



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

Office of the Associate Administrator
for Airports

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Washington, DC 20591

May 3, 2022

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Re: *United Airlines v. Port Authority of New York and New Jersey*, FAA Docket
No. 16-14-13

Dear Mses. Chen, Fisher and Moseley and Messrs. Warren, Span, Steinbrecher, Conneely,
Rosenthal and Taliaferro:

Enclosed is a copy of the Director's Determination on Remand in the above-captioned matter
under 14 CFR Part 16.

The Director concludes that Port Authority of New York and New Jersey (PANYNJ) has
grandfathered rights as provided for in 49 U.S.C. §§ 47107(b)(2) and 47133 (b)(1) and Grant
Assurance 25. The Director also concludes that a civil penalty is not warranted at this time.

The reasons are set forth in the enclosed Director's Determination on Remand.

Sincerely,

**KEVIN
WILLIS**

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KEVIN WILLIS
Date: 2022.05.03
17:40:26 -04'00'

Kevin C. Willis
Director, Office of Airport Compliance
and Management Analysis

Enclosure



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UNITED STATES DEPARTMENT OF
TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC

UNITED AIRLINES, INC.,

COMPLAINANT,

V.

THE PORT AUTHORITY OF NEW YORK AND
NEW JERSEY,

RESPONDENT.



FAA Docket No. 16-14-13

DIRECTOR'S DETERMINATION ON REMAND

I. INTRODUCTION

This matter is before the Federal Aviation Administration (FAA) Office of Airport Compliance and Management Analysis Director (Director) as a result of the Associate Administrator for Airports' *Order Affirming in Part and Remanding in Part the Director's Determination* (Remand Order), dated January 11, 2021. [FAA Exhibit 1, Item 1]. The Associate Administrator ordered that the Director's Determination is affirmed, as so modified, and remanded, in part, to the Director, to determine the basis for the Port Authority of New York and New Jersey's (PANYNJ's) grandfathered rights, if any, and as to whether to issue a civil penalty. [FAA Exhibit 1, Item 1, p. 33].

The Remand Order remands the matter to the Director (1) to determine if PANYNJ has grandfathered rights based on a pre-September 2, 1982 law controlling financing as provided for in 49 U.S.C. § 47107 and § 47133, and Grant Assurance 25, and (2) for a determination as to whether to issue a civil penalty consistent with the instances of non-compliance affirmed in the Remand Order, and if so, the amount. The Remand Order affirms the Director's Determination that to the extent grandfathered rights exist, they do not allow for the expenditure of airport revenue to support facilities that PANYNJ does not own or operate.¹ [FAA Exhibit 1, Item 1, p. 33].

On April 26, 2021, the Director issued an *Order for Supplemental Pleadings*. The Director sought supplemental pleadings from the parties in order to address issues raised by the Associate Administrator in the Remand Order and to afford the parties the opportunity to present additional information on these issues. [FAA Exhibit 1, Item 2].

In its Supplemental Brief, PANYNJ states that its enabling legislation qualifies it as a grandfathered airport as well as its covenants and assurances with respect to its debt obligations. PANYNJ claims its filing again demonstrates its eligibility under the grandfather exception. PANYNJ claims that a civil penalty is not warranted. [FAA Exhibit 1, Item 6, pp. 2-3, and 28].

¹ This finding is being challenged in a petition for review in the matter of *Port Authority of New York and New Jersey v. FAA*, (D.C. Cir. No. 21-1086). The matter is being held in abeyance pending discussions on PANYNJ's corrective action plan.

In its Reply to PANYNY's Supplemental Brief, United Airlines, Inc. (United) maintains that because PANYNJ was once grandfathered, that does not mean it is grandfathered today, or that the scope of its grandfathered authority cannot change. United took no position on whether civil penalties should be assessed, but contended if imposed the penalties should not be paid from airport funds and not increase airline rates and charges. [FAA Exhibit 1, Item 7, pp. 6-8]. PANYNJ filed a *Motion for Leave to file a Reply Brief in Further Support of its Supplemental Brief*. [FAA Exhibit 1, Item 8]. United elected not to respond to this pleading.

In accordance with the Remand Order, the Director analyzed PANYNJ's grandfathered status and whether to issue a civil penalty. The Director examined the Remand Order and its record, the Director's Determination and its record, the supplemental filings submitted by the parties, and related information. Based on this examination, the Director finds that PANYNJ has grandfathered rights based on laws controlling its financing and covenants in debt obligations enacted or issued not later than September 2, 1982 as provided for in 49 U.S.C. §§ 47107(b)(2) and 47133 (b)(1). The Director also finds that issuing civil penalties is not warranted at this time.

II. PARTIES

A. Complainant - United Airlines, Inc.

United is a corporation organized under the laws of the State of Delaware and is based in Chicago, Illinois. United has the largest air carrier presence at Newark Liberty International Airport (EWR) and operates approximately 135,000 departures from there annually. [FAA Exhibit 1, Item 1, p. 3].

B. Respondent - PANYNJ

PANYNJ, headquartered in New York City, is a bi-state corporate instrumentality and political subdivision of New York and New Jersey. PANYNJ was created by an interstate compact made by New York and New Jersey in 1921 and consented to by Congress. The two states established PANYNJ to provide transportation, terminal, and other facilities of commerce within the Port District, which includes the cities of New York and Newark, and other municipalities in the two states. [FAA Exhibit 1, Item 1, pp. 2-3].

PANYNJ is the airport sponsor of EWR. EWR is a public-use commercial service airport located in the City of Newark, New Jersey. EWR serves as a hub for United. Since 1982, EWR has been the recipient of 139 Airport Improvement Program (AIP) grants totaling \$332 million. [FAA Exhibit 1, Item 1, p. 2].

III. PROCEDURAL HISTORY

1. On January 11, 2021, the Associate Administrator for Airports issued an *Order Affirming in Part and Remanding in Part the Director's Determination*. [FAA Exhibit 1, Item 1].
2. On April 26, 2021, the Director issued an *Order for Supplemental Pleadings*. [FAA Exhibit 1, Item 2].
3. On September 15, 2021, PANYNJ filed a *Supplemental Brief, Filed Pursuant To the Final Decision and the Order for Supplemental Pleadings*. [FAA Exhibit 1, Item 6].
4. On October 15, 2021, United filed a *Reply to Respondent's Supplemental Brief on Remand*. [FAA Exhibit 1, Item 7].
5. On November 1, 2021, PANYNJ filed a *Motion for Leave to File Reply Brief and Reply Brief in Further Support of its Supplemental Brief*. [FAA Exhibit 1, Item 8].

See attached Index for additional procedural filings.

IV. ISSUES

Per the Remand Order, the Director will address the following two issues:

Issue 1 – Whether PANYNJ has grandfathered rights based on a pre-September 2, 1982 law controlling financing as provided for in 49 U.S.C. §§ 47107 and 47133, and Grant Assurance 25.

Issue 2 – Whether the FAA should issue a civil penalty consistent with the instances of noncompliance affirmed in the Associate Administrator’s Remand Order, and if so, the amount.

V. ANALYSIS

Issue 1 – Whether PANYNJ has grandfathered rights based on a pre-September 2, 1982 law controlling financing as provided for in 49 U.S.C. §§ 47107 and 47133, and Grant Assurance 25.

1. PANYNJ’s Position

PANYNJ asserts in its Supplemental Brief that it is a grandfathered airport because it has a pre-1982 law controlling financing which provides that the revenues from its facilities be used to support not only its airports but also PANYNJ's general debt obligations. [FAA Exhibit 1, Item 6, p. 2]. PANYNJ also asserts that it is a grandfathered airport because it has covenants in pre-1982 bonds which provide that the revenues from its facilities be used to support not only its airports but also PANYNJ's general debt obligations. [FAA Exhibit 1, Item 6, pp. 2-3]. PANYNJ contends “perhaps most importantly, the Port Authority is a grandfathered airport because it was classified as such by DOT [Department of Transportation].” [FAA Exhibit 1, Item 6, p. 3].

PANYNJ quotes the Associate Administrator in stating that the Director’s Determination “appears to assume PANYNJ is grandfathered” because PANYNJ’s “enabling legislation clearly evidences its eligibility for such a classification.” PANYNJ claims for nearly 30 years, FAA and DOT “have made determinations and classified [PANYNJ] as a grandfathered airport.” [FAA Exhibit 1, Item 6, p. 2].

In its Supplemental Brief, PANYNJ emphasizes the word “or” in restating the statutory provisions at 49 U.S.C. §§ 47107(b)(2) and 47133(b)(1) that an airport is grandfathered and not subject to the general revenue diversion restrictions

if a provision enacted not later than September 2, 1982, in a law controlling financing by the airport owner or operator, **or** a covenant or assurance in a debt obligation issued not later than September 2, 1982, by the owner or operator, provides that the revenues, including local taxes on aviation fuel at public airports, from any of the facilities of the owner or operator, including the airport, be used to support not only the airport but also the general debt obligations **or** other facilities of the owner or operator. [FAA Exhibit 1, Item 6, p. 3 (emphasis in original)].

PANYNJ relies on a 1982 House Conference Report in support of its claim that PANYNJ is an exempt grandfathered airport under both provisions of Title 49. PANYNJ contends that Congress made “it clear that under two distinct exemptions ‘[a]irports that are part of a unified ports authority are exempt from [the requirement of non-airport revenue diversion] if covenants or assurances in previously issued debt obligations or controlling statutes require that these funds are available for use at other port facilities.’ H.R. Rep. No. 97-760, at 712 (1982) (Conf. Rep.)” [FAA Exhibit 1, Item 6, p. 3].

PANYNJ asserts its governing legislation controlling its financing was enacted in 1931, and specific statutory authorization for the pooling of airport revenues was enacted in 1947. PANYNJ claims these statutes provide that its revenues, “including revenues from [its airports] be pledged as security or applied to the repayment of debt.” The provisions require PANYNJ “to maintain a general fund to support consolidated bonds.” PANYNJ notes that “the statutory proscriptions are clear and specific” and require PANYNJ to divert its net revenues and reserve them for payment of debt service. [FAA Exhibit 1, Item 6, pp. 5 and 8].

PANYNJ argues that

so long as ‘a law controlling financing’ to which an airport owner/operator is subject, provides that the revenue from its airport ‘be used to support not only the airport but also the general debt obligations’ of the airport owner/operator, then under the terms of the statute, the revenue diversion provision ‘shall not apply.’ [FAA Exhibit 1, Item 6, pp. 5, 8-9].

PANYNJ highlights that “the purpose of the grandfathered provisions...is to preserve creditors' ability to count on the revenues of the system for repayment.” PANYNJ argues that “so long as it complies with the governing legislation,” it is in compliance with the grandfathered provisions. In further support of its position, PANYNJ points to language in the House and Senate Conference Reports on the *Airport and Airway Improvement Act of 1982* (AAIA), that “[a]irports that are part of a unified ports authority are exempted from... [the revenue diversion] requirement if covenants or assurances in previously issued debt obligations or controlling statutes require that these funds are available for use at other port facilities.” [FAA Exhibit 1, Item 6, pp. 10-11].

Additionally, in its Supplemental Brief, PANYNJ asserts its covenants in debt obligations predate 1982, and bond covenants (referred to as “consolidated bonds”) have existed since 1952, and are used for financing all of its facilities. PANYNJ contends the 1952 Consolidated Bond Resolution “constitutes a covenant or assurance in debt obligations providing for consolidated financing of its capital investments” and “[is] a pre-1982 debt obligation binding [PANYNJ] to issue debt obligations [as a] contract and covenant of PANYNJ with its bondholders.” [FAA Exhibit 1, Item 6, pp. 3-4 and 15].

PANYNJ explains that since 1952, its Official Statement under which it issues consolidated bonds states that the payment of the debt service upon all Consolidated Bonds, regardless of series or installment, and regardless of date of issuance or maturity or purpose for issue, shall be secured equally and ratably by PANYNJ net revenues from existing and future facilities financed with Consolidated Bond proceeds. [FAA Exhibit 1, Item 6, pp. 15-16].

PANYNJ also states that “even assuming that the debt condition has continuing applicability, nothing in the statute says (or even implies) that grandfathered status would cease if the debt in place as of September 2, 1982 has been retired, at least so long as the replacement debt satisfies the statutory condition.” PANYNJ claims the FAA points to no guidance stating that replacement debt does not satisfy the statutory condition. PANYNJ adds that a “straightforward reading of the statute clearly indicates that certain airport owners and operators were to be entitled to maintain their methods of financing to the extent in place pre-1982.” [FAA Exhibit 1, Item 6, p. 17].

In its Supplemental Brief, PANYNJ contends that on multiple occasions, Congress, the FAA, and the Government Accountability Office (GAO) confirmed its status as a grandfathered airport system.

PANYNJ citing to a 1993 House Committee Report, which includes a report entitled, *Diversion of Airport Revenues from Commercial Air Service Airports in the United States*, states

The Committee Report also references a determination by the Department of Transportation (DOT) OGC [Office of the General Counsel] that the "Port Authority of New York and New Jersey" is an "excepted" airport system (Committee Report at iv-v), and refers to an investigation by the DOT OGC after an inquiry by the DOT Office of Inspector General. According to the Committee Report,

the DOT OGC determined four airport sponsors diverted revenues generated by their airports under circumstances considered excepted under AAIA. The OGC resolved the matter in favor of three of the airport sponsors after the OIG questioned the legality of the diversion. The OGC stated the remaining sponsor (a port authority [of New York and New Jersey]) is excepted based on AAIA's legislative history. [FAA Exhibit 1, Item 6, p. 19, Exhibit G, p. 13].

PANYNJ also points to past occurrences when the FAA and PANYNJ exchanged correspondence on its grandfathered status. PANYNJ refers to instances where "grandfathered payments" were discussed but that "at no point...did the FAA ever suggest that [PANYNJ] was not [grandfathered]." Similarly, PANYNJ refers to 2012 correspondence with the FAA on "a net overage to the...grandfathered payments," referencing a "grandfathered cap," "annual grandfathered payments," and "detail[s] [of] the grandfathered revenue calculations." Again, PANYNJ states that at no point in the 2012 correspondence did the FAA ever suggest that it was not grandfathered. [FAA Exhibit 1, Item 6, pp. 20-22].

PANYNJ cites to a 2018 OIG Report noting that the "nine grandfathered sponsors" includes PANYNJ. Also cited by PANYNJ is a 2020 GAO Report referring to PANYNJ as one of nine airport owners exempted from the requirement to use airport revenue solely for airport purposes. PANYNJ adds that the GAO analyzed relevant documents such as state and local laws, Congressional authorization of an interstate compact, New York and New Jersey state laws, and consolidated bond resolutions as the sources of PANYNJ's grandfathered status. [FAA Exhibit 1, Item 6, pp. 22-23].

In its Supplemental Brief, PANYNJ claims it is required and "not given the option, to pool all revenue from its operations to support general obligation bonds and to use those pooled funds to support all of its facilities." PANYNJ further claims that the FAA is estopped from reaching an alternative conclusion and FAA should not reverse PANYNJ's classification. [FAA Exhibit 1, Item 6, pp. 14 and 23].

PANYNJ recognizes that its governing legislation must require, and not merely give the Port Authority the "option to divert revenue," to qualify as a grandfathered airport. [FAA Exhibit 1, Item 6, p. 14].

2. United's Position

United's posits that although PANYNJ may once have been grandfathered, such former status does not mean that PANYNJ is currently grandfathered. United argues that although the "PANYNJ once enjoyed grandfathered status [such status] is not dispositive decades later." United asserts that the "PANYNJ has neither made a detailed accounting such that FAA can determine whether it has paid off, or re-financed, its pre-1982 debt, nor taken steps to reform its revenue diversion practices." United rejects PANYNJ's "assertion that having once been grandfathered for a time-limited purpose, it is now grandfathered forever and for all purposes." [FAA Exhibit 1, Item 7, pp. 1, 8].

United claims that although PANYNJ cites to several pre-1982 statutes to support its grandfathered status, these authorities only refer to pooling of revenues for debt service and a reserve fund equal to ten percent of the par value of outstanding obligations, and do not require that airport revenue be used for other purposes. United claims that the Remand Order determined that "PANYNJ could spend airport revenue only on its own facilities and only to the extent required by pre-1982 laws or debt covenants." [FAA Exhibit 1, Item 7, p. 2].

United states that “PANYNJ has not provided information regarding the amount of debt obligation or debt service at any given time; whether airport surplus revenue over the years has exceeded the requirement for debt service and reserves; the retirement of pre-1982 debt...nor has PANYNJ explained why a Consolidated Bond Resolution enacted in 1952 still governs debt issuance 70 years later.” [FAA Exhibit 1, Item 7, p. 3].

United rejects PANYNJ’s arguments that the terms of 49 U.S.C. § 47107(b)(2) only require that an airport satisfy specific debt conditions as of September 2, 1982 in order to be a grandfathered airport. United raises the hypothetical “in which PANYNJ had paid off all its pre-1982 debt by 1985, and then never borrowed another dime” but “according to PANYNJ, it would still have unlimited rights to divert airport revenue even though such revenue was no longer needed for debt service or reserves.” United contends that “PANYNJ must provide a full accounting of post-1982 debt service, reserves, and use of surplus airport revenue” and “only then would the Director be able to determine the scope, if any, of PANYNJ’s grandfathered authority.” [FAA Exhibit 1, Item 7, pp. 4-6].

United claims that PANYNJ argues for the “broadest possible interpretation of the revenue diversion statutes” and counters that the Associate Administrator rejected this in noting that “grandfathered rights should be interpreted narrowly ‘to preserve the primary operation of the provision.’” [FAA Exhibit 1, Item 7, p. 5].

United argues that “this is not a question of estoppel” but “instead a question of whether PANYNJ continues to qualify for grandfathered status and, if so, the proper scope of that authority.” [FAA Exhibit 1, Item 7, pp. 4-6].

3. PANYNJ’s Motion to Submit Reply Brief

PANYNJ filed a *Motion for Leave to File a Reply Brief in Response to United’s Reply Brief*. In the Reply Brief, PANYNJ specifically addressed United’s assertion “that an airport can lose its grandfathered status even though its pre-1982 governing documents and its operational practices required by those documents have not changed.” PANYNJ argues that

to the contrary, both 49 U.S.C. § 47107(b)(2) and 49 U.S.C. § 47133(b)(1) establish a threshold date of September 2, 1982, and ask only whether there is a statute or a covenant in a debt obligation as of that date ‘provides that the revenues from any of the facilities of the owner or operator, including the airport, be used to support not only the airport but also the general debt obligations or other facilities of the owner or operator.’ [FAA Exhibit 1, Item 8, p. 4].

PANYNJ again points to 1982 Conference Report H.R. No. 97-760 in emphasizing “that a port authority, such as PANYNJ, is the paradigmatic airport sponsor that the grandfathered provision was designed to protect.” PANYNJ asserts that nothing in these statutes has changed since they were originally enacted and that United did not point to an airport sponsor losing its grandfathered status in the last 40 years. PANYNJ further asserts that if it had lost its grandfathered status at some point in the last 40 years, FAA would have taken notice. [FAA Exhibit 1, Item 8, pp. 4-6].

PANYNJ claims it demonstrated that it is required to pool revenues between non-airport and airport revenue sources. It also states the 1952 Consolidated Bond Resolution continues to govern the issuance of bonds as PANYNJ’s sole authority. PANYNJ rejects that it has to provide information regarding the amount of its debt obligation or debt service at any given time. PANYNJ counters that the grandfathered provisions contain no such limitation that it is only a grandfathered airport up to the amount of revenue necessary to secure debt service and reserves. [FAA Exhibit 1, Item 8, p. 7].

PANYNJ claims it has never extinguished all of its debt and continues to borrow money to build its facilities. PANYNJ also claims that the “outstanding balance of Consolidated Bonds has increased every

year since 1982, and stands at \$23.4 billion as at December 31, 2020, secured by annual net revenues in 2020 in excess of \$2.0 billion.” [FAA Exhibit 1, Item 8, p. 7].

4. Director’s Review and Analysis

A. Issue 1 on Remand

The Associate Administrator remanded the matter to the Director to determine if PANYNJ has grandfathered rights based on a pre-September 2, 1982 law controlling financing as provided for in 49 U.S.C. §§ 47107 and 47133 and Grant Assurance 25.

On Remand, the Associate Administrator stated that “although the Director found that grandfathered rights allow diversion to occur ‘within certain limits,’ the Determination appears to assume PANYNJ is grandfathered without analyzing this issue.” The Associate Administrator concluded that the “Director did not analyze the extent to which PANYNJ’s enabling act qualifies it for grandfathered status.” [FAA Exhibit 1, Item 1, p. 13].

The Associate Administrator questioned PANYNJ’s grandfathering status as it relates to (1) its enabling legislation and (2) whether debt obligations that existed in September 2, 1982 have now been retired. As a result, the Associate Administrator asked the Director to determine the basis for PANYNJ’s grandfathered rights, and if any, its scope. [FAA Exhibit 1, Item 1, pp. 13-14, and 33].

In order to address the issues raised by Associate Administrator in the Remand Order and to afford the parties the opportunity to present additional information on these issues, the Director issued an *Order for Supplemental Pleadings* from the parties. [FAA Exhibit 1, Item 2].

In responding to the Director’s Order for Supplemental Pleadings on whether PANYNJ has grandfathered rights based on a law enacted before September 2, 1982 controlling financing as provided for in 49 U.S.C. §§ 47107 and 47133 and Grant Assurance 25, the parties each addressed both exceptions for grandfathered rights under the statutes.

PANYNJ filed a *Motion for Leave to File a Reply Brief* and a *Reply Brief in Further Support of its Supplemental Brief*. United did not file an answer in opposition to this Motion. The Director grants PANYNJ’s *Motion for Leave to File a Reply Brief*, and the Reply Brief will be considered.

B. Assessment of PANYNJ’s Grandfathered Status on Remand

Title 49 U.S.C. § 47107(b)(2) and § 47133(b)(1) each set out the grandfather clause exception at issue in this decision.

49 U.S. Code § 47107 - Project grant application approval conditioned on assurances about airport operations

(b)Written Assurances on Use of Revenue.

(1)The Secretary of Transportation may approve a project grant application under this subchapter for an airport development project only if the Secretary receives written assurances, satisfactory to the Secretary, that local taxes on aviation fuel (except taxes in effect on December 30, 1987) and the revenues generated by a public airport will be expended for the capital or operating costs of—

(A) the airport;

(B) the local airport system; or

(C) other local facilities owned or operated by the airport owner or operator and directly and substantially related to the air transportation of passengers or property.

(2) Paragraph (1) of this subsection does not apply if a provision enacted not later than September 2, 1982, in a law controlling financing by the airport owner or operator, or a covenant or assurance in a debt obligation issued not later than September 2, 1982, by the owner or operator, provides that the revenues, including local taxes on aviation fuel at public airports, from any of the facilities of the owner or operator, including the airport, be used to support not only the airport but also the general debt obligations or other facilities of the owner or operator.

(3) This subsection does not prevent the use of a State tax on aviation fuel to support a State aviation program or the use of airport revenue on or off the airport for a noise mitigation purpose.

49 U.S. Code § 47133 - Restriction on use of revenues

(a) Prohibition. Local taxes on aviation fuel (except taxes in effect on December 30, 1987) or the revenues generated by an airport that is the subject of Federal assistance may not be expended for any purpose other than the capital or operating costs of—

(1) the airport;

(2) the local airport system; or

(3) any other local facility that is owned or operated by the person or entity that owns or operates the airport that is directly and substantially related to the air transportation of passengers or property.

(b) Exceptions.

(1) Prior Laws and Agreements. Subsection (a) shall not apply if a provision enacted not later than September 2, 1982, in a law controlling financing by the airport owner or operator, or a covenant or assurance in a debt obligation issued not later than September 2, 1982, by the owner or operator, provides that the revenues, including local taxes on aviation fuel at public airports, from any of the facilities of the owner or operator, including the airport, be used to support not only the airport but also the general debt obligations or other facilities of the owner or operator.

Grant Assurance 25, *Airport Revenues*, implements the grandfather clause exception under 49 U.S.C. §§ 47107(b) and 47133 via this provision:

If covenants or assurances in debt obligations issued before September 3, 1982, by the owner or operator of the airport, or provisions enacted before September 3, 1982, in governing statutes controlling the owner or operator's financing, provide for the use of the revenues from any of the airport owner or operator's facilities, including the airport, to support not only the airport but also the airport owner or operator's general debt obligations or other facilities, then this limitation on the use of all revenues generated by the airport (and, in the case of a public airport, local taxes on aviation fuel) shall not apply.

The grandfather exception under each of these authorities can be met in one of two ways. The first way is to determine if a provision in a law controlling financing by the airport owner, that was enacted not later than September 2, 1982, provides for the use of revenue from any of the owner or operator's facilities, including the airport, to support not only the airport, but also general debt obligations and facilities of the owner or operator. The second way is to determine if there were covenants or assurances in debt obligations issued not later than September 2, 1982 that provide for the use of revenue from any of the owner or operator's facilities, including the airport, to support not only the airport, but also general debt obligations and facilities of the owner or operator.

As part of the analysis and assessment of PANYNJ's grandfathered status, the Director examined where PANYNJ's grandfathered rights were considered in the 2018 Director's Determination (DD) and other related documents referenced in the Supplemental Pleadings as detailed below.

The Director notes that the 2018 DD explained that certain airports are "grandfathered" when provisions establishing certain financial arrangements exist that were in effect prior to the enactment of the AAIA on

September 3, 1982. (See 49 U.S.C. §§ 47107(b)(2) and 47133(b)). For an airport to have grandfathered rights, there must be laws controlling financing or covenants or assurances in debt obligations issued prior to September 2, 1982, that provide that revenues from any of the facilities of the owner or operator, including the airport, “be used to support not only the airport but also the general debt obligations or other facilities of the owner or operator.” [FAA Exhibit 1, Item 1, DD, p. 8].

The DD record included an analysis and review of PANYNJ’s legislation and the Consolidated Bond Resolution that were in place prior to 1982, the relevant time period under the law for grandfathered status. The specific documents reviewed included (a) April 30, 1921 Compact between New York and New Jersey creating PANYNJ, (b) General Reserve Fund statutes, Chapter 48 of the Laws of New York of 1931 (Chapter 5 of the Laws of New Jersey of 1931), and (c) 1952 Consolidated Bond Resolution. The analysis in the DD explained how the Compact controls PANYNJ financing in several ways, one of which is to allow PANYNJ to borrow money through bonds. It also described how PANYNJ’s 1952 Consolidated Bond Resolution provides that bond payments must be secured equally and ratably from all PANYNJ facilities, and how additional PANYNJ owned facilities can be financed by the issuance of consolidated bonds. [FAA Exhibit 1, Item 1, DD, pp. 2, 19-21].

1. Review of Grandfathered Status - Pre-Existing Laws

As part of this examination, the Director reviewed the 1982 H.R. Conference Report 97-760, which explained that “airports that are part of a unified ports authority are exempt [from revenue use requirements] if covenants or assurances in previously issued debt obligations or controlling statutes require that these funds are available for use at other port facilities.” [FAA Exhibit 1, Item 1, DD, p. 22, and Item 9]. The 1982 Conference Report states

The language regarding 'local facilities which are owned or operated by the owner or operator of an airport and used for the transportation of passengers or property' was included to make clear the intent that the requirement would not prohibit the use of revenues for the purpose of retiring indebtedness on consolidated bonds which have been used in some jurisdictions to finance multimodal transportation facilities which are owned or operated by the owner or operator of an airport and used for transportation of passengers or property but which are not themselves airport facilities. [FAA Exhibit 1, Item 9].

The Director also reviewed the Project Sponsorship provision addressing grandfathered status at section 511 of the 1982 AAIA (PL 97-248) and notes that section 511 states

if covenants or assurances in debt obligations previously issued by the owner or operator of the airport, or provisions in governing statutes controlling the owner or operator's financing, provide for the use of the revenues from any of the airport owner or operator's facilities, including the airport, to support not only the airport but also the airport owner or operator's general debt obligations or other facilities, then this limitation on the use of all other revenues generated by the airport shall not apply. [FAA Exhibit 1, Item 10].

The Director reviewed the 1987 House Report No. 100-123(II) that addressed the statutory grandfather exception in stating

The assurance in existing law requiring that airport revenues must be spent on the airport is modified to provide that local taxes for aviation fuel must also be spent on the airport; that the authorization to spend airport revenues for other transportation facilities is limited to facilities directly and substantially related to the actual air transportation of passengers or property; and to provide that the exception permitting the use of airport revenues to support the airport owner's or operator's general debt obligation or other facilities is limited to cases in which such use of airport

revenues was authorized by debt obligations or statutes enacted before September 3, 1982. [FAA Exhibit 1, Item 11].

In furtherance of this review, the Director re-examined the provisions of pre-existing laws that PANYNJ claims control its financing. These laws include McKinney's Unconsolidated Laws of New York §§ 6636 and 7002 that were exhibits to PANYNJ's Supplemental Brief, and restated here. [FAA Exhibit 1, Item 6, p. 5 and Exhibits A and B].

Use of Reserve Funds

The moneys in the general reserve fund of the Port Authority may be pledged in whole or in part by the Port Authority as security for or applied by it to the repayment with interest of any moneys which it may raise upon bonds issued by it from time to time to provide funds for air terminal purposes; and the moneys in said general reserve fund may be applied by the Port Authority to the fulfillment of any other undertakings which it may assume to or for the benefit of the holders of any such bonds.

Subject to prior liens and pledges, (and to the obligation of the Port Authority to apply revenues to the maintenance of its general reserve fund in the amount prescribed by the general reserve fund statutes), the revenues of the Port Authority from facilities established, constructed, acquired or effectuated through the issuance or sale of bonds of the Port Authority secured by a pledge of its general reserve fund may be pledged in whole or in part as security for or applied by it to the repayment with interest of any moneys which it may raise upon bonds issued by it to provide funds for air terminal purposes, and said revenues may be applied by the Port Authority to the fulfillment of any other undertakings which it may assume to or for the benefit of the holders of such bonds. [McKinney's Unconsol. Laws of NY § 6636 (Use of reserve funds of Authority; disposition of revenues) as added by L. 1947, ch. 802 § 6].

Establishment of General Reserve Fund

In all cases where the Port Authority has raised or shall hereafter raise money for the establishment, acquisition, construction or effectuation of terminal and/or transportation facilities by the issue and sale of bonds legal for investment, as herein defined and limited, the surplus revenues received by or accruing to the Port Authority from or in connection with the operation of such terminal and/or transportation facilities built in whole or in part by the proceeds of the sale of such bonds shall be pooled and applied by it to the establishment and maintenance of a general reserve fund in an amount equal to one-tenth ($\frac{1}{10}$) of the par value of all bonds legal for investment, as herein defined and limited, issued by the Port Authority and currently outstanding. The moneys in the said general reserve fund may be pledged in whole or in part by the port authority as security for or applied by it to the repayment with interest of any moneys which it has raised or may hereafter raise upon any bonds, legal for investment, as herein defined and limited, and made and issued by it for any of its lawful purposes; and the said moneys may be applied by the Port Authority to the fulfillment of any other undertakings which it has assumed or may or shall hereafter assume to or for the benefit of the holders of any of such bonds.

Any surplus revenues not required for the establishment and maintenance of the aforesaid general reserve fund shall be used for such purposes as may hereafter be directed by the two said states. [McKinney's Unconsol. Laws of NY § 7002 (Establishment of general reserve fund) as added by L. 1931, ch. 48, § 2].

As indicated above, the citation for § 6636 indicates it was in place as of 1947, and the citation for § 7002 indicates it was in place as of 1931. PANYNJ confirmed that § 6636 subjecting certain airport revenue to PANYNJ's obligation to apply revenues to the maintenance of its general reserve fund has not changed since it was originally enacted. PANYNJ also confirmed that the statute at § 7002 for the general reserve

fund for pooling net revenues, has not changed since it was originally enacted. [FAA Item 1, Exhibit 8, p. 5].

The Director also examined the definition of “surplus revenues” at McKinney Unconsol. Laws § 7001 and understood that it is the balance of the revenues from each PANYNJ terminal or transportation facility remaining at any time currently in the hands of PANYNJ after the deduction of current expenses of the operation and maintenance.

The laws from 1931 and 1947 support PANYNJ’s position that it has pre-1982 laws controlling financing that provide for revenue, including airport revenues, be used to support PANYNJ facilities. The laws call for the pooling of surplus revenues of all of PANYNJ’s facilities, including airports.

In order for an entity to have grandfather status, it must satisfy the requirements of the statute. The statutory requirements are the exclusive basis for finding grandfather status. Nevertheless, the Director notes that the following sources addressed or assumed the grandfather status of PANYNJ: as follows.

The Report to the Committee on Appropriations, U.S. House of Representatives on the Diversion of Airport Revenue, dated December 8, 1993, reported that the Department of Transportation Office of General Counsel addressed PANYNJ’s excepted status from the revenue retention requirement of the AAIA. The lack of a “formal determination” noted in the following summary for PANYNJ, and as found by the Associate Administrator in the Remand Order, is what brings us to the issues the Director examines today.

The port authority's revenue bond covenants require its operation be consolidated so revenues from any port authority entity can be used to support development and operations of another. Port authority financial statements show aviation funds offset losses incurred by other port authority entities. A DOT official advised, although a formal determination of the AAIA excepted status of the port authority has not been made, the legislative history specifically exempts unified ports authority from the revenue retention requirement of Section 511 (a) (12). Therefore, in OGC's view, there is a legal presumption the port authority is excepted. [FAA Exhibit 1, Item 6, Exhibit G, p. 17].

Policy and Procedures Concerning the Use of Airport Revenue, 64 Fed. Reg. 7696, 7719 (February 16, 1999) (FAA Revenue Use Policy).

Based on previous DOT interpretations, examples of grandfathered airport sponsors may include, but are not limited to the following:

- a. A port authority or state department of transportation which owns or operates other transportation facilities in addition to airports, and which have pre-September 3, 1982, debt obligations or legislation governing financing and providing for use of airport revenue for non-airport purposes...
- e. A 1957 state statutory transportation program governing the financing and operations of a multimodal transportation authority, including airport, highway, port, rail and transit facilities, wherein state revenues, including airport revenues, support the state’s transportation related, and other, facilities. The funds flow from the airports to a state transportation trust fund, composed of all “taxes, fees, charges, and revenues” collected or received by the state department of transportation.
- f. A port authority’s 1956 enabling act provisions specifically permitting it to use port revenue, which includes airport revenue, to satisfy debt obligations and to use revenues from each project for the expenses of the authority. The act also exempts the authority from property taxes but requires annual payments in lieu of taxes to several local governments and gives it other corporate powers. A 1978 trust agreement recognizes the use of the authority’s revenue for debt servicing, facilities of

the authority, its expenses, reserves, and the payment in lieu of taxes fund.

Similar provisions were considered in the *Proposed Policy and Procedures Concerning the Use of Airport Revenue*, 61 Fed. Reg. 7134, 7142 (February 26, 1996)

Examples of grandfathered airport sponsors may include, but are not limited to, a port authority or state department of transportation which owns or operates other transportation facilities in addition to airports, and which have pre-September 3, 1982, debt obligations or legislation governing financing and providing for use of airport revenue for non-airport purposes...

(d) A 1957 state statutory transportation program governing the financing and operations of a multimodal transportation authority, including airport, highway, port, rail, and transit facilities, wherein state revenues, including airport revenues, support the state's transportation related, and other, facilities. The funds flow from the airports to a state transportation trust fund, composed of all "taxes, fees, charges, and revenues" collected or received by the state department of transportation.

(e) A port authority's 1956 enabling act provisions specifically permitting it to use port revenue, which includes airport revenue, to satisfy debt obligations and to use revenues from each project for the expenses of the authority.

Securities and Exchange Commission (SEC) Order, January 10, 2017

The Port Authority approved \$1.8 billion in non-revenue generating projects, and initially allocated bond proceeds towards funding such projects, without disclosing known material risks surrounding the potential lack of legal authority to fund those projects...On multiple occasions, Port Authority lawyers cautioned that "projects that fall outside the scope of the Port Authority's mandate would be ultra vires, and cannot, therefore, be undertaken by the Port Authority as a Port Authority project or funded by the Port Authority, in partnership with another governmental agency..." [FAA Exhibit 1, Item 1, DD, Item 29, p. 2].

GAO Report 20-684 *Report Airport Funding - Information on Grandfathered Revenue Diversion and Potential Implications of Repeal*, dated September 2020 provides the source of PANYNJ grandfathered status as

Congressional authorization of interstate compact, New York and New Jersey state laws, and consolidated bond resolutions of its Board of Commissioners... Citations: S. J. Res. 88, 67th Cong. 42 Stat. 174 (1921); McK. Unconsol. Laws §§ 7001-7003) (NY) and N.J.S.A. 32:1 – 141 to 143 (NJ); 1952 consolidated bond resolution. [FAA Exhibit 1, Item 12, pp. 11 and 30].

GAO Report 20-684 also notes

PANYNJ's consolidated bond resolution requires it to pledge its consolidated revenues to the repayment of debt service. According to officials, the PANYNJ currently has approximately \$22 billion in outstanding consolidated bonds as of December 31, 2019, with maturity dates out into the 2060s and 2070s, and the longest maturing in 2094. [FAA Exhibit 1, Item 12, p. 16].

The Director has considered all the arguments and carefully reviewed the Remand Order, submissions from the parties, applicable laws, including McKinney Unconsol. Laws §§ 6636, 7001, and 7002, to determine whether the PANYNJ has grandfathered rights based on a pre-existing law controlling financing. The Director finds that these laws satisfy the grandfather clause requirements of §§ 471107 and 47133, and Grant Assurance 25 for several reasons.

First, the Director finds that both §§ 6636 and 7002 were enacted before September 2, 1982. Second, the Director finds that both of these laws constitute “law[s] controlling financing by the airport owner or operator.” Finally, based on their language the Director finds that they provide that airport revenue “be used to support not only the airport but also the general debt obligations or other facilities of the owner or operator.” This is fulfilled, in part, by the language of § 7002 that provides:

The moneys in the said general reserve fund may be pledged in whole or in part by the port authority as security for or applied by it to the repayment with interest of any moneys which it has raised or may hereafter raise upon any bonds, legal for investment, as herein defined and limited, and made and issued by it for any of its lawful purposes; and the said moneys may be applied by the Port Authority to the fulfillment of any other undertakings which it has assumed or may or shall hereafter assume to or for the benefit of the holders of any of such bonds.

N.Y. Unconsol. L. § 7002 (McKinney).

The Director recognizes that the language under § 7002 requires surplus revenues to be pooled and applied to a general reserve fund in an amount equal to one-tenth ($\frac{1}{10}$) of the par value of all bonds. The requirement to pool satisfies the statutory requirement for the grandfather exception. At this time the Director is not ruling as to whether the $\frac{1}{10}$ th provision caps the amount that the Port may grandfather.

Additionally, the Director notes that § 7002 provides that revenue that is not required for the general reserve fund shall be used “as may hereafter be directed by the two said states.” N.Y. Unconsol. L. § 7002 (McKinney). Arguably, the 1952 Consolidated Bond Resolution - an agreement that precedes the grandfather cutoff date of September 2, 1982 - constitutes such a “direct[ive],” and to the extent that Agreement provides for the pooling of revenue, this lends further support to our holding today.

The foregoing validates that laws were in place prior to 1982 that control financing for PANYNJ facilities and airports, and require revenues to be used to support not only airports, but other port owned and operated facilities. Moreover, these financing laws are still in effect today.

Accordingly, the Director finds that PANYNJ has grandfathered rights based on pre-September 2, 1982 laws controlling financing as provided for in 49 U.S.C. §§ 47107 and 47133, and Grant Assurance 25.

The Director addressed the primary question raised in the Remand Order by finding that PANYNJ has grandfathered rights based on a pre-existing law controlling financing. Language in the Remand Order also raised a related question in asking the Director to determine the basis for PANYNJ’s grandfathered rights, and if any, its scope.

As to the scope under the finding that PANYNJ has grandfathered rights, it is not without limitation as stated in the Remand Order.

2. Review of Grandfathered Status - Pre-Existing Covenants in Debt Obligation

The Director finds that in order to fully respond to the Remand Order, review of the second basis for grandfathering rights pertaining to pre-1982 covenants in debt obligations is warranted. Notably, the parties in their submissions addressed this separate basis for grandfathering.

In furtherance of this review on Remand, the Director examined PANYNJ’s 1952 Consolidated Bond Resolution, which PANYNJ claims continues to govern the issuance of bonds and is the authority by which PANYNJ issues consolidated bonds. PANYNJ stated it has never extinguished all of its debt and continues to borrow money to build out facilities. [FAA Exhibit 1, Item 8, pp. 6-7]. The Resolution provides, in part:

Consolidated Bond Resolution, (Adopted October 9, 1952)

WHEREAS, by Chapter 48 of the Laws of New York of 1931, as amended, and Chapter 5 of the Laws of New Jersey of 1931, as amended, The Port of New York Authority (hereinafter called the Authority) has been authorized and empowered to establish and maintain a certain General Reserve Fund, and to pledge said fund as security for certain of its bonds or other securities or obligations, and

WHEREAS, there are now outstanding several issues of bonds of the Authority, which although secured by said General Reserve Fund, nevertheless differ as to form, security, terms and conditions, and

WHEREAS, the Authority has determined to authorize and establish an issue of Consolidated Bonds, and to use such Bonds (and the proceeds derived from the sale thereof) from time to time for the purpose of refunding bonds heretofore or hereafter issued and to serve as a unified medium for financing for any and all purposes for which the Authority is or shall be authorized to issue bonds secured by a pledge of the General Reserve Fund, to the exclusion of bonds of prior issues...

SECTION 2. Establishment and Issuance.

An issue of bonds of the Authority to be known as "Consolidated Bonds" is hereby authorized and established. The bonds of said issue shall be direct and general obligations of the Authority and the full faith and credit of the Authority are hereby pledged for the prompt payment of the debt service thereon and for the fulfillment of all other undertakings of the Authority assumed by it to or for the benefit of the holders thereof. This resolution shall constitute a contract with the holders of such bonds.

Said Consolidated Bonds shall be issued only for purposes for which at the time of issuance the Authority is authorized by law to issue bonds secured by a pledge of the General Reserve Fund and only in such amounts as are permitted by Section 3 of this resolution. Said Consolidated Bonds shall be secured by revenues of the facilities of the Authority in the manner and to the extent provided in Sections 4 and 5 of this resolution and by the General Reserve Fund of the Authority in the manner and to the extent provided in Section 6 of this resolution and by the Consolidated Bond Reserve Fund in the manner and to the extent provided in Section 7 of this resolution.

Said Consolidated Bonds may be issued from time to time in such series as the Authority may hereafter determine. The bonds of each series may be issued in one or more installments as the Authority may hereafter determine. [FAA Exhibit 1, Item 6, Exhibit F].

The 1952 Consolidated Bond Resolution is the means by which PANYNJ issues consolidated bonds and, according to the Port, the terms of the Resolution constitute a contract with bondholders. Under the Resolution the full faith and credit of PANYNJ is pledged for the prompt payment of the debt service. PANYNJ confirmed in its submission that this provision requires PANYNJ revenues, including airport revenue, to be used to support PANYNJ general debt obligations. [FAA Exhibit 1, Item 6, p. 15-16].

The following press releases for the years 2010-2014 illustrates how PANYNJ relies on the 1952 Consolidated Bond Resolution and commonly uses consolidated bonds as a means to fund projects and refund (refinance) bonds.²

² The term "refunding, as used with reference to bonds, shall mean the retirement and cancellation thereof, after their acquisition by the Authority (before, at or after maturity) either in exchange for other bonds or by payment, purchase or redemption with the proceeds of the sale of other bonds; and the term refunded, as used with reference to bonds, shall mean the refunding thereof accomplished." See FAA Exhibit 1, Item 6, Exhibit F, p. 16. Bond, refunding's, or refinancing are used to achieve debt service savings.

- On July 21, 2010, PANYNJ announced the sale of Consolidated Bonds, 163rd Series, and totaling \$400 million with maturity dates from 2017 to 2040. The proceeds of these bonds were allocated to capital projects and also may be used for refunding obligations.
- On October 28, 2011, PANYNJ announced the sale of \$400 million in Consolidated Bonds, 169th Series, composed of bonds due from October 15, 2012 to October 15, 2041, with the proceeds to be allocated for capital projects and for refunding of certain obligations.
- On September 27, 2012, PANYNJ announced the negotiated sale of Consolidated Bonds, 174th Series for \$2 billion with maturity in 2062, with the proceeds to be used for the refunding of certain currently outstanding obligations.
- On January 23, 2013, PANYNJ announced the sale of Consolidated Bonds, 177th Series for \$350 million, composed of bonds due from July 15, 2014, to January 15, 2043, with proceeds to be used for capital projects and/or for refunding [of PANYNJ] obligations.
- On June 17, 2014, PANYNJ announced the sale of Consolidated Bonds, 183rd Series and totaling \$400 million maturing in 2025 and 2044. Proceeds were to be used for capital projects and refunding obligations of PANYNJ. [FAA Exhibit 1, Item 13].

On Remand, the Director examined PANYNJ's *Financial Statements and Appended Notes for the Year Ended December 31, 2019* which reported that the refundings "decreased its aggregate debt service payments by approximately \$263.7 million over the life of the refunded Consolidated Bonds." [FAA Exhibit 1, Item 14].

The Director reviewed the August 2019 Bond document (212th - 216th Series) and confirmed it had the information PANYNJ said was in its Official Statements when issuing consolidated bonds. The information identifies that payment of debt service regardless of series or installment, and regardless of dates of issuance or maturity or purposes for which issued, is secured equally and ratably by the net revenues of PANYNJ from its existing and future facilities financed with the use of Consolidated Bond proceeds. [FAA Exhibit 1, Item 6, pp. 15-16].

This provision from the 1987 House Report No. 100-123(II) is telling when considering PANYNJ's actions in issuing and refunding bonds.

The Committee intends that those airport owners or operators that had legislation or issued assurances or covenants in general debt obligations prior to September 3, 1982, which make it difficult or impossible for them to represent that all airport revenues would be used for the purposes specified in the Act may continue to utilize the exceptions for these airports. The continuing issuance of general debt obligations in this manner will not preclude those owners or operators from qualifying for Federal airport grants. [FAA Exhibit 1, Item 11, p. 11].

Since grant eligibility is preserved by the continuing issuance of general debt obligations in the same manner that existed prior to September 1982, it is reasonable to conclude that the corresponding grandfathered right is retained.

The Director has considered all the arguments and carefully reviewed the Remand Order, submissions from the parties, applicable laws, including the 1952 Consolidated Bond Resolution and various bond announcements for refundings, to determine whether the PANYNJ has grandfathered rights based on a covenant or assurance in a debt obligation issued not later than September 2, 1982. The Director finds that

these obligations satisfy the grandfather requirements of §§ 471107 and 47133, and Grant Assurance 25 for several reasons.

First, the Director finds that 1952 Consolidated Bond Resolution was enacted before September 2, 1982. Second, the Director finds that the 1952 Consolidated Bond Resolution continues to govern the issuance of bonds and is the authority by which PANYNJ issues consolidated bonds. And since the 1952 Consolidated Bond Resolution expressly constitutes a contract with bondholders, it is “a covenant or assurance in a debt obligation issued.” Finally, the Director finds that the 1952 Consolidated Bond Resolution and the subsequent issuance and refunding of bond obligations, requires that airport revenue “be used to support not only the airport but also the general debt obligations or other facilities of the owner or operator.”

The 1952 Consolidated Bond Resolution continues to control debt financing via pooling of net operating revenues from all facilities and the pledge of all net operating revenues to pay debt service and to establish statutory reserves. The finding the Director reaches today is also supported by the Port’s uncontested assertion that it has “never extinguished all of its debt and continues to borrow money to build out facilities.”

Additionally, as stated above, the 1952 Consolidated Bond Resolution could arguably be deemed a pre-existing law under the grandfather clause exception.

The Director finds that PANYNJ has grandfathered rights based on a pre-September 2, 1982 covenant or assurance in a debt obligation that provides that the revenues, including airport revenue, be used to support general debt obligations as provided for in 49 U.S.C. §§ 47107 and 47133, and Grant Assurance 25.

C. Director’s Conclusion

As discussed in the analysis above, a review of the Remand Order, the Director’s Determination, supporting records, the party’s supplemental filings, and related information confirm that PANYNJ meets the requirements for the grandfather exception. The scope of PANYNJ’s grandfathered right is limited as stated in the Remand Order.

The grandfathered rights established under the statutory exceptions are acceptable to the extent that pre-1982 “law[s] controlling financing” continue to provide for certain comingling of funds or debt obligations issued prior to September 2, 1982 remain in effect and likewise provide for comingling of PANYNJ revenue. In accordance with the Remand Order issued on January 11, 2021, airport revenue that falls within the PANYNJ’s grandfathered rights are limited to support only those facilities that the PANYNJ owns or operates.

Issue 2 – Whether the FAA should issue a civil penalty consistent with the instances of non-compliance affirmed in the Associate Administrator’s Remand Order, and if so, the amount.

1. PANYNJ’s Position

In its Supplemental Brief, PANYNJ argues that there is no basis for the assessment of civil penalties and that “DOT regulations and guidelines are clear: civil penalties should only be assessed when other efforts to secure compliance have failed, which is not the case here.” [FAA Exhibit 1, Item 6, p. 3]. PANYNJ states that since the issuance of the Director's Determination in 2018, it “actively engaged with the FAA in an effort to come into compliance with the requirements of the FAA’s [Corrective Action Plan or CAP].” PANYNJ claims it has “evidenced a willingness to perform sweeping changes in its reporting and accounting for airport expenditures to provide increased transparency and information as to the use of airport revenues.” PANYNJ claims these changes improve its governance and transparency and it has been acting in good faith. [FAA Exhibit 1, Item 6, pp. 23-24].

PANYNJ recognizes the ability of the FAA to impose civil penalties for grant assurance violations. [FAA Exhibit 1, Item 6, p. 24]. However, PANYNJ counters that in the FAA Revenue Use Policy and FAA Order

5190.6 *Airport Compliance Manual*, FAA expressed its preference to seek civil penalties only as a last resort. PANYNJ claims as provided in these sources, a civil penalty is imposed only after a sponsor has been given an opportunity to take corrective action, and other enforcement actions failed to achieve compliance. [FAA Exhibit 1, Item 6, pp. 25-26].

PANYNJ states that it is “pursuing in good faith each of the projects or programs that are the subject of the Final Decision.” PANYNJ represents that its actions demonstrate its good faith efforts to comply with its obligations, and that it intends to continue to cooperate to come into compliance with any corrective action FAA may deem necessary. [FAA Exhibit 1, Item 6, pp. 26-28].

PANYNJ claims “because of the FAA's strong preference against imposing civil penalties for revenue diversion,” it was not able identify an instance where FAA imposed a civil penalty for a grant assurance violation in general or for revenue diversion specifically. PANYNJ concludes its argument by asserting that FAA should not impose civil penalties. [FAA Exhibit 1, Item 6, p. 28].

2. United’s Position

In its Reply to PANYNJ’s Supplemental Brief, United claims that PANYNJ’s efforts to secure compliance have failed. United argues that “PANYNJ actually commits to nothing. . .it simply says it does not expect to act illegally, but if it does so, FAA has remedies.” United took no position on whether civil penalties should be assessed, but stated if penalties are assessed, the monies should not be paid from airport funds, and should not increase the rates and charges paid by airlines. [FAA Exhibit 1, Item 7, pp. 6-8].

Additionally, United states that to the “extent FAA determines that money has been improperly diverted from EWR, such amounts should be returned to the airport for the benefit of its users rather than paid to the United States Treasury” and United claims that PANYNJ merits reform and accountability much more than the imposition of a civil penalty. [FAA Exhibit 1, Item 7, pp. 6-8].

3. Director’s Analysis and Conclusion

The FAA is authorized to impose civil penalties per 49 U.S.C. § 46301 for revenue diversion in violation of 49 U.S.C. §§ 47107 and 47133. Section 46301 permits the amount of a civil penalty for up to three times the amount of revenues diverted.

PANYNJ is correct that FAA policy generally affords an airport sponsor an opportunity to take corrective action before a civil penalty would be issued. As explained in the FAA Revenue Use Policy, if a finding of revenue diversion is made, and the sponsor declines to take the corrective action, the FAA will propose enforcement action. Such actions may include assessing civil penalties.

Use of this authority is generally only after the airport sponsor has been given a reasonable period of time after a violation has been clearly identified, to take corrective action to restore the funds or otherwise come into compliance before a civil penalty is assessed. FAA will seek civil penalties for the diversion of airport funds if the airport sponsor is not willing to correct the diversion and make restitution, with interest, in a timely manner. [See Revenue Use Policy, 64 Fed. Reg. 7714 and 7723].

On remand, and upon consideration, the Director finds that because of (1) the on-going good faith corrective action discussions between the FAA and PANYNJ, (2) the uncertainty about the amounts of actual unlawfully diverted revenues as noted in both the Director’s Determination and Remand Order, and (3) the effect of the corrective actions that PANYNJ will ultimately implement, issuing civil penalties is not warranted at this time. The FAA, however, reserves the right to take enforcement actions as provided under law. In any assessment of civil penalties, the financial interest of PANYNJ’s airports (not PANYNJ as a whole) and the financial impact on its users should be considered.

VI. CONCLUSION AND FINDINGS

Based on this robust review, the Director determines that PANYNJ has grandfathered rights based on laws controlling its financing and covenants in debt obligations enacted prior to September 2, 1982 providing that revenues be used to support not only the airport but also the general debt obligations or other facilities owned or operated by PANYNJ as provided for in 49 U.S.C. §§ 47107(b)(2) and 47133 (b)(1), and Grant Assurance 25. The Director also determines that issuing civil penalties is not warranted at this time.

VII. ORDER

Based on the evidence of record in this proceeding, the Director determines that:

Issue 1 – PANYNJ has grandfathered rights as provided for in 49 U.S.C. §§ 47107(b)(2) and 47133(b)(1), and Grant Assurance 25.

Issue 2 – At this time, issuing civil penalties consistent with the instances of non-compliance affirmed in the Associate Administrator’s Remand Order is not warranted.

Accordingly, it is ordered that:

1. PANYNJ has grandfathered rights based on laws controlling its financing and covenants in debt obligations enacted prior to September 2, 1982 providing that revenues be used to support not only the airport but also the general debt obligations or other facilities owned or operated by PANYNJ as provided for in 49 U.S.C. §§ 47107(b)(2) and 47133 (b)(1), and Grant Assurance 25.
2. Issuing civil penalties consistent with the instances of non-compliance affirmed in the Associate Administrator’s Remand Order is not warranted; and
3. All motions not expressly granted in this Director’s Determination on Remand are denied.

VIII. RIGHT OF APPEAL

This Director’s Determination on Remand is an initial agency determination and does not constitute a final agency decision and order subject to judicial review. 14 CFR § 16.247(b)(2). A party to this proceeding adversely affected by the Director’s Determination on Remand may appeal the initial determination pursuant to 14 CFR § 16.33(c) within 30 days after service of the Director’s Determination on Remand.

**KEVIN
WILLIS**

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Kevin C. Willis
Director, Office of Airport Compliance
and Management Analysis

Date

INDEX OF THE ADMINISTRATIVE RECORD

FAA Exhibit 1

- Item 1** Order Affirming in Part and Remanding in Part, January 11, 2021, and Index including Director’s Determination, November 19, 2018.
- Item 2** Order for Supplemental Pleadings, April 26, 2021.
- Item 2A** Consent Motion by Respondent the Port Authority of New York and New Jersey's To Extend the Date For Submission Of Supplemental Pleading, May 19, 2021.
- Item 3** Notice For Extension of Time, May 27, 2021.
- Item 4** Second Motion by Respondent the Port Authority of New York and New Jersey's To Extend the Date For Submission Of Supplemental Pleading, August 8, 2021.
- Item 5** Order For Extension of Time, August 10, 2021.
- Item 6** The Port Authority of New York and New Jersey's Supplemental Brief, Filed Pursuant To the Final Decision and the Order for Supplemental Pleadings, September 15, 2021.
- Exhibit A - McKinney's Consolidated Laws of New York Annotated Unconsolidated Laws, Title 17. Port Authority of New York and New Jersey, Chapter 6--Air Terminals, § 6636, Use of reserve funds of Authority: disposition of revenues.
- Exhibit B - McKinney's Consolidated Laws of New York Annotated Unconsolidated Laws Title 17. Port Authority of New York and New Jersey, Chapter 20-General Reserve Fund, § 7002, Establishment of general reserve fund.
- Exhibit C - McKinney's Consolidated Laws of New York Annotated, Unconsolidated Laws, §§ 6631-2.
- Exhibit D - McKinney's Consolidated Laws of New York Annotated, Unconsolidated Laws, §§ 7001-3.
- Exhibit E - McKinney's Consolidated Laws of New York Annotated, Unconsolidated Laws §§ 6643-5.
- Exhibit F - Bonds, Notes And Other Obligations, Consolidated Bond Resolution, (Adopted October 9, 1952).
- Exhibit G - Report to the Committee on Appropriations, U.S. House of Representatives on the Diversion of Airport Revenue, December 8, 1993.
- Item 7** Reply of United Airlines, Inc. to Respondent’s Supplemental Brief on Remand, October 15, 2021.
- Item 8** The Port Authority of New York and New Jersey’s Motion For Leave To File Reply Brief and Reply Brief in Further Support of its Supplemental Brief, November 1, 2021.
- Item 9** House Conference Report, 97-760, August 17, 1982, excerpt.
- Item 10** Public Law 97-248, excerpt.
- Item 11** House Report No. 100–123, June 26, 1987.
- Item 12** *Airport Funding - Information on Grandfathered Revenue Diversion and Potential Implications of Repeal*, GAO-20-684, September 2020.
- Item 13** Press Release Number: 5-2010, Press Release Number 130-2011, Press Release Number: 133-2012, Press Release Number: 8-2013, and Press Release Number: 125-2014.
- Item 14** PANYNJ *Financial Statements and Appended Notes for the Year Ended December 31, 2019*.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 3, 2022, I caused to be emailed and to be placed in the Federal Express a true copy of this Director's Determination on Remand for FAA Docket No. 16-14-13 addressed to:

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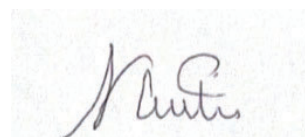
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FAA Airports Eastern Region (AEA-600)



Natalie Curtis,
Office of Airport Compliance and
Management Analysis