GOVERNMENT OF THE DISTRICT OF COLUMBIA
OFFICE OF THE ATTORNEY GENERAL

By E-Mail and US Mail

July 17, 2012

Michael A. Curto, Chairman
Quince T. Brinkley, Jr., Vice President and Secretary
Metropolitan Washington Airports Authority
1 Aviation Circle
Washington, D.C. 20001

Re: *District of Columbia's Opposition to Seating Any Additional Members of the Board of Directors*

Dear Messrs. Curto and Brinkley:

I write to urge the Metropolitan Washington Airports Authority (MWAA) to reject the last-minute effort by the Commonwealth of Virginia to have additional representatives seated as members at MWAA's July 18, 2012 Board of Directors meeting. Such an action would be beyond the authority of the MWAA provided in the governing interstate compact, would violate the compact, and could lead to unnecessary conflict and, potentially, to litigation.

We have been advised that yesterday the Secretary of Transportation of Virginia asserted to you that recent legislation enacted by the Congress and Virginia provides the MWAA with sufficient authority to seat two additional members representing Virginia to the Board. We have been provided a copy of his July 16, 2012 letter to you making such an argument. This argument is fallacious and its acceptance could have unfortunate consequences.

As you are well aware, the MWAA is the product of joint action by the District of Columbia and Virginia, and was subsequently approved by Congress, and any changes to the terms of the resulting interstate compact must be the product of joint action by the District and Virginia. The Compact, as codified at D.C. Official Code § 9-902, and its analogous counterpart in the Virginia Code, provides that the MWAA is established as "a public body corporate and politic and independent of all other bodies, having the powers and jurisdiction enumerated by this chapter, and other and additional powers as shall be conferred upon it jointly by the legislative authorities of the Commonwealth of Virginia and the District *or by either of the jurisdictions and concurred in by the legislative authority of the other jurisdiction.*" (Emphasis added.) Virginia cannot unilaterally change the compact or increase its proportional representation without the specific concurrence of the legislative authority of the District of Columbia, *i.e.*, our City Council.

We understand that the MWAA has previously and correctly adhered to the legal position, based upon an in-depth, well researched and well-reasoned legal opinion from its outside counsel (the

law firm of Jenner & Block), that neither the Congress nor Virginia can unilaterally change the terms of the MVAA compact. *See, e.g.*, Memorandum from Jenner and Block LLP to MWAA at 9 (Nov. 29, 2011) ("consistent with caselaw and practice under previous MWAA legislation, the Legislation should not be considered operative unless and until Virginia *and* the District of Columbia enact legislation conforming the compact to the Legislation.") (Emphasis added.) We share this well considered view, and urge you to continue to abide by it.

As you know, the District of Columbia has not yet passed conforming legislation. Such a bill is pending before the Council of the District of Columbia. Bill 19-829, the "Metropolitan Washington Airports Authority Amendment Act of 2012" was at the Mayor's request introduced in the Council on June 29, 2012 and, if and when enacted, will provide the District's portion of the joint action necessary to authorize the MWAA to seat not only the two additional Virginia members, but also an additional member from the District of Columbia and one from the State of Maryland. We urge you in the strongest possible terms to await passage of this conforming legislation – which will be addressed in the next Council legislative session – to seat additional members of the MWAA. For the MWAA to do otherwise would violate the Compact.

It would be unfortunate and unlawful if the MWAA unjustifiably changed course now and purported to seat the two additional Virginia representatives recently named by Governor McConnell and count votes by them on MWAA matters prior to the passage of conforming legislation by the District and prior to the seating of additional representatives from the other participating jurisdictions. If this occurs, the District will have no choice but to consider its legal options, including pursuing relief in the courts. This would be an unnecessary and unfortunate result, diverting the MWAA and its constituents from the important work of the Authority. The more appropriate course is for the MWAA to await passage of the conforming legislation and then seat additional members from all three jurisdictions, free from the legal cloud that will accompany any attempt to seat additional purported new members from one party to the compact at this time.

We have not in this letter addressed all of the many dubious points made in the Secretary's July 16 letter and our silence on those points should not be taken as acquiescence. We will address them at the appropriate time and in the appropriate forum, if necessary. But one basic premise of the Secretary's letter cannot go uncommented.

The repeated and unsupported assertions in the Secretary of Transportation's letter suggesting that the District may not enter into compacts with the States are ill-informed and ill-considered. If it were accurate, the MWAA would be a nullity. In truth, it is well established and beyond dispute that the District of Columbia may enter – and has frequently entered – into interstate compacts with the approval of Congress, when necessary, as in the case of the MWAA, (*e.g.,* the *Washington Metropolitan Area Transit Authority Compact (Metro), Interstate Agreement on Detainers, and the Interstate Compact on Juveniles,* (D.C. Official Code §§ 9-1101.01 *et seq.*, 24-801 *et seq.*, and 24-1101 *et seq.* respectively)), and even without the approval of Congress when the purpose of the compact does not encroach on or otherwise interfere with constitutionally-mandated federal supremacy in a particular field. The courts have repeatedly

recognized that the Self-Government Act grants the District government broad (but not exclusive) sovereign legislative power "analogous to the powers of the States . . . ." *See, e.g., District of Columbia v. Owens-Corning*. 572 A.2d 394, 406 (D.C. 1989); H.R. Report No. 93-482, 93rd Cong., 1st Columbia, Markup Sessions for H.R. 9056, 93rd Cong., 1st Sess. (July 11and 18, 1973), set forth in *Home Rule for the District of Columbia* (December 31, 1974) at 981 and 1034. As part of their sovereign legislative powers, the states generally may enter into interstate compacts, limited only by the U.S. Constitution and, in particular, the Compact Clause. *See, e.g., Cuyler v. Adams*, 449 U.S. 433, 441 (1981). Because the District government has state-like legislative powers, it, too, may make interstate agreements. This conclusion is reinforced by the absence of any relevant express prohibition in the Self-Government Act and the repeated judicial confirmation of the authority of the District to enter into these arrangements and the upholding of the resulting agreements. *See District of Columbia v. Riggs National Bank of Washington D.C.*, 581 A.2d 1229, 1232-1233 (D.C. 1990) (upholding the validity of agreements that the Mayor had made with 11 states for the mutual exchange of abandoned property, pursuant to a law passed by the Council); *Lim v. District of Columbia Taxicab Commission,* 564 A.2d 720, 723 (D.C. 1989) (upholding the validity of an agreement between the District and Virginia for reciprocal taxicab licensing).

Thank you for considering our views. Should you have questions or need any clarification, please feel free to call me at (202) 724-1301.

Sincerely,

Irvin B. Nathan
Attorney General
for the District of Columbia

cc: Additional Members of the Metropolitan Washington Airports Authority Board of Directors:

The Honorable Thomas M. Davis III
Robert Clarke Brown
Richard S. Carter
The Honorable William W. Cobey Jr.
Frank M. Conner III
The Honorable H.R. Crawford
Shirley Robinson Hall
Dennis L. Martire (c/o Kevin Hodges, Esq.)
Michael L. O'Reilly
Warner H. Session
Todd A. Stottlemyer

John E. Potter, President and CEO, Metropolitan Washington Airports Authority Board of Directors
The Hon. Phil Mendelson, Chairman, Council of the District of Columbia
The Hon. Sean T. Connaughton, Secretary of Transportation, Commonwealth of Virginia