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**Research and
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Docket # 2007-28396

1200 New Jersey Avenue S.E.
Washington, D.C. 20590

DEC 5 2007

Mr. Robert P. Silverberg, Esq.
Silverberg, Goldman & Bikoff, LLP
1101 30th Street, NW, Suite 120
Washington, D.C. 20007

Dear Mr. Silverberg:

This letter is in response to the September 20, 2007, Petition for Review of Staff Action, (Petition) filed by ExpressJet Airlines, Inc. (ExpressJet). The Petition appeals the September 10, 2007, decision denying the motions filed by ExpressJet seeking confidential treatment of its branded service Schedule T-100 data for the months of April, May, June and July 2007. In the October 2, 2007, October 31, 2007, and November 27, 2007 Motions for Confidential Treatment, ExpressJet requested that its branded service operations contained in its August 2007, September 2007, and October 2007 T-100 reports, respectively, also be withheld from public disclosure pending the Department's (DOT's) decision on ExpressJet's Petition for Review of Staff Action. The Department kept ExpressJet's August 2007 and September 2007 branded service T-100 data confidential pending the Department's decision on the petition for review. Accordingly, ExpressJet's motions regarding its August 2007, September 2007, and October 2007 branded service T-100 data are included in the scope of this decision.

M. Clay Moritz, Jr., Acting Assistant Director, Aviation Information, initially reviewed the appeal of staff action denying ExpressJet's motions for confidential treatment. He did not find a basis for overturning the original denial of ExpressJet's motions for confidential treatment and so informed ExpressJet of this fact by letter dated November 2, 2007. In accordance with the provisions of Title 14 Code of Federal Regulations sections 385.33 and 385.34, Mr. Moritz forwarded ExpressJet's Petition for Review of Staff Action to me as the Reviewing Official.

In the September 20, 2007 ExpressJet Petition, ExpressJet strongly objected to DOT's conclusion that release of the T-100 data for ExpressJet's branded flights will not permit "a competitor to use this information to make strategic judgments that would likely cause substantial harm to ExpressJet's competitive position." ExpressJet argued that detailed city-pair traffic data alone are sufficient to provide considerable understanding about the relative performance of ExpressJet branded flights and that access to ExpressJet's T-100 data would provide considerable vision into the relative market performance of a carrier operating in discrete nonstop city-pair markets as is ExpressJet. ExpressJet noted that where most of its flights are marketed on a nonstop basis, onboard traffic is mainly local O&D traffic that informs the airline analyst how successful ExpressJet may be in attracting (diverting) passengers in each city-pair market. ExpressJet noted

that armed with this knowledge ExpressJet's competitors can build and fine-tune their competitive responses to ExpressJet's newly branded service. We disagree that this is the case and believe that many of the competitors in these markets would not rely solely on ExpressJet's T-100 data. In fact, a competitor would be able to get a reasonably accurate estimate of any diversionary effect by reviewing their own T-100 data and that of other carriers reporting traffic data to the DOT.

Moreover, ExpressJet's competitors can review fare data reported to the DOT, ExpressJet's and other T-100 reporting carriers' Form 41 financial data by aircraft type, and ExpressJet's SEC detailed financial filings to make judgments on ExpressJet's financial results and gain some insight into ExpressJet's branded flight operations. ExpressJet conceded in its Petition that by reviewing these numerous sources of public information -traffic, fare, and financial- a competing carrier could create a fairly accurate picture of whether ExpressJet is obtaining financially sustainable levels of passengers and the degree to which ExpressJet is diverting traffic from the competing carrier(s). ExpressJet believes, however, that the key to this analysis is the T-100 report of traffic data on a city-pair basis. We agree that other carriers may use the data, just as ExpressJet could use its competitor's data, to selectively target those flights and markets with the best load factors for a more aggressive competitive response. While we believe that simply combining the DOT and SEC financial data, the DOT fare data, and the T-100 data would provide some operational understanding, we also believe that such information is not detailed enough to provide direct insight into ExpressJet's branded operations to the extent it would allow a competitor to make specific strategic market decisions that would likely cause **substantial** harm to Express Jet's competitive position.

On page 3 of ExpressJet's Petition we note the following paragraph regarding the timeliness and competitive usefulness or utility of ExpressJet's T-100 data for these other carriers' competitive response to ExpressJet's branded flight operations.

“As Mr. Warren states in his Declaration, much of ExpressJet's traffic is diverted from competing carriers serving the same markets as ExpressJet, albeit on a connecting or one stop basis. If competing carriers have access to ExpressJet's city-pair load factor data, they will be in a much stronger position to respond to any inroads being made by ExpressJet by either instituting nonstop service to compete with ExpressJet's nonstop flights, or lower fares, or both. Without the load factor data supplied by the DOT, the competing carrier will have to be more circumspect in making plans to mount a competitive response to ExpressJet.”

Based on filings from dissenting carriers, which were submitted to the docket, we note that several other carriers initiated non-stop service in some of the markets at issue prior to ExpressJet, and thus, these market decisions were not made in response to ExpressJet's inauguration of non-stop service. We also note several comments on the competitive usefulness of ExpressJet's T-100 data for which protection is being sought. For example, in the “Answer of Alaska Airlines dated July 12, 2007,” Alaska Airlines (Alaska) noted that Horizon Air's new

Spokane-Sacramento service began on July 1, 2007, and its new Spokane/Boise-San Diego services began on July 22, 2007. Alaska noted that the planning for these new routes began long in advance of ExpressJet's first T-100 filing- none of which have yet to be made public because of ExpressJet's pending requests for confidentiality. Alaska also noted that the route planning for these and other new services are all detailed on its website. Alaska concluded and the Department concurs that more rather than less transparency will enhance new entry and greater reliance on competitive market forces; and there is simply no reasonable policy basis or precedent for affording ExpressJet the special competitive protection it is seeking, nor is there any evidence that would lead us to conclude that release of ExpressJet's new branded service T-100 data would likely cause substantial competitive harm to ExpressJet.

In American's July 5, 2007 answer, American noted that ExpressJet's suggestion that American Eagle has "already" entered three ExpressJet markets based on access to ExpressJet's T-100 data is false. According to American, American Eagle initiated service between Raleigh/Durham and Jacksonville, Kansas City, and Louisville on May 1, 2007, prior to the date that ExpressJet had even submitted its **initial** at issue T-100 report on May 30, 2007, and indeed prior to the date that ExpressJet began serving these three markets itself on May 7, 2007. This evidence supports our belief that carriers are making decisions to enter new markets without the benefit of ExpressJet's branded service T-100 data, and are initiating non-stop service in some of these markets based on their own T-100 data, their own business decisions and other factors such as the public's preference for nonstop service.

ExpressJet noted that it seeks only a modest "head start" in the development of its newly branded service before competing carriers will have access to its load factor data with which to fashion competitive responses in the new nonstop markets. In the Declaration of Christopher Warren, ExpressJet's Senior Director of Strategic Planning, Exhibit 2 of ExpressJet's Petition, Mr. Warren notes "By temporarily shielding competing carriers from this information, ExpressJet may have a better opportunity to gain a toehold in its new nonstop markets before competing carriers can train their competitive guns on ExpressJet's branded flights." We believe, however, that ExpressJet is asking for more than a modest "head start." While ExpressJet has access to competitor's T-100 data, it is in fact requesting an unfair advantage from the Department by requesting its T-100 reports be withheld from public disclosure until at least May 30, 2008. ExpressJet is essentially asking the Department to shield its new service from competitive pressure. The Department agrees with the Petition's opponents that while ExpressJet may face reciprocal competition from its competitors, it does not mean that such competition would result in the likelihood of ExpressJet suffering "substantial competitive harm" that warrants withholding its traffic data. ExpressJet appears to equate competition with the likelihood of substantial competitive harm -- hardly the same standard. The Department seeks to avoid shielding any carrier from competition, including new entrants, or favoring one competitor over another in a deregulated environment. Such action would not be consistent with DOT's mandate to encourage, develop, and maintain an air transportation system that relies primarily on market forces.

ExpressJet also stated that the Department's Decision Letter is erroneous because it raises an important question of policy (the goal of the DOT to foster a competitive aviation system). ExpressJet unquestionably has competition from a number of carriers and undoubtedly these carriers will review ExpressJet T-100 data, but we believe there is nothing unique about ExpressJet's service that could justify the unique treatment it is seeking. ExpressJet is correct that the goal of DOT is to foster a competitive aviation system, however the Department has long held that competition is promoted, and consumers benefit, by maximizing the amount of accurate information in the public domain. We continue to believe that it would be counter to the Department's longstanding data dissemination practices and the public interest for us to grant a motion of confidential treatment for Schedule T-100 data absent a carrier providing clear evidence of the likelihood of substantial competitive harm.

ExpressJet stated that the Decision Letter has been shown to be clearly erroneous with regard to the impact the release of the data would have on the competitive position of ExpressJet because the legal conclusion on which the decision was based was contrary to Department rules and precedent, and law (which would nullify FOIA Exemption 4 in favor of an across-the-board rejection of any Rule 12 motions seeking protection of T-100 data). I do not believe that the prior decision was erroneous or that the legal conclusion is contrary to law. The previous staff decision did not elevate concerns about fragmentation of the data collection program above all other considerations, and the Acting Assistant Director did not make FOIA Exemption 4 a nullity by setting a policy consideration that would trump any competitive harm argument made in a Rule 12 petition.

In addition to the primary standard of whether release of the T-100 data would likely cause substantial harm to ExpressJet's competitive position, we have also considered the secondary concerns of the opposing carriers. We also agree with these carriers that it would be unfair, prejudicial to other reporting carriers, and adverse to the public interest, to withhold ExpressJet's T-100 data when the data submitted by these and all other carriers are released immediately. Moreover, we view the unilateral disclosure of data submitted by one group of carriers when another group of carriers is not disclosing similar data as contrary to the public interest.

As the Director, Bureau of Transportation Statistics, I am the Reviewing Official and I am exercising my discretionary right of review for the September 10, 2007, staff action. I have reviewed the appeal of the staff action denying ExpressJet's motions for confidential treatment and considered all documents properly filed in DOT Docket OST-2007-28396. I find that ExpressJet did not present any additional evidence to demonstrate the likelihood that ExpressJet would suffer substantial competitive harm from the release of the T-100 data for Express Jet's branded flights. Based on my review of the record in Docket 28396, I am affirming the staff action in this matter because I did not find a compelling justification for overturning the original denial of ExpressJet's motions for confidential treatment.

This action is taken under 14 CFR section 385.34 of Part 385 of the Department's Organization Regulations. In accordance with the above regulation, where the Reviewing Official affirms the

staff action, staff action stayed by the petition for review shall become effective on the second business day following the date of service of the Reviewing Official's order. Therefore, on the second business day following the service date, ExpressJet's branded service Schedule T-100 data for the months of April, May, June, July, August, and September 2007 will be released to the general public. ExpressJet's branded service October 2007 T-100 data will be included in the normal scheduled release of October T-100 data for all reporting carriers. This is a final administrative decision and is not subject to a petition for reconsideration.

Sincerely,



Steven D. Dillingham, Ph.D.
Director
Bureau of Transportation Statistics

cc: Mr. Scott R. Peterson
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