





Continental Express<sup>1</sup> opposes the Borough President's motion and "objections" as follows:

1. While airlines such as Continental Express were busily making preparations to institute new services at LaGuardia in full compliance with Air 21 and the Department's orders, the Borough President waited seven weeks before submitting her "objections" to the Department, four weeks after petitions for reconsideration were due. Although Continental Express will not be operating its first new flights at LaGuardia until September, Continental Express has already planned commitments of aircraft, personnel and space for the new flights and offered the flights for sale. As a result, passengers are already counting on new Continental Express flights which the Borough President is asking the Department to cancel. The Borough President's motion contains not one word of justification for the tardiness of her "objections," much less the good cause required by Rule 9 (a)(2). Thus, the Department should deny the motion.

2. If the Department nonetheless considers the Borough President's "objections" as a petition for reconsideration, that petition should be denied. The Borough President's real complaint is that Congress has directed the Department to award slot exemptions for specified service with regional jets between LaGuardia and small-hub and non-hub cities and for service by new entrants using up to 20 slots. DOT and Congress did not "throw open the doors to LaGuardia" or

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<sup>1</sup> Common names are used for airlines.

“eviscerate the High Density Rule” (Objections at 6) before 2007. Congress instead set specific standards for the award of exemptions for regional and new entrant services and said DOT “shall grant” exemptions to qualifying carriers (see 49 U.S.C. § 41716(a) and (b)). DOT has done so. Thus, the Borough President’s request for a carrier and route selection proceeding “to determine which proposals would bring more service to underserved markets which really need it” is nothing less than a proposal to “eviscerate” Air 21.

3. Although the Borough President argues that the Department must perform a comprehensive environmental assessment before awarding the mandatory slot exemptions, the Department could not perform any such assessment and meet the timing requirements for action pursuant to Air 21. Clearly, the Department’s award of slot exemptions for qualifying regional aircraft and new entrant services is not discretionary. So long as the Department’s decision is not discretionary, no environmental assessment is required. (See American Airlines v. DOT, 202 F.3d 788, 803-04 (5<sup>th</sup> Cir. 2000) and the cases cited therein). Although the Borough President cites instances in which environmental assessments were performed for discretionary DOT slot exemptions, it cites no authority for imposing such requirements upon non-discretionary awards. Under Air 21, even where awards at Washington Reagan are discretionary Congress specified that no environmental evaluations would be required. (49 U.S.C. § 41718 (e)) Since the awards which the Borough President asks the Department to reconsider were not discretionary, no specific exception to the environmental requirements applicable to

discretionary awards was required, and the absence of any comparable exception provision applicable to the mandatory LaGuardia exemptions does not suggest otherwise. Similarly, the fact that adjacent sections of Air 21 establish a priority for airport noise compatibility planning and programs and require a study of community noise levels surrounding High Density Rule airports suggests only that Congress wanted the Department to provide funding to ameliorate noise impacts from new flights and to study the impact of the increased services after they are implemented.<sup>2</sup>

4. The Borough President recognizes “the great importance of the airports to the economy of New York City,” and says that “LaGuardia is the preferred airport of business travelers” but asks the Department to preclude flights which are important to New York’s economy and business travelers using small, quiet, new regional jet aircraft. Congress did indeed impose “some kind of restraint” on new flights at LaGuardia when it enacted Air 21: it mandated flights by regional jet aircraft only for non-hub and small-hub airports and it limited slots for new entrants to a maximum of 20. Subject only to those limits, Congress has ordered the Department to award slot exemptions, the Department has done so and

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<sup>2</sup> Similarly, Congressional enactment of Air 21 clearly overrides the Department’s decision in Spirit Airlines, Order 95-8-38, cited by the Borough President.

the Borough President has provided no justification whatever for reconsidering the Department's orders taking action mandated by Congress to grant slot exemptions to qualifying carriers.

For the foregoing reasons, Continental Express urges the Department to deny the Borough President's motion for leave to file "objections" and the request for reconsideration of the Department's orders awarding slot exemptions at LaGuardia pursuant to Air 21.

Respectfully submitted,

CROWELL & MORING LLP

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R. Bruce Keiner, Jr.  
rkeiner@cromor.com

Counsel for  
Continental Express, Inc.

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1724306

CERTIFICATE OF SERVICE

I certify that I have this date served the foregoing document on all parties to this proceeding in accordance with the Department's Rules of Practice.

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Edward B. Glennon

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