

BEFORE THE  
DEPARTMENT OF TRANSPORTATION  
WASHINGTON, D.C.

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Docket Section

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Application of )  
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 THE COMMUNITIES OF THE VIRGINIA )  
 PENINSULA )  
 )  
 for an exemption from 14 CFR Part 93, Subparts K and S )  
 pursuant to 49 U.S.C. §41714 (Nonstop Service to )  
 Chicago O'Hare) )

Docket OST-98-4604 - 3

ANSWER OF UNITED AIR LINES, INC.

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DATED: November 4, 1998

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**DATED: November 4, 1998**

**ANSWER OF UNITED AIR LINES, INC.**

United Air Lines, Inc. ("United") submits the following answer to the above-captioned application of the Communities of the Virginia Peninsula, consisting of the cities of Newport News and Hampton and certain civic associations (hereafter "Newport News"):

1. By its application, Newport News seeks six O'Hare slots by exemption to be used by an unidentified air carrier to operate regional jet service between the Newport News/Williamsburg Airport ("PHF") and Chicago O'Hare. While United appreciates Newport News' interest in obtaining new service, the application fails to articulate a legal basis under 49 U.S.C. §41714 for the Department to grant slots at Chicago for the purpose stated. Absent the required showing, the application cannot be approved, as the Department recently concluded in Order 98-9-24 with respect to a similar application.

The application also poses, but does not answer, important policy questions regarding the allocation of capacity at O'Hare. Despite its desire for service to O'Hare, Newport

News has not shown that this desire cannot be satisfied with existing service from nearby Norfolk Airport (“ORF”). In the alternative, if nonstop service to Chicago is needed from PHF, Newport News has not shown why that need cannot be met by service between PHF and Chicago Midway Airport.

Finally, if the Department accepts the premises on which Newport News has based its application, the Department must consider the request of Newport News in conjunction with the long pending request of Atlantic Coast Airlines, Inc. (“ACA”) to provide new services to O’Hare from Savannah, Georgia. See, Docket OST-98-3982. ACA’s application for exemption slots has been pending for some time and has been submitted by a carrier that is prepared to operate services immediately. Such an application must be given priority over the more speculative application of Newport News.

II. The Application Of Newport News Lacks A Legal Basis For Granting The Relief Requested And Is Inconsistent With The Department’s Requirements For Slot Exemptions.

Newport News’ application seeks exemption slots pursuant to 49 U.S.C. §4 17 14, but fails to identify the precise provision of that legislation under which the Secretary is empowered to grant the relief requested. A review of §4 17 14 shows that no such provision exists.

Section 4 17 14 authorizes the Secretary to grant exemptions to enable a carrier to operate slots in three distinct circumstances. Under the authority of subsection (a)(2) and orders issued by the Department interpreting that section (e.g., Order 96-1 0-42), slots may be granted to

carriers that propose operations to small communities for service authorized under the Essential Air Service program.

Newport News is an EAS point. The CAB, however, has already determined that Chicago is not an eligible hub for EAS service from Newport News. Order 8 1-5-1 59 at 5. An exemption under (a)(2) may be granted only where it involves service between an eligible point and a high density airport such as O'Hare and where that service is part of that eligible point's authorized essential air service. Since that is not the case with respect to Newport News-Chicago, no exemption may be granted under (a)(2).

Subsection (b) of the statute involves slots for foreign air transportation, clearly not applicable here. Subsection (c) requires that slots be used by a new entrant. A new entrant is defined as a carrier that has never sold or traded a slot at O'Hare and currently holds 11 or fewer slots at the airport. 49 U.S.C. §41714(h)(3). If this is the provision upon which Newport News is relying, then only such a carrier, and not the city, would be eligible to operate the slots requested here. In this case, the identity of the potential operator of the slots must be known to ensure that this criteria is satisfied before slots are granted for the service.

Indeed, the Department recently rejected a slot exemption application submitted by a community that was similar in many respects to the instant Newport News application. The Department reasoned that it would make no decision on such an application where it was

not accompanied by a specific operating proposal naming a committed air carrier and its actual schedule, including aircraft type. As a practical matter, the Department is not in a position to ascertain whether [such a] request comports with our guidelines

(see, e.g., Order 98-4-21, at 4) which include a requirement that the proposed service should be operationally and financially feasible.

Order 98-9-24 at 6-7. While Newport News has submitted a pro forma traffic and profitability forecast, there is no indication as to what carrier's costs were used to produce these results (Exhibits 21 and 21a). More importantly, no carrier has committed itself to operations by submitting an application or schedule for service between Newport News and Chicago.

Subsection (c) also includes the criterion that slots may be granted only if the Secretary finds the circumstances surrounding the application to be exceptional. Newport News has failed to show that its desire for service to Chicago O'Hare rises to an "exceptional" level, even under the broader interpretation of this criterion the Department has articulated in its most recent decisions.

In Order 97-10-16, the Department explained that its expanded definition of "exceptional circumstances" was aimed specifically at broadening access to slot-controlled airports to low-fare carriers. The Department also stated its intention to look favorably on proposals for service with Stage 3 jet aircraft that could be shown to be financially viable and that will provide new non-stop services or new competitive services by a low cost carrier. Without knowing what carrier (if any) ultimately might utilize the slots requested, Newport News cannot demonstrate that grant of its request would satisfy these criteria. In short, Newport News cannot meet the statutory standards of 9417 14 or show how its proposal will achieve the Department's objectives as articulated in Order 97-10-16.

Although the Department addressed in Order 98-9-24 the issue of the ineligibility of cities to receive slot exemptions under §41714, the message does not seem to be getting through.' United urges the Department to issue an order specifically dismissing the application of Newport News based on its ineligibility to receive an exemption. Such an order should be aimed at discouraging cities and other local associations from devoting their resources to seeking relief which cannot lawfully be granted. Their interests would be better served by approaching carriers with an interest in operating services to cooperate in efforts to gain exemptions where that may be appropriate and consistent with the statute and the Department's guidelines.

III. Chicago-Newport News Traffic May Be Served Through Norfolk Or Midway Airports.

Newport News has frequent nonstop service to Atlanta, Charlotte, Philadelphia and Washington Dulles operated at PHF. OAG, October 1998. All of these points are hubs for major carriers and would provide convenient connections to Chicago as well as other domestic and international points. To the extent that a Newport News passenger wanted nonstop service to Chicago, United operates 3 daily nonstop flights between Norfolk and O'Hare in large jet equipment.

The CAB has previously considered the issue of whether Newport News passengers are conveniently served via Norfolk. The CAB concluded that, with the deregulation

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<sup>1</sup> That order dealt with an application of the City of Savannah. Because an air carrier subsequently filed its own exemption application for slots to serve Savannah-Chicago O'Hare, the Department's rejection of the City's original application was somewhat less than definitive. Where, as here, no related carrier application exists, a clear and unequivocal dismissal notice is the appropriate remedy.

of routes, service at Norfolk improved and attracted passengers away from PHF. That, in turn, caused a decrease in service at PHF. Order 8 1-5-1 59 at 6-7. When Newport News sought a determination that Chicago should be served as an EAS hub, this was rejected due in part to the proximity of Norfolk. Id. Subsequently, when Newport News sought a determination that Atlanta should be designated as a second EAS hub, the CAB concluded that it

cannot ignore the existence and availability of service at Norfolk airport, approximately 21 miles from Newport News' city center.

Order 8 1-9-56. The Board ultimately rejected Newport News' request for service to Atlanta as a second EAS hub. Again, the Board concluded that the expansion of service to Atlanta from the nearby Norfolk airport made it unlikely that EAS service from Newport News could be financially viable. Order 84-1-64 at 2.

Norfolk is just as close to Newport News today as it was in 1984. Indeed, in its own application, Newport News concedes that Norfolk airport is only 28 minutes driving time from Newport News and 25 minutes from Hampton. (Exhibit 3a) These are the two largest communities on the peninsula served by PHF. With convenient driving times of that magnitude, it is not surprising that passengers in the Hampton/Newport News area have availed themselves of the improved services made possible by deregulation at Norfolk.

In a very real sense, Newport News is again coming before the U.S. government seeking a subsidy for service to Chicago just as it did in 198 1. Newport News is eligible to buy or lease a slot under the FAA's high density airport rules. Such slots have been purchased or

leased by non-air carriers in the past.’ By requesting the Department to issue it O’Hare slots by exemption, Newport News is seeking another form of subsidy in the very same city pair where subsidy was rejected nearly 20 years ago. Given the proximity of Norfolk and the superior, large jet service available at that airport, it is equally true today that service to Chicago from PHF would be of questionable financial viability even with slots provided free of charge.

The Department should follow a policy of encouraging medium sized regional communities which are served by multiple airports, such as the Tidewater area, to concentrate their airport development efforts to achieve improved service for the entire community rather than dividing service among competing airports. The long history of CAB’s attempts prior to 1978 to guarantee some level of service to smaller airports such as PHF has been demonstrated by deregulation to have been counterproductive. With the onset of deregulation, carriers were able to provide service to those airports that were best located to serve the entire community. The Tidewater area as a whole has benefitted by gaining better services to points such as Chicago than were delivered during the days of strict route regulation. As a result, traffic grew for the Tidewater area even though there was a decline at the less centrally located PHF airport. See, e.g., Orders 84-1 -64 and 84-1 O-1 38. To now use exemption powers in an attempt to attract carriers to airports such as PHF would be to turn the clock back on route deregulation.

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<sup>2</sup> The acquisition of a slot by a non-air carrier by purchase or lease under 14 CFR §93.221 does not raise the same issues as the exemption of a non-air carrier under 49 U.S.C. §41714. The terms of §93.221 allow the purchase, sale or lease of a slot by “any person” while §41714 allows exemptions to be issued only to air carriers for specific purposes.



Moreover, to the extent Newport News could support its own nonstop service to Chicago, it has not shown why this service could not be provided at Midway Airport. As Newport News points out, it is growing as an important leisure and tourist destination in the Tidewater area. (Application at 9, e.g.) Access to this segment of the Chicago market can be achieved through service to Midway Airport. As a number of carriers have discovered, Midway is often an effective equivalent, if not a superior choice, for service to meet the needs of leisure traffic, while providing a cost-effective alternative for point-to-point business travelers.<sup>3</sup>

Newport News' needs could effectively be met by any carrier willing and able to provide service to Chicago Midway. The service could be mounted on a schedule unconstrained by the limited availability of slots at O'Hare and offer frequencies tailored to the needs of this unique market. The choice of aircraft could be determined on the basis of market demand rather than the exigencies of the exemption process. The fact that nothing in Newport News' application suggests that this would not be a wholly functional and satisfactory alternative to service at O'Hare, should be considered by the Department as an important factor in its determination of whether Newport News' application would represent the highest and best use of incremental O'Hare capacity.

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<sup>3</sup> Newport News argues that it requires access to O'Hare in order to attract tourists from Canada who visit the Tidewater-area attractions. All Canadian passengers to Newport News via Chicago would, of course, involve connections. Those connections are presently available for these passengers at the three of the four hubs that already receive nonstop service to Newport News. Indeed, there is also direct, one-stop service available between Norfolk and Toronto, the busiest airport in Canada.

IV. Exemption Slots Should Not Be Granted On The Basis Of Speculation.

Newport News' application would require the Department to set aside valuable slots for six months with no assurance that any carrier meeting the statutory criteria would come forward to utilize them. Considering the continuing demand for slots at Chicago on the part of carriers and communities that have no alternative access to large-carrier hub networks or that require access to an international airport, reserving slots as Newport News, as requested, cannot be justified.

The Department has before it other applications from air carriers seeking the few slots currently available at O'Hare including the ACA application to serve Savannah mentioned above. To the extent that there are insufficient slots available to meet the needs of all current proposals, ACA's plan to use available exemption slots to serve the Savannah-Chicago market should be given priority over that of Newport News. Savannah, unlike Newport News, has a carrier that is proposing to provide service to Chicago with exemption slots. There is, therefore, no speculative element inherent in granting slot exemptions to ACA for service to Savannah.

ACA is prepared to start service by a date certain to meet the needs of passengers, and to immediately satisfy the requirements of the use-or-lose provisions of the High Density rule. The use-or-lose rule, in particular, is designed to ensure that valuable capacity at O'Hare is not wasted and is efficiently and consistently utilized. Without an identified carrier, exemption slots granted to Newport News will simply be "parked" for six months, as the community works to find an appropriate operator. Such a scenario is precisely contrary to the concerns of the FAA,

the Department, and even members of Congress, to ensure that valuable O'Hare capacity is fully utilized.

The Department can also expect that if it grants Newport News' application, it will be flooded with similar requests from similarly situated communities that hope, at some uncertain future time, to induce as yet unidentified carriers to provide service with slots that will, until then, remain unused. Indeed, Newport News' own application seems to have been inspired by the earlier community application which the Department rejected in Order 98-9-24. Were the Department to entertain Newport News' request, communities throughout the country that have been unable to generate sufficient traffic and competitive impact to attract a carrier will undoubtedly want to add to their own arsenals the advantage of slots at an HDR airport.<sup>4</sup> These speculative applications will introduce an additional factor for the Department to consider in its process of allocation incremental capacity at O'Hare.

United has consistently urged the Department to develop an economically rational, market-based framework by which to judge competing applications for slots. The most economically efficient way to allocate capacity in a deregulated environment is to allow the actual economics of providing air service to determine the results. Thus, the administrative mechanism should produce allocation decisions that most closely mirror the results that would be achieved in the marketplace.

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<sup>4</sup> See also application of the Community of Flint, Michigan, dated August 19, 1998, in Docket OST-98-4346. That application was unsupported by a carrier and was subsequently withdrawn by the community.

Comparing applications that propose definite service by an identified carrier as of a date certain, while striving to ensure that the results consistently reflect the needs of the marketplace, has proved complex enough for the Department to achieve. Adding the speculative factors represented by the application of Newport News, and the others that would most certainly follow, would make this already difficult balancing task all but impossible.

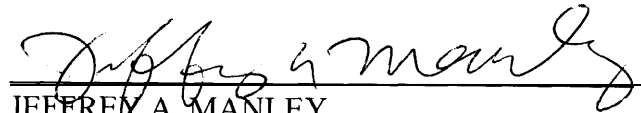
Finally, even if the Department were to entertain the speculative application of Newport News, despite all the foregoing concerns, it could not do so without at the same time considering mutually exclusive applications of carriers such as ACA. While it is not entirely clear how many O'Hare exemption slots remain available, it is unlikely to be enough to meet the requirements of all competing applicants. Because ACA's application for exemption slots to serve Savannah has been on file since June 24, 1998, it would be unfair to consolidate ACA's application into a proceeding involving the much later application of Newport News. Order 97-10-16 at 7. The proper course is to reject the application of Newport News just as the Department rejected the previous applications that were either unsupported by a carrier proposal or filed long after procedures on another earlier filed application had been completed.

V. Conclusion.

United appreciates Newport News' desire for access to O'Hare. The instant application, however, cannot succeed in meeting that need. On both legal and policy grounds, the Department cannot find that the request of Newport News satisfies the standards of the authorizing legislation or of the important policy determinations that must accompany decisions

to grant access to O'Hare under exceptional circumstances. On the basis of the foregoing,  
therefore, the application cannot be granted.

Respectfully submitted,



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**DATED: November 4, 1998**

CERTIFICATE OF SERVICE

I hereby certify that I have this date served a copy of the foregoing Answer of United Air Lines, Inc. on all persons on the attached Service List by causing a copy to be sent via first-class mail, postage prepaid.

  
Brenda Gardner

**DATED: November 4, 1998**

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