



Legislation Details (With Text)

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**Title:** Recommendation to adopt resolution amending Resolution No. C-28465 with respect to the utilization of flight slots allocated at the Long Beach Airport and related administrative amendments to the Resolution, in accordance with the Airport Noise Compatibility Ordinance set forth in Chapter 16.43 of the Long Beach Municipal Code. (Citywide)

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Date	Ver.	Action By	Action	Result
11/20/2018	1	City Council	approve recommendation and adopt	Pass

Recommendation to adopt resolution amending Resolution No. C-28465 with respect to the utilization of flight slots allocated at the Long Beach Airport and related administrative amendments to the Resolution, in accordance with the Airport Noise Compatibility Ordinance set forth in Chapter 16.43 of the Long Beach Municipal Code. (Citywide)

The City of Long Beach (City) is the owner and operator of Long Beach Airport (Airport). The City restricts flight activity and the time of day that aircraft operations may be scheduled and occur at the Airport, requires minimum utilization of allocated flight slots, and prescribes administrative penalties and an alternative enforcement process for operators who violate the regulations. These regulations date back to a pre-existing court order and subsequent settlement agreement that was originally entered into in 1989 and included various noise-based restrictions and regulations on aircraft operations at the Airport. In 1995, a negotiated Stipulated Final Judgment was approved by the court that provided the City with the ability to enforce its noise regulations. The Noise Ordinance (Long Beach Municipal Code Chapter 16.43) remains in effect today and has not been amended or modified by the City Council since its first enactment in 1995.

The implementing provisions for the Noise Ordinance are provided in Resolution No. C-28465 (Allocation Resolution). The Allocation Resolution provides important allocation preferences, flight slot allocation processes, minimum and maximum use provisions, and related allocation provisions necessary for implementing the Noise Ordinance. The Federal Aviation Administration (FAA) has previously acknowledged that the fundamental provisions of the City’s Noise Ordinance and Allocation Resolution, including those related to the noise and curfew provisions, are exempt from the provisions of the Airport Noise and Capacity Act

of 1990 (49 U.S.C. 47521 et seq.) (ANCA) and its implementing regulations (14 C.F.R. Part 161).

In September 2017, the City initiated a public process to consider possible amendments to the Noise Ordinance and Allocation Resolution to modify certain administrative penalties, slot utilization, and related administrative provisions. In light of the recent increased demand for permanent flight slots at the Airport, lack of availability of permanent flight slots, and based on the continued and anticipated further underutilization of allocated flight slots compared to current load factors and industry trends in the region, it is recommended that the City Council adopt the attached Resolution amending the Allocation Resolution, on an expedited basis, separate from any proposed amendments to the Noise Ordinance relating to curfew penalties and related issues. This approach is also appropriate in light of an agreement the City reached with JetBlue Airways earlier this year regarding compliance with the existing curfew provisions of the Noise Ordinance.

The City has always been vigilant in assuring the Airport operates within the defined parameters and in strict compliance with all provisions of the Airport's Noise Ordinance and Allocation Resolution. In addition, the City has always sought to regulate in a manner that protects its legitimate interests and concerns as the proprietor of the Airport but does not unnecessarily interfere with or affect competition between the air carriers serving the Airport or the economic evolution of the airline industry. It is current City policy to provide the best possible air transportation services and opportunities to the traveling public in a manner that supports a healthy and competitive business environment at the Airport within the existing environmental and operational constraints. The City and Airport have determined the Allocation Resolution requirements relating to minimum use provisions conflict unnecessarily with these vital objectives and policies.

The proposed amendments to the Allocation Resolution are intended to allow the City and Airport to continue to meet two important policy objectives as follows:

1. The Airport should not allow air carriers to operate in a manner that creates artificial advantages for any carriers operating at the Airport unrelated to the basic objective of the City in providing air transportation facilities and services to the public and might even encourage anti-competitive conduct at the Airport. Essentially, this is the "fairness" issue underlying the proposed amendments to the Allocation Resolution.

In addition to the basic public policy reality that "fairness" is always a desirable regulatory objective, the City has contractual obligations to the FAA to operate the Airport on "fair and reasonable" terms and without "unjust discrimination" as between similarly situated airport users. The proposed amendments to the provisions of the Allocation Resolution continue to ensure compliance with these obligations.

2. Slot allocations are not, and must not be permitted to become, property rights or property interests of the commercial operators at the Airport. The slots (and all other capacity) at the Airport are not transferable by the air carriers, and the proposed amendments to the Allocation Resolution do not alter this basic premise of commercial

operations at the Airport in any respect. This is the “property rights” issue underlying the proposed amendments to the Allocation Resolution.

### **Proposed Amendments**

The proposed amendments to the Allocation Resolution are primarily focused on ensuring that air carriers adequately utilize their flight slots, which are allocated by the Airport. The historical failure by air carriers to adequately utilize their allocated flight slots is minimizing the opportunities for other incumbent and new entrant air carriers to increase or initiate service at the Airport. This is particularly problematic with the recent increase in demand for Airport flight slots and the current and anticipated future failure by some incumbent air carriers to fully utilize their slot allocations.

### ***Existing Flight Slot Utilization Requirements***

Slot utilization requirements are contained in Section 2(l) of the Allocation Resolution (definition of “Operations”). As stated in the Allocation Resolution, “Operations means averaging at least four Flights per Slot per week over any 180-day period [57 percent]; provided, however, failure to conduct at least 30 Flights per Slot in any 60-day period [50 percent] shall constitute failure to Continuously Operate such Slot.” The requirements enable a carrier to maintain a slot with a minimum of 57 percent utilization. This level of utilization arguably provides for the potential to engage in anti-competitive behavior by maintaining flight slots that are underutilized and, thereby, restrict opportunities for new entrants or other incumbent air carriers that might otherwise be able to operate the slots.

### ***Proposed Amendments to Flight Slot Utilization Requirements***

The proposed amendments to the flight slot utilization requirements would require flight slot utilization of 60 percent during any calendar month, 70 percent during any calendar quarter, and 85 percent during any calendar year. These proposed, minimum utilization requirements are similar to the minimum utilization requirements at other airports in the region, including at John Wayne Airport, Orange County and are consistent with average load factors and seat and passenger utilization at the Long Beach Airport.

In addition to these modifications, the proposed amendments include administrative penalty provisions for failure to comply with the minimum utilization requirements that would, among others, subject air carriers to penalties including reduction in the number of flight slots consistent with actual utilization and potential disqualification from receiving additional permanent or supplemental flight slots for a period of time after violation of the minimum utilization provisions and under certain specified circumstances. These proposed administrative penalty provisions would allow the Airport to reallocate under-utilized flight slots to incumbent and new entrant air carriers.

### ***Additional Recommended Amendments***

The Airport is recommending other administrative amendments, including modifications to the definition of flight slot and ferry operations and other minor administrative amendments that

will facilitate continued implementation of the Allocation Resolution.

### **Public Review and Comment on Proposed Allocation Resolution Amendments**

The City initiated the process for the City Council to consider possible proposed amendments to the Noise Ordinance and Allocation Resolution in September 2017 to ensure that all interested parties had an opportunity to provide input to the Airport and City as it considers these important possible amendments. This process included written correspondence to, and request for comment from, air carriers and other interested parties. The Airport also reached out to the greater community to discuss the proposed amendments through public input meetings. The Airport received written comments from the air carriers during this process and oral comments from community members and other interested parties. In the late spring of 2018, the Airport resolved an ongoing dispute with JetBlue relating to its curfew operations and interpretation of the existing curfew provisions, and, based on assurances from JetBlue as well as recent schedule changes by the air carrier, the Airport anticipates the number of curfew operations will decrease. Based on the written and oral comments received during the public review and comment process, and the agreement reached with JetBlue regarding the enforcement provisions of the Noise Ordinance, the Airport decided to take a more focused approach to the proposed amendments as they relate specifically to the Allocation Resolution.

On May 16, 2018, the Airport Director sent a letter to the air carriers and other interested parties requesting comments on the proposed Allocation Resolution amendments (Attachment A). The Airport received only two comment letters from Southwest and JetBlue (Attachment B). As indicated above, additional comment letters were received in the context of the broader Noise Ordinance amendment process initiated in 2017. In light of the Airport's decision to proceed at this time with only the Allocation Resolution amendments, these comments letters have not been attached but are available upon request.

The two airline comment letters received fall into two separate camps: JetBlue opposes staff's recommendations and appears to prefer the minimum utilization policies status quo. In contrast, Southwest supports staff's recommendations. Because this is obviously an important issue to both JetBlue and Southwest, staff has responded to each of the principle arguments advanced by the air carriers.

#### ***JetBlue Comments***

The bedrock of many of the objections made by JetBlue regarding the proposed amendments to the Allocation Resolution relates to its perception that the proposed amendments are "... specifically designed to harm JetBlue..." and are not necessary because JetBlue is in "... full compliance with the Allocation Resolution and Ordinance." Contrary to JetBlue's assertions, the proposed amendments are not targeted at JetBlue; rather the proposed amendments are a result of the continued underutilization of flight slots at the Airport. The new minimum utilization requirements will apply equally to all incumbent and potential, new entrant air carriers at the Airport, not just to JetBlue.

In addition, JetBlue's minimal compliance with the existing utilization provisions is not the issue at hand; rather, the issue is that the Airport is increasingly concerned that given the existing minimum utilization provisions in the current Allocation Resolution, air carriers have the ability to essentially "slot squat" on flights without permanently returning the underutilized flight slots. This in turn impacts the ability of other air carriers (both incumbent and new entrant) to utilize the unused flights on a regular basis. The inability to use these slots on a regular and long-term basis (rather than on a supplemental and limited basis) restricts an air carrier's long-term planning at the Airport. It is important to emphasize that the proposed amendments would apply to all air carriers (incumbent and new entrant) and would simply require an increase in the minimum utilization of the flight slots to ensure maximum utilization of this limited resource.

It is important to recognize that the Airport's flight utilization objectives are the essence of the proposed amendments and are arguably the most direct and effective means for the City to maximize flight operations within the flight slot and noise budget constraints that currently exist. Because of the constrained operational environment that the Airport operates within, the Airport must necessarily determine how the flight slots can be most efficiently and fairly administered by the City. In addition to the standard legal obligation of the City that it not act in a manner that is "arbitrary or capricious" in its structuring of its regulations, the City also has obligations under its grant agreements with the FAA to administer the operation of the Airport on "fair and reasonable terms" and without "unjust discrimination" among airport users. The proposed amendments relating to flight utilization requirements address inherent and inevitable administrative questions that flow naturally from the very existence of a noise control and allocation resolution, which requires the allocation of scarce operating capacity among competing users. The Allocation Resolution inevitably, addresses issues of "fairness" and "reasonableness" in allocating those resources. The Allocation Resolution must address the question of which provisions are necessary to protect legitimate City interests as the proprietor and operator of the Airport. The Airport must consider which restrictions on the use of flight slots are necessary to avoid inadvertently allowing one user from unfairly taking advantage of the system to the detriment of other, existing or potential airport users. These are the questions the City must address in administering the Allocation Resolution, and they are the questions that are at the heart of the proposed amendments to the minimum utilization requirements.

With respect to the proposed new, minimum utilization percentage requirements, JetBlue also argues that the proposed annual 85 percent slot usage requirement "...is more stringent than the [80 percent slot usage requirement used by the] International Air Transport Association (IATA) ... at the three federally-slot controlled airports in the United States (JFK, LGA, and DCA)..." However, what JetBlue fails to disclose is that the 80 percent slot usage requirement is for any two-month period and that slots at these airports are subject to being withdrawn if not utilized at a rate of at least 80 percent over each two-month period. Therefore, the proposed amendments to the minimum use provisions would still be more lenient (i.e., not as strict as) than the three federally-slot controlled airports.

JetBlue also argues that even with the airline's service reductions, which went into effect

September 2018, “less than half of the unused slots have been requested. In other words, there will likely be ample slots available in the near future, which provides further reason for the City to not pursue an unwise and possibly unlawful modification of the Resolution at this time...” This argument, however, is hollow and without merit because it fails to recognize that JetBlue has indicated to the Airport that despite its schedule changes, JetBlue will not be permanently returning any flight slots. Accordingly, any unused portions of slots will only provide “temporary” capacity for incumbent and new entrant air carriers to utilize. Unless the minimum utilization requirements are modified, JetBlue will not be required to return any flight slots even with the planned reduction in service. As a result, no returned permanent flight slots will be available for allocation to incumbent or new entrant air carriers at the Airport. This issue is further addressed below in the context of Southwest Airlines’ comments, which indicate the difficulty in operating with only temporary capacity (i.e., unused portions of slots).

In reality, JetBlue’s argument is a somewhat transparent attempt to advocate that the Airport should continue to restrain normal market forces by enforcing the existing minimum utilization provisions in a manner which, as a practical matter, will allow JetBlue to continue to avoid reducing its service at the Airport, despite its cutback in flights, so that other air carriers will not have the opportunity to expand service at the Airport by receiving an allocation of permanent flight slots “returned” by JetBlue to the Airport. In essence, JetBlue’s argument is an attempt to solicit the City and Airport’s assistance in using the Allocation Resolution to provide JetBlue with a continuing competitive advantage at the Airport, while disadvantaging one (or more) of JetBlue’s competitors. The Airport does not make flight slot allocations for the purpose of facilitating or encouraging anti-competitive conduct where air carriers might deny their competitors access to operations capacity that they do not intend to use themselves.

JetBlue also argues that the proposed terms such as “any year” “calendar month” and “calendar quarter” be clarified and that “...such rigid time frames would not account for complexities inherent in the airline industry, especially when such a regime does not allow for slot transfer rights as allowed for by the IATA WSG to address commercial/seasonal realities. It is unnecessary for an underutilized small municipal airport to impose slot restrictions more stringent than the nation’s, indeed the world’s, busiest airports. There is no legal or policy basis to do so.” In response to JetBlue’s assertions, the final proposed amendments to the Allocation Resolution clarify that the terms used refer to a calendar month, calendar quarter and calendar year for purposes of calculating the minimum utilization requirements. Therefore, these proposed minimum utilization requirements allow for commercial/seasonal fluctuations.

Finally, JetBlue argues that “...the proposed changes might have a serious impact on JetBlue’s ability to efficiently schedule aircraft and crewmembers, ...The specific nature of Long Beach’s operating regime was approved by a Federal District Court and grandfathered by Congress through ANCA. Tampering with this system could have drastic consequences and be contrary to the intent of the community. The City needs to be especially careful not to discriminate against one airline, or type of airline business model, ...Any City action to unilaterally impose changes to the Ordinance or Allocation Resolution

that are more restrictive or facially discriminatory could have unintended consequences and be deemed presumptively invalid.” JetBlue’s argument is irrelevant to the recommended amendments. JetBlue does not have a “vested right,” or even a “vested interest,” in continued application by the City of each and every existing provision of the Noise Ordinance or Allocation Resolution. JetBlue has a reasonable expectation - as do all of the air carriers - that the City will apply the Noise Ordinance and Allocation Resolution in a fair and reasonable manner, and without “unjust discrimination.” However, no carrier has a reasonable expectation that the City will refrain from all modifications and policies unless the carrier finds the modification to the carrier’s competitive advantage or if the carrier finds that the modification would enhance operational opportunities for its competitors. So long as the City’s rules for the Airport are carrier-neutral in their structure and application, JetBlue does not have a legitimate basis for objecting to City Airport policy on competitive grounds.

### ***Southwest Airlines Comments***

In contrast to JetBlue, Southwest Airlines provides strong support for the recommended amendments and, in fact, indicates the proposed amendments to the minimum utilization requirements do not go far enough. “From Southwest Airlines’ perspective, good policy dictates that, to the extent [flight slots] are allocated to and, as a result, controlled by individual air carriers, there must be an effective mechanism to assure maximum usage of such capacity.” Southwest emphasizes that “[w]hile the current Resolution provides a process for the Calculation and Reservation of Unused Flights, ...the intricacies of the scheduling process render that process extremely unwieldy and simply not conducive to effective scheduling of aircraft and/or personnel. Further, it virtually forecloses our ability to consider new markets and the attendant commitment of appropriate marketing and other resources to such operations given their temporary nature. Without the ability to be reasonably sure of a substantial duration, such investment cannot be justified.”

Staff sees merit in this argument and it appears reasonable and fair that, in a situation where there are unused flights, an air carrier should be required to permanently return the flight slots rather than simply maintain a minimum flight schedule that essentially leaves capacity on the ground and unused. This issue goes to the very heart of JetBlue’s position relating to the existing lack of capacity demand at the Airport. In fact, if the minimum utilization provisions are amended to require greater utilization and use it or lose it provisions are put in place, the Airport anticipates that flight slots will necessarily be returned to the Airport for reallocation and that Southwest and/or other incumbent and new entrant air carriers will request and utilize all of these flight slots; particularly when they are not burdened with the requirements for utilization of “unused flights.”

### **Federal Aviation Administration Coordination Efforts**

At appropriate points during the process, the Airport, in coordination with the City Attorney’s Office and outside counsel, has coordinated on this matter with representatives from the Western-Pacific Region and FAA legal at headquarters, to ensure the City recognizes any federal interest or concerns that might be related to the consideration of these important

issues.

Prior to presenting the Airport's final recommendations to the City Council, the Airport requested a formal written opinion from the FAA Chief Counsel to provide the City with the necessary written assurances that the proposed amendments to the Allocation Resolution will not jeopardize the ANCA-grandfathered status of the Noise Ordinance and Allocation Resolution and that the proposed amendments are consistent with, and do not violate, any provision of existing federal law for which FAA has statutory or delegated enforcement or implementation responsibilities.

The FAA responded to the City's request in a letter dated August 15, 2018. In the letter, the FAA acknowledges the City's request for a legal opinion on the proposed amendments to the Allocation Resolution. In their response, however, they also indicate that FAA is not prepared to provide a "comprehensive legal opinion" on what FAA states is "...a broad range of facts and legal issues based on a draft resolution." The FAA's written response is similar to FAA's response in the context of other airport issues where FAA has been reluctant to step into the shoes of the airport proprietor and provide "comfort letters" relating to possible scenarios/actions in the face of concerns voiced by the community/air carriers. Subsequent discussions with FAA indicate that FAA does not believe the proposed amendments raise ANCA issues and that the FAA encourages the City, as the Airport proprietor, to make the necessary business decisions to encourage and promote competition at the Airport.

The City and Airport continue to recognize and are respectful of, the legitimate federal interest in aviation matters, and the cooperation, assistance, and guidance the City has received from the FAA, which are of critical importance to the City's success in continuing to operate the Airport within the constraints of the Noise Ordinance and Allocation Resolution. Notwithstanding the FAA's decision to not provide a formal written legal opinion, taking action to update Resolution C-28465, which includes among other things, requirements to utilize flight slots more fully and efficiently, is a way to ensure these flight slots are in fact used in a way to encourage better utilization and support a healthy and competitive business environment at the Airport.

This matter was reviewed by Assistant City Attorney Michael J. Mais and by Budget Analysis Officer Julissa José-Murray on November 2, 2018.

City Council action is requested on November 20, 2018, to ensure that the substantial and important under-utilization issues that are reflected in upcoming flight schedules will not impact the ability of incumbent and new entrant air carriers to increase or initiate service at the Airport.

There is no fiscal or local job impact associated with this recommendation.

Approve recommendation.

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APPROVED:

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