

[4910-13]

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

[Docket No. FAA-2008-0036]

RIN 2120-AF90

Policy Regarding Airport Rates and Charges

AGENCY: Department of Transportation, Office of the Secretary and Federal Aviation Administration.

ACTION: Notice of amendment to policy statement.

SUMMARY: This action amends the Department of Transportation (“Department”) “Policy Regarding the Establishment of Airport Rates and Charges” published in the Federal Register on June 21, 1996 (“1996 Rates and Charges Policy”). This action adopts three amendments to the 1996 Rates and Charges Policy (two modifications and one clarification). These amendments are intended to provide greater flexibility to operators of congested airports to use landing fees to provide incentives to air carriers to use the airport at less congested times or to use alternate airports to meet regional air service needs. Any charges imposed on international operations must also comply with the international obligations of the United States.

DATES: This policy statement is effective [Insert date of publication].

ADDRESSES:

Docket: To read background documents or comments received, go to <http://www.regulations.gov> at any time or to Room W12-140 on the ground floor of the West Building, 1200 New Jersey Avenue, SE, Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

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SUPPLEMENTARY INFORMATION:

Availability of Documents

You can get an electronic copy of this notice and all other documents in this docket using the Internet by:

- (1) Searching the Federal eRulemaking portal (<http://www.regulations.gov/search>);
- (2) Visiting the FAA's Regulations and Policies web page at http://www.faa.gov/regulations_policies; or
- (3) Accessing the Government Printing Office's web page at http://www.access.gpo.gov/su_docs/aces/aces140.html.

You can also get a copy by sending a request to the Federal Aviation Administration, Office of Rulemaking, ARM-1, 800 Independence Avenue SW, Washington, DC 20591, or by calling (202) 267-9680. Make sure to identify the docket number, notice number, or amendment number of this proceeding.

Authority for this Proceeding

This notice is published under the authority described in Subtitle VII, Part B, Chapter 471, Section 47129 of Title 49 United States Code. Under subsection (b) of this section, the Secretary of Transportation is required to publish policy statements establishing standards or guidelines the Secretary will use in determining the reasonableness of airport fees charged to airlines under Section 47129.

Background

On January 17, 2008, the Department of Transportation published a notice in the Federal Register proposing to amend the Department of Transportation (“Department”) “Policy Regarding the Establishment of Airport Rates and Charges” published in the Federal Register on June 21, 1996, (“1996 Rates and Charges Policy” or “1996 Policy”). (73 FR 3310, January 17, 2008). The comment period on the notice was extended to April 3, 2008. (73 FR 7626, February 8, 2008). The notice proposed three amendments to the 1996 Policy (technically two modifications and one clarification). These amendments were intended to provide greater flexibility to operators of congested airports to use landing fees to provide incentives to air carriers to use the airport at less congested times or to use alternate airports to meet regional air service needs. The notice noted that any charges imposed on international operations must also comply with the international obligations of the United States.

Specifically, the notice first proposed to clarify the 1996 Policy by explicitly acknowledging that airport operators are authorized to establish a two-part landing fee structure consisting of both an operation charge and a weight-based charge, in lieu of the standard weight-based charge. Such a two-part fee would serve as an incentive for carriers to use larger aircraft and increase the number of passengers served with the same or fewer operations. Second, the notice proposed to expand the ability of the operator of a congested airport to include in the airfield fees of a congested airport a portion of the airfield costs of other, underutilized airports owned and operated by the same proprietor. Third, the notice proposed to permit the operator of a congested airport to charge users of a congested airport a portion of the cost of airfield projects

under construction. Under the existing policy, costs of new or reconstructed airfield facilities could be included in airfield charges only when the new or reconstructed facilities are completed and in use, unless carriers at the airport agree otherwise. This notice proposed two alternatives for charges for projects under construction. The first would permit the costs to be included in the rate base only during periods when the airport experiences congestion. At some airports, such as Chicago O’Hare or New York LaGuardia, this could occur throughout the normal operating day. The second would permit these costs to be included in the rate base of the congested airport at all times of the day. Because the latter two proposed amendments would apply only at congested airports, the notice proposed to add a definition of “congested airport” in the Applicability section of the 1996 Policy based upon 49 U.S.C. § 47175(2).

Legal Requirements for Airport Rates and Charges

All commercial service airports operating in the United States and most other airports that are open to the public have accepted grants for airport development under the Airport Improvement Program, authorized in Title 49 of the United States Code, Subtitle VII, Part B, Chapter 471. Under § 47107, in exchange for receiving grant funds, airport operators must give a variety of assurances regarding the operation of their airports and the implementation of grant funded projects. Among other things, airport operators pledge to make the airport “available for public use on reasonable conditions and without unjust discrimination.” 49 U.S.C. § 47107(a)(1). This obligation encompasses the obligation to establish reasonable and not unjustly discriminatory fees and charges for aeronautical use of the airfield. The Department’s rules of

practice and procedure for enforcement proceedings involving Federally assisted airports are set forth in 14 C.F.R. Part 16.

Section 47129 authorizes the Department to review the reasonableness of airport fees charged to air carriers, upon a complaint or request for determination and a finding of a significant dispute, and directs the publication of policies or guidelines for determining reasonable fees and development of expedited hearing procedures to resolve airport fee disputes. The Department's procedures applicable to a proceeding concerning airport fees are contained in Subpart F, Title 14 C.F.R., § 302.601 - § 302.609.

The Policy Regarding Airport Rates and Charges

The Department published the 1996 Rates and Charges Policy in the Federal Register at 61 FR 31994 on June 21, 1996. The statement of policy was required by section 113 of the Federal Aviation Administration Authorization Act of 1994, Public Law 103-305 (August 23, 1994), now codified at 49 U.S.C. § 47129. The publication of the 1996 Rates and Charges Policy followed publication of a notice of proposed policy (59 FR 29874, June 9, 1994). That proposal predated enactment of section 47129. After enactment of section 47129, the Department published a supplemental notice of proposed policy (59 FR 51836, October 12, 1994); an Interim Policy (60 FR 6906, February 3, 1995); and a further supplemental notice of proposed policy (60 FR 47012, September 8, 1995).

The Air Transport Association of America (ATA), on behalf of its member airlines, and the City of Los Angeles, operator of Los Angeles International Airport, both challenged elements of the 1996 Rates and Charges Policy in the United States Court of Appeals for the District of

Columbia. The court vacated portions of the 1996 Rates and Charges Policy in Air Transport Ass'n of America v. DOT, 119 F.3d 38, amended by 129 F.3d 625 (D.C. Cir. 1997).

The 1996 Rates and Charges Policy specified that, unless otherwise agreed to by an airport user, fees for airfield use must be based on costs calculated using the historic cost accounting (HCA) methodology. However, under paragraphs 2.2, 2.4, and 2.5.1, for other airport facilities and services the airport proprietor was free to use any reasonable methodology to determine fees, if justified and applied on a consistent basis. 1996 Rates and Charges Policy, para. 2.6. Petitioners in the court case challenged the disparate treatment of airfield fees and other fees. The court determined that this distinction had not been adequately justified. *Air Transport*, 119 F.3d at 44. At the Department's request, the Court vacated only the specific provisions the 1996 Rates and Charges Policy that petitioners challenged as implementing that distinction. *Air Transport*, 129 F.3d at 625.

Since the court's ruling, the Department has addressed significant airport-airline fee disputes through case-by-case adjudication. The Department's decisions are informed by the statutory limitations imposed on airport fees. One limitation derives from requirements of the Airport Improvement Program (AIP) grant assurances, 49 U.S.C. § 47107. In particular, a federally-assisted airport sponsor must give the Secretary of Transportation and the Federal Aviation Administration (FAA) certain assurances, including the assurance that the airport will be available for public use on fair and reasonable terms and without unjust discrimination. The other limitation arises from the proprietor's exception to the Anti-Head Tax Act, 49 U.S.C. § 40116, which allows the airport proprietor to collect only reasonable rental charges, landing fees, and other service charges from aircraft operators for the use of airport facilities.

Our past cases have established some guidelines for our analysis of fees challenged by airlines. Our cases have examined fees and fee methodologies that we considered reasonable as well as those we considered not to be reasonable. See, Miami International Airport Rates Proceeding, Order 97-3-26 (March 19, 1997), *aff'd sub nom.*, Air Canada v. DOT, 148 F.3d 1142 (D.C. Cir. 1998); Alaska Airlines, Inc., et al. v. Los Angeles World Airports, Order 2007-6-8 (June 15, 2007) (*LAX III*), on appeal to the United States Court of Appeals for the District of Columbia Circuit).

Additionally, we have established some guidance on unreasonable airline fees. Second Los Angeles Int'l Airport Rates Proceeding, Order 95-9-24 (Sept. 22, 1995, (*LAX II*), *aff'd sub nom.*, City of Los Angeles v. DOT, 165 F.3d 972 (D.C. Cir. 1999); Brendan Airways, LLC v. Port Authority of New York and New Jersey, Order 2005-6-11 (June 14, 2005), *aff'd in part*, Port. Auth. of New York and New Jersey v. DOT, 479 F.3d 21 (D.C. Cir. 2007).

The Secretary has also determined whether or not certain disputed fees were unjustly discriminatory. *Brendan Airways*, op cit., Order 2005-6-11; *LAX III*.

Rationale for the proposal

The January 17 notice offered a two-part justification for the proposed policy changes: first, the increasing congestion and operating delays at major airports in the U.S., and second, the potential that peak period pricing has to address that congestion. Excess demand has already resulted in congestion at certain airports to the point that the FAA has taken action to limit access. These airports include LaGuardia, JFK International, O'Hare International, and Newark Liberty International. A recent study, *Capacity Needs in the National Airspace System 2007-2025: An Analysis of Airports and Metropolitan Area Demand and Operational Capacity*

in the Future, conducted by the Federal Aviation Administration as part of the Future Airport Capacity Task (FACT) 2, indicates metropolitan areas and regions along the East and West Coasts are experiencing large amounts of growth in population and economic activity that cause chronic congestion. Based on studies and analyses associated with FACT 2, conditions are projected to worsen in the future in these coastal regions, primarily concentrated at Operational Evolution Partnership (OEP) airports. Fourteen of the 35 OEP airports and eight metropolitan areas are forecasted to be capacity-constrained in 2025. Of the fourteen airports identified as capacity-constrained in the study, several are further constrained by conditions, either physical (New York LaGuardia) or environmental (Long Beach-Daugherty Field), that prevent additional runway capacity from being built.

The January 17 notice noted that one way of addressing congestion of an airport's airside facilities is by the pricing of those facilities. By raising the cost of operating a flight during congested periods, an airport owner/operator can increase the efficient utilization of the airport in a number of ways. First, by charging higher landing fees during periods of peak congestion, the airport proprietor gives aircraft operators the incentive to reschedule their flights to less congested periods or to use secondary airports. The degree to which aircraft operators reschedule will in large part depend on their network structure and access to secondary airports. Second, if airports structure their airfield charges to reflect scarcity by combining per-operation charges with weight-based charges, they will provide an incentive for air carriers to use congested airfield facilities more efficiently by increasing the size of aircraft operating during periods of congestion. Third, even where expansion is not feasible, the industry and users benefit if adjustment of prices during congested periods increases the efficiency with which congested airfield facilities are used.

The January 17 notice made clear that the proposed actions did not represent true congestion pricing because they did not authorize airport proprietors to set fees to balance demand with capacity without regard to allowable costs of airfield facilities and services. However, enabling proprietors at congested airports to assign additional, but still appropriate, costs to the airfield could encourage more efficient use of these airports. Airport sponsors would still need to assure that the airport is available to the public on reasonable terms and without unjust discrimination and that fees charged for international operations comply with the international obligations of the United States.

Comments on the proposals, FAA Docket 2008-0036

The Department received more than 70 substantive comments on the proposals, from U.S. and foreign air carriers, foreign governments and airport operators, U.S. airport operators, general aviation aircraft operators, local government agencies, trade and nonprofit associations, private citizens, an aircraft manufacturer, and a university.

The comments covered a broad range of subjects, but tended to fall within five general issue areas:

1. Legal authority to adopt the proposed policies.
2. Adequacy of the guidance contained in the notice.
3. Effectiveness of the proposals to achieve the stated goals.
4. Whether the proposed policies are unjustly discriminatory toward particular categories of operators and particular markets.
5. Whether the notice properly acknowledged the discretionary authority of airport operators to set rates.

This summary of comments reflects the major issues raised and does not restate each comment received. The Department considered all comments received even if not specifically identified and responded to here.

1. *Legal authority*

Several airlines argued that the proposed policy is preempted by the Airline Deregulation Act's preemption provision, which prohibits States or localities from regulating airline rates, routes, or services. They contended that airports are thereby preempted from pricing airfield access in order to modify airline conduct and that the Department accordingly lacks the authority to permit an airport to price landing areas to affect airline behavior. They disputed the premise that the "proprietor's exception" to the preemption provision allowed an airport to take congestion into account in formulating its charges. They also argued that the Anti-Head Tax Act constrains an airport's ability to implement market-based congestion pricing or slot auctions.

Comment: The proposals are in essence congestion pricing, and neither the Department nor airport operators are authorized to use congestion pricing in establishing airfield charges.

Many of the carrier comments equated the proposals to market-based congestion pricing. One association submitted a legal opinion concluding that neither the Department nor airports have the authority to impose such congestion pricing.

Response: The notice made clear that the purpose of the proposed policies was to provide an airport operator with greater flexibility to allocate new categories of cost to peak hour landing fees, thereby providing an additional means to address peak hour congestion. The financing of airfield projects under construction and inclusion of airfield costs of secondary

airports would use new and non-traditional cost allocations to achieve some of the effects of congestion pricing. The proposals allow an airport proprietor to assign certain costs to airfield charges, but not to charge fees that exceed those costs. Thus, the proposals represent pricing based upon costs of providing facilities and services rather than use of market-clearing rates to set prices. Although the intent of applying those costs to peak hours at a congested airport is to encourage changes in airline scheduling or use of larger aircraft, the fees utilized are cost-based, and therefore are not congestion pricing.

Comment: Even if cost-based, the proposals depart from established ratemaking in two general ways: charging carriers for facilities they are not using, because the facilities are at another airport or are not yet built; and charging fees higher than direct costs for the express purpose of achieving the airport operator's goals relating to airline scheduling and fleet mix. Some commenters argued that the assignment of future costs or the costs of another airport to carriers at a congested airport goes beyond the established principles of cost-based ratemaking, and the Department cannot, therefore, consider the proposals to reflect cost recovery.

Response: The proposed policies depart from past practice only in expanding the ability of an airport proprietor to rate-base certain costs in the landing fee and to expressly permit congested airports to include a greater portion of those costs in landing fees during congested periods. The result is not additional revenue to the airport, because fees remain limited to actual, aggregate costs. Clearly, the Department has the authority to amend its policy on airport-airline fee reasonableness. The Supreme Court has recognized that the Secretary of Transportation is responsible for administering the aviation laws and in *County of Kent*, made clear that the

Department could adopt policies that would change the rules under which the court was deciding that case. Northwest Airlines v. County of Kent, 510 U.S. 355, 366-367 (1994):

The Secretary of Transportation is charged with administering the federal aviation laws, including the AHTA. His Department is equipped, as courts are not, to survey the field nationwide, and to regulate based on a full view of the relevant facts and circumstances. If we had the benefit of the Secretary's reasoned decision concerning the AHTA's permission for the charges in question, we would accord that decision substantial deference. See Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-845, 104 S. Ct. 2778, 2781-2783, 81 L. Ed.2d 694 (1984).

The Supreme Court has also called the Department of Transportation the "superintending agency" for purposes of applying the Airline Deregulation Act's preemption provision over state and municipal regulation of airline rates, routes and services. American Airlines, Inc. v. Wolens, 513 U.S. 219, 229, fn.6 (1995).

Lower courts have recognized the superintending role of the Secretary of Transportation in administering the Anti-Head Tax Act, particularly with respect to fees imposed by airports on airlines. See, Port Authority of New York and New Jersey v. U.S. Department of Transportation, 479 F.3d 21, 27 (D.C. Cir., 2007); Southwest Air Ambulance, Inc. v. City of Las Cruces 268 F.3d 1162, 1170 (10th Cir. 2001); City of Los Angeles v. U.S. Dept. of Transp., 165 F.3d 972, 978 (D. C. Cir. 1999); Air Canada v. U.S. Dept. of Transp., 148 F.3d 1142, 1150-1151; (D.C. Cir. 1998); and New England Legal Foundation v. Massachusetts Port Authority, 883 F.2d 157, 172 (1st Cir. 1989).

Commenters also argued that the *purpose* of the proposed charges—which they identify as approximating the effect of congestion pricing at congested airports—was beyond the proprietary authority of airport operators. This is based on judicial opinions—e.g., *Massport*—holding that local governments may charge fees to defray their airport costs but not to regulate air traffic.

The Anti-Head Tax Act gives airport proprietors clear and express authority to charge airline users landing fees and other charges for use of their airport. 49 U.S.C. § 40116(e)(2). *County of Kent*, 510 U.S. at 365; *Wardair Canada, Inc. v. Florida Department of Revenue*, 477 U.S. 1, 15-16 (1986). The proposals would change the way costs are allocated, but would not depart from a system in which the airport operator charged for actual costs.

Under our policy, an airport proprietor may establish peak period landing fees, for the purpose of reducing congestion, provided the fees are properly structured and revenue-neutral. (Note: While the terms “peak period” and “congested hours” are used interchangeably on an informal basis in this preamble and in responding to comments, the final policy defines and uses only the term “congested hours.”) The Department has permitted such fees to be charged when they do not exceed the aggregate costs of airfield facilities. The *Massport* case upheld the Department Decision finding that “while it may be appropriate to raise fees in order to invoke market responses during periods when the airport is congested, to do this during times when there is no shortage of runway capacity penalizes smaller aircraft users when they are not imposing congestion related costs on other users.” *Investigation into Massport’s Landing Fees*, Opinion and Order, FAA Docket 13-88-2 (December 22, 1988). The *Massport* case stands for the proposition that a properly structured peak period pricing system could be found reasonable and not unjustly discriminatory. Reasonable peak period fees would not be preempted under 49

U.S.C. § 41713 notwithstanding some impact on air carrier rates, routes or services. Opinion and Order at 11; *New England Legal Foundation* at 165.

The Airline Deregulation Act does not prevent an airport proprietor from charging users for use of the airport facilities and services, including peak-period charges. The Deregulation Act's preemption provision contains a savings clause permitting an airport proprietor to exercise its proprietary powers and rights. An airport may use its proprietary powers in a manner that is reasonable, is nondiscriminatory, is not an undue burden on interstate commerce, and is designed not to conflict with the Airline Deregulation Act and its policies. *Arapahoe County Public Airport Authority v. FAA*, 242 F.3d 1213, 1221-1222 (10th Cir. 2001).

The policy defines congested airports and contains other safeguards to assure that these fees fulfill the Department's priorities for alleviating congestion in the national air transportation system. Any fees adopted by an airport pursuant to the Department's Policy would have to be consistent with the goals of that Policy.

Several recent rules and policies issued by the Department show that it has consistently interpreted Federal law to authorize properly structured peak period pricing programs. First, in promulgating regulations to implement the 1990 Airport Noise and Capacity Act (ANCA) (49 U.S.C. § 47521, *et seq.*), the Department determined that a peak-period pricing program, where the objective is to align the number of aircraft operations with airport capacity, does not constitute an airport noise or access restriction subject to FAA review and approval. 14 C.F.R. § 161.5, definition of "noise or access restriction."

Second, the current Policy on Airport Rates and Charges provides that a properly structured peak pricing program that allocates limited resources using price during periods of congestion will not be considered to be unjustly discriminatory. An airport proprietor may,

consistent with the policies expressed in the policy statement, establish fees that enhance the efficient utilization of the airport. 61 FR 31994, 32021, § 3 (1996).

The Airline Deregulation Act's preemption provision does not bar airports from taking reasonable, nondiscriminatory measures for a purpose within their proprietary authority merely because those measures would influence airline behavior. Reasonable, not unjustly discriminatory measures taken by an airport operator to align capacity and demand consistent with the Department's policy and in order to alleviate congestion in the national air transportation system are in accordance with Federal policy and are not prohibited because those measures have the purpose and effect of influencing airlines to change aircraft scheduling practices. See *Massport*, 883 F.2d at 165, 173-174.

One commenter cited *San Diego Unified Port District v. Gianturco* (651 F.2d 1306, 9th Cir. (1981)); cert. den. 455 U.S. 1000 (1982) for the proposition that an airport's proprietary functions are limited to measures designed to insulate an airport proprietor from liability. We disagree.

Gianturco stands for the proposition that a non-airport proprietor (in that case, the State of California) may not direct an airport proprietor (*i.e.*, the San Diego Unified Port District) to impose a curfew on aircraft flights. The decision acknowledged that because an airport proprietor bears the monetary liability for excessive aircraft noise, it has the proprietary powers to adopt reasonable noise regulations. *Gianturco* did not hold that an airport proprietor's powers were limited to the adoption of noise-based measures only; similarly, it did not hold that an airport proprietor was limited to adopting measures solely designed to insulate itself from liability.

Airport proprietors of course have powers in addition to noise controls, including setting fees for the use of the airfield. The Anti-Head Tax Act provides that authority. 49 U.S.C. § 40116(e)(2). See, *County of Kent*, 510 U.S. 355.

Commenters also claimed that airport-airline charges must relate to the costs imposed and benefits received from the charged carrier, citing *Evansville-Vanderburgh Airport Auth. Dis. v. Delta Airlines*, 405 U.S. 707 (1972) and *County of Kent*. This test of reasonableness was based on the Commerce Clause, and the Supreme Court expressly acknowledged that it was within the Department's powers to adopt another test of reasonableness, under the Anti-Head Tax Act. The *Evansville-Vanderburgh* court pointed out that the charges did not conflict with any federal policies on uniform regulation of air transportation, and noted:

No federal statute or specific congressional action or declaration evidences a congressional purpose to deny or pre-empt state and local power to levy charges designed to help defray the costs of airport construction and maintenance. . . . At least until Congress chooses to enact a nation-wide rule, the power [to have interstate commerce share a fair share of airport costs] will not be denied to the States. 405 U.S. at 721.

The United States Court of Appeals for the District of Columbia Circuit explained, in the *Air Canada* case, that the Department was not obligated to apply a cost-benefit formula for purposes of deciding the reasonableness of Miami International Airport's fee allocation methodology. Referring to the *County of Kent* decision, the D. C. Circuit stated:

[T]he Court made clear that it was not establishing a standard for reasonableness under the Anti-Head Tax Act, and that the Secretary could establish another standard, whether more or less stringent than the standard the Court adopted in *Northwest Airlines*, so long as it was a permissible construction of the statute. We need not delve into whether *Northwest Airlines* requires a cost-benefit analysis or any other particular study, nor whether the Department's reasonableness standards are consistent with those applied by the

Supreme Court in *Northwest Airlines*, because the Department was not bound to the standards in that case.

[fn. omitted] 148 F.3d 1142 at 1151-52.

Comment: The proposals are inconsistent with International Civil Aviation Organization (ICAO) standards for airport pricing and violate standard provisions in bilateral agreements. Every foreign airline that commented on the notice, 34 embassies, the Washington delegation of the European Commission, U.S. carriers and others argued that the proposals were not consistent with ICAO pricing guidelines or provisions in U.S. bilateral agreements (although several foreign carriers expressed a preference for per-operation fees over weight-based fees). Some U.S. carriers assumed the charges could not apply to foreign carriers due to bilateral agreements, and that the charges would, therefore, discriminate against U.S. carriers. One association filed comments refuting the assertion that *ICAO* and bilateral provisions prohibit the proposed charges.

Response: For the reasons discussed in part above under *Legal Authority*, the Department believes the proposed charges can be applied to U.S. and foreign air carriers alike, consistent with ICAO guidance and with U.S. bilateral agreement obligations. First, those documents contain provisions for charges like those proposed, as described below. Second, the United States Government maintains a formal and comprehensive system for regulation of airport charges, including administrative and legal forums in which both foreign and U.S. parties may challenge the reasonableness of any airport charge. See 14 C.F.R. Part 16 and 49 U.S.C. § 47129. The United States Government is fully committed to compliance with its international obligations regarding airport charges, and the final policy, as adopted by this action, includes in its basic statement of principles a clear reminder of the requirement that U.S. airport charges comply with those obligations.

Two-part landing fee. The two-part landing fee will be based on the same long-unchallenged rate base as a weight-based fee, so it is clearly cost-based. Some foreign carriers argued the fee would disproportionately affect foreign carriers by reducing small-aircraft feed traffic in peak hours, but that effect would apply to both U.S. and foreign carriers, and to both international and domestic long-haul flights. Accordingly, we do not find that a two-part landing fee would have a disproportionate effect on foreign carriers. .

Moreover, the proposal is consistent with ICAO guidance, which expressly states, “Landing charges should be based on the weight formula... . However, allowance should be made for the use of a fixed charge per aircraft or a combination of a fixed charge with a weight-related element, in certain circumstances, such as at congested airports and during peak periods.” ICAO’s Policies on Charges for Airports and Air Navigation Services, Doc 9082/7 (7th Ed. 2004), ¶ 26 (i). It also is consistent with ICAO guidance on airport charging systems, which provides that charges “should be determined on the basis of sound accounting principles and may reflect, as required, other economic principles, provided that these are in conformity with Article 15 of the *Convention on International Civil Aviation* and other principles in the present Policies.” *Id.*, ¶ 23(iii).

Charges for facilities under construction. ICAO guidance expressly allows for pre-funding of airport projects particularly those that are long-term and of a large-scale. ICAO’s Policies on Charges for Airports and Air Navigation Services, Doc 9082/7 (7th Ed. 2004), ¶ 24 states:

...notwithstanding the principles of cost-relatedness for charges and of the protection of users from being charged for facilities that do not exist or are not provided..., prefunding of projects may be accepted in specific circumstances where this is the most appropriate

means of financing long-term, large-scale investment, provided that strict safeguards are in place, including the following:

- (i) Effective and transparent economic regulation of user charges and the related provision of services, including performance auditing and “benchmarking” (comparison of productivity criteria against other similar enterprises);
- (ii) Comprehensive and transparent accounting, with assurances that all aviation user charges are, and will remain, earmarked for civil aviation services or projects;
- (iii) Advance, transparent and substantive consultation by providers and, to the greatest extent possible, agreement with users regarding significant projects;
- (iv) Application for a limited period of time with users benefiting from lower charges and from smoother transition in changes to charges than would otherwise have been the case once new facilities or infrastructure in place.

The Department believes that charging for the costs of airfield projects under construction as those costs are incurred, exclusively at congested airports for the primary purpose of relieving current congestion, can be a “most appropriate means of financing long term large scale projects” because it can address current congestion without increasing total charges to users over time. In fact, financing airfield projects under construction through peak hour charges will ultimately result in lower charges to carriers, by reducing interest costs that would otherwise be capitalized and added to project debt charged to airlines through landing fees after the project is completed.

We note that the proposal adopted by this action to allow recovery of construction costs before a project is in use is not “pre-funding” or “pre-financing,” as those terms are used in ICAO guidance and elsewhere. The adopted policy does not allow the accumulation of funds before a project begins, to be used later. Rather, the policy requires that costs be incurred for construction before the charges can be assessed, and limits the charges to a reasonable annual amortized amount for the costs actually incurred.

Moreover, the U.S. system of regulation of airport fees, through the grant assurances and 49 U.S.C. § 40116, provides the safeguards recommended by ICAO. U.S. obligations under bilateral air services agreements and FAA’s AIP program provide the means by which user fees can be regulated and transparent accounting can be assured. As noted in the proposed policy, “[t]he Department strongly encourages all airports to comply with the obligations ... to engage in meaningful consultation with carriers ... to justify their fees and to exchange appropriate financial information to enable carriers to fully evaluate ... proposed fees.” The Department also strongly encourages substantive consultations between airports and users. Finally, the provisions in proposed section 2.5.3(a) are consistent with ICAO safeguard (iv), above.

As to the requirement of U.S. air services agreements, the majority of U.S. air services agreements specifically recognize that user charges may reflect but not exceed the full cost to the competent charging authorities of providing the appropriate airport services. (Others simply require that charges be just, reasonable and non-discriminatory.) These provisions do not preclude funding facilities that are still under construction if the charging authority is already incurring costs. We note also that the policy requires that all planning and environmental approvals have been obtained, that financing has been obtained, and that construction has

actually commenced, all of which go to assure that the airfield facilities charged for will actually be provided.

Some foreign airlines complained that the provision allowing charges for facilities under construction would permit an airport to build facilities that would not ease congestion, such as terminal facilities. Airfield charges are limited to airfield facilities, however, and this applies to facilities under construction as well as those in use.

Charges for a secondary airport. Bilateral air services agreements recognize that user charges may reflect but not exceed the full cost to the competent charging authorities of providing the appropriate airport services “at the airport or **within the airport system.**” This language clearly indicates that these agreements contemplate charges at one airport for costs at another, as long as the charges are justified and in compliance with the other standards of the agreement, including equitable apportionment.

2. *Adequacy of guidance*

Several airline commenters stated that the proposals were too vague to provide useful guidance on implementation, and would simply lead to litigation. Airport commenters that generally supported the proposals asked for additional guidance about how the costs of projects under construction would actually be allowed in current charges, and what airports would be eligible to use the proposed fees.

Comment: Revise the definition of congested airport. Several commenters found the definitions of congested airport and congested hours incomplete or unsatisfactory. A carrier association commented that the definition included many airports that did not have a congestion problem

justifying extraordinary pricing increases, and some airports with no congestion at all, such as St. Louis and Pittsburgh. The commenter also questioned the policy of defining airports as congested based on their contribution of one per cent or more of the national delay total, on the basis that many factors could contribute to delay other than airfield infrastructure capacity. In contrast, some commenters representing airports argued for an expansion of the definition, to include airports with congestion issues as defined by the airport operator, and airports with local congestion but no role in national system delays at all.

Response: The Department understands why the definition proposed in the January 17 notice was not considered sufficiently precise to identify an appropriate list of airports eligible for the proposed charges. The Department is clarifying here that it interprets 49 U.S.C. § 47175(2) to refer to the most recent 2004 Airport Capacity Benchmark Report, which has replaced the 2001 report. The 2004 report includes 35 airports while the 2001 report examined 31. We expect to update Section 47175(2) as part of the agency's reauthorization legislation. In response to these comments, particularly given the status of the reauthorization legislation, the Department has revised the definition of congested airports. The final policy adopts a definition that contains two criteria, one relating to existing congestion and the other to future congestion. An airport qualifies as currently congested if it accounts for at least one per cent of system delays nationally or is listed in table 1 of the FAA's Airport Capacity Benchmark Report 2004. Whether these criteria are met should be determined using the most recent year for which delay data are available and the most recent Airport Capacity Benchmark Report available. An airport is considered congested in the future if it is forecasted to meet a defined threshold level of congestion in the FACT 2 study or the most recent update of that study. The two criteria produce lists of specific airports, current versions of which have been placed in the public

docket. The group of airports produced by the definition is finite, identifiable, and a relatively small portion of the several hundred commercial airports in the U.S. However, the list includes not only airports that are now congested, but airports that have a real expectation of becoming congested in the foreseeable future and would have an interest in planning to prevent a congested condition before it occurs.

We note that two of the fourteen additional airports that qualify as congested based upon the 2004 report do not currently have congested hours. On balance, it is reasonable to adopt the same definition here that Congress used to define congested airports for purposes of environmental streamlining in Vision 100-Century of Aviation Reauthorization Act. First, the policy amendments, like the environmental streamlining provisions in Vision 100, are intended to help reduce airport congestion and delays. Use of a narrower definition would reduce the utility of this policy in achieving these goals. Second, any viable definition of a congested airport has to reflect the dynamic nature of the aviation industry. This means any definition adopted by the Department should, like 49 USC §47175(2), consider not only which airports account for the most current delays in any given year, but also which airports are the largest in terms of size and activity level and have historically played a significant role in the national air transportation system. The FAA took these latter factors into account in identifying the 35 airports in the 2004 report. There is no other comparable list. Third, the FAA currently uses this list of airports, known as the operational evolution partnership (OEP) airports, to monitor progress in adding capacity as part of its strategic planning. Finally, the overall list remains viable in terms of identifying the largest airports that handle the vast majority of operations. The OEP airports include all of the large hub airports, which have 1% or more of the total annual passenger enplanements in the country, and 5 medium hub airports, which have at least .25% but

less than 1 % of passenger enplanements. All but two of the airports that qualify as congested airports only because they are OEP, Pittsburgh and San Diego, ranked among the 50 busiest in the country in 2006, according to FAA OPSNET data (<http://aspm.faa.gov/opsnet/sys/main.asp>). St. Louis and Pittsburgh simply illustrate the point that there is a twofold test for using the new fees. The new fees may not be imposed at an airport that does not have congested hours, even if it is on the list of “congested airports” developed by the FAA for planning purposes.

In response to comments, the Department is also adding a definition for congested hours. A congested hour is an hour during which demand approaches or exceeds average runway capacity resulting in volume-related delays. This will typically occur during the most desirable peak hours of operation at a congested airport, although some like LaGuardia Airport experience congestion throughout the operating day.

We continue to believe the threshold of one per cent of national delays is a reliable indicator of an airport’s ability to accommodate demand. While factors other than the airfield may contribute to performance—an example offered was typical low visibility in morning hours at San Francisco International Airport—those factors can have a direct effect on efficiency and be beyond the ability of the airport proprietor or the FAA to change. Accordingly, it is appropriate to use a performance measure that takes into account all factors that contribute to airfield performance, and the percentage of national delays is a reliable indicator of airfield performance.

The Department is not adopting the recommendation to delegate to airport operators the responsibility to determine whether there is sufficient congestion to justify the proposed charges. Because the policies will increase fees for some users at peak hours, the Department believes

they should be applied only where objectively justified as effective in reducing or preventing congestion that would have a significant effect on delays in the national system. The FAA is in the best position to make determinations on this effect, and believes the definition of congested airport for this purpose should remain a responsibility of the Department.

The Department also declines to extend the proposed pricing options to general aviation airports and other commercial airports with little or no national impact. This expansion of the pricing policies would have no effect on the primary issues the Department is trying to address: congestion and delays experienced at peak periods at the most heavily used airports, and the ripple effect of those delays throughout the national system.

Comment: The notice did not make clear or place sufficient limits on the kinds of costs at a secondary airport in the local system that could be included in the rate base at a congested airport.

Response: The Department agrees that the proposed policy will be more useful if it contains more specific guidance about what costs could be included in the proposed peak hour charges. Paragraph 2.4 of the 1996 Rates and Charges Policy listed specific costs that could be charged to the airfield, but that paragraph was vacated by the *Air Transport Association* decision. Clearly only the airfield costs at a secondary airport could be included in landing fees at the congested airport airfield, as a matter of reasonableness in a cost-based system of charges. Within that limitation, the airfield costs that may be recovered in the landing fee at the congested airport would be the same types of costs that are recoverable from operators at the primary airport. Accordingly, as clarification, the final policy adopted notes only that costs of the second airport that may be included in the rate base of the first airport are limited to customary airfield cost center charges for the first airport. If the airfield costs rated-based at the first (congested)

airport are reasonable, they are reasonable for the airfield at the secondary airport as well. If carriers had agreed in a lease and use agreement to include other, non-airfield costs in a landing fee, those costs at the secondary airport could not be included in the fee at the primary airport (unless the carriers agree), because they are not costs of the airfield itself.

Comment: The proposed policy lacks guidance on how principal and interest costs of projects under construction could be rate-based in current charges, and how much of the project cost could be included.

Response: First, we would expect airports to conform as closely as possible to current commercial practice in recovering project costs after a project is completed and in use. Typically a project under construction would be financed by interim financing until the project is completed, at which time the total costs would be capitalized and financed through a long-term bond issue. When the project is completed, carriers would be charged the annual debt service over the amortization period of the bonds. For charges imposed on carriers while the project is under construction, the final policy states that the amount of project costs included in charges during the construction period cannot exceed an amount corresponding to debt service calculated in accordance with a commercially reasonable amortization period, which would consider the expected period of the permanent financing and not simply the time required for construction. The policy continues to make clear that project costs paid for during the construction period will be deducted from total costs financed later. We believe this guidance is sufficient to prevent excessive annual charges for project costs during construction.

Comment: It is not clear whether the three proposed charges can be used in combination.

Response: The preamble to the notice noted that the three proposals are not intended to be mutually exclusive. In other words, if the circumstances justify doing so, an airport proprietor might use a combination of two, or even all three, proposals in setting landing fees during periods of congestion.

3. *Effectiveness*

Many air carriers and carrier associations commented that at least some of the proposals would not have any effect on congestion, but would simply increase costs. Some airports and airport associations, even though supportive of the additional flexibility in addressing peak hour congestion, expressed concern about the effectiveness of the proposals in influencing carrier scheduling in peak hours.

Comment: Charging for facilities under construction and costs of a secondary airport would still not produce landing fees high enough to induce carriers to move flights out of peak hours.

The basic comment on effectiveness of two of the proposals—forward financing and support of secondary airports—is that the increased costs of peak period operation would still not be enough to induce carriers to schedule fewer flights in those hours, or to move flights to a secondary airport. As long as the fees must remain revenue-neutral, even with added costs in the peak hours, they cannot be set at an effective market-clearing rate. Reasons offered in support of this conclusion included:

- There are too many negative consequences for carriers of not maintaining flights at peak hours, including coordination with schedules throughout the system, and marketing considerations of how flights appear in reservation systems;

- Landing fees are only a portion of carrier costs for a flight;
- Carriers have investment in facilities at the airport that must be productively used;
- The costs of higher landing fees at one airport would be absorbed by carriers on a system-wide basis, and would not directly affect the calculation of benefits of the targeted flights at that airport;
- Increased landing fees for carriers have no disincentive effect on passengers, who are the actual drivers of demand for service in peak hours;
- Even if fees are passed on directly to passengers, those passengers are still likely to absorb the additional cost for the convenience of traveling at desired times.

Response: Other commenters argued that the increased fees did not have to have an effect on all operators or flights to be effective. Rather, a decision by carriers to cancel or reschedule just a few marginally profitable operations would be sufficient to achieve some beneficial effect on congestion in peak hours.

We agree. The notice did not claim that the proposed policies would have the exact effect of real congestion pricing, because they would not result in setting rates at the perfect market-clearing price. Without any differentiation between peak and off-peak fees, which is the almost universal case at present, there is no incentive for airlines to reschedule even the most marginally profitable operation to avoid peak hours. If an increase in fees adversely affected the cost-effectiveness of even a few of these operations, there would be a positive effect on congestion and a reduction in delays during peak hours.

Comment: The proposal to allow a 2-part landing fee does not require that the airport be congested, which would permit a landing fee that discriminates against smaller aircraft when there is no justification related to congestion.

Response: The existing policy does not expressly limit the forms in which airport fees can be imposed, as long as they are reasonable, not unjustly discriminatory, and limited to recovery of appropriate airport costs. Conventional weight-based fees meet these tests. The policy amendments make clear that a 2-part fee can be justified in a situation where demand exceeds capacity in peak hours, and smaller aircraft serving relatively fewer passengers contribute to the peak hour congestion. In this case a 2-part fee could be justified by its beneficial effect on peak hour congestion without significantly affecting the number of passengers able to travel at peak hours. The amendments do not limit the use of a 2-part fee to congested hours, but it is not clear what other circumstances might justify such a fee. In any event, the fee should be justified based upon meaningful consultation with carriers, including exchange of appropriate financial information. The fee, if challenged, would require evidence that it is reasonable, not unjustly discriminatory, and based upon legitimate objectives.

Comment: If the proposed charges are adopted as final policy, the Department should adopt Option 1, limiting charges for secondary airports to peak hours, to avoid unfairly penalizing carriers already operating outside of peak hours. Carriers that already operate outside of peak hours noted that imposing the costs of secondary airports and projects under construction in all hours, rather than just congested hours, would increase costs for operators that have no operations in peak hours. Thus the proposed policy would simply increase costs for these operators with no incentive effect on peak hour congestion.

Response: We agree. This comment argues for limiting the additional proposed charges to flights in congested hours, Option 1. Otherwise, cargo operators and other operators that are already avoiding congested time periods would be penalized without any related incentive effect. Charging the additional costs in all hours would also result in the off-peak operators subsidizing operations during peak hours, actually reducing the intended disincentive for operation during those peak hours. Limiting charges for secondary airports, as well as facilities under construction, to peak hours maximizes the potential differentiation between peak and off-peak charges within a revenue-neutral system, and best serves the purpose for which these charges are authorized.

Comment: The Department did not conduct any analysis of the effects of the proposal showing that it would have the intended effect on airport congestion.

Response: This comment is technically correct but presumes that the Department needed quantitative analysis before it could conclude that the proposals would reduce congestion. The premise of the proposal that added costs would result in fewer operations is based on general pricing theory, and on the reliable conclusion that at some level of cost and unprofitability, a carrier will discontinue or reschedule an operation. The Department did not attempt a study of the proposals, because a conclusion on the effectiveness at an airport would depend entirely on the circumstances at each airport and the details of the charges imposed. A simulation of the effect of pricing at an airport was conducted by the FAA Center of Excellence for Operations Research (NEXTOR) in 2004. This research was done in cooperation with a number of stakeholders, including airline participants. While the simulation was necessarily a simplification of an actual airport situation, the results did indicate that peak period pricing would affect carrier use of peak hours.

The Department agrees with commenters that the proposed policies should not be used to increase costs to operators at a particular airport unless there is reason to believe they would have an actual positive effect on congestion. That effect could be either to relieve existing congestion and reduce delays to an acceptable level, or to prevent that level of congestion if it would otherwise occur. The final policy language adopted incorporates two changes to reinforce that policy.

Both charges for facilities under construction and charges for a secondary airport are authorized only if they would have the effect of reducing or preventing a level of congestion serious enough for the airport to be identified on an FAA list of airports that either have or are forecasted to have among the highest level of operating delays at U.S. airports. The fact alone that an airport is congested within the definition of the policy is not in itself sufficient to justify imposing the fees; the airport proprietor must have reason to believe that the added fees in peak periods would have an actual effect in reducing or preventing that congestion. The airport proprietor may implement the added fees as it would any other fee change. We expect the airport proprietor to engage in meaningful consultation with airport users before implementing new or increased fees, particularly by using a new fee methodology. As we discussed in the Notice of Proposed Amendment, the airport proprietor should provide adequate information to enable the airlines to evaluate the proprietor's justification for the new charges and to assess their reasonableness. Each side should thoroughly consider the views of the other. As we indicated in the 1996 Rates and Charges Policy, at paragraph 1.1.1, and in Appendix 1 to that Policy, we encourage the airport operator to provide certain historic financial information for the airport, economic, financial, and/or legal justification for change in fee methodology or level of fees, traffic information, and planning and forecasting information. In determining the reasonableness

of any new fee instituted under this policy, we will consider the effectiveness of the fee in addressing congestion. Even in the absence of a complaint, the FAA may request a report on the effectiveness of a fee imposed under these amendments, under the FAA's authority in 49 U.S.C. § 47107(a)(15) and the AIP grant assurances.

The policy amendments adopted here include new language emphasizing the importance of providing this information to carriers in proposing higher peak period fees, including justification for the fees. While the airport proprietor's objective justification of the peak period fee is not technically required by regulation, it may serve to rebut a *prima facie* case of unreasonableness if the fee is challenged by a carrier in a proceeding before the Department under 49 U.S.C. § 47129, or in an FAA grant assurance investigation under 14 C.F.R. Part 16.

We note that one commenter observed that the Department had in fact found that revenue-neutral peak period pricing would not work, in an analysis of peak period pricing in connection with the environmental impact statement for a proposed runway extension project at Philadelphia International Airport. However, that analysis determined not that such pricing would not work at all, but rather that it would not reduce delays so as to meet the purpose and need of the proposed runway project. Specifically, the analysis showed that peak period pricing would reduce general aviation and turboprop operations on the shorter runways but would have no impact on congestion on the primary air carrier runways and therefore would not reduce delays at the airport. That example is not pertinent to the policies adopted here. As discussed below in more detail, runway development projects are the preferred response to demand. Pricing should only be used when new runways cannot be made available in time to prevent significant delays that would adversely affect the national air transportation system. Moreover, that analysis assumed charges only for traditional current airfield costs at the congested airport

itself, and not the additional costs of projects under construction and secondary airports under consideration here. So, the Philadelphia analysis does not have any relevance for the policies adopted here, and certainly does not indicate they would not have an effect on congestion at PHL or any other airport.

An airline employee involved in scheduling noted the complexities of airline scheduling and suggested that a carrier's response would not necessarily be what the airport intends. The Department recognizes that airline scheduling is indeed complex, and that carriers take a number of factors into account in deciding where and when to use a certain aircraft. However, we continue to believe that the cost of operating at a particular airport at a particular time will become a factor at some price point. If the proposed policies allow an airport operator to reach that price point for even a small number of marginally efficient operations in peak hours, the purpose of the policies will have been served.

A carrier association noted that because landing fees work as an incentive only on landings, departures in peak hours would be unaffected and actually subsidized by operators with more arrivals in a congested period. The Department believes that there will typically be enough of a balance between arrivals and departures that an incentive that works only on arrivals would still work in most cases. Presumably this issue would be addressed in an airport operator's consideration of the fees before they were adopted. We note that the Massport peak period pricing rule applies congestion fees to both arrivals and departures, which is permitted under the Department Rates and Charges Policy as long as total fees do not exceed aggregate airfield costs.

Commenters who concluded that the proposals would not reduce congestion had different views about what that meant. Many carriers argued that because the proposed policy changes would not achieve their stated purpose and would simply increase costs to industry and travelers,

the Department should not adopt the changes. Some airports and associations reached the opposite conclusion—that because a revenue-neutral pricing system could not raise fees enough to affect scheduling, the Department should abandon the requirement for revenue neutrality and allow airports to set fees high enough to be effective.

The Department is required to provide guidance on reasonable fees based on our survey of the nationwide aviation field, and we have found that airfield fees nationwide typically are based on capital costs plus recurring costs associated with maintenance, upgrading, repaving, and installation of safety and security systems. The cost-based system of user fees also conforms to U.S. international obligations. As mentioned above, the Department believes that the newly allowed charges that may be incorporated in peak fees can have an effect on enough operations to affect congestion, at least at some airports, and should be available to the operator of a congested airport where that effect can be reasonably predicted and ultimately demonstrated.

Comment: The two-part landing fee would simply impose additional costs without resulting in schedule changes for smaller aircraft as intended. The effectiveness of the two-part landing fee is a somewhat different issue from the two facilities charges. Most commenters seemed to accept that a 2-part landing fee would have the effect of discouraging use of smaller aircraft in peak hours, as intended, although they did not agree on the fairness or benefits of that effect (discussed under 4. *Unjust discrimination* below). However, carriers providing international service argued that it is not realistic to expect feeder flights that use smaller aircraft to move out of peak hours, because of the inconvenience to international and long-haul passengers. So, they argued, it is not clear that the increased fees per seat for smaller aircraft would have the intended effect, at least for some small aircraft operators at international airports.

Response: The Department cannot anticipate the reaction of each carrier to a change in landing fees at peak periods, because of the many different factors each carrier would need to consider in evaluating the costs and benefits of a schedule change. The Department continues to believe that higher peak period fees will affect scheduling for some flights of smaller aircraft, even if not all, and the effect on some can be sufficient to have a positive effect on congestion.

Comment: If airfield costs at a secondary airport are charged to carriers at a congested airport, the resulting below-cost fees at the secondary airport might attract new service at the secondary airport, rather than promoting relocation of flights from the congested airport as intended. This new service would be in competition with carriers at the primary airport, as well as being subsidized by them.

Response: This result is theoretically possible but is not a reason not to permit the charges as proposed, if those charges would be effective in relieving congestion at the main airport in the system, to the benefit of the carriers operating there.

Comment: The ability of airport proprietors to raise landing fees to control congestion, as proposed, acts as a disincentive for airport proprietors to invest in new capacity, which should be the primary solution for congestion.

Response: First, the airport proprietor will not actually receive more funds over time and across the airport system under the policies adopted, although current fees at the congested airport may be greater than before. The Department does agree that building new runways and otherwise generating new capacity is the preferred response to demand, and that pricing should be used only where airport development projects cannot be built and made available in time to

prevent congestion. The policies adopted should not undercut an airport operator's incentives to add runways and expand capacity, because they will not allow the airport operator to increase system revenue over time. The adopted policy is designed to augment tools available to local governments who operate airports to resolve capacity issues. 73 FR at 3312.

Comment: The January 17 notice stated that generation of additional revenue for capacity enhancement was a stated objective, or at least a benefit, of the proposed policies. Airports are fully able to recover costs and fund new projects now, and do not need additional revenue to support capacity expansion projects.

Response: The notice observed that an airport proprietor would have additional revenue for development, as a result of the ability to charge for facilities under construction. The notice did not claim that result as a purpose of the proposals, but did suggest that it was a corollary benefit. We agree with the comment that generation of revenue is not the purpose of the proposals. The final policy amendments adopted are intended to relieve congestion at peak periods at congested airports, not generate additional revenue for airports. The new charges, if adopted, would increase costs for some carriers for peak hour operations, but would not increase aggregate carrier costs for airfield facilities and services in a local airport system over time.

4. *Unjust discrimination*

Many of the comments that criticized the proposals cited the unfair and disproportionate burden on some operators, concluding that the proposed landing fees, if adopted by an airport, would be unjustly discriminatory toward one or more categories of operators. As some commenters noted, the proposed fees are in part actually *intended* to be discriminatory, so their

legality depends on whether or not the discrimination is sufficiently justified to be “justly discriminatory.” A corollary issue is whether an otherwise justified discriminatory fee has unintended adverse effects on operators that do not contribute to the congestion problem being addressed.

Typical comments claiming discrimination were:

Comment: The proposed fee increases would not induce any movement out of the congested hours, so they would unfairly raise carrier costs for no reason.

Response: The fees authorized under this policy may be justified in terms of having the potential to reduce delays in congested hours, including by encouraging use of larger aircraft, as well as being supported by actual costs. As noted above, however, the policy changes are adopted based on the Department’s belief that the charges can have some beneficial effect, because some carriers will decide not to pay the higher charges to operate in peak hours. This conclusion is reinforced by our strongly urging airport operators to justify and explain to carriers the methodology for any fee increase before imposing it at a particular airport.

Comment: The proposed fee increases would force some operators to move out of the peak hours, even though their customers want to travel then.

Response: This comment is partially correct although we add that operators scheduling several flights during peak periods with smaller aircraft may decide to consolidate some flights with larger aircraft and thereby not inconvenience passengers. The Department understands that moving flights out of peak hours means moving some passenger trips out of peak hours. The flights and passengers that are able to continue to use peak hours will experience less delay, and

whether or not their fares are increased will be determined by the competition, the gauge of aircraft used, and other factors.

Comment: Some operators can move flights and others cannot, and the higher pricing in peak hours unfairly impacts categories of operation that cannot move flights out of peak hours or to secondary airports.

Response: From a market standpoint, this is essentially another way of saying that operation in peak hours has a higher value for some operators than for others. Charging a higher price in peak hours results in the allocation of peak hour flights to the carriers that value operation in those hours the most. This is the market working, not an indiscriminate side-effect of higher charges. It is true that there are some operations that may not be able to reschedule or operate at an alternative secondary airport. However, those operations receive the same benefit as all other operations from a reduction in peak hour congestion at the congested airport.

Comment: If costs for facilities under construction and secondary airport airfields are included in the proposed charges applied to all operations throughout the day, some categories of operation will be penalized by higher fees even though they have no role in the current congestion or the intended solution.

Response: We agree. Accordingly, the final policy permits charges for facilities under construction and the costs of a secondary airport only in peak hours at the congested airport, i.e., hours in which that airport experiences delays that qualify it as a congested airport (Option 1 for the proposed charge for facilities under construction).

Comment: Under a 2-part landing fee, some carriers and categories of operation will have no ability to upgauge, and will simply have to absorb higher fees or cease operation in the market.

Response: This may be true for some operators. The effect is mitigated with respect to markets subsidized under the Essential Air Service (EAS) Program, because the final policy allows an airport operator to exempt those markets from the three new policies (although such operations would still be subject to conventional landing charges). However, for other operations, carriers will need to assess the feasibility of each flight with a particular aircraft type, taking into consideration the effect of the per-operation component of the landing fee at the airport.

Commenters also offered specific examples of how the proposed charges would result in a discriminatory effect for some operators. Some examples cited in the comments are:

Comment: Raising costs to encourage use of larger aircraft unfairly targets operators of regional jets and the markets they serve. One association and carriers operating regional jets argued that segments of the national air service market depend on that size aircraft, and that efforts to eliminate small jet operations are inconsistent with § 40101(a)(16), which establishes a policy of ensuring that residents of small and rural communities have full access to the national air transportation system. Several small U.S. airports and communities complained that the pricing incentive to upgauge from regional jets to larger aircraft, if effective, would jeopardize their connections to hub airports, because the market and sometimes the airport would not accommodate larger jets. Some airport representatives commented that the Department should

develop a list of criteria for small communities to be eligible for exemption from higher landing fees, and allow airport operators to incorporate those exemptions in their fees to protect small community access. Some commenters argued that carriers and passengers want to have regional jet service, and that the Department, therefore, should “let the market work” by not allowing airports to create a disincentive to that service.

Response: The notice did not directly address the potential impact on small community service. We agree that higher peak period charges, or a higher per-operation landing fee, could be a disincentive to operation of smaller aircraft types in peak hours—that is one purpose of the proposed policy. While it is not the Department’s intention to adopt a policy that would adversely affect service in any particular market, we understand the possibility that higher peak period landing fees could result in a reduction or even loss of service in marginally profitable markets. The final policy adopted permits an airport operator to exempt flights from the added peak period charges, if the flights are being subsidized under the EAS Program. The ability of an airport operator to exempt EAS-subsidized flights from peak period pricing has been recognized by the Department previously. Not all of the markets served by regional jets and smaller aircraft will be eligible for this exemption, however, and airport proprietors may not extend the exemption to non-EAS markets, because that action would be considered local regulation of air carrier rates, routes and services. Accordingly, it is possible that service in some markets could be adversely affected as described in the comments.

As a result, actually “letting the market work” may well not provide the broadest or most uniform distribution of service to all markets from the congested airport. It will, however, come closer to providing the most economically efficient use of the congested airport for the greatest number of travelers. Arguably, open access for all to the scarce resource of a congested hub

airport at peak hours, when demand for access exceeds airport capacity, is itself a distortion of the market. Conversely, a requirement to pay more for that resource during periods of congestion is actually closer to letting the market work.

Comment: Foreign carriers will be disproportionately affected by the proposed charges, because they cannot avoid them or absorb costs across a larger domestic system. Foreign carriers and governments commented that these carriers could not use off-peak hours because of the restrictions on operation in European and Asian airport markets, and could not operate at secondary airports because those airports would not be U.S. ports of entry. Accordingly, these carriers would bear the full effect of the increased landing fees, with no ability to avoid the costs or to spread the costs across other flights as U.S. competitors could do.

Response: We agree that there may be limits on foreign carriers' ability to avoid the fees, although they are not unique in that regard. International flights by U.S. carriers will be affected in exactly the same way. To the extent that higher charges at peak periods reduce congestion, carriers operating international service will benefit from the resulting reduction in operating delays and greater scheduling reliability. The policy allowing airport operators to charge higher fees in peak congested hours recognizes that many operators will choose to pay the higher fees to retain access to peak hours, for a variety of business reasons; the need for international flights to operate in those hours is one such reason. Those carriers get something in return for the higher fees: a reduction in operating delays.

U.S. carriers claimed that the increased fees would unfairly fall on U.S. carriers, because foreign carriers would necessarily be exempted from the fees in order to comply with ICAO

standards and air service agreements. As discussed in part in this notice under *Legal Authority*, we do not believe ICAO guidance or air service agreements require exemption of any operators from the proposed charges, so there would be no difference in the fees charged to U.S. and foreign carriers.

Comment: The proposed policies would adversely affect transborder Canadian service disproportionately, because many flights between Canada and major U.S. airports use regional jets. This is similar to the complaints by U.S. carriers that use regional jets and cities those carriers serve, but with the additional consideration of provisions in the bilateral agreement with Canada. Canadian carriers, airports, and a carrier association argued that the U.S.-Canada bilateral agreement would prohibit the application of some or all of the three proposed policies to transborder flights.

Response: The U.S.-Canada bilateral agreement is similar to other U.S. air service agreements. For the reasons discussed above under *Legal Authority*, the Department does not believe the terms of those agreements prohibit the proposed charges, and reaches the same conclusion with respect to the U.S.-Canada bilateral agreement. There is no language in the agreement that specifically requires weight-based landing fees or prohibits other methodologies for landing fees. The agreement contains the standard requirement that fees be equitably apportioned among categories, but that in itself does not prohibit a per-operation component in the landing fee with justification based on the circumstances existing at the airport. With respect to charges for facilities under construction, the agreement provides only that charges may not exceed the costs of providing appropriate airport services. We believe the policy allowing an operator of a congested airport to impose the costs of airfield facilities already under construction

is not inconsistent with this language. Finally, we note that the agreement permits charges for services “at the airport or within the airport system,” and thus does not prohibit appropriate charges for a secondary airport in a system where the primary airport is congested due to excess demand.

We recognize that the proposed policies could have some effect on carrier decisions regarding transborder service, as with service in U.S. markets at congested airports. However, the policies would apply to Canadian markets and Canadian carriers in exactly the same way as they would to U.S. markets and carriers, and would not be prohibited by antidiscrimination or other provisions in the U.S.-Canada bilateral agreement. One commenter expressed concern about the effect on access by Canadian carriers to Reagan Washington National and LaGuardia Airports, which is expressly guaranteed by the agreement. Both airports are included on the list of congested airports. However, as Reagan Washington National does not currently have any congested hours, these policies would not be used there at this time. . Any peak hour charges adopted by the Port Authority of New York and New Jersey at LaGuardia would need to take into consideration the terms of our bilateral aviation agreement with Canada.

Comment: Carriers that operate a single aircraft type have no opportunity to up-gauge, and would simply pay higher fees for the same operation, or cancel some operations.

Response: The policy allowing airport operators to charge higher fees in peak periods is not directed toward any particular operator, but will have an effect on any operator using aircraft that are not economically feasible with those fees in effect. The fact that an operator’s entire fleet will be affected to some degree is not a persuasive reason to guarantee that operator lower-cost access to peak hours at a congested airport by exempting it from the general effect of the

pricing regime. Some operators will find it beneficial to pay the higher peak fees to continue peak hour operations, along with a reduction in operating delays in those hours, but others may not. The Department does not consider that possibility a reason to deny airport operators the use of the proposed policies to enhance the effect of peak period pricing at their airports, when justified by peak hour congestion.

Comment: If the costs of future projects and secondary airports are added to charges throughout the day at the primary airport, rather than just during peak hours, then the burden falls unfairly on operators that do not contribute to the problem. Cargo operators operate largely in night hours when there is no issue of congestion.

Response: As discussed under *Effectiveness* above, the final policy avoids this result by limiting the application of the additional costs to operations in peak hours.

Comment: The fees would make operations in peak hours far more expensive for general aviation and on-demand air taxi operators, even though those operators make no significant contribution to the current congestion.

Response: The policy adopted, like the 1996 Rates and Charges Policy as a whole, does not include any general exception for general aviation. However, airfield charges must be reasonable and not unjustly discriminatory. Presumably an analysis of a proposed peak period fee by the airport proprietor would reach some conclusion about whether general aviation flights are contributing to peak hour congestion at the airport or not, and support a corresponding pricing policy for general aviation flights. Proposed charges on general aviation could reflect,

for example, whether general aviation flights at the airport compete with air carrier aircraft for use of the same runways. For this reason it is more appropriate to consider general aviation charges through actual, case-by-case analyses of their activity and impacts on congestion at each airport, rather than define a separate policy for general aviation in this policy statement.

5. Comments that the proposals should define an airport proprietor's authority more broadly.

Operators of large airports and associations representing airports generally commented favorably on the intent of the proposed policy to clarify and expand the ability of airport operators to impose higher fees in peak hours at a congested airport. However, some commenters requested that a final policy be revised to avoid actually limiting an airport operator's existing proprietary authority. Some commenters further requested that the final policy contain language expressly expanding the airport operator's flexibility to impose fees beyond what the Department proposed.

Comment: The policy should clarify that an airport operator may use a "limitless" variety of methods to set landing fees, including a purely per-operation fee. Specifically allowing a 2-part fee suggests airports cannot impose other kinds of fees besides weight-based and 2-part weight-based and per-operation fees. Also, the policy should not rule out innovative fees such as negative landing fees at off-peak hours.

Response: The policy does not define the universe of kinds of landing fee an airport operator may impose, but only clarifies that a 2-part landing fee may be used at peak hours to relieve congestion, without necessarily being considered to be unjustly discriminatory. Other kinds of landing fees are possible, but any such fee would need to be both reasonable and not

unjustly discriminatory. “Negative landing fees” would necessarily involve cash subsidies to carriers operating in off-peak hours, generated by fees on other operations in peak hours. Such subsidies, even if considered nondiscriminatory, could be inconsistent with requirements for use of airport revenue and would be likely to raise issues under U.S. international obligations. Negative landing fees were not proposed in the notice, and are not included in the final policy.

Comment: Clarify that airport operators are not preempted from using landing fees to create economic incentives for carriers to alter schedules at peak times, up-gauge aircraft types, or shift service to less congested airports. A landing fee can affect carrier business and marketing decisions not only indirectly, but also with the stated purpose of having a direct effect on carrier decisions.

Response: As discussed under *Legal Authority* above, an airport operator pursuing a legitimate objective in the exercise of its proprietary authority consistent with its other responsibilities under Federal law has some ability to influence carrier decisions. So, an airport proprietor can charge a higher landing fee in peak hours to influence carriers to use less congested hours, because reducing excess demand that results in a high level of operating delays on the airfield at peak hours is a legitimate objective of the Department and the airport proprietor. However, that authority is not unlimited, given the prohibition on airport regulation of airline rates, routes, and services in 49 U.S.C § 41713(b). A landing fee designed to implement a preference for certain aircraft types, but not justified by any condition or purpose related to the functioning of the airfield itself would be preempted under § 41713(b).

Comment: The Department should abandon the limitation on airfield fees to historic cost valuation and revenue-neutral airfield fees, and allow airports to use market pricing.

Response: The policies proposed were intended to permit airport proprietors some flexibility to use pricing to manage conditions of serious peak hour congestion, without deviating from the policy of cost-recovery, revenue-neutral charges. See 1996 Policy, ¶ 2.2. Moreover, the requested authority would be unnecessary to implement the policies proposed in the notice.

Comment: In allowing charges for facilities under construction, the Department should Adopt Option 2 for financing future construction, to permit the higher fees to be imposed throughout the day. Also, the policy should extend future financing to include new airports, not just new facilities.

Response: The final policy adopts Option 1, which provides that the added charges will be considered reasonable only in hours of peak congestion. The purpose of the policy is not cost recovery or revenue generation; rather the purpose is to allow for increased differentiation between peak and non-peak period pricing at the airport. Adding the charges of future facilities in off-peak hours works against this goal, and against the incentive for encouraging off-peak operation. It also penalizes operators already operating outside congested hours, by imposing unnecessary costs on those operators with no possible incentive effect on scheduling. As airports typically adjust their fees regularly and can capitalize the project costs remaining after construction, limiting the charges to hours of peak congestion is not expected to be difficult or increase administrative burdens on airports.

With respect to allowing charges for the costs of future airports under construction, we do not see the need for a statement of general policy on this issue. Cases in which the policy might be applied would rarely occur, and any decision on the reasonableness of the charges might be highly dependent on the facts of a particular case. The final policy adopts the provision on charges for facilities under construction as proposed—limited to facilities at the airport where the charges are imposed.

Comment: In allowing charges for the costs of secondary airports in the region, the Department should extend the list of secondary airports eligible for cross-subsidy to regional airports not owned by the same sponsor as the primary, congested airport. The final policy should allow airport operators to enter into agreements, approved by the Department, for support of one airport with fees from another.

Response: The FAA has traditionally not allowed airports with different owners to enter into agreements that affect access to the airports, primarily because one airport sponsor cannot delegate its responsibility for reasonable access under its grant assurances to another airport operator, or guarantee access at an airport it does not control. This new request is similar in that an airport operator would be charging its carriers for the access benefits at another airport, and the costs of operation of that airport, when it had no control over the access to or costs at that second airport. The final policy adopts the provision as proposed, limiting charges to the costs of airports owned or operated by the same airport proprietor that operates the congested airport.

Comment: The Department should clarify that the proposed fees could be implemented outside the airport's existing lease and use agreements.

Response: The Department assumes that airport proprietors would take into account any existing agreements with carriers before imposing any new charges, and could only impose those charges as the agreements provided or when they expired. Accordingly, the final policy amendment does not include the requested language.

Comment: The notice stated that an airport proprietor "may consider the presence of congestion at the [congested] airport when determining the portion of the airfield costs of the other airport to be paid by the users of the first airport during periods of congestion." This can be understood to mean that the airport can impose the opportunity costs of congestion in its landing fees.

Response: This statement in the notice was intended merely to refer to a determination of the portion of the second airport's costs that could be included in fees at the congested airport. Nothing in the proposed amendments would authorize an airport proprietor to charge airfield fees that include any amount in excess of the airport proprietor's actual system costs. Other commenters expressed confusion about the intended meaning of this same language, and it is not included in the final amendment.

The policy amendments adopted

After review of the public comments, the Office of the Secretary of Transportation and the FAA have determined that the proposed amendments to the 1996 Rates and Charges Policy should be adopted, with revisions to address concerns and suggestions raised in the comments. The amendments do not alter one of the fundamental principles of the 1996 Rates and Charges Policy: that reasonable airfield fees must be based on the capital and operating costs of the facilities for which the fees are assessed. None of the amendments will permit an airport to generate revenues in excess of the allowable costs of providing airfield facilities and services at the congested airport and its related airport system, as defined in accordance with the 1996 Rates and Charges Policy.

The effect of each of these modifications is to allow the airport operator to increase the cost of landing at a congested airport during periods of congestion, even if congestion lasts through much of the day. By raising the costs of using the congested facilities at peak times, the airport operator would provide an incentive for current or potential aircraft operators to (1) adjust schedules to operate at less congested times (if they exist); (2) use less congested secondary or reliever airports to meet regional air service needs; or (3) use the congested airport more efficiently by up-gauging aircraft. The three amendments are not intended to be mutually exclusive. In other words, if the circumstances justify doing so, an airport proprietor might use a combination of two, or even all three, charges in setting landing fees during periods of congestion. Any charges imposed on international operations, whether using this proposed flexibility or not, would also have to comply with the international obligations of the United States, including requirements that the charges be just, reasonable, and equitably apportioned among categories of users.

The Department continues to consider airport development and expansion of airport capacity to be the most appropriate and the preferred long-term action to address airport congestion and delay. However, at airports that meet the definition of congested airports when development projects are planned but will not be available in time to prevent increasing delays, and at those congested airports where capacity expansion is simply not feasible, the amendments adopted in this action will provide the airport proprietor additional tools to manage available capacity.

Principles Applicable to Airport Rates and Charges

The amendments adopted include a new paragraph 6 in the statement of basic principles applicable to airport rates and charges. The new paragraph affirms the requirement that all airport charges imposed on international air transportation in the United States comply with the international obligations of the United States. This is not a change in policy, because this requirement has always applied. However, in view of the many comments expressing concern that the proposed charges would not comply with international agreements and other authority, the Department is revising the amendments to include provisions affirming the strong commitment of the United States to meet its international obligations in the oversight of airport charges in the U.S. The amendments adopted, therefore, include an express statement of the requirement for fees at U.S. airport to meet all U.S. international obligations regarding airport charges, in the same terms used in U.S. bilateral air service agreements. These obligations, of course, apply to the entire Rates and Charges Policy and not just the amendments adopted in this action.

Special Provisions Applicable to Congested Airports

The amendment adds a new Section 6, *Congested Airports*. Paragraph 6 defines a congested airport for the purposes of the Rates and Charges Policy according to two criteria, one relating to existing congestion and the other to future congestion. An airport qualifies as currently congested if it accounts for at least one per cent of system delays nationally or is listed in table 1 of the FAA's Airport Capacity Benchmark Report 2004. Whether these criteria are met should be determined using the most recent year for which delay data are available and the most recent Airport Capacity Benchmark Report available. An airport is considered congested in the future if it is forecast to meet a defined threshold level of congestion in the FACT 2 study or the most recent update of that study. This revised definition responds, in part, to comments that the proposed definition included some airports that were not congested. Note that while the definition defines an eligible category of airport for use of fees to control congestion, there must be a congestion problem and those fees must still be reasonable. The new fees may not at this time be imposed at airports like Reagan Washington National, St. Louis, and Pittsburgh that do not currently have congested hours. An airport could not impose fees today based on a forecast that it will become congested years in the future. It could, however, put in place measures to address future congestion that would become effective when it met the definition of congested or was about to do so. Section 6 also defines "congested hour" as an hour during which demand exceeds average runway capacity resulting in volume-related delays or is anticipated to do so.

New paragraph 6.1 emphasizes the importance of providing operators an explanation or justification for any use of the peak period fees authorized in this policy change and of consultations with carriers as already provided in the Rates and Charges Policy. The paragraph

expressly references Appendix 1 to the Policy, containing a list of the information the Department would expect the airport proprietor to provide to carriers and other operators.

New paragraph 6.2 clarifies that an airport proprietor may adopt measures to address congestion even before conditions would justify peak period pricing, as long as that pricing does not take effect until the conditions described in that paragraph are met. Such a measure would include a specified condition, such as number and severity of chronic operating delays, that triggered the implementation of the pricing. Advance consideration of the need for peak period pricing not only allows full time for consultation with users, but also allows users to adjust schedules well in advance to avoid congestion that would trigger the peak period pricing.

New paragraph 6.3 provides that an airport operator that imposes peak period charges for facilities under construction, or for the costs of a secondary airport in the system, can exempt from those charges any flights operated under an Essential Air Service (EAS) Program subsidy, in accordance with 49 U.S.C. §§ 41731-41735. The Department has previously acknowledged that an airport proprietor may exempt EAS subsidized flights from general fee increases that would jeopardize that service. That determination is based on the Supremacy Clause of the U.S. Constitution and the interpretation that the proprietary exception to Federal preemption only permits an airport proprietor to take actions consistent with the implementation of a Federal program, and not to make its own decision about preferences for certain markets. As discussed in the response to comments above, the Department sees no authority for an exemption beyond the EAS Program eligible airports.

Two-part landing fee

Paragraph 2.1 is amended by adding a new paragraph 2.1.4 as proposed, to clarify that an airport proprietor may impose a landing fee that incorporates both weight-based and per-

operation elements. There are conditions on the use of a two-part fee: it must reasonably allocate costs to users on a rational and economically justified basis, and it may not generate fees in excess of allowable airfield costs.

New subparagraph 2.1.4(a) notes that a positive effect on congestion-reduction, such as enhancing the number of passengers accommodated during congested hours, may justify a fee incorporating a substantial per-operation component, such as the two-part landing fee. The policy does not limit the use of two-part landing fees to congested airports, although the Department does not currently see any alternative justification for such fees.

New subparagraph 2.1.4(b) provides for the exemption of EAS-subsidized markets from the application of a two-part landing fee, and provides guidance on how such flights would otherwise be charged for their share of airfield costs. Exemption from the two-part fee would not be a waiver of all fees, but rather an exemption from the fee increase due to the per-operation component of the two-part fee. The assumption is that under an exemption, an EAS operator would continue to pay the weight-based charge in effect before adoption of the two-part fee (or that would have been in effect if all carriers were paying a weight-based charge). The paragraph also makes clear that where an exemption results in lower charges for EAS operators, the resulting loss in revenue cannot be made up by an increase in the landing fees charged to other operators.

Charges for facilities under construction

The policy as amended would replace paragraph 2.5.3, which was vacated by the court of appeals, with a new paragraph addressing charges for facilities under construction, as proposed in the notice. For the reasons explained in the notice, the replacement language is consistent with the court's opinion that vacated the original paragraph 2.5.3. The final policy adopts Option

1 in the notice, limiting the added charges for facilities under construction to hours when peak hour pricing would be justified. The paragraph as adopted includes the three conditions in the proposal that serve to limit the charges to facilities that are approved and under construction. This effectively limits additional landing fees to projects for which the airport operator is already incurring construction costs, and which will be in use in the relatively near future. In response to comments, paragraph 2.5.3 as adopted also includes a new fourth condition not in the notice: that the added costs for current operators would have the effect of reducing or preventing congestion and operating delays at the airport. While the notice limited this charge to congested airports, it did not contain an express condition that the charge actually have a positive effect on congestion, although that condition was implied. This new language adds an express statement of that condition. For a new charge, the effect could be predicted using information available. For a charge that had been in effect for some time, there would be actual performance data available for review of the effectiveness of the charge.

New paragraph 2.5.3(a) is adopted as proposed, simply requiring that any construction costs reimbursed during the construction period not be included in the final project cost when completed.

The final policy deletes the proposed paragraph 2.5.3(b), which suggested that an airport proprietor consult the ICAO *Airport Economics Manual*. The Department strongly urges that charges be constructed in accordance with this Manual; however, the new paragraph 6 of the *Principles*, stating clearly the broad obligation to comply with all U.S. international obligations, makes the reference to one ICAO manual too limiting.

The policy adopted includes a new paragraph 2.5.3(b) clarifying that a charge for a facility under construction cannot exceed the actual costs as incurred by the airport proprietor. It

indicates that the costs can be recovered as they are incurred, but the airport proprietor could not accumulate funds in advance of requirements. Second, charges are limited to the debt service over a conventional amortization period which takes into account the expected term of the permanent financing. Some air carriers commented that the policy did not prevent an airport proprietor from charging all costs of construction as incurred, even though the finished project would normally be financed and paid off through debt service over a period of years. While the policy does not prescribe in detail any particular methodology, it does limit the added charge in any year to a commercially reasonable amount for debt service on the financing for the particular project amount involved.

The final policy as adopted includes a conforming amendment to paragraph 2.4.4 not included in the notice. Paragraph 2.4.4, relating to recovery of costs for debt service, contains a parenthetical “(for facilities in use),” which states the general policy limiting charges to facilities that are completed and in use by the operators being charged. To assure internal consistency of the amendments, the final policy amends the parenthetical to read, “(for facilities in use or in accordance with paragraph 2.5.3),” to provide for the limited exception for facilities under construction at congested airports.

Charges for the costs of a secondary airport

As stated in the notice, paragraph 2.5.4 of the 1996 Rates and Charges Policy permits the operator of an airport to include in the rate base of that airport costs of another airport currently in use if three conditions are met: (1) the two airports have the same proprietor; (2) the second airport is currently in use; and (3) the costs of the second airport to be included in the first airport’s rate-base are reasonably related to the aviation benefits that the second airport provides

or is expected to provide to the aeronautical users of the first airport. Subparagraph (a) further provides that the third condition will be presumed to be satisfied if the second airport is designated as a reliever airport to the first in the FAA's National Plan of Integrated Airport Systems (NPIAS).

The notice proposed to amend subparagraph 2.5.4(a) to add another category of airports to the presumption – those that the FAA has designated as secondary airports serving cities, metropolitan areas, or regions served by congested airports. The three conditions in paragraph 2.5.4 continue to apply to this new presumption. The final policy includes the proposed amendments with one change: to satisfy the presumption that the secondary commercial airport benefits users of the congested airport, the policy as adopted provides that the added costs in peak hour charges at the congested airport must also have the effect of reducing or preventing further congestion and operating delays at that airport. The notice assumed that the proposed charges would have the effect of relieving congestion at the congested airport, but did not actually make that effect a requirement for the use of the charges by the operator of a congested airport. As with the charges for facilities under construction, for a new charge the effect could be predicted using information available. For a charge that had been in effect for some time, there would be actual performance data available for review of the effectiveness of the charge.

FAA has identified the secondary airports that would meet the first two criteria for the presumption in paragraph 2.5.4(a)(2) (i.e., the first airport is congested, and the secondary airport serves the same community or region), and monitors development projects at these airports in the FAA strategic plan or "Flight Plan." The current list of secondary airports has been placed in the public docket. The FAA has also posted the current list of designated secondary airports on its website, and will keep it up to date.

The notice also proposed to add a new subparagraph 2.5.4(e) stating, first, that the proprietor of a congested airport may consider the presence of congestion when determining the share of the airfield costs of the secondary airport to be included in the rate base of the congested airport during periods of congestion, and second, that in no event would the airport operator be allowed to generate more revenue from airfield charges imposed at the two airports than the costs of operating the two airfields. Commenters were confused by the first part of that sentence, and some commenters entirely misunderstood its intended meaning. In lieu of the language as proposed, the final policy adopted contains a more direct statement in paragraph 2.5.4(a)(2) that charges for a secondary commercial airport may be used only when they have an actual effect in relieving or preventing congestion.

The final policy includes a new paragraph 2.5.4(e), which includes a slight revision of the second part of proposed paragraph (e) to expressly limit total charges to the allowable costs of the congested and secondary airport combined. New paragraph (e) adds new language clarifying that the allowable charges for a secondary airport are limited to customary airfield cost center charges. Some commenters expressed concern at the lack of guidance on costs of the secondary airport that could be charged to operators at the congested airport. The Department has not attempted to prescribe detailed guidance, in consideration of the variation in local rate methodologies at airports. In lieu of detailed guidance, the policy limits charges to airfield costs, and to those airfield costs which would be customary for the methodology in effect in that airport system. We believe that guidance will be sufficient to evaluate the reasonableness of a proposed peak hour charge that includes costs at a secondary airport.

Finally, the final policy adopted includes a conforming amendment to paragraph 2.2 of the Rates and Charges Policy. Existing paragraph 2.2 states the general rule that airfield charges

cannot exceed the costs to the airport proprietor of providing airfield services and assets currently in use unless users agree otherwise. The final policy makes the carrier approval paragraph 2.2(a), and adds a paragraph 2.2(b) with an alternate exception: if the charge is imposed in accordance with paragraph 2.5.3, for facilities under construction, or paragraph 2.5.4(a), for the costs of a secondary airport. With these limited exceptions, the general rule limiting charges to facilities currently in use continues to apply.

Amendment of the Rates and Charges Policy

In consideration of the foregoing, the Department of Transportation amends the Policy Regarding Airport Rates and Charges, published at 61 FR 31994 (June 21, 1996) as follows:

POLICY REGARDING AIRPORT RATES AND CHARGES

Principles Applicable to Airport Rates and Charges

1. In *Principles Applicable to Airport Rates and Charges*, add a new paragraph 6 to read as follows:

6. Fees imposed on international operations must also comply with the international obligations of the United States, which include the requirements that the fees be just, reasonable, not unjustly discriminatory, equitably apportioned among categories of users, no less favorable to foreign airlines than to U.S. airlines, , and not in excess of the full cost to the competent charging authorities of providing the facilities and services efficiently and economically at the airport or within the airport system.

Fair and Reasonable Fees

2. Amend subsection 2.1 by adding a new paragraph 2.1.4 as follows:

2.1.4 An airport proprietor may impose a two-part landing fee consisting of a combination of a per-operation charge and a weight-based charge provided that (1) the two-part fee reasonably allocates costs to users on a rational and economically justified basis; and (2) the total revenues from the two-part landing fee do not exceed the allowable costs of the airfield.

(a) The proportionately higher costs per passenger for aircraft with fewer seats that will result from the per-operation component of a two-part fee may be justified by the effect of the fee on congestion and operating delays and the total number of passengers accommodated during congested hours.

(b) An airport proprietor may exempt flights subsidized under the Essential Air Service Program from the general application of a 2-part landing fee, and instead charge those flights a landing fee that would have been charged if a conventional weight-based fee was in effect. To the extent an exemption reduces total airfield fees recovered, the difference may not be recovered by increasing charges to other operators currently operating at the airport.

3. Revise paragraph 2.2 to read:

Revenues from fees imposed for use of the airfield (“airfield revenues”) may not exceed the costs to the airport proprietor of providing airfield services and airfield assets currently in aeronautical use unless:

(a) otherwise agreed to by the affected aeronautical users; or

(b) the fee includes charges in accordance with paragraph 2.5.3 or paragraph 2.5.4(a), and there is a corresponding reduction in fees for users that would otherwise have paid those charges.

4. Amend paragraph 2.4.4 by revising the parenthetical phrase to read:

“...(for facilities in use or in accordance with paragraph 2.5.3)...”

5. Add a new paragraph 2.5.3 to read as:

2.5.3. The proprietor of a congested airport may include in the rate-base used to determine airfield charges during congested hours a portion of the costs of an airfield project under construction so long as (1) all planning and environmental approvals have been obtained for the project; (2) the proprietor has obtained financing for the project; (3) construction has commenced on the project; and (4) the added costs for current operators would have the effect of reducing or preventing congestion and operating delays at that airport.

(a) The airport proprietor must deduct from the total costs of the projects any principal and interest collected during the period of construction in determining the amount of project costs to be capitalized and amortized once the project is commissioned and put in service.

(b) The amount of project costs included in current charges may not exceed an amount corresponding to costs actually incurred during the construction period, calculated in accordance with a commercially reasonable amortization period based on the expected term for the permanent financing of the project.

6. Amend paragraph 2.5.4(a) to read as follows:

(a) Element no. 3 above will be presumed to be satisfied if:

(1) the other airport is designated as a reliever airport for the first airport in the FAA's National Plan of Integrated Airport Systems ("NPIAS"); or

(2) the first airport is a congested airport; the other airport has been designated by the FAA as a secondary airport serving the community, metropolitan area or region served by the first airport; and adding airfield costs of the second airport to the rate base of the first airport during congested hours would have the effect of reducing or preventing congestion and operating delays at that airport in those hours.

7. Add a new subparagraph 2.5.4(e) to read as follows:

(e) Costs of the second airport that may be included in the rate base of the first airport are limited to customary airfield cost center charges. The total airfield revenue recovered from the users of both airports cannot exceed the total allowable costs of the two airports combined.

8. Add a new Section 6, Congested Airports to read as follows:

Congested Airports

6. Congested Airports

(a) The Department considers a currently congested airport to be –

(1) An airport at which the number of operating delays is one per cent or more of the total operating delays at the 55 airports with the highest number of operating delays; or

(2) An airport identified as congested by the Federal Aviation Administration

listed in table 1 of the FAA's Airport Capacity Benchmark Report 2004, or the most recent version of the Airport Capacity Benchmark Report.

(b) The Department considers an airport to be a future congested airport if an airport is forecasted to meet a defined threshold level of congestion reported in the Future Airport Capacity Task 2 study entitled *Capacity Needs in the National Airspace System 2007-2025: An analysis of Airports and Metropolitan Area Demand and Operational Capacity in the Future* (FACT 2 Report), or any update to that report that the FAA may publish from time-to-time.

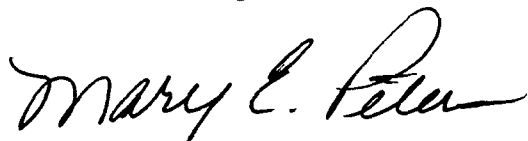
(c) A congested hour is an hour during which demand exceeds average runway capacity resulting in volume-related delays, or is anticipated to do so.

6.1. Because charges provided in paragraphs 2.1.4, 2.5.3 and 2.5.4 to address congestion can result in higher fees for some or all operators, it is especially important for airport operators proposing such charges to provide carriers in advance the information listed in Appendix 1, with special emphasis on data, analysis and forecasts used to justify the charges.

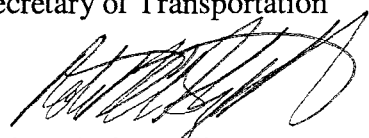
6.2. The proprietor of a future congested airport may adopt measures to address congestion in accordance with paragraphs 2.1.4, 2.5.3 and 2.5.4 of this policy, if the measures will not take effect or have any effect on airfield charges until a time when the airport meets the definition of a congested airport in paragraph 6 (a) or is anticipated to do so. This kind of measure would typically identify the specific condition, e.g., operating delays that regularly exceed a certain level at the airport that would trigger the implementation of the special charges to address congestion.

6.3 An airport proprietor may exempt flights subsidized under the Essential Air Service Program from charges imposed under paragraphs 2.5.3 and 2.5.4 of this policy.

Issued in Washington, D.C. on JUL 8 2008



Mary E. Peters
Secretary of Transportation



Robert A. Sturgell
Acting Administrator, Federal
Aviation Administration

Airports that Account for 1 Percent or More of Total Delayed Operations in CY07

Rank	Arpt	Airport Name	CY 07 % of Total Delayed Ops for 55 Arpts
1	ORD	Chicago O'Hare Interionatl	16%
2	EWR	Newark Liberty International	15%
3	LGA	LaGuardia	13%
4	JFK	John F.Kennedy International	9%
5	ATL	Hartsfield-Jackson Atlanta International	8%
6	PHL	Philadelphia International	6%
7	LAS	McCarran International	4%
8	SFO	San Francisco International	3%
9	IAH	George Bush Intercontinental/Houston	3%
10	DFW	Dallas/Fort Worth International	3%
11	BOS	General Edward Lawrence Logan International	2%
12	MSP	Minneapolis-St. Paul International	2%
13	TEB	Teterboro	2%
14	CLT	CharlotteDouglas International	2%
15	PHX	Phoenix Sky Harbor International	2%
16	LAX	Los Angeles International	1%
17	DEN	Denver International	1%
18	DTW	Detroit Metropolitan Wayne County	1%
19	MDW	Chicago Midway International	1%
20	IAD	Washington Dulles International	1%
21	FLL	Fort Lauderdale/Hollywood International	1%
22	HPN	Westchester County	1%
23	SEA	Seattle-Tacoma International	1%

Airports Listed in Capacity Benchmark Report 2004 That Do Not have 1 Percent of Total Delayed Operations

Rank	Arpt	Airport Name
1	BWI	Baltimore-Washington International
2	CLE	Cleveland-Hopkins International
3	CVG	Cincinnati/Northern Kentucky International
4	DCA	Ronald Reagan Washington National
5	HNL	Honolulu International
6	MCO	Orlando International
7	MEM	Memphis International
8	MIA	Miami International
9	PDX	Portland International
10	PIT	Pittsburgh International
11	SAN	San Diego International
12	SLC	Salt Lake City International
13	STL	Lambert-St. Louis International
14	TPA	Tampa International

**Table 4
Airports and
Metropolitan Areas
Needing Additional
Capacity in 2025
after and without
Planned
Improvements**

Airports Needing Additional Capacity	After Planned Improvements	Without Planned Improvements
Boston Logan International (BOS)		♦
Charlotte Douglas International (CLT)		♦
Fort Lauderdale-Hollywood Int'l (FLL)	♦	♦
George Bush Intercontinental (IAH)		♦
Hartsfield-Jackson Atlanta Int'l (ATL)	♦	♦
John F. Kennedy International (JFK)	♦	♦
John Wayne-Orange County (SNA)	♦	♦
LaGuardia (LGA)	♦	♦
Long Beach-Daugherty Field (LGB)	♦	♦
Los Angeles International (LAX)		♦
McCarran International (LAS)	♦	♦
Metropolitan Oakland Int'l (OAK)	♦	♦
Midway Airport (MDW)	♦	♦
Minneapolis-St. Paul Int'l (MSP)		♦
Newark Liberty International (EWR)	♦	♦
O'Hare International (ORD)		♦
Palm Beach International (PBI)		♦
Philadelphia International (PHL)	♦	♦
Phoenix Sky Harbor International (PHX)	♦	♦
San Antonio International (SAT)		♦
San Diego International (SAN)		♦
San Francisco International (SFO)	♦	♦
Seattle-Tacoma International (SEA)		♦
T.F. Green (PVD)		♦
Tucson International (TUS)		♦
Washington Dulles International (IAD)		♦
William P. Hobby (HOU)		♦
Total	14	27
Metropolitan Areas Needing Additional Capacity	After Planned Improvements	Without Planned Improvements
Atlanta	♦	♦
Charlotte		♦
Chicago		♦
Houston		♦
Las Vegas	♦	♦
Los Angeles	♦	♦
Minneapolis-St. Paul		♦
New York	♦	♦
Philadelphia	♦	♦
Phoenix	♦	♦
Seattle		♦
San Diego	♦	♦
San Francisco	♦	♦
South Florida		♦
Washington-Baltimore		♦
Total	8	15

Appendix of Secondary Airports –July 2008

Congested Airports	Secondary Airport*	Airport Sponsor
Newark Liberty International LaGuardia John F. Kennedy International Teterboro	Stewart International	Port Authority of New York and New Jersey
Las Vegas McCarran International	North Las Vegas	Clark County
George Bush Intercontinental/Houston	Houston Hobby	City of Houston
General Edward Lawrence Logan International	Hanscom Field	Massachusetts Port Authority
Los Angeles International	Ontario International Palmdale	City of Los Angeles
Cleveland Hopkins International	Hardwick Field	City of Cleveland
Honolulu International	Lihue Lanai Molokai Kona International at Keahole Kahului Hilo International	State of Hawaii

* Secondary Airports are existing commercial service airports

Appendix of Secondary Airports –2025

Congested Airports	Secondary Airport*	Airport Sponsor
Newark Liberty International LaGuardia John F. Kennedy International Teterboro	Stewart International	Port Authority of New York and New Jersey
Las Vegas McCarran International	North Las Vegas	Clark County
George Bush Intercontinental/Houston	Houston Hobby	City of Houston
General Edward Lawrence Logan International	Hanscom Field	Massachusetts Port Authority
Los Angeles International	Ontario International	City of Los Angeles
Cleveland Hopkins International	Hardwick Field	City of Cleveland
Honolulu International	Lihue Lanai Molokai Kona International at Keahole Kahului Hilo International	State of Hawaii
T.F. Green	Block Island State Westerly State	Rhode Island Airports Corporation

* Secondary Airports are existing commercial service airports