DEPARTMENT OF TRANSPORTATION

Office of the Secretary

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 proposed amendment to policy statement.

SUMMARY: This action proposes 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''). This action proposes 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: Send your comments on or before March 3, 2008.

ADDRESSES: You may send comments [identified by Docket Number FAA–2007–XXXXX] using any of the following methods:

- *Government-wide rulemaking Web site:* Go to *http://www.regulations.gov* and follow the instructions for sending your comments electronically.
- *Mail:* Docket Operations, U.S. Department of Transportation, West Building, Ground Floor, Room W12–140, Routing Symbol M–30, 1200 New Jersey Avenue, SE., Washington, DC 20590.
- *Fax:* 1–202–493–2251.
- *Hand Delivery:* To Docket Operations, Room W12–140 on the ground floor of the West Building, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

For more information on the notice and comment process, see the **SUPPLEMENTARY INFORMATION** section of this document.

Privacy: We will post all comments we receive, without change, to *http://www.regulations.gov*, including any personal information you provide. For more information, see the Privacy Act discussion in the **SUPPLEMENTARY INFORMATION** section of this document.

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.

FOR FURTHER INFORMATION CONTACT: Barry L. Molar, Manager, Airports Financial Assistance Division, APP–500, Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591; telephone: (202) 267–3831; facsimile: (202) 267–5302; *e-mail: barry.molar@faa.gov;* or Charles Erhard, Manager, Airport Compliance Division, AAS–400, Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591, *telephone:* (202) 267–3187; *facsimile:* (202) 267–5769; e-mail: *charles.erhard@faa.gov*.

SUPPLEMENTARY INFORMATION:

Comments Invited

The Department of Transportation invites interested persons to join in this notice and comment process by filing written comments, data, or views. The most helpful comments reference a specific portion of the proposal, explain the reason for any recommended change, and include supporting data. We ask that you send us two copies of written comments.

We will file in the docket all comments we receive, as well as a report summarizing each substantive public contact with Department personnel about this proposal. The docket is available for public inspection before and after the comment closing date. If you wish to review the docket in person, go to the address in the **ADDRESSES** section of this preamble between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. You may also review the docket using the Internet at the web address in the **ADDRESSES** section.

Privacy Act: Using the search function of our docket Web site, anyone can find and read the comments received into any of our dockets. This includes the name of the individual sending the comment (or signing the comment for an association, business, labor union). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477–78) or you may visit *http://regulations.gov.*

Before acting on this proposal, we will consider all comments we receive on or before the closing date for comments. We will consider comments filed late if it is possible to do so without incurring expense or delay. We may change this proposal because of the comments we receive.

If you want the Department to acknowledge receipt of your comments on this proposal, include with your comments a preaddressed, stamped postcard on which the docket number appears. We will stamp the date on the postcard and mail it to you.

Proprietary or Confidential Business Information

Do not file in the docket information that you consider to be proprietary or confidential business information. Send or deliver this information directly to the person identified in the **FOR FURTHER INFORMATION CONTACT** section of this document. You must mark the information that you consider proprietary or confidential. If you send the information on a disk or CD ROM, mark the outside of the disk or CD ROM and also identify electronically within the disk or CD ROM the specific information that is proprietary or confidential.

Under 14 CFR 11.35(b), when we are aware of proprietary information filed with a comment, we do not place it in the docket. We hold it in a separate file to which the public does not have access and place a note in the docket that we have received it. If we receive a request to examine or copy this information, we treat it as any other request under the Freedom of Information Act (5 U.S.C. 552). We process such a request under the DOT procedures found in 49 CFR Part 7.

Availability of Documents

You can get an electronic copy 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 publishing policy statements establishing standards or guidelines the Secretary will use in determining the reasonableness of airport fees charged to airlines under Section 47129.

Background

This action proposes 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''). Portions of the policy were subsequently vacated by the United States Court of Appeals for the District of Columbia Circuit in *Air Transport Ass'n of America* v. *DOT,* 119 F.3d 38, amended by 129 F.3d 625 (DC Cir. 1997). This action proposes 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.

First, this notice proposes to clarify the policy by explicitly acknowledging the ability of airport operators 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, this action proposes 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, this action proposes 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. Currently, costs of new or reconstructed airfield facilities may 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 proposed modification would also permit the operator of a congested airport to include in the rate base the costs of projects under construction. This notice proposes two alternatives. 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. Because the latter two proposed amendments would apply only at congested airports, this notice also proposes to add a definition of ''congested airport'' in the Applicability section.

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.

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 proceeding concerning airport fees are contained in Subpart F, Title 14 CFR 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 51585, October 12, 1994); an Interim Policy (60 FR 6906, February 3, 1995); and a further supplemental notice of proposed policy (60 FR 47102, September 8, 1995).

On behalf of its member airlines, the Air Transport Association of America (ATA) and the City of Los Angeles, operator of Los Angeles International Airport, 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 F3d 38, amended by 129 F.3d 625 (DC 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. 1996 Rates and Charges Policy, paras. 2.2, 2.4, 2.5.1. For other airport facilities and services, however, 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. 119 F.3d at 44. At the Department's request, the Court vacated only the specific provisions of the 1996 Rates and Charges Policy that petitioners challenged as implementing that distinction. 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 grant assurances, 49 U.S.C. 47107. In particular, a federally assisted airport sponsor must give the Secretary of Transportation and the 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, which allows the airport sponsor 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 (DC 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 (DC 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,* 478 F.3d 21 (DC 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.*

Airport Congestion in the United States

Currently, the National Airspace System (NAS) handles 750 million passengers each year. We expect this number to reach one billion by 2015, and forecasts indicate increases in demand ranging from a factor of two to three by 2025. Market competition spurred by new-entrant, low-cost carriers and the competitive response by legacy airlines have generated much of the increase in air travel demand. Among the trends are new and expanded route networks to lesser-served markets connecting major hubs with regional jet service. The additional service in some cases provides no net increase in seats between origins and destinations but provides more operations in the system with greater numbers of smaller capacity aircraft.

The majority of the airports in the NAS have adequate airport capacity with little, if any, delay. Generally, congestion occurs at the largest airports. The 35 busiest airports, known as Operational Evolution Partnership (OEP) airports, handle approximately 73 percent of the commercial air passenger boardings in the system. Runway construction projects have long served as a primary method to improve capacity. Since fiscal year 2000, thirteen new runways (more than 20 miles of new pavement) have opened at the 35 OEP airports. In addition, six more of the OEP airports have airfield projects under construction (two airfield reconfigurations, three new runways, and one runway extension), which should be commissioned within the next three years. These new runways and airfield reconfigurations involve eighteen of the 35 OEP airports, providing these airports with the potential to accommodate about two million more annual operations.

Nevertheless, the experience of summer 2007 shows that congestion is a problem today. Airlines at New York JFK International Airport increased their scheduled operations by 41 percent between March 2006 and August 2007. As a result, the number of arrival delays exceeding one hour increased by 114 percent in the first ten months of fiscal year 2007, compared to the same period the previous year. During June and July 2007, on-time arrival performance at JFK was only 59 percent. Moreover, delays resulting from operations at New York metropolitan area airports alone can account for up to one-third of the delays throughout the entire national system. The congestion in the New York airspace has ripple effects across the national airspace system, causing flight delays, cancellations, and/or missed connections. These delays impose economic and social costs on airline passengers and shippers; airlines incur extra costs for fuel, flight crews, and schedulers. Delays are likewise beginning to increase at San Francisco. At Chicago O'Hare, the FAA implemented voluntary flight restrictions in 2004 to limit congestion and delays. The reconfiguration of the O'Hare airfield will eventually provide the capacity to overcome congestion. In the short run, however, congestion would be much worse if not for FAA intervention.

Most portions of the country have plans and capabilities to meet projected aviation demand. 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 get worse in the future in these coastal regions, primarily concentrated at various 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. To date, even with planned improvements, no single solution to the congestion at these airports has been identified. Aside from adding runway capacity, air traffic operational improvements and airspace redesign are additional measures that have been considered. In addition, even at airports where expansion is possible or planned, the lead-time to bring a planned improvement project from concept to commissioning may be substantial (10–15 years). Until new facilities are completed and put into service, these locations may continue to be plagued by congestion and delays.

To adequately prepare to handle the increasing air travel demand in the system, it will be necessary to augment tools available to the local governments which operate these airports to encourage regional aviation assets to be employed to resolve the capacity issues. In areas where the metropolitan areas may be served by more than one commercial service airport, the dispersal or regionalization of traffic can be encouraged by certain financial incentives, not all of which are expressly permitted by the current rates and charges policy.

Role of Price in Addressing Congestion

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 incorporating 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, properly pricing scarce airfield capacity will yield a clearer signal as to the desirability of expansion of capacity at that airfield. 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 proposed actions do not represent true congestion pricing because they do not authorize airport proprietors to set fees to balance demand with capacity without regard to allowable costs of airfield facilities and services. Nevertheless, by enabling proprietors at congested airports to assign additional, but still appropriate, costs to the airfield to better reflect the cost of using congested airfield facilities, these proposed actions should encourage more efficient use of these facilities and encourage feasible capacity expansion. Airport sponsors must assure the Department that the airport is available to the public on reasonable terms and without unjust discrimination. If we adopt the two proposed amendments targeted for congested airports, we expect affected proprietors to implement them in a manner that is consistent with the grant assurance and we expect that the implementation will lead to a more efficient use of the congested facilities

Discussion of Proposals

General Discussion

The three specific proposals do not alter one of the fundamental principles of the 1996 Rates and Charges Policy: that reasonable fees must be based on the capital and operating costs of the facilities for which the fees are assessed. Rather, two of the proposals would modify costs that may be reasonably included in the cost base of landing fees at a congested airport. The third would clarify the ability of airports to adopt a ''dual-element'' landing fee with both a per-operation and weight-based component. This authority exists today for airports with or without congestion. While the presence or absence of congestion may affect how an airport may reasonably implement a dual element-landing fee, as discussed below, the 1996 Rates and Charges Policy is silent on this point. None of the proposed amendments is intended to permit an airport to generate revenues in excess of the allowable costs of providing airfield facilities and services at the congested airport, as defined in accordance with the 1996 Rates and Charges Policy.

The effect of each of these modifications would be 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 the congested facilities, 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 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. 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.

Where additions to airport capacity are financially and physically feasible and can be accomplished without undue adverse environmental or social impacts, the Department considers such additions to be the most appropriate long-term actions to address airport congestion and delay. The amendments to the 1996 Rates and Charges Policy proposed in this action are intended to help airports manage available capacity in the short-run, while additions to capacity are being planned and built and to help those airports where capacity expansion is not feasible.

Definition of Congested Airport

Two of the three proposed revisions would apply only to congested airports. Therefore, this action proposes to add a new subsection E to the Applicability Section of the 1996 Rates and Charges Policy that would define a congested airport. The subsection would establish two categories of congested airports—those meeting the statutory definition of congested airport contained in 49 U.S.C. 47175 or those identified in the report titled ''Capacity Needs in the National Airspace System, 2007–2025'' (May 2007), issued by the Future Airport Capacity Task and commonly referred to as the ''FACT 2 Report.'' Section 47175 is part of an aviation development streamlining program enacted by Congress in 2003 (Vision-100). That program recognized the significant negative economic impact on our national economy resulting from congestion and delays at our major airports. It gave airport capacity enhancement projects at those airports a national priority status, and authorized an expedited environmental coordination process that would protect the environment while ensuring the economic vitality resulting from the continued growth in aviation. Public Law 108–176, Title III, § 302 (2003). A congested airport is defined as an airport that accounted for at least one percent of all delayed aircraft operations in the Untied States and an airport listed in Table 1 of the FAA's Airport Capacity Benchmark Report 2001. 49 U.S.C. 47175(2). Under its general authority to manage airspace, and after a comprehensive analysis of current and forecasted traffic, demand, and demographic trends, the FAA published the FACT 2 report identifying airports that are or will be congested at three milestones—2007, 2015 and 2025. It would not be appropriate to permit an airport that is not projected to be congested in 2025 to rely on provisions applicable to congested airports in setting fees today. Therefore, the proposed amendment would also exclude airports projected to be congested in 2025 for the first time from the scope of the definition.

Two-Part Landing Fees

As noted, although most airports rely on a single element weight-based landing fee, the use of a weight-based landing fee is not required. This issue was squarely addressed in the Department's decision in the Massport Pace case, *Investigation into Massport's Landing Fees,* Opinion and Order, FAA Docket 13–88–2 (December 22, 1988), *aff'd New England Legal Foundation* v. *Department of Transportation,* 883 F.2d 157 (1st Cir. 1989). In that case, the Department did not determine that Massport's two-part landing fee for Boston Logan Airport was unreasonable, *per se.* Rather, the Department concluded that ''landing fee structures that vary from the traditional weight-based approach are permissible so long as the approach adopted reasonably allocates costs to the appropriate users on a rational and economically justified basis.'' Opinion and Order at 11. The Department found the landing fee to be unreasonable because it failed to meet this standard for allocating costs. *Id.* This decision followed a previous ruling in *AOPA* v. *PANYNJ,* 305 F. Supp 93 (E.D.N.Y. 1969), upholding a minimum take-off fee (essentially a per-operation charge) imposed by the Port Authority of New York and New Jersey at Newark, LaGuardia and Kennedy airports.

The proposed amendment would explicitly acknowledge the ability of an airport to establish a two-part landing fee. The amendment would add a new paragraph 2.1.4, in the section titled ''Fair and Reasonable Fees,'' stating that fair and reasonable fees may include a two-part landing fee consisting of a per-operation charge and a weight-based charge, so long as the two-part fee reasonably allocates costs to the appropriate users on a rational and economically justified basis. This provision would apply to any airport. However, the presence of congestion and the potential to serve more individual travelers if larger aircraft are used in the limited number of operations available, would be the most obvious circumstance for the justification of a dual component fee.

Carriers may have many reasons to serve routes with smaller aircraft—regional jets or even turboprops. Smaller aircraft may have lower operating costs or allow the carrier to offer more frequent service economically. However, operations of smaller aircraft during periods of airport congestion reduce the efficiency of the airport. First, it simply takes more operations to move the same number of people to and from the airport. Second, these aircraft may have slower speeds on approach to and departure from the airport than larger jets. Also, they may require larger separation distances from large jet aircraft than other large jets.

A purely weight-based landing fee provides no disincentive, and may actually provide an incentive, for carriers to operate smaller aircraft. The landing fee for small aircraft will be substantially lower than the fee for a larger aircraft. If an airport assesses a per-operation charge as a component of the landing fee, the cost of operating a smaller aircraft will increase, and the cost per seat of operating smaller aircraft will increase. The proposed amendment would make it clear that during periods of congestion the airport proprietor may take the presence of congestion into account in determining the proportion of airfield costs to be recovered from the per-operation charge, so long as the combination of the two elements do not generate revenues in excess of the allowable costs of the airfield. The flaw with the Massport ''PACE'' fee was that Massport justified the per operations fee on the basis of congestion, yet applied it at all times, even when congestion was not present. Opinion and Order at 9. For a per operation fee imposed during times when congestion might not be present, the per-operation charge would need to be justified on other settled principles of cost allocation.

Costs of Facilities Under Construction

The proposed action would amend the 1996 Rates and Charges Policy by replacing paragraph 2.5.3, which was vacated by the court of appeals, with a new paragraph addressing charges for facilities under construction. The paragraph vacated by the court specified that with limited exceptions for land acquired for future development, costs of airfield facilities not yet built and operating could not be included in the rate base of the airfield unless agreed to by airfield users. The court's decision to vacate this paragraph did not necessarily represent a determination that the provision was erroneous, per se. Rather, as noted, the court identified the provision as one that was intimately connected to the 1996 Rates and Charges Policy's erroneous distinction between airfield fees and fees for other facilities.

The court's decision did not vacate the principle that airfield fees are limited to an amount that recovers the costs of operating and maintaining the airfield. One of the fundamental principles of this ''cost of service'' approach to setting fees is the principle that only the cost of facilities ''used and useful'' by the rate-payers may be included in the rate-base. (A. Priest, 1 Principles of Public Utility Regulation 174, 178 (1969); J. Bonbright, *Principles of Public Utility Rates* 178 (1961); S. Breyer, *Regulation and Its Reform* 40 (1982); *City and County of Denver* v. *Continental Air Lines, Inc.,* 712 F. Supp. 834, D.CO. (1989)). The vacated paragraph 2.5.3 represented the application of this principle, which is still accepted practice in ''cost of service'' fee setting. The Department has applied this principle only once in a fee dispute adjudication, finding that an airport may reasonably include, in its landing fee, a debt service charge for uncompleted capital projects, since the projects were expected to be completed during the year in which the charges were made. *Second Los Angeles International Airport Rates Proceeding,* DOT Order 95–12–33 (Dec. 22, 1995).

With that said, exceptions to the principle that the costs of facilities not yet built and operating may not be included in the rate base have been recognized in unusual circumstances (*e.g., Consumer Protection Board* v. *Public Service Commission,* 78 A.D. 2d 65, 434 N.Y. Supp. 2d 820, 822 (1980) (inclusion of construction work in progress in rate base is an extraordinary remedy); *Mid-Tex Electric Cooperative, Inc.* v. *FERC,* 773 F.2d 327 (DC Cir. 1985) (decision to allow construction work in progress in rate base is consistent with the ''used and useful'' principle)). The proposed amendment would represent a modest departure from this principle. It would permit the operator of a congested airport to incorporate the costs of airfield facilities under construction (including costs associated with reconstructing facilities) into the landing fee. Two approaches are being considered, and we solicit comment on each. Under the first approach, the costs of facilities under construction could be included only during periods when the airport experiences congestion. Under the second approach, the costs could be included at the congested airport throughout the day. Any costs recovered for principal and interest during the construction period would have to be deducted from the amount later capitalized and amortized for recovery in the rate-base after the facility is put into use. To qualify for inclusion, the facilities would need to be under construction, so that availability of the facilities for use would not be speculative. All planning and environmental reviews would need to have been completed, a financing plan developed, and financing arranged. Once construction is under way, the risk that current users will not benefit from the facility in the foreseeable future is reduced or eliminated if the user remains at the airport. In addition, allowing the airport proprietor to begin early recovery of capital and interest carrying costs of the facility during construction would reduce the long-term costs of the project by reducing the amount of financing costs incurred during the construction period that would otherwise be capitalized and added to the rate base. In any event, it would not increase the total costs of the project passed on to carriers, and it could hasten the arrival of capacity expansions which benefit the carriers by reducing future congestion. The proposed amendment would also direct international airports intending to charge for projects under construction to consult the International Civil Aviation Organization Document 9562, *Airport Economics Manual,* Second Edition, Attachment 6. This document sets forth internationally accepted principles for charging airport users for projects under construction.

This modification would allow the airport proprietor to raise the cost of using congested airfield facilities during periods of congestion or alternatively during all periods of the day in the near term. The increased cost in turn would provide additional financial incentives to users to consider alternatives to using

the airfield when congestion is present, including shifting operations to off-peak periods or to less congested airports that also serve the market area of the congested airport, or to serving the airfield more efficiently such as with up-gauged aircraft.

Including Costs of Secondary Airports in the Rate-Base of a Congested Airport

The 1996 Rates and Charges Policy permits, in paragraph 2.5.4, 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 proposed action would amend subparagraph (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. FAA has identified these airports and tracks development at these airports in the FAA strategic plan or ''Flight Plan.'' The current list of secondary airports is included as an appendix to this notice. The FAA will post the current list of designated secondary airports on its website upon publication of a final amendment to the policy statement and will keep it up to date.

The proposed action would also add a new subparagraph (e) stating 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. 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.

The proposed action would provide incentives to aircraft operators to shift service away from congested times at congested airports in two ways. First, it would raise the cost of operating at the congested airport during times of congestion. Second, by adding costs of the secondary airport to the rate base of the first airport, the amendment would reduce the costs of the secondary airport remaining to be recovered from landing fees imposed at the secondary airport. Thus the costs of serving the region through a secondary airport would go down.

These proposed modifications to our rates and charges policy do not affect an airport's requirement to meaningfully consult with airline users before increasing fees, charging new fees, or changing fee methodologies. ''Adequate information'' should be provided by the airport to permit aeronautical users to evaluate the proprietor's justification for the charge and to assess the reasonableness of the charge. Each party should give ''due regard'' to the views of the other and the airport should consider the effects of fee changes on the users and the users should consider the financial needs of the airports. A ''good faith effort'' to reach agreement should be made. Additionally, the Department encourages 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.[1]

In the context of considering a fee dispute complaint under 49 U.S.C. 47129, the Department has stated that ''one of the important goals in the Policy Statement is the encouragement of airport–airline negotiations in the establishment of new fees or fee increases'' and it encouraged:

> All airports to comply with their obligations under the Policy Statement and applicable bilateral aviation agreements to engage in meaningful consultations with carriers in advance of increasing fees or establishing new fees. We expect airports to justify their fees and to exchange appropriate financial information to enable the carriers to fully evaluate those proposed fees.
>
> *British Airways PLC and Virgin Atlantic Airways Limited* v. *The Port Authority of New York and New Jersey,* Order 2000–5–23 at 10. (May 24, 2000).

The Proposed Amendment

Because of the foregoing, the Department of Transportation proposes to amend the Policy Regarding Airport Rates and Charges, published at 61 FR 31994 (June 21, 1996) as follows:

Policy Regarding Airport Rates and Charges

Applicability of Policy

1. Add a new subsection E, Congested Airports to read as follows:

E. Congested Airports

The Department considers a congested airport to be—

(1) An airport meeting the definition of congested airport in 49 U.S.C. 47175; or

(2) An airport identified as congested by the Federal Aviation Administration in the report of the Future Airport Capacity Task 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, except for airports that will not become congested until 2025.

Fair and Reasonable Fees

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

2.1.4 An airport proprietor may impose a two-part landing fee consisting 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. The operator of a congested airport may consider the presence of airfield congestion when determining the portion of allowable airfield costs to be allocated to the per operation charge during periods of congestion

3. Add a new paragraph 2.5.3 to read as one of the following two options:

Option One

''2.5.3. The proprietor of a congested airport may include in the rate-base used to determine airfield charges during periods of congestion a portion of the costs of airfield projects under construction so long as (1) all planning and environmental approvals have been obtained for the projects; (2) the proprietor has obtained financing for the projects; and (3) construction has commenced on the projects.

''(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.

[1] DOT Policy Regarding Airport Rates and Charges, 61 Fed. Reg. 32018–32019 and 32022 (1996).

''(b) The airport proprietor should consult the International Civil Aviation Organization Document 9562, *Airport Economics Manual,* Second Edition, Attachment 6 before taking action to include costs of a project under construction in the rate-base of an airport with international air service.'';

Option Two

''2.5.3. The proprietor of a congested airport may include in the rate-base used to determine airfield charges a portion of the costs of airfield projects under construction so long as (1) all planning and environmental approvals have been obtained for the projects; (2) the proprietor has obtained financing for the projects; and (3) construction has commenced on the projects.

''(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 airport proprietor should consult the International Civil Aviation Organization Document 9562, *Airport Economics Manual,* Second Edition, Attachment 6 before taking action to include costs of a project under construction in the rate-base of an airport with international air service.''

4. Revise 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 congested and 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.

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

(e) The proprietor of a congested airport may consider the presence of airfield congestion at the first 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, so long as the total airfield revenue recovered from the users of both airports do not exceed the total allowable costs of the two airports combined.

Issued in Washington, DC, on January 11, 2008.

Mary E. Peters,

Secretary of Transportation.

Robert A. Sturgell,

Acting Administrator, Federal Aviation Administration.

[FR Doc. E8–815 Filed 1–16–08; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

Privacy Act of 1974: System of Records

AGENCY: Department of Transportation (DOT), Office of the Secretary.

ACTION: Notice to modify a system of records.

SUMMARY: DOT proposes to modify a system of records under the Privacy Act of 1974. The system is DOT's Docket Management System (DMS), which is being modified to reflect: (1) Incorporation in the new Government-wide Federal DMS; (2) relocation of DOT's Headquarters Building (HQ), in which DMS is located; and (3) new name of the organizational entity of which DMS is a part, and its location in the new DOT HQ. This system would not duplicate any other DOT system of records.

EFFECTIVE DATE: This notice will be effective, without further notice, on February 26, 2008, unless modified by a subsequent notice to incorporate comments received by the public. Comments must be received by February 19, 2008 to be assured consideration.

ADDRESSES: Send comments to Habib Azarsina, Acting Departmental Privacy Officer, S–80, United States Department of Transportation, Office of the Secretary of Transportation, 1200 New Jersey Avenue, SE., Washington DC 20590 or *habib.azarsina@dot.gov.*

FOR FURTHER INFORMATION CONTACT: Habib Azarsina, Acting Departmental Privacy Officer, S–80, United States Department of Transportation, Office of the Secretary of Transportation, 1200 New Jersey Avenue, SE., Washington DC 20590; telephone 202.366.1965, or *habib.azarsina@dot.gov.*

SUPPLEMENTARY INFORMATION: The DOT system of records notice subject to the Privacy Act of 1974 (5 U.S.C. 552a), as amended, as proposed to be modified, is available from the above mentioned address and appears below:

DOT/ALL 14

SYSTEM NAME:

Federal Docket Management System (FDMS).

SECURITY CLASSIFICATION:

Unclassified, non-sensitive.

SYSTEM LOCATION:

The system is located in U.S. Department of Transportation, Office of Information Services, Docket Operations, M–30, New Jersey Ave., SE., Room W12–140, Washington, DC 20590.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Individuals who participate in proceedings at DOT that are covered by the Administrative Procedure Act (APA), and who provide information about their identities. These include proceedings conducted by DOT and by the Department of Homeland Security's U.S. Coast Guard (USCG) and Transportation Security Administration (TSA).

CATEGORIES OF RECORDS IN THE SYSTEM:

DOT, USCG, and TSA rulemaking and related documents issued in informal rulemakings, and public comments thereon; non-rulemaking and related documents, and public comments thereon; in formal rulemakings, motions, petitions, complaints, and related documents and formal responses thereto.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

5 U.S.C. 551 *et seq.*

PURPOSE(S):

To facilitate involvement of the public in APA and related proceedings. Routine uses of records maintained in the system, including categories of users and the purposes of such uses: See Prefatory Statement of General Routine Uses.

DISCLOSURE TO CONSUMER REPORTING AGENCIES:

None

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Electronically on a publicly-accessible website.

RETRIEVABILITY:

Documents are retrievable through FDMS by name of individual submitting comment, and by docket number.

SAFEGUARDS:

Records are freely available to anyone.