U.S. Department
of Transportation
**Federal Aviation
Administration**

800 Independence Ave., S.W.
Washington, D.C. 20591

APR 30 2003

Mr. Chris Kunze
Manager, Long Beach Airport
4100 Donald Douglas Drive
Long Beach, CA 90808

RE: Final Settlement Agreement Between the City of Long Beach and American Airlines, Inc., JetBlue Airways Corp., and Alaska Airlines, Inc.

Dear Mr. Kunze:

In February 2003, the City of Long Beach (City) submitted a final settlement agreement entered into on February 5, 2003 ("agreement" or "settlement agreement"), between the City, American Airlines, JetBlue Airways, and Alaska Airlines (the parties) relating to the allocation of operating slots at Long Beach Airport. The agreement resolves a dispute among the parties relating to the allocation of a limited number of regular and supplemental slots at the airport. The nature of the dispute and the process leading to the agreement resolving the dispute are set forth in the recitals to the agreement. As noted in section 1.9 of the agreement, the Federal Aviation Administration (FAA) offered its services in the mediation of a settlement, and FAA representatives participated in meetings of the parties during negotiation.

The City has accepted grants under the Airport Improvement Program (AIP), 49 U.S.C. § 47101 *et seq.*, and is obligated by the assurances in its grant agreements with the FAA. Obligations under the grant assurances include the obligation to provide access by air carriers on reasonable and not unjustly discriminatory terms. Airports imposing restrictions on Stage 2 aircraft operations proposed after October 1, 1990, and imposing restrictions on Stage 3 aircraft operations that became effective after October 1, 1990, are subject to the provisions of the Airport Noise and Capacity Act of 1990 (ANCA), 49 U.S.C. § 47521, *et seq.*, and its implementing regulations at 14 C.F.R. Part 161.

The parties have asked the FAA for an opinion on the consistency of the proposed agreement with Federal law and policy on airport access. Section 4.2 of the settlement agreement conditions implementation of the agreement on FAA concluding that the agreement is consistent with applicable Federal law. We will first address the

applicability of ANCA to the settlement agreement, and then discuss the consistency of the agreement with the City's AIP grant assurances.

The Airport Noise and Capacity Act (ANCA)

On November 5, 1990, the Congress enacted ANCA to establish a national program for review of airport noise and access restrictions. ANCA, as implemented by 14 C.F.R. Part 161, requires airport proprietors that propose to implement airport noise or access restrictions that affect the operation of Stage 2 aircraft to comply with specific notice, economic cost benefit analysis, and comment requirements. ANCA further requires that airport proprietors proposing to implement noise or access restrictions on Stage 3 aircraft operations provide a detailed economic cost benefit analysis, demonstrate satisfaction of six statutory criteria, and obtain FAA approval prior to implementation of any such restrictions, unless agreement is obtained from all affected aircraft operators.

When ANCA was passed, it permitted airports to implement Stage 2 restrictions that were proposed and Stage 3 restrictions that were in effect before its effective date. ANCA also expressly gave a statutory exception to certain noise restrictions already in existence. These exceptions are collectively called the "grandfathering" provisions of ANCA. Three of the "specific exemptions" are relevant here and specifically provide that ANCA's requirements do not apply to:

- a subsequent amendment to an airport noise or access agreement or restriction in effect on November 5, 1990, that does not reduce or limit aircraft operations or affect aircraft safety. 49 U.S.C. 47524(d)(4).

- an airport noise or access restriction adopted by an airport operator not later than October 1, 1990, and stayed as of October 1, 1990, by a court order or as a result of litigation, if any part of the restriction is subsequently allowed by a court to take effect. 49 U.S.C. 47524(d)(5)(A).

- a new restriction imposed by an airport operator to replace any part of a restriction described in subclause (A) of this clause that is disallowed by a court, if the new restriction would not prohibit aircraft operations in effect on November 5, 1990. 49 U.S.C. 47524(d)(5)(B).

The FAA included similar exemption language in its implementing regulations at 14 C.F.R. Part 161.7(b), which states that:

> The notice, review, and approval requirements set forth in this part do not apply to airports with restrictions as specified in 49 U.S.C. App. 2153(a)(2)(C):
>
> > (4) A subsequent amendment to an airport aircraft noise or access agreement or restriction in effect on November 5, 1990, where the amendment does not reduce or limit aircraft operations or affect aircraft safety.

(5) A restriction that was adopted by an airport operator on or before October 1, 1990, and that was stayed as of October 1, 1990, by a court order or as a result of litigation, if such restriction, or a part thereof, is subsequently allowed by a court to take effect.

(6) In any case in which a restriction described in paragraph (b)(5) of this section is either partially or totally disallowed by a court, any new restriction imposed by an airport operator to replace such disallowed restriction, if such new restriction would not prohibit aircraft operations in effect on November 5, 1990.

As discussed below under the grant assurance section, the basic document governing access at the Long Beach Airport is Chapter 16.43 of the City's municipal code. The settlement agreement represents a subsequent amendment to Chapter 16.43. Therefore, before discussing the effect of ANCA on the proposed settlement agreement, it is necessary to briefly review the status of Chapter 16.43 with respect to ANCA.

Chapter 16.43 and ANCA:

In 1981, Long Beach adopted its first noise control ordinance, which limited air carrier flights to 15 per day and required carriers to use quieter aircraft. Shortly thereafter, years of litigation ensued over access to the Long Beach Airport. In December 1983, a Federal district court ruled that there was an insufficient basis to support the 15-flight restriction and entered a preliminary injunction prohibiting the city from reducing the number of daily carrier flights below 18.

Following entry of the preliminary injunction, the City undertook a 14 C.F.R. Part 150 study of the noise situation at the airport. The City submitted its final noise compatibility program and implementing ordinance to the FAA for review in July of 1986. In the meantime, prior to completion of the Part 150 program, and in part spurred by numerous noise-related nuisance and inverse condemnation claims filed by residents affected by airport operations, the City adopted an ordinance limiting the number of air carrier jet flights to 32. Additional litigation followed, and in 1989, the court invalidated the 1986 ordinance and ordered an increase in the minimum number of allowable flights from 26 to 41.

While the City's appeal to the Ninth Circuit was pending, on November 5, 1990, Congress enacted ANCA. Thereafter, on October 24, 1991, the Ninth Circuit Court of Appeals affirmed the district court's injunction and finding of unlawfulness of the City's 1986 noise ordinance. On January 9, 1992, the Ninth Circuit denied a petition for rehearing and rehearing en banc.

On November 5, 1990, when ANCA was enacted, the City was operating Long Beach Airport under the 41 flight limit imposed by the district court.

Beginning in 1992, in an effort to avoid further litigation, the parties negotiated a

Stipulated Final Judgment which the Federal district court adopted on May 18, 1995. Among other things, the stipulation provided that (1) the City could enforce its newly-adopted airport noise regulations (Chapter 16.43); (2) until at least January 1, 2001, the City could not amend its noise regulations to make them more restrictive with respect to aircraft noise or air carrier operations; and (3) on or after January 1, 2001, the City was free to "amend or replace ... its ordinances ... including the adoption of regulations more restrictive of airport noise and operations than those embodied in the version of Chapter 16.43 ...." The ordinance approved by the court remains in effect today and incorporated a provision that "Air Carriers shall be permitted to operate not less than forty-one flights per day, the number of flights authorized on November 5, 1990."

ANCA applies to airports imposing restrictions on Stage 2 aircraft operations proposed after October 1, 1990, and to airports imposing restrictions on Stage 3 aircraft operations that became effective after October 1, 1990. 14 C.F.R. 161.3(a). Although Chapter 16.43 imposes restrictions on Stage 2 and Stage 3 aircraft and was proposed and became effective after October 1, 1990, Chapter 16.43 is exempted from application of ANCA in accordance with 49 U.S.C. 47524(d)(5)(A) and (B), 14 C.F.R. 161.7(b)(5) and (6). As stated, at the time ANCA was enacted, the City was operating the Airport under the 41 flight limit imposed by the district court, and the City's 1986 noise ordinance had been invalidated by a court but this decision was under appeal. Under our interpretation, the City's 1986 ordinance represents "a restriction described in paragraph (b)(5) of this section [*i.e.*, 49 U.S.C. 47524(d)(5)(A), 14 C.F.R. 161.7(b)(5)] [that] is either partially or totally disallowed by a court." In addition, Chapter 16.43 represents a "new restriction imposed by an airport operator to replace such disallowed restriction, if such new restriction would not prohibit aircraft operations in effect on November 5, 1990." 49 U.S.C. 47524(d)(5)(B), 14 C.F.R. 161.7(b)(6). As noted, Chapter 16.43 was approved by the Federal district court in 1995 (to replace the invalidated ordinance) and includes the necessary requirement that the regulation would not prohibit aircraft operations in effect on November 5, 1990. Thus, by operation of 49 U.S.C. 47524(d)(5)(B) and 14 C.F.R. 161.7(b)(6), Chapter 16.43 is exempted and the notice, review, and approval requirements set forth in ANCA and Part 161 do not apply.

The Proposed Settlement Agreement and ANCA:

Under 49 U.S.C. § 47524(d)(4), as implemented by 14 C.F.R. §§ 161.3(b) and 161.7(b)(4), ANCA does not apply to "a subsequent amendment to an airport noise or access agreement or restriction in effect on November 5, 1990, that does not reduce or limit aircraft operations or affect aircraft safety." By operation of 49 U.S.C. 47524(d)(5)(A) and (B), and 14 C.F.R. 161.7(b)(5) and (6), for purposes of interpreting 49 U.S.C. 47524(d)(4) and 14 C.F.R. 161.7(b)(4), we consider Chapter 16.43 to be an "aircraft noise or access agreement or restriction in effect on November 5, 1990" within the meaning of 49 U.S.C. 47524(d)(4) and 14 C.F.R. 161.7(b)(4). The statutory provisions, 49 U.S.C. 47524(d)(5)(A) and (B), contemplate that an airport having a noise ordinance disallowed by a court may under certain conditions replace that ordinance with a new restriction that would be exempted from ANCA.

We conclude that the settlement agreement represents a "subsequent amendment" to Chapter 16.43 "that does not reduce or limit aircraft operations or affect aircraft safety" under 49 U.S.C. 47524(d)(4). As a result, neither ANCA nor Part 161 apply to the agreement. The agreement amends Chapter 16.43 because, among other things, it alters the way in which supplemental slots are allocated under Chapter 16.43 as discussed below in connection with the City's grant agreements. Rather than reducing or limiting air carrier operations at Long Beach Airport, the agreement permits an increase in the number of such operations as an alternative to almost certain litigation which could restrict access for years. In fact, both the noise ordinance and the agreement contemplate an increase in air carrier operations (through supplemental slots) assuming the City's noise budget would so permit. The agreement acknowledges in section 1.4 that Chapter 16.43 provides for a "minimum of forty-one (41) daily departures," and neither reduces nor limits aircraft operations. Nor does the agreement affect aircraft safety.

Resolution No. C-27843's Use Or Lose Provision:

As discussed below, City Resolution C-27843 extended the time air carriers may hold newly awarded slots before initiating service from six months to 24 months. The City is advised that such an extension of the use-or-lose period on its face could clearly impede new entry or increases in air carrier operations, and could be interpreted as a noise or access restriction within the meaning of ANCA and Part 161. However, as noted below, we consider the foreclosure issue to be moot at this time.

Airport Improvement Program Grant Assurances. Our review of the City's compliance with its grant assurances is limited to the settlement agreement, as requested; it does not extend to the basic document governing access at the airport, Chapter 16.43. We take Chapter 16.43 as a given, and we review the agreement only as a settlement of issues arising under implementation of Chapter 16.43 to resolve a dispute that would otherwise have almost certainly resulted in litigation. However, because the agreement is based on Chapter 16.43 and several actions taken under that ordinance in the past two years, we consider it necessary to address certain issues arising under Chapter 16.43 before addressing the agreement itself in order to clarify the limited extent of the opinions expressed in this letter.

Chapter 16.43. The parties have not requested the FAA to address the consistency of Chapter 16.43 with the grant assurances, and it is unnecessary at this time for the FAA to take a position on whether Chapter 16.43 meets Federal requirements for airport access. At some point in the future, however, the FAA may be presented with a complaint from a third party under 14 C.F.R. Part 16, or may have reason to review Chapter 16.43 from a compliance standpoint on its own initiative. The FAA thus reserves the right to review the consistency of Chapter 16.43 with Federal law in the future. That review would not be affected by the opinions in this letter related to the settlement agreement at issue. In other words, the FAA would not revisit the settlement terms, but the current finding that the settlement is a reasonable action under existing Chapter 16.43 would not prevent an analysis of whether the provisions of Chapter 16.43 themselves meet Federal access requirements, if that issue were to be raised.

For example, Chapter 16.43 provides that a minimum of 41 regular air carrier slots will be allocated to air carriers, and that additional slots will be allocated on a one-year basis as supplemental slots only. We understand that a noise ordinance based on the noise budget concept requires some flexibility to adjust the number of slots upward or downward from time to time, to ensure that operations remain within the established noise budget. At the same time, the supplemental slots allocated on a relatively short-term, temporary basis may well be far less useful and less valuable to carriers than regular slots. The City believes that the supplemental slots are not an avenue for new entry at the airport, because the risk of investing in a new operation at the airport using only temporary slots would probably be considered too high. The existing "defacto" limit of 41 regular slots (described as a "minimum" rather than a limit in Chapter 16.43) has largely been the driver of the dispute over slot allocation that led to the recent negotiations and settlement agreement. While the limit of 41 regular slots is accepted as a given for the purposes of the FAA's consideration of the agreement, the FAA may separately consider the continuing basis for that limit after we have had the opportunity to review the City's analysis of the effect of current operations on the noise budget targets.

The FAA will continue to offer its services to the City at any time to identify potential compliance issues and means by which they can be avoided.

The allocation of 27 slots to JetBlue. In May 2001, the City allocated all 27 of the then-remaining regular slots at the airport to JetBlue in a single allocation. That allocation was made in accordance with Chapter 16.43, which provides for allocation of available regular slots to a requesting carrier on a first-come, first-served basis. It is questionable whether the allocation of all remaining slots to a single carrier was consistent with the City's obligations to provide reasonable access to the airport in the future, particularly given the simultaneous action to permit JetBlue 24 months before it had to use the slots, as discussed below. However, the FAA has not issued an opinion on whether the allocation to JetBlue was consistent with the City's Federal obligations, because competing slot requests by other carriers were accommodated through settlement discussions that resulted in the settlement agreement. That agreement resolves all competing claims for all existing regular slots at the airport, and we consider the issue of the May 2001 allocation moot under the circumstances. Therefore, the FAA will not take any further action on the allocation.

Amendment of the time to begin use of slots. In May 2001, at essentially the same time it allocated 27 slots to JetBlue, the City amended its flight allocation procedures in accordance with Chapter 16.43 through Resolution No. C-27843. That Resolution extended the time carriers may hold newly awarded slots before initiating service (the use-or-lose period) from six months to 24 months. The combined effect of this change *and* the allocation to JetBlue of all remaining regular slots at the airport, without consideration of other factors, would appear to have potentially foreclosed new entry or any increase in an incumbent/competitor's operations. The FAA has informally advised the City that we do not find any proper justification for this change in the use-or-lose period, and, therefore, that this action would very likely be considered an unreasonable restriction on access to the airport in violation of Federal law and policy.

However, as with the allocation itself, the change in the use-or-lose period brought complaints by other carriers, which in turn resulted in a settlement that accommodated slot requests of all interested carriers. It is also very important that the period in which JetBlue enjoyed relief from having to begin operations ends shortly -- on June 1, 2003 -- at which time JetBlue will be required to operate all of its allocated slots or return them to the City. We expect that the City will rescind or revise as necessary section 5(B) of Resolution No. C-27843 (and Chapter 16.43 if necessary) to limit the use-or-lose period to a shorter period (such as the six month period previously in place or less than six months), and avoid any future compliance issue with this aspect of the Resolution or the Long Beach Municipal Code. Assuming that takes place, under these circumstances, the FAA will not take any further action on this issue.

The February 5 settlement agreement. Two provisions in the settlement agreement directly affect the allocation of operating rights at the airport: Section 2 relates to "regular" or non-expiring departure slots at the airport; Section 3 relates to supplemental departures allocated in years when the noise budget permits.

Section 2 of the agreement describes the allocation of the 41 regular departure slots at the airport. This section represents an agreement among all three of the air carriers that had requested regular slots at the airport as of the date of the agreement (and to this date). Section 2 does not alter the provisions of Chapter 16.43 for allocation of regular slots, which is essentially in accordance with a first-come, first-served procedure. Because of the aforementioned change by the City in the use-or-lose period, the parties did not agree on the City's allocation of all 27 available slots at the airport to one carrier. Section 2 resolves that disagreement, among all interested parties.

Because requests for regular slots by the interested parties, when added to the 14 existing operations at the airport, exceeded a total of 41, there is no outcome that would not have resulted in the allocation and operation of all 41 regular slots provided in Chapter 16.43. Accordingly, the agreement does not have any effect on the availability of regular slots to carriers other than the parties to the settlement now or in the future; that future availability will be determined by Chapter 16.43 and the City's noise budget contained therein.

Section 3 of the agreement provides for the allocation of the first seven supplemental departures for the years 2003 through 2008. If the City determines that more than seven supplemental slots can be allocated in any year under Chapter 16.43, the eighth and subsequent slots would be allocated to any requesting carrier in accordance with Chapter 16.43. After 2008, the agreement expires, and all supplemental slots will be allocated in accordance with Chapter 16.43, which calls for a lottery to distribute slots when demand exceeds supply.

In support of the reasonableness of the supplemental slot allocations under the agreement, the City argues that the agreement resolves the competing interests of all carriers that have expressed an interest in operating at the airport. For many years the City has

marketed the airport, but has been unable to interest new carriers in beginning service. As a result, until the recent allocation to JetBlue and subsequent requests by American and Alaska, no more than 14 of the airport's 41 regular slots were used for more than a decade.

The City also notes that the recent dispute over slot allocation, and resulting settlement discussions, were reported in the aviation press and would have been well known to any carrier interested in participating in those discussions. No carrier has approached the City requesting slots since the allocation to JetBlue in May 2001, other than the parties to the agreement.

The City further argues that the procedure for allocation of supplemental slots has no real effect on new entry, because supplemental slots are not suitable for initiation of service at the airport. Under Chapter 16.43, supplemental slots expire and are reissued each year. The number of supplemental slots is determined by whether the total air carrier activity at the airport is within the noise "budget" for air carriers under Chapter 16.43 during the previous year; the number can be increased, or be decreased down to zero. Thus, there is no guarantee of the renewal of a supplemental slot. The City argues that it is unlikely that a carrier would make the investment to initiate service at an airport using slots that are not guaranteed to last beyond one year.

In response to a recent informal notice to carriers of the City's request for FAA review of the settlement agreement, United Airlines objected to both any substantial extension of the use-or-lose period and to any agreement on supplemental slots that "effectively freezes out" new entry at the airport through 2008.

The FAA's view. As already indicated, the FAA believes that the extension of the use-or-lose period from six months to 24 months would likely be unreasonable under the grant assurances and that we expect the City to rescind it. At this point, all regular slots available at the airport will be in use by next month; we therefore intend to take no action on this aspect of the agreement. The FAA does not believe that the agreement on supplemental slots unreasonably limits new entry at the airport, given the immediate benefits of the temporary settlement agreement and the lack of any actual effect on new entry at this time, for the reasons discussed below. Therefore, we consider that the this portion of the agreement does not violate the City's AIP grant assurance obligations. Finally, it should again be stressed that we express no opinion on whether the number of regular slots under current Chapter 16.43, or the provision for limiting newly available capacity to one-year supplemental slots, provides reasonable access under the grant assurance requirements.

In our view, the settlement agreement has the significant benefit of providing immediate access to each of the three carriers actually interested in adding service at the airport. This includes 23 departures a day by JetBlue (reduced to 22 when one slot is recalled by Alaska), all added in the past two years. Implementation of the agreement avoids the delays and risks associated with litigation, and provides all three interested carriers with

the ability to begin desired new service immediately. This new service significantly expands competition and air service for users of Long Beach Airport.

The only potential adverse effect of the agreement on new entry arises from the following scenario: (1) sometime between the present and the end of 2008, a carrier that has not previously expressed an interest in serving Long Beach would develop such an interest; (2) that carrier would be willing to open a station and begin service at the airport using slots that expire each year with no guarantee of renewal, and (3) no more than seven supplemental slots are available at that time. (The number of supplemental slots likely to be made available under Chapter 16.43 is unknown at this time. If more than seven supplemental slots are available, they would be allocated under Chapter 16.43 and the carrier would have a fair chance of receiving them.)

While the requesting carrier in the scenario would never have been guaranteed supplemental slots at the airport, with or without the agreement, clearly the opportunity to obtain a supplemental slot is somewhat reduced by the agreement for the next several years. The question is whether this effect is sufficient to reject the agreed allocation of slots among all of the carriers currently interested in serving the airport. We do not believe it is in the circumstances of this case.

As a matter of general principle, the FAA would consider it unjustly discriminatory and the grant of an exclusive right for an airport to allocate slots now that may only become available in the future. Long Beach presents a special case for the following reasons:

- The allocation accommodates the interests of all interested carriers competing for access to the airport at this time.
- There is no evidence of interest in slots by any other carriers at this time.
- As indicated above, the FAA expects the extension of the use-or-lose period to be rescinded, and it does not now act to prevent new entry by any air carrier.
- Even if some other carrier were to develop an interest in the future, it is perhaps less likely to be able to initiate service at the airport using supplemental slots that expire each year. If the supplemental slots were acceptable to such a carrier, there is no guarantee they would be available even without the agreement in effect.
- The allocation does not apply to all potentially available supplemental slots, and some number of supplemental slots may be available even under the agreement, depending on the number of supplemental slots made available each year under Chapter 16.43.
- The measure is temporary and expires after 2008.

If at some point in the future a potential new entrant carrier believes that it is Chapter 16.43 itself that is the barrier to entry, that carrier is free to challenge Chapter 16.43 by bringing a complaint to the FAA under 14 C.F.R. Part 16. In that case, the City could defend the reasonableness of Chapter 16.43, make modifications thereto, or consider other courses of action.

As a result, the actual effect of the settlement agreement on future new entry at the airport is speculative and limited in time and scope. By contrast, the agreement permits the immediate introduction and continuation of a significantly expanded schedule and new competitive air service at the Long Beach Airport. It also avoids possible litigation and its uncertain results.

Accordingly, the FAA will not act to prevent the implementation of the agreement, as it does not currently present an issue of noncompliance under ANCA or the City's grant assurances.

This opinion is based on the particular circumstances at Long Beach Airport, including the fact that the agreement represents the settlement of potential litigation issues arising under the City's ordinance, which is grandfathered under ANCA. The findings and opinions in this letter should not be taken as general policy on airport access that would apply to any other airport access rules or proposed rules, even if similar to the ordinance in effect at Long Beach.

The FAA looks forward to continue working with the City of Long Beach. I appreciate the considerable time and effort that representatives of the City have spent in meeting with representatives of the FAA and responding to our questions.

Sincerely,

Nancy D. LoBue

for James W. Whitlow
Deputy Chief Counsel