non-Canadian foreign carriers, however, will continue to have access to international slots for transborder service and, accordingly, will gain an unfair advantage under the proposal.

Further, eliminating the allocation of international slots for transborder service between high density airports and Canada also will give U.S. carriers an advantage over Canadian carriers because, in the end, U.S. carriers will have access to an overall larger pool of slots due to

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[3] The FAA's proposal states that since Canadian carriers are receiving fourteen (14) slot allocations on a permanent basis, they no longer will be eligible to receive international slots under 14 C.F.R. § 93.217.

the reclassification.[4] A larger pool of slots will provide U.S. carriers the flexibility to reallocate domestic slots, now used for non-Canadian international service, to service between the U.S. and Canada. This is not an option available to Canadian carriers.

Finally, the NPRM provides that since Canadian carriers are subject to the same method for slot allocation as U.S. carriers, Canadian carriers will be permitted to participate in lotteries. Historically, the participation in slot lotteries was reserved for domestic carriers which, by definition, must be U.S. citizens. 49 U.S.C. § 40102 (2). In order to ensure Canadian carriers' access to lotteries, the FAA proposes to amend 14 C.F.R. § 93.225 to provide that participation in a lottery is open to each U.S. air carrier, *as well as where provided for by bilateral agreement.* 14 C.F.R. § 93,225 (e). *Nothing* in the U.S./Canada Bilateral Agreement, however, guarantees Canadian carriers access to U.S. slot lotteries. The proposed Amendment, therefore, fails to guarantee Canadian carriers the benefits described in the NPRM.

Enabling Canadian carriers to participate in lotteries, moreover, does nothing to ensure Canadian carriers equal treatment. Today, slot lotteries are virtually nonexistent. It is unlikely this situation will change in the foreseeable future. In this regard, a bill recently was introduced in the U.S. House of Representatives which would, in effect, allow for slot auctions

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[4] The reclassification of international slots held by U.S. carriers as domestic is intended to address a rule which limits international slot allocations to large U.S. carriers in order to prevent large carriers from forcing the withdrawal of domestic slots from other U.S. carriers in order to expand international operations. By reclassifying international slots as domestic, U.S. carriers will effectively lose thirty (35) international slots at O'Hare and seventeen (17) international slots at LaGuardia, thereby bringing them below their international slot allocation limit. This is an added bonus to domestic carriers because they now will have the ability to apply for additional international slots, an option they would not have had previously, in order to expand their international operations. Canadian carriers, on the other hand, will not have access to these additional international slots.

instead of lotteries. The Bill, H.R. 272 ("To enhance competition between airlines and reduce airfares, and for other purposes."), proposes to withdraw slots at HDRs and auction them to the highest "new entrant" bidder. Notably, the bill specifically provides that eligible bidders *must be citizens of the United States*. Accordingly, Canadian Airlines, which otherwise would be qualified to participate in the auctions described in the Bill, would be precluded from participating because it is not a U.S. citizen. Even assuming Canadian carriers were permitted to participate in auctions, any auction process where the slots to be purchased are intrinsically more valuable to U.S. carriers than to Canadian carriers means that the odds are stacked against Canadian carriers seeking to acquire such slots.

The NPRM will, if enacted, provide the two largest U.S. carriers with a broader array of slots and slot options than will be available to Canadian carriers. This, in and of itself, is inconsistent with the U.S./Canada Bilateral. The NPRM, moreover, does nothing to address the fundamental focus of the Bilateral, which was to provide equal opportunity of access by Canadian carriers to U.S. high density airports. The history of slot allocations subsequent to the 1995 Bilateral makes clear that Canadian carriers and Canadian Airlines, in particular, do not have equal opportunity of access to U.S. high density airports. There is no guarantee, furthermore, that future U.S. legislative or administrative initiatives will be consistent with the Bilateral's aim of equal treatment. The currently pending H.R. 272 is a perfect example of how Canadian carriers will continue to be unduly disadvantaged in the slot allocation process. Under no circumstance can it be said that, by enacting the NPRM alone, the Bilateral's intent will be fulfilled. The Department, in addition, must exercise its authority to allocate additional slots at U.S. high density airports to *both* Canadian and U.S. carriers. Such action, in conjunction with the NPRM,

would be a positive step toward equalizing the treatment of U.S. and Canadian carriers, consistent with the U.S./Canada Bilateral.

II. THE DEPARTMENT SHOULD EXERCISE ITS AUTHORITY TO ALLOCATE ADDITIONAL SLOTS AT HIGH DENSITY AIRPORTS

The Department has the authority to allocate additional slots at high density airports, either through the issuance of exemption slots pursuant to 49 U.S.C. § 41714, or by the issuance of Special Federal Aviation Regulations. It is undisputed, moreover, that certain high density airports (LaGuardia and O'Hare, in particular) have the capacity for increased operations. In 1995, the DOT issued a Report to Congress, *A Study of The High Density Rule*, in which it found that O'Hare, for instance, has a slot capacity of 159 operations per hour for the 155 slots allocated. *See* Report to the Congress: *A Study of The High Density Rule*, May 1995, p. 10. The report also found that gate and land-side capacities, as well as capacity for federal inspection services, such as immigration, customs, and agriculture, are sufficient to accommodate additional flights at O'Hare. *Id.* The Study found that such increased operations at O'Hare and LaGuardia generally would benefit consumers in the form of new and expanded air services and that a five percent projected average fare reduction would result due to increased competition at HDRs as more slots are allocated to more carriers. *A Study of The High Density Rule* at 3.

In October 1997, the Department issued an Environmental Assessment and Findings of No Significant Impact in which it supported the issuance of ten (10) additional slot exemptions at O'Hare and twenty-one (21) slot exemptions at LaGuardia under the DOT's slot exemption processes. *See* Environmental Assessment in Support of 10 slot exemptions at O'Hare and 21 slot exemptions at LaGuardia, Docket OST-95-368, Docket OST-97-2230, Docket OST-

97-2368, Docket OST-97-2442, Docket OST-97-2557 and Docket OST-97-2771, October 24, 1997, (hereinafter "Environmental Assessment") at p. 16. Notably, the DOT Order found that *no* environmental assessment was needed in order to allocate an additional *sixty (60)* operations at O'Hare and *thirty (30)* additional operations at LaGuardia. *Id*. In fact, the Assessment specifically held that an increase of sixty (60) slots at O'Hare and thirty (30) slots at LaGuardia would *not* result in a significant noise level increase or otherwise affect the "quality of the human and natural environment." *Id.* Presumably, an increase of slots above 60 likewise would not require further environmental assessment. At what point further environmental studies would be needed was not stated.

In the Assessment, the Department recognized that many airlines have been prevented from establishing routes between high density airports, such as O'Hare, and small and medium-sized airports. Environmental Assessment at p. 2. The Department expressed its commitment to ensuring that smaller and medium-sized communities receive adequate opportunities for air service and stated that one of its goals is to promote competition by allowing new access to smaller markets. Allocating additional slots at HDRs to all qualifying new entrant carriers (Canadian and U.S.), would promote the Department's commitment to providing air service to small and medium-sized communities.[5] Such action, moreover, is entirely consistent with the Department's Environmental Assessment.[6]

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[5] In the FAA Reauthorization Act of 1999 the Department proposes, in fact, that the high density rule be phased out over a five year period at LaGuardia, Kennedy and O'Hare airports.

[6] One suggestion, put forth in comments by the Air Carrier Association of America (ACAA), is to require foreign carriers to utilize their code share partner's slots. This proposal is (continued...)

Despite the ability to increase operations at high density airports, the Department has indicated that it will not issue any domestic exemption slots at such airports, claiming that further environmental assessments are necessary. Since the Department has the authority to allocate slots and it is clear the high density airports can support increased operations, there is no justification for denying slot and exemption requests to deserving carriers. The Department should take immediate steps to increase slot allocations at high density airports.

III. CONCLUSION

For the foregoing reasons, the Department's proposed regulations governing slot allocation procedures at certain high density airports are *not* consistent with the U.S./Canada Bilateral Agreement. In the event the Administrator takes final action on the NPRM, the Department should, simultaneously, open access to high density airports through greater use of

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[6](...continued)
not a solution, particularly since it is express Department policy that an important aspect of code sharing is the continued *competition* between airline partners in terms of price and service options. *See* Order 98-5-26 (approving the American Airlines and the TACA group reciprocal code sharing agreement). Forcing foreign carriers and, specifically, Canadian carriers, to utilize their U.S. code share partner's slots will result in an overall *decrease* in competition, providing large U.S. carriers with even greater market dominance at HDRs.

the exemption process set forth in 49 U.S.C. § 41714 as well as by the issuance of Special Federal Aviation Regulations or other available mechanisms.

Respectfully submitted,

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Thomas J. Whalen
Evelyn D. Sahr
Brenda A. Heffernan
CONDON & FORSYTH LLP
1016 Sixteenth Street, N.W.
Washington, D.C. 20036
(202) 289-0500

Attorneys for Canadian Airlines International Ltd.

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