



U.S. Department
of Transportation
Federal Aviation
Administration

Office of Airport Planning
and Programming

800 Independence Ave., SW
Washington, DC 20591

AUG 28 2001

Mr. William DeCota
Director of Aviation
The Port of New York and New Jersey
One World Trade Center
New York, NY 10048

Dear Mr. DeCota:

Thank you for your July 6 reply to our May 22 review of the Port Authority of New York and New Jersey's (Port Authority's) Competition Plan for the Newark International Airport (EWR), requesting additional information and clarification. We also believe that our June meeting in Washington, DC was useful. Please be assured that we remain willing to discuss the competition plan with you at your convenience.

The information you provided was responsive to our request. In light of these responses, we have determined that your competition plan is in conformity with the requirements of section 155 of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR-21), Pub. L. 106-181, April 5, 2000.

We note that your plan, as supplemented, describes a number of initiatives that you propose to implement to encourage competition, including the following:

- Establishing the position of New Entry manager to focus on new entry carrier access;
- Establishing a Task Force to examine alternative financing arrangements and leasing strategies for additional common use or short-term leased gates for new entrants rather than relying on the current practice of private investment and ownership;
- Publishing new entrant airline rights in airport procedures documents, airline leases, and sublease agreements;
- Monitoring gate use in a more aggressive manner than in the past to facilitate opportunities for facility recapture and accommodating a requesting airline; and
- Requiring incumbent airline tenants to report sublease fees in comparison to their costs.

The Port Authority is to be commended for undertaking or proposing these policies and practices, which were identified as best practices to foster opportunities for airport access and competition in the Department of Transportation's *Report on Airport Business Practices and Their Impact on Airline Competition* (Airport Practices report).

We request, however, that you address a number of issues relating to these initiatives in future updates to the plan.

Availability of gate and related facilities

In the next update, please report on the status of the gate utilization and monitoring program at Terminals A, B and C and your updated gate utilization study. We understand that you will rely on updates to the EWR 1999 gate utilization study for purposes of triggering the forced accommodation clauses and overseeing compliance with the “requesting airline” provision of your master leases. Your supplemental information indicates that the Port Authority will require the airlines to submit gate utilization statistics on a monthly basis and/or have annual updates prepared by a consultant. We suggest that, at a minimum, the Port Authority should capture monthly gate usage statistics based on actual operational data. As we indicated in our *Airport Practices* report, an airport that monitors actual gate usage of all gates is informed about the efficiency of gate usage and can better facilitate requests by other carriers for use of the gates.

Leasing and subleasing arrangements

With regard to accommodation of requesting airlines, we still have several concerns regarding potential barriers to entry that we suggest you address in the next update. First, the lease requires a written denial of sublease access before the Port Authority will assist a requesting airline. Your plan, as supplemented, indicates that the Port Authority has not followed this practice and will amend the lease to eliminate this requirement. Please confirm in your update that airlines operating at EWR and prospective new entrants are aware that the Port Authority has adopted a new policy no longer requiring a written denial. Please also update us on the elimination of this requirement.

Second, the lease recites the “necessity of the flights” as a factor for the Port Authority’s consideration in forcing accommodation of a requesting airline. Your plan, as supplemented, indicates that the benefits of increased competition by new entrant service would also be a factor in the Port Authority’s consideration. Please confirm in your update that airlines operating at EWR and prospective new entrants are aware that the Port Authority will consider this as an important factor for forcing accommodation. Additionally, we note that the master lease expressly prohibits an airline tenant from using competition as a factor in refusing accommodation. However, it is unlikely that applicable Federal legal requirements, including Airport Improvement Program (AIP) and Passenger Facility Charge (PFC) assurances, would permit a refusal of access based on competition even if the master lease were silent. Similarly, it is unlikely that these same legal requirements would permit a denial of access based on the Port Authority’s view of whether the service is needed. In these circumstances, we continue to question the justification for retaining in the master lease “necessity for flight” as a factor for the Port Authority’s consideration in accommodating a requesting airline.

Your plan, as supplemented, indicates that Spirit, America West, AirTran, and Midway have made requests for gates and that Midwest Express may need different ticket counter space. It also explains America West's request for a hardstand location in the United Parcel Service ramp. Please report in your update on the Port Authority's efforts with respect to these requests and the role played by the New Entry manager.

We also suggest that the Port Authority address certain issues relating to the forced accommodation clause in its next update. Your plan, as supplemented, indicates that you will change certain lease provisions such as the 30-day advance notice to the issuance of the six-month notice of termination and the "outdated" 60 percent use-it-or-lose-it requirement calculated from the base year. You also referred to the 90-day period the airline tenant has in which to submit a plan and commence corrective action. We are pleased with your commitment to attempt to compress the time periods for forced accommodation in order to provide underused gates to a new entrant or expanding incumbent carrier. We look forward to the information provided in your update regarding your efforts to change these requirements or to obtain an airline's voluntary consent to release gates in a shorter period of time.

We are very interested in an update of and a timeline for the Task Force efforts to explore alternative financing arrangements, such as PFC or non-airline funding, for further terminal expansion and the addition of up to ten new gates. These efforts for financing and leasing arrangements that could attract more new entrants are particularly important in view of the long time frames remaining on the airport's exclusive leases for incumbent airlines and the fact that the dominant carrier—Continental—was able to obtain two additional gates in connection with the airport's recapture of the United gates while domestic new entrants were initially unable to obtain any gates. We understand that, in the latter regard, the Port Authority is considering taking back one of the gates Air Canada is subleasing to Spirit so that Spirit would not have to sublease the gate. Please report on the Port Authority's efforts relating to the common use gates and the considerations for making more capacity and access available generally to new entrant carriers at EWR.

In addition, the plan, as supplemented, indicates that master airline leases now require airline service standards. Please clarify these arrangements and indicate whether they are voluntary on the part of airlines and how the Port Authority intends to monitor these standards.

Your plan, as supplemented, states that the Port Authority requires a minimum security deposit based on a credit analysis as well as the prepayment of airport fees. Please explain these requirements further in your next update. As we stated in our *Airport Practices* report, terms and conditions imposed on carriers must be reasonable and nondiscriminatory. The obligations for signatory status must be reasonably available to requesting carriers.

Please also include the revised Port Authority sublease consent process that will require the Port Authority to ensure consistent terms and more reasonable treatment of

sublessees by: (1) approving a sublease termination; (2) closely monitoring the sublease fee and limit airline overhead or administrative charges; (3) requiring the tenant to report sublease and handling fees in comparison to the cost of facilities and services provided; and (4) formulating a dispute resolution process.

Gate assignment policy

We suggest that the Port Authority institute procedures for the recapturing of gates that will provide for notification of availability of recaptured gates through a formal process to ensure that gate assignments are fair and transparent. We also suggest that the Port Authority consider implementing procedures that will provide real-time gate utilization information.

Please report on the process of formalizing the station managers' meetings, including preparation of agendas, notifications of all airlines, and including discussion of issues relating to airline accommodation. Please also report on the status of consideration of updating the "3 daily flight minimum" gate utilization rule.

Our *Airport Practices* report indicated that competitive access to airports is facilitated when airport officials provide new entrants with timely information about, and access on reasonable terms to, necessary gates, facilities and services. We encourage Port Authority to adopt policies for informing all existing carriers and carriers that have expressed interest in operating at the airport of gate availability both at the new terminal and at other gates that may become available.

Finally, the Federal Aviation Administration (FAA) recognizes the important role that John F. Kennedy International Airport plays in alleviating congestion at EWR and providing access to the New York City market such as in the case of Jet Blue. However, EWR, as the covered airport, is the subject of the competition plan requirement. We note that the focus of the competition plan requirement (49 U.S.C. 47106(f)) is on individual airports, rather than airport systems. Therefore we must, in reviewing your plan for EWR, focus on conditions at that airport.

Because of the interest that members of the traveling public may have in airline competitive issues at your airport, including your policy of ensuring reasonable access for new entrant airlines, we encourage you to put a copy of your competition plan and supplemental submission, including the FAA's responses, on your airport web page.

Please note that the Secretary is required to review the implementation of the competition plans from time-to-time to make sure each covered airport successfully implements its plan. In connection with our review, we may determine that site visits to one or more locations would be useful. We will notify you should we decide to visit EWR in connection with its competition plan.

If you have any questions regarding this letter or the FAA's review of your plan, please contact Mr. Barry Molar, Manager, Airports Financial Assistance Division at (202) 267-3831.

We look forward to seeing the future updates of your Competition Plan.

Sincerely,

Original Signed By

Catherine M. Lang
Director, Office of Airport
Planning and Programming

AAS400:KCWillis:KCW:78741:rt 08/14/01;Egabler 08/23/01
Rev. per OST 8/17/2001; 08/23/2001; th 08/28/01
G:\APP500\complans\EWRsuppl2.doc
APP-500/APP-530/AGC-600/C-10/X-60/APO-1/APO-200/AEA-600/Gabler