

BEFORE THE  
DEPARTMENT OF TRANSPORTATION  
WASHINGTON, D.C.

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Application of	)	
	)	
VANGUARD AIRLINES, INC.	)	
	)	
For an exemption from Subparts K and S	)	Docket No. OST-98-3550
of 14 CFR Part 93 (slot exemptions)	)	
Kansas City - New York (JFK)	)	
Pittsburgh - New York (JFK)	)	

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**ANSWER OF THE OFFICE OF THE QUEENS  
BOROUGH PRESIDENT, CITY OF NEW YORK**

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March 9, 1998

**TABLE OF CONTENTS**

	<u>Page</u>
I. INTRODUCTION .....	1

II. BACKGROUND .....	2
A. The High Density Rule .....	2
B. The Statutory Test .....	2
III. ARGUMENT .....	4
A. The Time Period for USDOT to Grant Additional Slots Has Expired .....	4
B. Vanguard’s Application Fails to Meet the Statutory Test for the Award of Slot Exemptions .....	5
1. Public Interest .....	5
2. Exceptional Circumstances .....	8
C. Vanguard’s Application Also Fails to Meet the New <u>Frontier Airlines</u> Standard of Review .....	9
D. USDOT Must Hold an <u>Ashbacker</u> Hearing Before Granting Any Additional Slots .....	11
IV. CONCLUSION .....	14

**ANSWER OF THE OFFICE OF THE QUEENS  
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**I. INTRODUCTION**

Once again, a “discount” airline is seeking an exemption from the “High Density Rule” at a New York City airport, in order to obtain free slots to add yet more flights to the already overcrowded airspace in this region. This means that there are now a total of eight applications pending before the United States Department of Transportation (USDOT), requesting permission to add 58 extra flights at Kennedy and LaGuardia airports every day.

Once again, the new applicant, Vanguard Airlines, claims that its service will be in the “public interest”. Like all of the previous applicants, however, Vanguard completely ignores the

significant adverse impact that the imposition of additional flights will have on the almost two million residents of this borough, including increased noise, flight delays, vehicular traffic congestion, higher air pollution levels, and decreased safety.

Once again, the most recent application wholly fails to meet the statutory requirements set forth by the United States Congress for the awarding of new slots. Specifically, in addition to failing to undertake a proper balancing of the “public interest” test, Vanguard provides no legitimate showing of “exceptional circumstances”, as required by law, and instead argues only that it will offer lower fares to airline passengers. Obviously, every “discount” carrier can claim that they will charge lower fares (because that is the definition of a “discount” carrier), and this assertion alone cannot form a sufficient basis for a slot award. Congress specifically stated that the airline must also show that its circumstances are “exceptional”, and Vanguard has not even attempted to make such a showing.

As a result, the Queens Borough President respectfully requests that Vanguard’s most recent slot exemption application be denied in its entirety.

## **II. BACKGROUND**

### **A. The High Density Rule**

Aircraft noise, congestion, delays and pollution have been a constant and intractable problem in Queens County for many years. LaGuardia and Kennedy Airports together handle about 700,000 flights and 50 million passengers per year, and this imposes a tremendous burden upon local residents.

This problem reached a crisis in the 1960s, and the FAA responded appropriately through the imposition of the High Density Rule, which placed a limit on the number of flights at several airports, including both Kennedy and LaGuardia airports. Over the past 30 years, the High

Density Rule has been the only effective limit on the amount of noise, congestion and pollution that Queens residents must endure.<sup>1</sup>

As part of the Federal Aviation Administration Authorization Act of 1994, the United States Congress ordered USDOT to undertake a study of the High Density Rule. In addition, during the time period of the study, Congress authorized USDOT to grant exemptions under very narrow circumstances, and established a two-part test for evaluating slot exemption applications.

### **B. The Statutory Test**

The first part of the statutory test established by Congress requires a showing that the additional flights are in the “public interest”. To meet this test, the applicant initially must demonstrate that public benefits would result from the slot exemptions, such as: (1) the institution of new service, or new non-stop service, where none previously existed; or (2) a substantial reduction in airfares in a market which is dominated by a single carrier or which otherwise lacks meaningful price competition. If the applicant makes this showing, then those potential benefits must be weighed against any potential adverse impacts on the public, such as: (1) an increase in aircraft noise; (2) more flight delays; (3) a worsening of vehicular traffic congestions; (4) a decrease in safety resulting from more congested airspace; and (5) the adverse health impacts from increased air pollution.

If this balancing shows that the adverse impacts from the flights outweigh any possible positive benefits, then the Department must deny the slot exemption application. If, in the alternative, the applicant demonstrates that the benefits outweigh the burdens of the new service, then the Department must address the second part of the statutory two-part test.

Under this second part of the test, the applicant must demonstrate that “exceptional” circumstances warrant the granting of the application. In undertaking this analysis, there are several factors that the Department must consider:

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<sup>1</sup> For a fuller discussion of the history behind the High Density Rule and the tremendous adverse impact that additional flights have New York City, see Consolidated Answer of the Office of the

1. Alternative Airports: First, the applicant must demonstrate that it is unable to provide service to the destination through another airport which is not covered by the High Density Rule. Obviously, if the service can be provided to an alternate airport, then there is no need at all for the slot exemption, and the application must be denied.

2. Alternative Times: Second, if the application relates to an airport which has hours that are not slot-controlled, then the applicant must demonstrate why the service cannot be provided during those hours. Once again, the ability to provide service during non-slot-controlled hours precludes the need for an exemption, and must result in the denial of the application.

3. Purchase or Lease of Slot: Third, the applicant must submit documentary evidence that it could not obtain the necessary slots from an existing holder, either through purchase or lease. Specifically, the applicant must provide: (1) copies of all written communications to other airlines and financial institutions setting forth the terms of any offers to purchase or lease slots; (2) copies of any responses to those requests, including responses setting forth terms different from those offered; and (3) an analysis of the financial impact on ticket prices if the applicant amortized the cost of any purchase or lease over a ten-year period. Without this information, the Department will not be able to determine whether the applicant should be required to purchase or lease slots on the buy-sell market.

4. Reallocation of Slots: If the applicant demonstrates that it cannot provide service to another airport, that it cannot provide service at the requested airport during non-slot-controlled hours, and that the cost of purchasing or leasing the slots would cause ticket prices to become uncompetitive, then the Department will have to decide whether to grant a new slot, or to reallocate an existing slot. If there are existing slots which are being underutilized, then the Department should withdraw those slots and should award them to the new applicant. If there are no underutilized slots, then “exceptional circumstances” exist and new slots can be awarded.

### **III. ARGUMENT**

#### **A. The Time Period for USDOT to Grant Additional Slots Has Expired**

As noted above, the United States Congress granted USDOT the power to grant slot exemptions as part of the mandate to study the High Density Rule in the Federal Aviation Administration Reauthorization Act of 1994. Pursuant to that federal law, USDOT was directed:

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Queens Borough President, City of New York, Docket Numbers OST-97-2870, OST-97-2885, OST-97-2932, OST-97-2970, OST-97-2984, OST-97-3086, OST-97-3087 (December 3, 1997).

(1) to determine whether technological and procedural improvements to the air traffic control system made it possible to eliminate the High Density Rule; and (2) to evaluate the impact that the elimination of the rule would have on airspace congestion, delays, noise, competition, safety and profitability.<sup>2</sup> Congress required USDOT to submit a report by January 31, 1995, and to commence a rulemaking proceeding and issue a final rule based upon the results of the study.<sup>3</sup>

Although Congress granted USDOT the power to grant exemptions to the High Density Rule during the period of the study, Congress specifically required that any slot exemptions that were granted must expire on the date on which the final rule became effective. Congress directed that the notice of rulemaking be issued no later than August 1, 1995, and that the final rule be issued within 90 days after the close of the public comment period. As a result, the final rule should have become effective on November 29, 1995, and therefore all prior exemptions should have terminated and USDOT's power to grant further exemptions statutorily expired on that date.

Contrary to this statutory direction, the Department never commenced a rulemaking on this issue, and thus a final rule was never issued (perhaps because the 1995 study concluded that the eliminating of the High Density Rule would have a net negative impact at both LaGuardia and Kennedy Airports). With the time period granted by Congress for the granting of exemptions to the rule having expired, there is no statutory basis for the granting of any additional slots, and Vanguard's exemption application must be denied.

#### **B. Vanguard's Application Fails to Meet the Statutory Test for the Award of Slot Exemptions**

Assuming arguendo that the Department still has the statutory power to grant slot exemptions, the request for additional slots must be denied because Vanguard Airlines completely fails to meet the statutory requirements for the granting of an exemption from the High Density Rule. First, the additional flights would have a net negative impact, and therefore are not in the "public interest". Second, Vanguard has failed to make any showing of "exceptional circumstances".

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<sup>2</sup> 49 U.S.C. § 41714(e).

<sup>3</sup> 49 U.S.C. § 41714(e)(2) and (f).

## 1. Public Interest

Vanguard Airlines readily admits that “substantial service exists between Kansas City and New York”, that “substantial service exists between Pittsburgh and New York”, and that “[w]ithout question, both the Kansas City-New York and the Pittsburgh-New York markets are large, well served and lucrative.”<sup>4</sup> As a result, there is no justification for granting exemptions to the High Density Rule to permit additional flights to these well-served markets.

Indeed, the best evidence against the granting of additional slots in the present case are Exhibits C, D and E to the application submitted by Vanguard, which show over 100 non-stop flights serving Kansas City and Pittsburgh every day. In addition, Vanguard’s attempt to bolster its application by asserting that it can provide one-stop service to Dallas, Denver, Minneapolis and Chicago is unavailing, because there is already a plethora of nonstop flights between New York City and all of those markets. Finally, this case is readily distinguishable from Reno Air, where USDOT granted additional slots, because there was no existing nonstop service between Reno and Chicago O’Hare, and the slot exemptions were deemed necessary to allow the initiation of that new nonstop service.<sup>5</sup>

Faced with the overwhelming evidence of available non-stop service to the public, Vanguard attempts to salvage its application by asking the Department simply to ignore all of the flights to Newark Airport and LaGuardia Airport. Vanguard asserts that these flights have no relevance, and focuses its public interest claim on the potential to provide service to Kennedy Airport.

This effort must fail, of course, because Vanguard has submitted absolutely no evidence to show that service to New York City via Kennedy Airport constitutes a separate market from service to New York City via Newark or LaGuardia. On this issue, the present case is identical to the Spirit Airlines case, in which the Department rejected Spirit’s request for additional slots to provide service between Detroit and LaGuardia, stating:

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<sup>4</sup> Application of Vanguard Airlines, Inc., pages 5 and 8.

<sup>5</sup> Reno Air, Order No. 94-9-30, page 3.

“The Detroit-LaGuardia market is currently served by Northwest with nine nonstop flights in each direction with seven flights operated on a daily basis and two flights operated six days per week. In addition, USAir provides a one-stop direct flight in the market six days per week. Furthermore, as pointed out by the Borough of Queens, there are five nonstop roundtrip flights operated by Trans World and Delta Connection in the Detroit-John F. Kennedy market and 14 nonstop roundtrip flights in the Detroit-Newark market operated by Continental and Northwest. While we acknowledge that some travelers prefer certain routings among these three, it is clear that current levels of service between the Detroit and New York areas are more than adequate and Spirit has offered no analysis to demonstrate that Detroit-LaGuardia is a separate, unique market.<sup>6</sup>

Finally, although Vanguard asserts that its regular fares are lower than those of other carriers, Vanguard’s own application shows that virtually all of the other carriers have promotional fares which are essentially identical to the Vanguard fares to Pittsburgh, and that at least one other carrier offers identical promotional fares to Kansas City.<sup>7</sup> With at least eight other carriers providing flights to one or both markets, Vanguard’s claim that there is a lack of price competition is unavailing.

This dearth of public benefits must be weighed against the significant adverse impacts that would result from the granting of the slot exemption application. Specifically, these new flights would simply exacerbate the already intolerable levels of noise, pollution, congestion and delays in and around Kennedy Airport. Moreover, even though Vanguard is seeking only four slots, the Department must consider the cumulative impacts that these adverse consequences would have on the local community. See Spirit Airlines, Order No. 95-8-38, at

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<sup>6</sup> Spirit Airlines, Order No. 95-8-38, pages 5-6. While it is true that the Department found that a separate market existed for LaGuardia Airport in granting the applications filed by Frontier Airlines and ValuJet Airlines, that finding purportedly was based upon an analysis of price differentials within those city-pair markets. That finding is currently the subject of litigation and, in any event, Vanguard has failed to make a similar showing that fares from Kansas City or Pittsburgh to Kennedy exceed fares to Newark or LaGuardia Airports.

<sup>7</sup> Application of Vanguard Airlines, Exhibit J.

page 9 (“[W]hile an additional departure or arrival may seem trivial, the cumulative impact of additional flights is highly disruptive.”).

Having failed to demonstrate the existence of any public benefits, and with this lack of benefits greatly outweighed by the burdens that would be imposed upon the community, it is clear that Vanguard Airlines has failed to establish that its application would be in the public interest. As a result, the application must be denied.

## **2. Exceptional Circumstances**

Although Vanguard’s inability to meet the “public interest” test requires the denial of its slot exemption application, it is also clear that Vanguard failed to meet the second part of the two-part test, because there are no exceptional circumstances warranting the granting of this application.

First, as noted above, there is no basis for granting a slot exemption if the applicant is able to serve the intended destination through another airport which is not covered by the High Density Rule. Here, Vanguard has provided no evidence to show why it cannot provide service to New York City through Newark Airport rather than Kennedy Airport. Second, Vanguard is already serving Kennedy Airport during hours that are not governed by the High Density Rule, and Vanguard can simply add another flight during those hours.

Finally, Vanguard has completely failed to demonstrate that it cannot simply purchase or lease a slot on the “buy-sell” market. Vanguard’s entire showing on this issue consists of a single paragraph which states that Vanguard has “attended industry meetings”, has “contacted” other airlines to determine if slots are available for a “reasonable” fee, and has determined that the cost is “prohibitive.” Unfortunately, Vanguard has failed to indicate what it considers “reasonable” or “prohibitive”, and thus has not provided the Department with a sufficient factual basis to find that a slot exemption is necessary.

Before granting any slot exemption, the Department must require that the applicant submit evidence setting forth the terms of any offers to purchase or lease slots, as well as the response to

those requests. The Department will then be able to determine the impact of the cost of a slot, amortized over a ten-year period, on the fares that would be charged by the applicant. If an applicant has based a slot application on a promise of price competition, then it must also show that the cost of the slots would eliminate that competitive advantage. If, on the other hand, the applicant can provide competitive prices by spreading the cost of the slot over a number of years, then the airline should be required to obtain the slot on the buy-sell market, and should not be provided with free slots by the Department. Vanguard has wholly failed to provide any of this necessary information.

Finally, even assuming that Vanguard were able to demonstrate that it could not provide service to Newark Airport, could not add flights at Kennedy Airport during non-slot-controlled hours, and could not feasibly purchase or lease a slot and provide competitive service, then the Department still must determine whether it should award a slot exemption or should reallocate a slot from an existing holder. By using its reallocation powers, the Department will be able to achieve all of the benefits that would accrue from the additional service, without increasing the number of flights at the airport, and therefore without adding to the noise, pollution, congestion, safety and delay problems suffered by the community. Only if the Department cannot reallocate slots can a finding of “exceptional circumstances” be made justifying the award of new slots to the applicant.

**C. Vanguard’s Application Also Fails to Meet  
the New *Frontier Airlines* Standard of Review**

On October 24, 1997, the Department issued its Frontier Airlines decision, which abandoned the statutory test established by Congress for the evaluation of slot exemption applications, and created a new standard for review.<sup>8</sup> The Queens Borough President has objected strongly to the Frontier Airlines decision, and joined with Mayor Rudolph Giuliani in the filing of a lawsuit challenging the validity of that decision.<sup>9</sup> Nevertheless, Vanguard Airlines fails to meet even the new, relaxed standard announced in Frontier, and thus the application must be denied even if the Frontier decision is upheld.

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<sup>8</sup> Frontier Airlines, Order No. 97-10-17 (October 24, 1997).

<sup>9</sup> City of New York v. Slater, No. 97-4358 (2d Cir.).

Specifically, in Frontier, the Department expanded the “exceptional circumstances” test by “recognizing the need for competitive service in a market, especially low-fare competitive service”. The Department determined that slot exemption applications seeking to provide “significantly lower fares in noncompetitive or underserved markets . . . can meet the exceptional circumstances criterion,” thus essentially merging the “exceptional circumstances” test with the “public interest” test.<sup>10</sup>

The Department attempted to “clarify” its new decisional guidelines by stating that it would consider the following three factors in evaluating the “public interest” and “exceptional circumstances” tests:

- The Department will “favor” proposals from airlines that will use Stage 3 aircraft;
- The Department will require a “reasonable expectation” that the proposed service is operationally and financially viable; and
- The Department will “place a premium” on the introduction of: (a) new nonstop service; and (b) new service by airlines that “have the demonstrated potential to offer low-fare competition”, where there is “single carrier service and the market can support entry”, or where existing services do not produce “meaningful price competition”.<sup>11</sup>

Assuming arguendo that Vanguard has met the first two factors,<sup>12</sup> it clearly has not met the third. Specifically, as Exhibits C, D and E attached to Vanguard’s application demonstrate, there is ample non-stop service to Kansas City and Pittsburgh from New York City. Second, this service is provided not by a “single carrier”, but rather by many different airlines. Finally, several

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<sup>10</sup> Frontier Airlines, pages 3-5.

<sup>11</sup> Id., page 4.

<sup>12</sup> It is not entirely clear that Vanguard’s proposed Kansas City service will be economically viable. Specifically, Vanguard states that it commenced its service to Kansas City with two daily flights in September 1997, but operated only one daily flight from December 1997 to February 1998, when its application was filed. Although Vanguard asserts that the reduction was due to an “aircraft availability” problem, it does not explain why it chose to suspend its Kennedy Airport service rather than service on any of its other routes.

of these airlines already provide low-cost service, and thus there is no basis for an award of additional slots to Vanguard.

**D. USDOT Must Hold an Ashbacker Hearing  
Before Granting Any Additional Slots**

In Ashbacker Radio Co. v. F.C.C., 326 U.S. 327 (1945), the United States Supreme Court held that where multiple parties have applied for a limited federal right and the applications are mutually exclusive, the federal agency may not grant the right to one applicant without providing a consolidated review of all applications. The Ashbacker doctrine has been followed by the Department other contexts, such as the grant of international route authority, where a comparative review occurs before any awards are made.

In its October 24, 1997 decision in Frontier Airlines, the Department decided to expand upon its existing statutory authority for review of slot exemption applications by applying a more relaxed scope of review than the standard set forth by Congress. In doing so, the Department made clear that some applicants who meet the new standard would still not receive exemptions, because only a limited number of slots were available. As stated by the Department:

“Even though we are expanding the use of our exemption authority, it is clear that we cannot grant all of the applications that might be made under this statute. We emphasize, therefore, that the number of available slots is very limited, and we may have to apply our guidelines on an increasingly more restrictive basis or even deny applications that otherwise meet the standards set forth in this order.”<sup>13</sup>

Thus, it is clear that slot exemptions at Kennedy Airport and LaGuardia Airport are a limited federal right, and that competing applications for such slots are mutually exclusive under Ashbacker.

Simultaneous with the issuance of its decision in Frontier Airlines, the Department released its Environmental Assessment which made a finding of no significant impact based upon an analysis of 30 additional flights.<sup>14</sup> The Department granted 21 flights in its Frontier decision, and thus there are, at most, 9 slots available for award at the two airports.

AccessAir Holdings, American Trans Air, America West Airlines, Colgan Air, Pan Am Airways, Carnival Airlines, Spirit Airlines and Vanguard Airlines all now have pending applications for a total of 58 slot exemptions at LaGuardia or Kennedy Airports. As a result of the complex interrelationship between the airspace used at LaGuardia and Kennedy, as well as the joint noise, congestion, delay and safety impacts throughout Queens County, a slot granted at one airport necessarily will reduce the availability of a slot at the other airport.

Accordingly, in the unlikely event that the Department determines that Vanguard Airlines has demonstrated that the additional flights would be in the public interest and that exceptional circumstances exist, then the Department would have to analyze all of the other pending requests, and determine which airlines have made similar showings. If the airlines which have met the statutory test are seeking to add more than 9 daily flights, then the requests are mutually exclusive, and the Department must undertake a comparative proceeding to choose the best applications before it can grant any slots. If the Department instead grants some applications

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<sup>13</sup> Frontier Airlines, Order No. 97-10-17, at page 5.

<sup>14</sup> The sufficiency of that environmental review is also the subject of the litigation commenced by the City of New York.

without deciding others, or without comparing the relative benefits and burdens of the different proposed flights, then it will have violated the Supreme Court's mandate in Ashbacker.

### CONCLUSION

For the reasons set forth above, the time period for the granting of exemptions from the High Density Rule has expired. Even if USDOT still has the power to award additional slots, the application submitted by Vanguard Airlines fails to meet the "public interest" test because the proposed service would provide no discernable benefits, and any such benefits would be greatly outweighed by the adverse impacts on the local community. In addition, the application fails to meet the "exceptional circumstances" test because: (1) Vanguard could offer the same service to Newark Airport; (2) Vanguard could provide service to Kennedy Airport during non-slot-controlled hours; (3) Vanguard has submitted no documentary evidence that it cannot purchase or lease the requested slots on the open market; and (4) the Department does not need to grant new slots because it can simply reallocate existing underutilized slots. Finally, if USDOT believes that the statutory test has been met, then it must hold an Ashbacker hearing to compare Vanguard Airline's request with other slot requests that have been filed.

Accordingly, the request by Vanguard Airlines for an exemption from the High Density Rule to expand its existing service to Kennedy Airport during slot-controlled hours should be denied in its entirety.

Respectfully submitted,

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March [], 1998

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