U.S. Department
of Transportation
Federal Aviation
Administration

MAY 24 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: Bill —

Thank you for your submittal of the Port of New York and New Jersey 's Competition Plan for Newark International Airport (EWR). We have reviewed your competition plan for 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. However, a final determination is being withheld pending submission of further materials, as outlined below. Additionally, we offer some suggestions for your consideration as you implement and update your plan.

Section 155 of AIR-21 enacted 49 U.S.C. 40117(k) and 47106(f), which require the filing of a competition plan for a covered airport seeking FAA approval of a passenger facility charge (PFC) or of an airport improvement program (AIP) grant application, beginning fiscal year 2001. The Secretary of Transportation will review the competition plans to ensure that they meet the statutory requirements and review their implementation from time to time to make sure that they are successfully implemented. The legislative history of the requirement states that "[t]he underlying purpose of the competition plan is for the airport to demonstrate how it will provide for new-entrant access and expansion by incumbent carriers. By forcing the airport to consider this, it would be more likely to direct its AIP and PFC money to that end." H. Rpt. 106-513. The FAA's Program Guidance Letter (PGL) 00-3, May 8, 2000, addressed nine features of an airport's business practices required by section 155 of AIR-21.

As you know, section 155 was enacted after the Department of Transportation published its *Report on Airport Business Practices and Their Impact on Airline Competition* (*Airport Practices* report). That report identified a number of airport business practices that could serve as impediments to new entry or expansion of incumbent carriers at an airport and a number of best practices that airport management have followed to achieve compliance with airport sponsors' obligation to provide access to all aeronautical users on reasonable terms without unjust discrimination.

Your plan indicates that the Port Authority is considering the following pro-competitive actions:

- Developing a program to regularly assess and monitor gate utilization of exclusive use gates for forced accommodation provisions;
- Eliminating a required 30–day notice of intent required in the existing airline master lease to exercise the lease's forced accommodation provision; and
- Reducing the six month advance notice of forced accommodation to 90 days.

Your plan also indicates that the Port Authority may consider alternative methods of financing and leasing that will enhance competition when new facilities are constructed. Your plan indicates that the Port Authority management is aware that existing arrangements and facilities potentially could function to hinder competition at EWR. We are troubled, though, that the plan does not reflect a stronger commitment to make necessary institutional or structural adjustments in the long-run or to pursue more aggressively in the short-run strategies to enhance competitive opportunities under existing arrangements.

We are also concerned that the Port Authority intends to rely on providing a requesting airline with space available at an alternative airport within the Port Authority's system. You have indicated that any competition plan for EWR must be considered within the context of the Port Authority's regional role and mission and that EWR is part of a multi-airport system. However, while the FAA acknowledges your position, it should be recognized that Congress required the Port Authority to submit a competition plan describing how the Port Authority will provide reasonable access at EWR. Moreover, as the plan acknowledges, each of the Port Authority Airports has developed its own unique niche. It is not clear that, for a carrier that fits the profile of EWR's niche, access to either LGA or JFK would constitute an effective competitive opportunity in all cases.

You also noted that the FAA is working with the Port Authority on ways to alleviate flight delays and congestion at LaGuardia, both in the short- and long-term. Please be assured that the FAA is endeavoring to solve the delay problems at LaGuardia and has been working with other members of the aviation community on this problem. The FAA will seek public input before taking action at LaGuardia.

Given the above discussion, we have identified a number of areas where additional information is necessary to support a determination that your plan is in accordance with section 155. The specific information will provide a more complete description of how the airport accommodates new entry and expansion. We request that you provide two copies of this information within 30 days. First and foremost, please provide a copy of your master airline

agreement and of recent agreements for new Terminal A space. For your convenience, we have categorized our remaining requests according to the applicable features discussed in PGL 00-3.

Availability of gate and related facilities

We are concerned that the Port Authority's narrow view of its legal authority over exclusive-use gates is inconsistent with its rights and obligations as a recipient of AIP funds to arrange for accommodation of new entrants or expanding carriers. The inability of an airport to provide reasonable access cannot be justified on the basis of gates being unavailable due to exclusive-use leases. As we found in the *Airport Practices* report, the airport manager has certain rights and obligations to arrange for gate sharing even without a negotiated agreement. In particular, an airport operator may not claim lack of gate availability when in fact gates are not fully used; defer completely to incumbent tenants' determinations on whether or not, and how, to accommodate requesting airlines; or deny access based solely on existing lease arrangements. Further, the fact that a facility was financed by a special purpose bond does not relieve the airport operator of its obligations with respect to access, since the facility is located at a federally-assisted airport.

Please describe the circumstances and results of all requests for new or expanded gate access at EWR within the last 12 months.

While the Port Authority has negotiated explicit agreements for gate sharing of exclusively leased gates, we encourage you to approach the negotiations from the perspective that the Port Authority has certain rights and obligations as outlined above. However, we must caution you that the failure to successfully conclude those negotiations would not obviate the Port Authority's Federal obligation to accommodate qualified carriers seeking to initiate or expand operations at the airport. Please explain what steps the Port Authority would take to accommodate a carrier's request for facilities in a situation where unused exclusive-use space was present, but the forced accommodation provisions of the EWR leases were not applicable and construction of a gate by the requesting carrier was not a practicable alternative.

We are also concerned with the Port Authority's reliance on private investment for gates. The competition plan indicates that the Port Authority encourages private investment in airport facilities, including terminals. While the competition plan also discussed the possibility of the Port Authority financing additional gates in Terminal A and reallocation of space in Terminal B, the plan made it clear that the Port Authority Board had not authorized such capital expenditures. Please explain any plans of the Port Authority for construction of gates that may be available for new entrants and for making existing gates available for new entrants.

The plan indicates that United Airlines will release seven underutilized gates as a result of reallocation of space among airlines within Terminal A, and that Air Canada will lease several of these gates. Please explain the circumstances for the Port Authority's recapture of these underused gates and the prospects for a similar event to occur for gates to be available for domestic use by a new entrant. Was any consideration given to making the recaptured gates available on a preferential- or common-use basis, in lieu of exclusive-use with forced accommodation?

We are also troubled by the discussion in the plan of potential delay that a new carrier may experience in gaining access to the airport. This can take from two to three months to almost a year. Also, the time can vary depending upon the type of service and scheduling requirements. For instance, in July 1998, AirTran requested access to EWR, yet there was no action on their request until the Department of Transportation intervened in the Spring 1999. What steps has the Port Authority taken to reduce the amount of time needed to gain access, monitor gate utilization, and improve communication with carriers waiting gate space? In addition, we have been told that America West may have been included among those carriers that requested gates at EWR and was accommodated only with a sublease arrangement. Do your records indicate if a request exists and if so, what action was taken on America West's request?

Regarding recapture of gates, the plan states that the Port Authority may recapture or require gate-sharing if the lessee's gate usage averages 60 percent of that of its base year, and subject to cure. The plan states that new agreements require a minimum usage of three daily operations. Please explain the justification for the 60 percent minimum use or lose/share requirement, as well as the three daily minimum operation requirement. We are concerned that these requirements may favor the incumbents to the detriment of new entrants, particularly when there is unscheduled gate time available for a significant portion of the day. Please also explain whether the Port Authority will accommodate a new entrant on a gate that is being used for the minimum daily operations and what the Port Authority's procedures are for such accommodation.

Leasing and subleasing arrangements

According to the competition plan, new entrants must gain access to the airport through an incumbent leasing arrangement. The plan states that sublease arrangements can be negotiated directly between an entrant and an incumbent airline master lessee and approved by the Port Authority. Furthermore, the lease requires that all sublease fees must be reasonable, non-discriminatory, and based on a pro-rata recovery of the lessee's costs. We are concerned, though, that the competition plan indicates that the Port Authority does not regulate sublease fees "consistent with the privatized nature of the terminals."

Our *Airport Practices* report found that an airport is obligated to ensure that sublease fees and terms are reasonable, given the public use nature of an airport subject to federal grant assurances. How does the Port Authority monitor sublease arrangements to ensure that fees are reasonable, non-discriminatory, and based on a pro-rata recovery of the lessee's costs? What policies, if any, does the Port Authority have regarding the inclusion of overhead or administrative charges in sublease rates or handling fees?

Our *Airport Practices* report found that airports that oversee the reasonableness of sublease fees and terms facilitate competitive access at their airports. While the plan states that the Port Authority resolves disputes on a case-by-case basis, no detailed information on the process or applicable policies is included. Please clarify the procedure an air carrier would follow if a dispute arose concerning access, sublease fees or terms, or ground handling services. For example, is there a recognized forum for hearing complaints? What role, if any, do carriers serving the airport have in this forum? Is there an appeal process? How are new entrants made aware of the procedure?

The competition plan also indicates the Port Authority will analyze specific requests for flight accommodation, including the "necessity for the flights." Please explain this criterion, particularly in light of the suggested best business practice in our *Airport Practices* report of encouraging access by new entrants as a means of promoting competition. Additionally, an airport may not deny access to a requesting airline on the basis that the requesting airline may directly compete with an incumbent carrier.

We are concerned that a requesting airline is required to obtain written denials from incumbent carriers before the Port Authority will assist an airline in obtaining access. This may place an undue burden on a new entrant, discouraging competitive entry at EWR rather than encouraging entry. Please explain whether the Port Authority is considering amending this requirement.

In September 2000, the Port Authority imposed prepayment requirements for PFCs and airport use fees on Legend Airlines as conditions of access to LaGuardia Airport. Since EWR is part of a multi-airport system, please inform us whether EWR has a policy similar to LaGuardia's regarding the prepayment of fees by new entrants and, if so, the basis for the policy.

Gate assignment policy

The plan does not indicate any Port Authority policy regarding gate availability announcements. In the absence of such a policy, please indicate how gate and facility availability information is acquired by tenants, non-tenants, and prospective new entrants that have expressed interest in operating at the airport.

We also encourage the Port Authority to consider and address in a future update of the competition plan other concerns and issues we outline below, in light of the best practices identified in the *Airport Practices* report. For your convenience, we have categorized them according to the applicable features discussed in PGL 00-3.

Availability of gate and related facilities

The competition plan indicates that there are 92 aircraft gates available at EWR, 77 exclusive-use and 15 common-use. The 15 common-use gates are under the control of the Port Authority and used primarily for international traffic. The Port Authority uses its own procedures combined with those of the International Air Transportation Association's *Scheduling Procedures Guide* for gate management. However, there appears to be no ongoing system for monitoring the utilization of the domestic exclusive-use gates. The plan indicates that the Port Authority collects the data, but the data tables throughout the plan are based upon 1998 data that were prepared by a consultant. We anticipate that this problem will be corrected when the Port Authority institutes its gate monitoring program identified as part of its competition plan. Please report on the status of the gate monitoring program under development in your first update to the plan.

As we indicated in our *Airport Practices* report, an airport that monitors actual gate usage of *all*
gates is informed of the efficiency of gate usage and can better facilitate requests by other carriers for use of the gates.

The competition plan indicates that carrier usage is one of the factors considered in the current and ultimate allocation of terminal gates. How does the Port Authority determine if its terminal gates are being used efficiently? Does the Port Authority employ an independent measure? For example, how would the Port Authority determine if the base year utilization is an efficient use of the gate?

Please revise your plan to identify the number and assignment of gates and ticket counters to the eight master airline lessees and their respective sublessees.

Leasing and subleasing arrangements

The plan proposes the construction of additional exclusive-use gates. We strongly recommend that the Port Authority consider making any new gates available on a preferential- or common-use basis, as well as converting existing exclusive-use gates to preferential- or common-use when the opportunity presents itself.

Gate assignment policy

You may want to consider developing procedures to ensure that all carriers operating at the airport, and new entrants that have expressed an interest in operating there, are aware of available gates or gate-sharing arrangements. Our *Airport Practices* report found that airport managers that routinely make this information available to all such carriers facilitate competition at the airport.

Finally, 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, including this response, on your airport web page.

Upon receipt of the information to be submitted within 30 days, the FAA will complete our review of the plan and advise you of our final disposition.

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.

Sincerely,

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

WP: EWRltr2
AAS400:KCWillis:KCW:78741:04/17/2001; rt 05/21/01
Rev. per OST 5/18/2001
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