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August 3, 2017

VIA ELECTRONIC MAIL

Jennifer Dopazo Gilbert, Esq.
Law Office of Robert L. Allen Jr., LLP
300 Washington Street
Brookline, MA 02445

Dear Ms. Gilbert,

As discussed, attached is a letter from Massport's outside counsel regarding noise based landing fees.

Sincerely,

Catherine M. McDonald
Chief Legal Counsel

Enclosure

cc: Elizabeth Becker

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August 2, 2017

Via Email to cmcdonald@massport.com
and First Class Mail

Catherine M. McDonald, Chief Legal Counsel
Massachusetts Port Authority
The Logan Office Center
One Harborside Drive Suite 200S
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Re: Massport CAC Motion re: 21st Century Noise Based Landing Fee

Dear Catherine:

You have asked for my opinion regarding whether the Massachusetts Port Authority ("Massport") could institute a "noise-based landing fee" at Logan International Airport ("Logan").

I. 21st Century Noise Based Landing Fee Resolution

On March 9, 2017, the Massport Community Advisory Committee ("Massport CAC") adopted a resolution recommending that Massport "adopt a 21st Century Noise Based Landing Fee based on the noise certification data for each aircraft type arriving at Logan, using an overweight on Approach and Take Off noise in combination with Sideline noise, and a standard seating component for each aircraft type." Massport CAC PowerPoint Presentation at pp. 11-12 (March 9, 2017) (attached as Exhibit A).

In support of that resolution, the Massport CAC asserts that "Massport has the authority" to impose a noise-based landing fee "as authorized by FAA legislation in Chapter 18 Airport Rates and Charges in accordance with 49 Code (CFR) of Federal Regulations Part 16." Although unclear, it is likely that the first reference is to Chapter 18 of the Federal Aviation Administration' s ("FAA's") Airport Compliance Manual, Order 5190.6B. Chapter 18 addresses the rates and charges that an airport sponsor may impose on aircraft; however, an airport operator's limited ability to impose noise-based restrictions, including noise-based landing fees, is addressed in Chapter 13 of the Manual. Order 5190.6B, Chapter 13.14. The second citation may be a reference to 14 CFR Part 36, which establishes noise standards for aircraft, or to 14

CFR Part 161, which requires FAA approval for any airport noise or access restriction, or to 14 CFR Part 16, which sets forth the rules of practice for FAA enforcement proceedings but does not contain substantive restrictions on aircraft noise.

II. Conclusion

A noise-based landing fee is prohibited by federal law unless approved under the FAA's prescribed regulatory process. The FAA has never granted approval for a noise and access restriction for Stage 3 aircraft (all aircraft currently serving Logan meet Stage 3 standards), and it is virtually inconceivable, given the burden on interstate and foreign commerce and the national aviation system, that the process involved in applying for that restriction could be successful given the circumstances here. The following is a summary of the federal law relevant to the issue.

III. Part 161 Noise and Access Restrictions

A. ANCA Applies At All U.S. Public Use Airports.

In 1990, Congress passed the Airport Noise and Capacity Act ("ANCA"). 49 U.S.C. § 47521 *et seq.* ANCA reflected a compromise between air carriers and airport operators: it required a gradual phase-out of older and noisier Stage 2 aircraft, but strictly limited an airport operator's ability to impose noise or access restrictions. According to ANCA, as implemented by 14 CFR Part 161, "Notice and Approval of Airport Noise and Access Restrictions," airports must follow an onerous process to meet the prerequisites for an access restriction on Stage 3 aircraft. *See generally* Airport Compliance Manual, Order 5190.6B, Chapter 13.2, 13.14-15. According to Massport's most recent Environmental Data Report, virtually all aircraft operations at Logan are Stage 3 aircraft.

The United States Court of Appeals for the Second Circuit recently confirmed the sweeping applicability of ANCA's requirements. ANCA's "plain statutory text is fairly read to mandate the identified procedural requirements for local noise and access restrictions on Stage 2 and 3 aircraft at *any* public airport." *Friends of the Easthampton Airport, Inc. v. Town of East Hampton*, 841 F.3d 133, 148 (2d Cir. 2016) (emphasis in original), *cert. denied*, 2017 WL 915255 (June 26, 2017). The Court cited the Congressional findings that "uncoordinated and inconsistent" noise restrictions at different airports "could impede the national air transportation system," and that, as a result, "noise policy *must* be carried out at the national level." *Id.* at 150 (emphasis in original), quoting 49 U.S.C. § 47521 (2) – (3). In that case, without complying with ANCA, the airport operator enacted a curfew on all aircraft from 11:00 p.m. to 7:00 a.m., an extended curfew for certain especially "noisy aircraft," and a one round trip per week limit on noisy aircraft's use of the airport during the busy summer season. The Second Circuit concluded that, because the airport operator had imposed those curfews and flight caps without complying with ANCA, all of those measures were federally preempted, *id.* at 151-152, and it remanded the case to the District Court for the entry of an order enjoining all three access restrictions. *Id.* at 155.

"Noise or access restrictions" subject to ANCA are not limited to flight curfews, but include:

> restrictions (including but not limited to provisions of ordinances and leases) affecting access or noise that affect the operations of Stage 2 or Stage 3 aircraft, such as … a restriction imposing limits on hours of operations; *a program of airport-use charges that has the direct or indirect effect of controlling airport noise*; and any other limit on Stage 2 or Stage 3 aircraft that has the effect of controlling airport noise.

14 CFR § 161.5 (emphasis added). Compliance with ANCA and Part 161 is required for airports to be eligible for Airport Improvement Program ("AIP") grants and to impose passenger facility charges ("PFCs"). 49 U.S.C. §§ 47524(e), 47526. While we understand that Massport depends heavily on both AIP grants and PFCs to maintain and improve Logan Airport, loss of that funding is not the only consequence for violating ANCA. The FAA or other aggrieved parties, including airport users, may bring an enforcement action, independent of whether an airport receives federal funding, to enjoin access restrictions that violate ANCA.

B. The FAA Has Never Approved A Restriction For Stage 3 Aircraft Under ANCA.

An airport operator may impose an access restriction "only if the restriction has been agreed to by the airport proprietor and all aircraft operators or has been submitted to and approved by the [FAA] after an airport or aircraft operator's request for approval." *See Friends of the Easthampton Airport, Inc.*, 841 F.3d at 148 ("[t]he phrase 'only if' is unambiguously limiting"). To approve a Part 161 airport noise or access restriction, FAA must find that the proposed restriction meets all six of the following statutory conditions:

> (1) the restriction is reasonable, nonarbitrary, and nondiscriminatory;
>
> (2) the restriction does not create an undue burden on interstate or foreign commerce;
>
> (3) the restriction is not inconsistent with maintaining the safe and efficient use of the navigable airspace;
>
> (4) the restriction does not conflict with a law or regulation of the United States;
>
> (5) an adequate opportunity has been provided for public comment on the restriction; and
>
> (6) the restriction does not create an undue burden on the national aviation system.

Id. at § 47524(c)(2)(A)-(F); *see* 14 CFR Part 161.305. ANCA and Part 161 do contain a grandfather provision, specifically exempting access restrictions effective on or before October 1, 1990. 49 U.S.C. §§ 47524(b) & (c).

The process to obtain FAA approval of a Part 161 application is onerous and virtually never successful. As part of the Part 161 process, airports must compile and present evidence to the FAA to demonstrate support for each of the six statutory factors. The FAA also encourages airport proprietors to prepare a study under 14 CFR Part 150 (implementing the Aviation Safety and Noise Abatement Act, "ANSA") evaluating alternative mitigation approaches as part of the Part 161 process. As part of that study, the airport sponsor must "analyze fully the anticipated

impact of any proposed restriction," and the FAA evaluates whether that "restriction places an undue burden on interstate or foreign commerce or the national aviation system, and whether the restriction affects the sponsor's ability to meet its federal obligations." Airport Compliance Manual, Order 5190.6B at 13-7. The FAA does not restrict its review solely to the airport where the restrictions are imposed. "While airport restrictions may have little impact at one airport, they may have a great deal of impact at others by adversely affecting airport capacity or excluding certain users from the airport." *Id.* at 13-15.

Based on the expansive definition of a noise or access restriction, which includes "a program of airport use charges that has the direct or indirect effect of controlling airport noise," 14 CFR § 161.5, CAC's proposed noise-based landing fee would be subject to review under ANCA. I have surveyed FAA's decisions on Part 161 applications since ANCA's adoption in 1990. The FAA has never approved an access restriction on Stage 3 aircraft, and has never approved a "noise-based" surcharge on a landing fee.

For example, in 2009, the Burbank-Glendale-Pasadena Airport Authority proposed to implement a mandatory nighttime curfew for all operations between 10:00 p.m. and 6:59 a.m. at Bob Hope Airport in Burbank, California ("Burbank"). The FAA denied the Part 161 application, concluding, after a thorough review of the evidence, that the proposed restriction was unreasonable on a number of grounds, including that Burbank did not demonstrate an adequate cost-benefit analysis and accordingly did not show that the restriction would not create an undue burden on interstate or foreign commerce, or the national aviation system. More recently, in 2014, the City of Los Angeles submitted a Part 161 application for a curfew for nighttime departures over communities to the east of Los Angeles International Airport ("LAX"). The FAA denied the Part 161 application, concluding that the benefits of the restriction were *de minimis* when considered in the context of LAX's noise problems, and that the curfew could create an undue burden on interstate and foreign commerce.

Here, the burden on interstate and foreign commerce, and on the national aviation system, would potentially be much more significant than in Burbank or LAX. If the noise-based landing fee sets high enough penalties for noisier aircraft, both domestic and foreign carriers would either pay higher costs, or choose to avoid Logan and travel to other airports, constricting carrier choices as to routes as well as passengers' available travel options, and causing additional traffic into already overcrowded airports serving other northeastern cities. As the FAA noted in the Burbank matter, "impacts in complex and congested [airspace] ripple throughout the national aviation system." The airspace in the northeastern United States is as crowded as any area of the county.

Please let us know if you have questions or would like to discuss the CAC resolution further.

Sincerely,

David S. Mackey

cc: Christina S. Marshall

Exhibit A

Massport CAC General Meeting

March 9, 2017

Massport Adopt a 21st Century Noise Based Landing Fee

Motion: Massachusetts Port Authority Community Advisory Committee recommends Massport adopt a 21st Century Noise Based Landing Fee based on the noise certification data for each aircraft type arriving at Logan, using an overweight on Approach and Take Off noise in combination with Sideline noise, and a standard seating component for each aircraft type.

RESOLUTION ADOPTED BY MCAC

Massport has the authority to pioneer a new 21st Century Noise Based Landing Fee (NBLF) as authorized by FAA legislation in Chapter 18 Airport Rates and Charges in accordance with 49 Code (CFR) of Federal Regulations Part 16. A NBLF would be "Fair and Reasonable" and "Not Discriminatory" as defined in Sections 18.5 and 18.8, and Federal law does not require a single rate-setting approach.

- Massport's mission includes "a commitment to our neighboring communities".
- Boston-Logan Airport is surrounded on three sides by communities with residential and commercial property and impacts the very densely populated Greater Boston area with over 4.7 million residents.
- Adoption of a NBLF by Massport would be clear evidence that the wellbeing of these citizens is a critical factor in the operation of the Boston-Logan Airport.
- Boston-Logan Airport is defined as an endpoint airport as opposed to a hub in the airline route system. This fact allows a Noise Based Landing Fee to provide an economic incentive for airline schedulers to plan the frequent use of their newest and quietest equipment to Logan.

Massport Adopt a 21st Century Noise Based Landing Fee continued

- The difference between the noise levels of the newest planes and older equipment – even the same model – is enormous. Boeing claims the 737 MAX (Southwest is a launch customer) is 40% quieter than the 737 NG. It is 70% quieter than older 737s. A320s and A321s manufactured more recently have the vortex generators that eliminate the Airbus whine on approach. Adoption of a NBLF would probably reduce total noise from Logan operations by 10 to 20%.
- Massport can acquire noise certification data for each and every aircraft type manufactured by Airbus, Boeing, Embraer, etc. (the data is part of the certification process and is specific to engine type).
- Massport has made extensive investments to protect close in communities from sideline noise, so we recommend the NBLF be based on Approach and Take Off noise measurements only, and include a seat component.
- Massport can assure the adoption of a NBLF is revenue neutral by simulating the current and projected Logan utilization and adjusting the noise based factor to achieve a revenue neutral result.