COMMONWEALTH of VIRGINIA

Office of the Governor

Sean T. Connaughton
Secretary of Transportation

July 16, 2012

VIA E-MAIL

Michael A. Curto, Chairman
Quince Brinkley, Secretary
Metropolitan Washington Airports Authority
1 Aviation Circle
Washington, D.C. 20001

Gentlemen:

Last week Governor McDonnell designated two new Virginia appointees to take positions on the Metropolitan Washington Airports Authority Board. Mr. Chapman and Ms. McConnell are ready and available to attend the meeting of the Board scheduled for July 18th, 2012. The Commonwealth respectfully asks that the Authority extend all courtesies and privileges that pertain to their new office.

In conveying this information, we are aware of correspondence to Governor McDonnell from Chairman Snelling last December 1st in which the then-Chairman indicated that he and/or the Board felt that there might be an impediment to MWAA's honoring the Governor's appointments of these additional Board Members, despite the passage of federal and state legislation authorizing the expansion of the Board. While it is not clear from Mr. Snelling's letter whether this position is an official position of the Authority, we submit that the issue merits further deliberation and review in light of the new appointments.

It appears that, at least on December 1, 2011, Mr. Snelling, and perhaps other MWAA Board Members, considered the November 29, 2011 legal opinion from Messrs. Jenner & Block to be a definitive bar to the seating of the additional Virginia appointees on the MWAA Board:

> ". . .the legal opinion we have will not permit them (*i.e.*, the two additional Virginia appointees) to participate in board duties until the appropriate changes are made to the governing MWAA compact between the Commonwealth and the District."

We have reviewed the referenced legal opinion (which Chairman Snelling attached to his letter) and suggest that a more in-depth examination of the issues he identifies would be in order. Several factors support this view.

First, it is clear that the Chairman and the Board had little time to review the legal opinion from Jenner & Block, as Chairman Snelling's letter to the Governor issued only two days after the date of the legal opinion. Second, it is unclear whether the Board (as distinguished from Mr. Snelling personally) met to discuss and form a majority view that is congruent with Mr. Snelling's conclusions about the import of the legal opinion in the one-day interval between the transmission of the Jenner & Block opinion and Chairman Snelling's letter to the Governor. We have found no official record of such deliberations or conclusions. Third, a review of the Jenner & Block opinion suggests that its conclusions might not be as prohibitive as Mr. Snelling, on necessarily quick perusal, took them to be. Fourth, the Jenner & Block opinion seems to assume, without any particular critical inquiry, that the Commonwealth and a non-state entity like the District of Columbia can form a valid interstate compact such as those contemplated by Article I, section 10, clause 3 of the Constitution of the United States. Fifth, eight months have passed since the Congress passed amendments to the Transfer Act that increased the Virginia allotment of Board seats from five to seven. The General Assembly of Virginia has enacted similar legislation. However, the District of Columbia has not, to date, acted and, despite some indications earlier this month that action might be imminent, we appear to be in a situation where Congress and the Commonwealth are, under Mr. Snelling's interpretation of the Jenner & Block opinion, indefinitely dependent on the City Council of the District of Columbia in order for the will of Congress and the General Assembly to be given effect. This is an improbable situation, at best, and, more gravely, one that raises significant constitutional issues about the District of Columbia's power through inaction to frustrate the will of the Congress and the General Assembly of the Commonwealth. Finally, and as somewhat of an extension of the prior point, the Commonwealth views the enactment of the 2011 federal amendments to the Transfer Act of 1986 as controlling and sufficient under the Supremacy Clause of the federal Constitution to supersede any contrary action or inaction by the District of Columbia. Any other interpretation would leave the District of Columbia in a position to veto congressional actions and able to control unilaterally the content of the substantive MWAA legal regime despite agreement between the Commonwealth (the only state member of the MWAA arrangement) and the federal government. We do not believe such a result could withstand judicial scrutiny.

We ask that the Authority seat Mr. Chapman and Ms. McConnell immediately. If there needs to be internal Board discussion of this request, it should occur at the upcoming MWAA Board meeting. The Commonwealth will make its special counsel, Mr. Benner, available to share the Commonwealth's views on this subject if it would be helpful to the Board.

The Commonwealth continues to be concerned that any votes taken at meetings where any of Virginia's appointees are barred or restricted from full participation may be subject to collateral attack as irregular, unlawful actions by the Authority.

It is therefore in the interests of all parties that Ms. Merrick, Ms. McConnell and Mr. Chapman be seated as quickly as possible. If MWAA refuses to seat these appointees, the Commonwealth will take affirmative measures to obtain mandatory process requiring that the Board operate with its full complement of Virginia appointees.

Because Mr. Chapman and Ms. McConnell must plan their schedules, please let me know if there is any reason they should not attend Wednesday's meeting.

Thank you very much for your attention to this situation.

Sincerely,

Sean T. Connaughton

c: Mr. Jack Potter