LANE & PARTNERS LLP

15 Bloomsbury Square London WC1A 2LS

T +44 (0)20 7242 2626 F +44 (0)20 7242 0387

DX 134442 BLOOMSBURY info@lane.co.uk www.lane.co.uk

RWV/CCB

Our ref: Your ref: Direct Dial: E-mail:

18 October 2005

Civil Aviation Authority CAA House, Gate 1 K4 45-59 Kingsway London WC2B 6TE

For the attention of: Mr Dave Miller Economic Regulation Group

Dear Sirs

Consultation on the CAA's allocation of Scarce Bilateral Capacity Rights: Review of Statement of Policies Annex 8 Official Record Series 1 and hearing procedures

Thank you for writing to me about the CAA's proposed revision of its published guidance on the economic framework for considering cases relating to the allocation of scarce bilateral capacity.

In my view, the existing Annex 8 proved to be unworkable in the India case. Far from providing constructive guidance on the preparation of written evidence, it actually impeded the parties in the presentation of their respective cases and did not achieve its purpose. The CAA should, therefore, withdraw Annex 8 at the earliest opportunity.

In considering whether any publication needs to be put in its place, and, if so, what that publication should contain, the CAA should not lose sight of the fact that, whatever may be decided as a result of this consultation, the principal criteria in accordance with which a scarce capacity case will be determined are:

- (a) the CAA's general objectives and duties as set out in the Civil Aviation Act 1982, as amended; and
- (b) the CAA's Statement of Policies published pursuant to Section 69 of the Act.

Both Annex 8 and the Statement of Key Issues are new concepts in the licensing process. They both apparently aim to ensure that the evidence and argument is confined as far as possible to matters which the CAA consider to be relevant. Whilst neither document is required by statute, I support the CAA's attempt to persuade the parties to address the essential issues. So far, the attempt has not been wholly successful, perhaps because the CAA has shrunk from being too interventionist.

I have no problem with the proposed new version of Annex 8 except that it really does not add very much to the knowledge that the airlines already have of what the CAA expects by way of written evidence. However, I believe that the CAA's aims would be more achievable if it made more effective use of the preliminary meeting procedure provided for in Regulation 23 of the Civil Aviation Authority Regulations to supplement their use of Annex 8 and the Statement of Key Issues.

The CAA should, as a matter of course, fix a preliminary meeting to take place three working days (or longer if time permits) after the date for submission of the written evidence in support of the application(s). The preliminary meeting would be used for the CAA to indicate

- (a) whether the parties' written evidence satisfactorily met the requirements of the Guidance and, if not, to indicate in what areas the CAA would expect to receive additional, or amended, evidence, and
- (b) what the CAA perceived to be Key Issues, and to invite oral submissions before a formal Statement of Key Issues was circulated to the parties.

There are two points which I would make about use of the preliminary meeting procedure. First, it may be said that the need to call a preliminary meeting will lengthen the process. My view on this is that, if the result is to produce a more constructive debate, then the use of a little more time is not to be discouraged. If the steps recommended above are taken, it will be easier for the Panel to interrupt a line of argument, or cross-examination, to invite the advocate to explain the relevance. Secondly, it may be said that the Regulation 23 procedure relates only to a preliminary meeting "to discuss the conduct of the case", and that this wording does not sufficiently cover what I have proposed above. In my view, it does, but the easy answer, if the point is taken, would be for the Regulations to be amended to incorporate a wider wording.

There are two additional points upon which I would like to comment.

Definition of the Market

In my view, it would be helpful if the CAA were to include in its Statement of Key Issues its views on the definition of the market. Whilst airlines would be able at the hearing to contest the CAA's preliminary view, such an indication would be of assistance in confining the debate.

The Adversarial Hearing Procedure

There is no doubt that the result of the use of this procedure adds to the expense of the hearing process. It does not necessarily add to the length of the process because this is often determined by the amount of time which the CAA is willing to set aside for a hearing, which is often limited. It is undeniable, however, that the adversarial process, and detailed cross-examination, ensure that the issues are minutely addressed. Given that the CAA's decision will often determine rights to operate on a particular route for many years to come, it seems to me that such a detailed examination is highly appropriate. The alternative, I suppose, would be the adoption by the CAA of some sort of inquisitorial process but, in the absence of arguments in favour of that alternative, I am not persuaded that it would be better.

As I have the opportunity, I would make one point in relation to the time which the CAA should set aside for a hearing. In general terms, the CAA should be prepared to allow one day per applicant in a particular case. In the India case, the CAA allowed only two days in a complicated case in which there were three applicants. They sought to remedy this deficiency by extending the hearing day so that the hearing lasted from 09:30 until 18:00 with brief breaks. This is too demanding upon advocates and witnesses (and the Panel) and is counter-productive because tired advocates tend to ramble. The CAA should not underestimate the amount of preparation which is required outside of the hearing both before the beginning of the case and during the case. Accordingly, hearing days should, in general, reflect the practice of the High Court, which sits from 10:30am until 4:00 or 4:30pm.

I confirm that I have no objection to this response being posted on the CAA's website. I shall be happy to discuss with the CAA any points made above.

With best wishes,

Yours sincerely

R W Venables

For Lane & Partners LLP