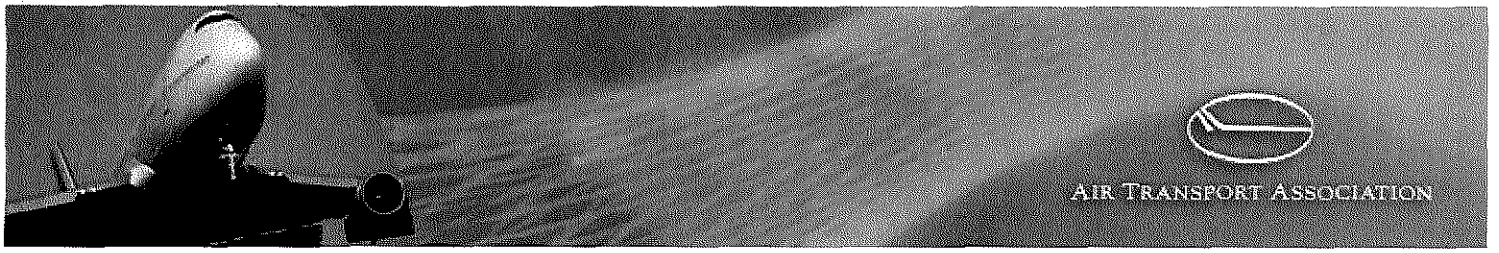

Air Transport Association of America, Inc.

Briefing for

Susan E. Dudley, Administrator,

Office of Information and Regulatory Affairs

September 26, 2008

Congestion Management Rule for LaGuardia Airport

- Confiscates slots currently operated by airlines
  (Option 1: 18 slots retired, 71 confiscated; Option 2: 179 slots confiscated)
- Slots auctioned annually over 5-year period
- Auction proceeds pay for auction process and other congestion initiatives in New York (option 1) or given to airline (option 2)
- DOT/FAA relies on newly discovered procurement and property management authority to support slot auctions

The Congestion Management Rule for LaGuardia Airport is Bad Policy

- ATA shares the FAA's goal of addressing congestion problems in the New York area. This proposal has nothing to do with congestion management, which is accomplished by capping hourly operations at the airport.
- Confiscating slots to reallocate them harms airlines, shareholders and lenders who reasonably rely on slot holdings and network structures
- This proposal comes at the worst possible time, when the airlines are suffering from a financial crisis due to high fuel prices and a sagging economy. The current financial crisis amplifies the already difficult economic environment for airlines and this proposal further destabilizes the industry.
- OMB should require the FAA to withdraw the proposal because it is unlawful and the agency has not made a "reasoned determination" that the proposal's benefits outweigh its costs.

The Proposal is Defective Legally

- FAA lacks regulatory authority to adopt a slot auction scheme
- New user fees are prohibited by statute
- The FAA does not have taxing authority
- The FAA cannot rely on its property management authority to adopt a slot auction scheme
- The FAA is prohibited from retaining and expending auction proceeds
- The proposal fails to provide a reasoned determination that the benefits justify the costs.

The FAA Lacks Authority to Implement Slot Auctions

- The FAA has authority under 49 U.S.C. 40103 to regulate the use of the navigable airspace of the United States.
  - "This section authorizes the FAA to develop plans and policy for the use of navigable airspace and to assign the use that the FAA deems necessary for its safe and efficient utilization. It further directs the FAA to prescribe air traffic rules and regulations governing the efficient utilization of the navigable airspace."
    - LGA SNPRM, Statement of Legal Authority

- But section 40103 does not grant FAA authority to auction the use of navigable airspace – in contrast to section 309(j) of the Communications Act, which confers on the FCC explicit authority to auction spectrum.

FAA Has Acknowledged it Lacks Authority to Implement Slot Auctions

- "This information will also be incorporated in a legislative proposal to Congress that will seek authority to utilize market-based mechanisms at LaGuardia in the future. Such legislation would be necessary to employ market-based approaches such as auctions or congestion pricing at LaGuardia because the FAA currently does not have the statutory authority to assess market-clearing charges for a landing or departure authorization. If Congress approves the use of market based mechanisms as we plan to propose, a new rulemaking would be necessary to implement such measures at LaGuardia."

- "Consequently, we are seeking the legislative authority to conduct auctions or congestion pricing at LaGuardia in the future. If Congress approves the use of market-based mechanisms, a new rulemaking would be necessary to implement such measures at LaGuardia."

-- August 29, 2006 LaGuardia NPRM 71 Fed. Reg. 51362, 51363

New User Fees Are Prohibited by Statute

- The FAA has not previously charged a fee for the assignment of slots. Consequently, collecting auction payments for slots would amount to the imposition of a new aviation user fee, which is explicitly *prohibited* by statute.

- **2008/Prior Consolidated Appropriations Acts**
  "none of the funds in this Act shall be available for the Federal Aviation Administration to finalize or implement any regulation that would promulgate new aviation user fees not specifically authorized by law after the date of the enactment of this Act."

  -- Public Law 110-161, December 26, 2007

The FAA Does Not Have Taxing Authority

- **Congress "is the sole organ for levying taxes"**
  - *National Cable Television Ass'n, Inc. v. United States*, 415 U.S. 336, 341 (1974)

- 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. No statute provides such a delegation.

The Independent Offices Appropriations Act Does Not Save the Proposal

- "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."

  -- *Engine Manufacturers Ass'n v. EPA*, 20 F.3d 1177, 1180 (D.C. Cir. 1994)

- The auction payments would bear no relation to the cost of conducting the auction or issuing the slots, so they cannot be predicated on the IOAA. Indeed, they are more likely to be viewed as a tax that Congress has not authorized the FAA to assess.

FAA Cannot Rely on Property Management Authority to Regulate Airspace

To Circumvent Prior FAA statements and Appropriation Acts the Agency now cites the Following Property Management Statutes as Authority to Conduct Auctions:

- 49 U.S.C. § 106(l)(6) - "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) - "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"

- 49 U.S.C. § 40110(a)(2) - "dispose of an interest in property for adequate consideration."

But slots are not property of the FAA, and the assignment of slots constitutes regulatory licensing, not the disposition of FAA property. *See Cleveland v. United States*, 531 U.S. 12 (2000). For these reasons, among others, the FAA's property management authority has no relevance here

The FAA Is Prohibited From Spending or Disbursing the Auction Proceeds as Proposed

- Since Congress has not authorized FAA to collect auction payments and spend them on congestion management projects in the New York City area (or to collect auction payments and disburse them to airlines from which the auctioned slots were taken), each of the Options proposed in the LGA SNPRM would violate 49 U.S.C. 45303(c)(2).

- In addition, because it would be *ultra vires,* the FAA's conduct of slot auctions (and the associated expenditure of auction proceeds) would violate the Anti-Deficiency Act, 31 U.S.C. § 1341, and the related anti-augmentation principle, as well as the "purpose" limitation on federal appropriations, 31 U.S.C. § 1301(a).

This Proposal Fails to a Provide a Reasoned Determination that the Benefits of the Regulation Justify Its Costs

- The FAA cannot know the costs of this proposal because they are still seeking comment on proposed auction procedures
- The cost/benefit analysis excludes the greatest cost of this proposal, the amount a carrier will pay for a slot at auction
- The only true benefit identified in the regulatory evaluation, a mandatory cap on the number of flights per hour, already exists today and therefore should not be counted as a benefit of this proposal

Conclusion

Executive Order (E.O.) 12866 sets out a number of regulatory principles, to which the FAA has not adhered in this rulemaking.

- First, "[f]ederal agencies should promulgate only such regulations as are required by law, are necessary to interpret the law, or are made necessary by compelling public need…."
  - Not only has the FAA failed to show a need for this proposal, it has failed to identify any legal authority to implement this proposal.
- Second, "[e]ach agency shall assess both the costs and the benefits of the intended regulation and … propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs."
  - The FAA's assessment of the costs and benefits of the SNPRM is flawed, it underestimates costs and attributes benefits that already exist.
- Finally, "[e]ach agency shall base its decision on the best reasonably obtainable scientific, technical, economic, and other information concerning the need for, and consequences of, the intended regulation."
  - This entire proposal is based on a theory, not related to congestion management, but reallocation of slots. The decision to proceed with this proposal is based on the desire to implement an experiment and ignores all outside information concerning the economic consequences of the proposal.

For these reasons, the SNPRM does not meet E.O. 12886's standards, and should be withdrawn.

Office of Dispute Resolution for Acquisition
Federal Aviation Administration
Washington, D.C.

Protests of	)	
Air Transport Association of America, Inc.	)	Docket No. 08-ODRA-00452
Northwest Airlines, Inc.	)	Docket No. 08-ODRA-00453
Continental Air Lines, Inc.	)	Docket No. 08-ODRA-00454
US Airways Group, Inc.	)	Docket No. 08-ODRA-00455
United Air Lines, Inc.	)	Docket No. 08-ODRA-00456
Delta Air Lines, Inc.	)	Docket No. 08-ODRA-00457
Port Authority of New York and New Jersey	)	Docket No. 08-ODRA-00461
New York Aviation Management Association	)	Docket No. 08-ODRA-00461
SIR Posting 6996	)	

PROTESTERS' COMMENTS ON
THE PROGRAM OFFICE'S RESPONSE TO PROTESTS

TABLE OF CONTENTS

INTRODUCTION

The Air Transport Association of America, Inc. ("ATA"), Northwest Airlines, Inc., Continental Air Lines, Inc., US Airways Group, Inc., United Airlines, Inc., and Delta Air Lines, Inc. (hereinafter referred to collectively as "Protesters") respectfully submit these Comments regarding the FAA Program Office Response to the Protests that have been filed in the above-referenced Dockets.

The protests in this proceeding challenge FAA's plans to conduct an auction of certain "unallocated" slots at Newark Liberty International Airport ("EWR") that the Agency says it will "lease" to the highest bidder for a period of five years. The FAA appears determined to proceed with this unprecedented and unlawful action despite the facts that –

- On repeated occasions, the FAA has admitted explicitly and correctly that it lacks the legal authority to auction slots.
- When Congress intends to authorize an agency to conduct auctions of what might be viewed as a license to utilize a public good, it does so explicitly – as it did when it authorized the Federal Communications Commission to establish and implement a competitive bidding process to obtain the right to use the airwaves, *see* 47 U.S.C. § 309(j). Congress has not given the FAA any such authority with respect to slots.
- Congress has expressly prohibited the FAA from expending funds to finalize or implement a regulation that would impose new aviation user fees; yet, in the face of this restriction, that is just what the FAA has done.
- By conducting a slot auction without congressional authorization, the FAA would be violating the Anti-Deficiency Act and the related anti-augmentation principle.
- The scheduling and conduct of the slot auction effectively amend the May 15, 2008 final Operating Limitations Order at EWR but deprive airlines and other affected parties of procedural rights under the Administrative Procedure Act ("APA") and the Due Process Clause of the U.S. Constitution.
- The auction proposal is opposed –
    - ➢ by virtually every airline operating at the three New York area airports where the auctioning of slots is contemplated;

- by the Port Authority of New York and New Jersey, which operates the three affected airports;
- by the association representing New York State airport management officials and related government agencies and planning boards;
- by associations representing both business and leisure travelers;
- by the Governors of New York and New Jersey (*see* Protesters' Exhibit ("PE")-1;
- by the Chairman and ranking members of the Senate Commerce, Science, and Transportation Committee and the Senate Committee on Appropriations (*see* PE-2 & PE-3); and
- by the bipartisan membership of the New Jersey Congressional delegation (*see* PE-4).

ODRA should recommend to the Administrator's designee that the FAA abandon its unlawful and unsupported plan to auction slots at EWR.

Part I of these Comments provides a brief supplementation and correction of the Statement of Facts set forth in the Program Office Response. The Comments then discuss the merits of the various issues raised in the Protests – including the FAA's lack of authority to auction slots (Part II), its violation of spending restrictions contained in the 2008 Consolidated Appropriations Act (Part III), its violation of the Ant-Deficiency Act and the related anti-augmentation principle (Part IV), its imposition of an unconstitutional tax (Part V), its denial of the Protesters' procedural rights under the APA and the Due Process Clause (Part VI), and its failure to structure a solicitation free of unacceptable ambiguity (Part VII). Part VIII addresses the questions (1) whether ATA has standing to file this protest (and, if not, whether ATA's lack of standing matters as far as ODRA's disposition of these consolidated protests is concerned); and (2) whether ODRA has jurisdiction to consider the issues raised in these protests and to award appropriate relief.

I. STATEMENT OF FACTS

A. Factual Supplementation

The Program Office Response contains a lengthy – and, for the most part, irrelevant – Statement of Facts, backed up by more than 600 pages of exhibits, most of which have nothing to do with the issues raised in these Protests. Instead, they presumably bear on the question whether auctioning slots at congested airports represents sound regulatory policy. That question, of course, is not one that falls within the purview of ODRA's dispute resolution jurisdiction; accordingly, it has not been raised by the Protesters, except through the incorporation of their respective rulemaking comments submitted as attachments to various of the Protests.[1] Nonetheless, in order to prevent the Program Office from constructing an entirely unbalanced record on this issue, we are submitting as Exhibit PE-5 through PE-37 copies of Comments and letters submitted by various parties (including economists Daniel M. Kasper and Darin N. Lee) in Docket Nos. FAA-2006-25709, FAA-2008-0221, and FAA-2008-0517, showing that slot auctions are both unnecessary in terms of congestion management, ill-advised as a matter of policy, and plagued with serious conceptual flaws.

In addition, since the Program Office makes light of the impact that assigning additional slots would have at EWR, we are submitting as Exhibit PE-38 a slide showing operation levels and delay rates at EWR for the January through July periods of 2000 through 2008. This illustrates graphically why adding the slots that FAA proposes to auction here would create the potential for even greater customer dissatisfaction with service at the airport.

---

[1] To the extent that ODRA concludes that the merits of the regulatory policy are properly before it, it should recommend that the Administrator's designee set aside the auction for the reasons set forth in those comments.

B. Factual Corrections

Several factual assertions in the Program Office Response are incorrect and warrant a response.

- In paragraph 15 on page 6 of its Response, the Program Office purports to quote from the "proposed [Newark Operating Limitations] Order" of March 18, 2008, referring to the possibility that FAA would lease certain slots pursuant to an auction. In fact, the lengthy quotation is *not* from the proposed Order; it is from the *preamble* to the proposed Order. As the Program Office acknowledges, this is a critical distinction – because the preamble, as distinct from the actual language of the Order itself, "prescribes nothing" and "does not have the binding effect on either the Agency or other interested parties that the Order itself does." Program Office Response at 68.

- A similar incorrect statement appears in paragraph 23 on page 7 of the Response, where the Program Office contends that the final Newark Operating Limitations "Order" (which was issued on May 15, 2008 and published in the Federal Register on May 21, 2008, 73 Fed. Reg. 29,550) contained certain statements regarding the FAA's alleged authority to lease slots at auction. As in the case of the proposed Order, however, those statements were contained in the *preamble* to the final Newark Order, *not* in the Order itself.

- Significantly, what the Program Office fails to recount is this. The text of FAA's *proposed* Newark Operating Limitations Order expressly provided for the auction of *unallocated* slots. Thus, paragraph 10 of the proposed Order stated: "Long-term allocations of returned or unallocated Operating Authorizations will be by auction." 73 Fed. Reg. 14,552, 14,558 (Mar. 18, 2008). When it issued the *final* Newark Operating Limitations Order, however, the FAA – presumably in response to comments opposing

allocation by auction – *deleted* that sentence. Instead, paragraph 10 of the *final* Newark Operating Limitations Order provides merely:

> In the event that a carrier surrenders to the FAA any Operating Authorization assigned to it under this Order or if there are unallocated Operating Authorizations, the FAA will determine whether the unallocated Operating Authorizations should be reallocated. The FAA may temporarily allocate an Operating Authorization if it determines that such allocation will not increase congestion at the airport. Such temporary allocations will not be entitled to historical status for the next applicable scheduling season under paragraph 9.[2]

Thus, in contrast to the *proposed* Order, the text of the *final* Newark Operating Limitations Order (which the Program Office contends remains in effect without change[3]) contains no language suggesting the possibility that slots (whether unallocated or otherwise) will be auctioned.

- Furthermore, in contrast to the preamble of the *proposed* Newark Operating Limitations Order, the preamble to the *final* Order makes no mention of auctioning "unallocated" slots at all. *See* 73 Fed. Reg. at 29,553. This is particularly significant – because, as the Program Office acknowledges, the FAA was distinctly aware of the fact that the slots that would have been allocated to Eos Airlines under the *proposed* Order were not allocated to any airline in the *final* Order, thereby, in FAA's view, making them "unallocated" slots. *See* Program Office Response at 8 (¶ 24).

- Although it was aware of the fact that the Eos slots were "unallocated" at the time it issued the *final* Order, the FAA did not include any provision in the Order itself (or in its

---

2 73 Fed. Reg. 29,550, 29,555 (May 21, 2008).

3 *See* Program Office Response at 32, 67 (stating that "the Program Office freely acknowledges" that it has not amended the final Newark Order and that it does not require an amendment).

preamble) providing for the auctioning of "unallocated" slots – even going so far as to *delete* a provision to that effect that had appeared in paragraph 10 of the *proposed* Order.

- The Program Office also fails to note that the August 6, 2008 Notice of Slot Lease Auction creates an entirely new class of slots at EWR – slots with a lifetime of five years that extends far beyond the expiration date of the final Newark Operating Limitations Order itself.

- Lastly, the Program Office neglects to mention that the FAA just recently determined that "it is necessary to limit unscheduled operations [at JFK and EWR], as even the addition of a few operations in the critical peak hours can result in added congestion and delay." 73 Fed. Reg. 41156, 41156 (July 17, 2008). How the allocation (by auction) of additional slots during peak hours at EWR can be reconciled with that determination is never explained. This is particularly troubling – because paragraph 10 of the final Newark Operating Limitations Order states that the FAA may reallocate unallocated slots only "if it determines that such allocation will not increase congestion at the airport."

II. FAA LACKS AUTHORITY TO AUCTION SLOTS

A. FAA Has Admitted That It Lacks Authority To Auction Slots

As the Program Office acknowledges (Response at 58-60), the FAA has admitted on a number of occasions that it lacks authority to conduct slot auctions. For example, when it issued the proposed Congestion Management Rule for LaGuardia Airport just two years ago, the FAA unequivocally denied having such authority:

> This information [regarding auctions of slots] will also be incorporated in a legislative proposal to Congress that will seek authority to utilize market-based mechanisms at LaGuardia in the future. *Such legislation would be necessary to employ market-*

> *based approaches such as auctions or congestion pricing at LaGuardia because the FAA currently does not have the statutory authority to assess market-clearing charges for a landing or departure authorization.* If Congress approves the use of market-based mechanisms as we plan to propose, a new rulemaking would be necessary to implement such measures at LaGuardia.

71 Fed. Reg. 51360, 51362 (Aug. 29, 2006) (emphasis added). That notice also stated that FAA "currently does not have full legislative authority" to use "market-based mechanisms, such as auctions or congestion pricing." *Id.* at 51363. The FAA has made similar disclaimers of authority to auction slots dating back more than two decades. *See* 50 Fed. Reg. 52138 (Dec. 20, 1985) (an "auction mechanism was not proposed . . . because legislation would be required for the collection and disposition of the proceeds").[4]

In its Response, the Program Office struggles to reconcile these admissions with its current assertion of authority to conduct auctions. The Program Office claims, for example, that the statement made in the 2006 LaGuardia rulemaking "did not address the FAA's authority to dispose of property." Program Office Response at 59. Strictly speaking, that is correct. The 2006 statement did not expressly address the FAA's authority to dispose of property – because no one (not even the FAA) imagined that the allocation of slots (a regulatory licensing action in which airlines are granted permission to use constrained navigable airspace) involves the disposition of FAA property; hence, there was no reason to address that issue. But the FAA's

---

[4] *See also Midwest 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").

2006 concession clearly was not limited to a lack of *regulatory* authority. Rather, the agency broadly acknowledged a lack of any kind of "statutory authority" for the very type of auction it now seeks to conduct. Given its strongly expressed desire to auction slots, the FAA surely would have pointed to its property disposition authority as a basis for doing so had it believed such authority existed.

Moreover, if it believed it already possessed authority to auction slots, there would have been no need for the FAA to seek legislation granting it such authority. Yet that is precisely what the FAA did in the proposed 2007 reauthorization package that the FAA submitted to Congress. *See* Opposition to Stay Request, August 20, 2008, at 11-12. The Program Office argues that the legislation was needed merely because FAA sought to allow congestion pricing by the airports. *See* Program Office Response at 59. But the LaGuardia rulemaking notice made clear that legislation was needed for "auctions *or* congestion pricing." 71 Fed. Reg. at 51362 (emphasis added). And, as the Program Office has admitted, the legislation FAA submitted to Congress as part of the proposed 2007 reauthorization package encompassed *auction authority for the FAA* as well as congestion pricing authority for the airports. *See* Opposition to Stay Request, August 20, 2008, at 11-12.

The Program Office's attempt to explain the FAA's 1985 admission that it lacked authority to auction slots is equally unpersuasive. At that time, the FAA said:

> The auction mechanism was not proposed in Notice 84-6 because legislation would be required for the collection and disposition of the proceeds. DOJ noted that several unresolved legal questions make it impractical to use auctions, citing in particular the Independent Offices Appropriations Act, 31 U.S.C. 9701 as an example. This is particularly so if these proceeds were to be applied for airport improvement as suggested by some commenters.

50 Fed. Reg. at 52183. The Program Office now claims that, in 1985, "it was not clear" the agency's "authority to dispose of an interest in property" included the authority to *lease* property. Program Office Response at 58. According to the Program Office, that authority was only made clear in 1996.

This purported explanation has nothing to do with the view expressed by the FAA in 1985. The FAA's 1985 admission that it lacked authority to auction slots does not even remotely suggest that the only problem was a lack of *leasing* authority. Rather, the FAA expressed concern that what it lacked was authority "for the *collection and disposition of [auction] proceeds*." (Emphasis added.) The question whether FAA had authority to grant *leasehold* interests in property was not even considered – presumably, because no one even imagined that the FAA could dispose of slots as its property. If there had been a reason for the FAA to consider whether its authority to dispose of property included leaseholds, the question clearly would have been answered in the affirmative – because, as the Program Office *itself* points out, "[a] federal agency's power to dispose of property includes the power to lease that property, even without express Congressional authority." Program Office Response at 52 (citing *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 331 (1936)). Since the Program Office considers that question to have been settled by the Supreme Court *in 1936*, the FAA could hardly have doubted its authority to grant leasehold interests *in 1985*.[5]

In sum, the Program Office's explanations of why the FAA's longstanding disclaimers of statutory authority to auction slots do not constitute admissions that it lacks such authority are so unpersuasive that even the Program Office remains unconvinced – and ultimately is compelled to

---

[5] The Program Office also contends that in contrast to 1985, it now has the authority to deposit funds into a specific FAA account. *See* Program Office Response at 59. But that could not possibly explain the agency's acknowledgment in 1985 that it lacked authority for "the *collection*" of auction proceeds. 50 Fed. Reg. at 52183 (emphasis added).

take the equally untenable position that the view of its statutory authority expressed by the FAA for more than two decades is simply "erroneous." *See* Program Office Response at 60. The FAA, however, may not dismiss its long-standing position in such a cavalier fashion.[6] In fact, the FAA was right in 1985 when it said it lacked authority to auction slots, and it was right in 2006 when it reiterated that position and sought to remedy the perceived problem by seeking slot auction authority from Congress. Unfortunately for the Program Office, Congress has not obliged. Indeed, as discussed in Part III below, Congress has gone in the opposite direction – by explicitly banning the FAA from expending funds to implement new aviation user fees without specific congressional authorization.

B. FAA Lacks Regulatory Authority To Auction Slots

As noted above, the FAA repeatedly has disclaimed statutory authority to auction slots. Indeed, even in its most recent notices regarding congestion management at the New York area airports, the FAA has acknowledged that it lacks *regulatory* authority to auction slots, contending only that it can rely on its newly-discovered property management or transaction

---

[6] Under well-settled precedent, federal agencies cannot simply reverse course without a sound justification. As the Supreme Court stated, "an agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance." *Motor Vehicle Manu. Assoc. v. State Farm Mutual Automobile Ins. Co.,* 463 U.S. 29, 42 (1983); *accord Immigration and Naturalization Service v. Cardoza-Fonseca,* 480 U.S. 421, 446-47 n. 30 (1987). Furthermore, this is not a case in which an agency is acting pursuant to a delegation of *regulatory* authority where Congress has left gaps for the agency to fill by adopting regulations having the force of law. *See Christensen v. Harris County*, 529 U.S. 576, 587 (2000); *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001). Rather, the FAA is attempting to apply its general *property management* authority as a substitute for regulatory authority that Congress has not conferred on the agency. In these circumstances, there is no basis under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U. S. 837 (1984), to defer to the FAA's belated and unexplained change in position – particularly since it does not involve the exercise of an express or implied delegation of authority to fill a gap in the regulatory language of the Transportation Code.

authority as the basis for doing so.[7] Yet, in a footnote of its Response, the Program Office states without explanation that it "believes it has authority to conduct an auction under 49 U.S.C. § 40103" – the primary grant of regulatory authority to the agency. *See* Program Office Response at 34 n.10. The Program Office's unsupported belief – which contradicts the position taken by the FAA just five months ago – is unfounded and cannot withstand scrutiny.[8]

First of all, by its terms, 49 U.S.C. § 40103(b)(1) authorizes the FAA to "assign *by regulation or order* the use of airspace necessary to ensure the safety of aircraft and the efficient use of airspace." (Emphasis added.) There is nothing here to suggest that the FAA may assign use of navigable airspace by auctioning slots or "disposing" of its "property." This is particularly significant because when Congress intends to authorize an agency to auction the right to use a public resource, it does so in explicit terms – as it did when it authorized the Federal Communications Commission to auction the right to use certain portions of the broadcast spectrum. Thus, 47 U.S.C. § 309(j) provides:

> (j) Use of competitive bidding
>
> (1) General authority
>
> If, consistent with the obligations described in paragraph (6)(E), mutually exclusive applications are accepted for any initial license or construction permit, then, except as provided in paragraph (2), the Commission shall grant the license or permit to a qualified applicant *through a system of competitive bidding* that meets the requirements of this subsection.

---

[7] *See, e.g.*, 73 Fed. Reg. 20846, 20852 (April 17, 2008) ("The FAA continues to believe that it cannot rely on a market-based allocation method under a purely regulatory approach, which is why it explicitly sought legislation on this matter.").

[8] *See id.*

(emphasis added). Here, by contrast, Congress not only has withheld any such authority, but has explicitly prohibited the FAA from promulgating or implementing "new aviation user fees not specifically authorized by law." *See* Part III below.

Oddly enough, the Program Office argues that the FCC's authority to auction spectrum supports its position that the FAA possesses implicit authority to auction slots. *See* Program Office Response at 49. In fact, however, the FCC situation demonstrates just the opposite, because the FCC has conducted auctions only pursuant to a grant of *express* statutory authority of the sort that Congress has withheld from the FAA. The Program Office wrongly implies that for four years before the 1997 amendments added the above-quoted language to the Communications Act, the FCC conducted auctions of spectrum even though it had no more authority to conduct auctions than the FAA currently does. According to the Program Office, the FCC then, like the FAA now, had merely what the Program Office obliquely calls "a statutory preference for competition." *Id.* at 49 n. 21. The Program Office is mistaken. Even in 1993, the FCC, enjoyed an *express authorization* to conduct auctions:

> (a) USE OF COMPETITIVE BIDDING.--Section 309 of the Communications Act of 1934 (47 U.S.C. 309) is amended by adding at the end the following new subsection:
>
> "(j) USE OF COMPETITIVE BIDDING.--
>
> "(1) GENERAL AUTHORITY.--If mutually exclusive applications are accepted for filing for any initial license or construction permit which will involve a use of the electromagnetic spectrum described in paragraph (2), then the Commission shall have the authority, subject to paragraph (10), to grant such license or permit to a qualified applicant *through the use of a system of competitive bidding* that meets the requirements of this subsection.

Pub. L. 103-66 § 6002, 107 Stat. 416 (1993) (emphasis added); *see also In the Matter of Implementation of Section 309(j) of the Communications Act Competitive Bidding*, FCC Rcd.

7635, 1993 WL 530414 (F.C.C.) ("On August 10, 1993, the Omnibus Budget Reconciliation Act of 1993 (Budget Act) added a new section 309(j) to the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-713 (Communications Act). This amendment to the Communications Act gives the Commission express authority to employ competitive bidding procedures to choose from among two or more mutually exclusive accepted applications for initial licenses."). The FCC, in short, enjoyed express auction *authority* starting in 1993. The 1997 amendments simply *mandated* that competitive bidding be used. The FAA, by contrast, has neither a *mandate* nor *authorization* to allocate slots through competitive bidding.

Furthermore, it cannot be said – and the Program Office does not argue – that auctioning slots is a means to reduce congestion and delay at EWR. That objective is achieved by *capping hourly operations* at the airport, not by allocating or reallocating the resulting slots – much less by allocating *additional* slots in already congested peak-period hours, as the Program Office plans to do here. Instead, by auctioning and leasing these slots, the FAA hopes to achieve certain *economic* objectives – such as promoting competition, increasing passenger throughput at congested airports, and reallocating slots to carriers that value them most highly and can maximize revenues from their use (even if that means that service to smaller communities will suffer). *See, e.g.,* 73 Fed. Reg. 29,626, 29,630-631 (May 21, 2008). But the FAA's authority under the Transportation Code is limited to ensuring the safety of air transportation and the efficient use of navigable airspace. *See* 49 U.S.C. § 40103(b). *Economic* regulatory authority – to the extent it still exists – resides with the *Secretary of Transportation* under 49 U.S.C. Chapters 411-421, not with the FAA. Consequently, the FAA's use of slot auctions to achieve economic objectives exceeds its regulatory authority under the Transportation Code.

THE FULL DOCUMENT IS AVAILABLE IN THE OIRA DOCKET LIBRARY