AIRPORT BUSINESS PRACTICES AND THEIR IMPACT ON AIRLINE COMPETITION

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C O N T E N T S

EXECUTIVE SUMMARY

INTRODUCTION

Airline deregulation has generated substantial economic benefits for the vast majority of the traveling public. Lower average airfares (after adjusting for inflation) and better service for most consumers have increased the demand for air travel. Despite deregulation's overall success, however, questions continue to be raised as to whether competition in certain air travel markets is as vigorous as it could be. Academic and government studies continue to find the existence of substantial airfare "premiums," particularly at concentrated hub airports where new entrant and low-fare airlines have had problems establishing a strong market presence. As barriers to entry, the U.S. General Accounting Office and other observers have pointed to airports' long-term, exclusive-use gate-lease agreements with tenant airlines and to majority-in-interest (MII) clauses, which give signatory airlines special rights to approve airport capital improvement plans. Recently, the Transportation Research Board concluded that limited access to airport gates can be an obstacle to entry that merits close monitoring by airport operators and the Department of Transportation (DOT).[1]

Air Carrier Complaints

Furthermore, at Congressional hearings and in comments to DOT officials, representatives of new entrant and incumbent air carriers report that they face the following conditions in gaining access to critical facilities, particularly at certain heavily used airports:

- Lack of assistance from airport management in obtaining access to gates or in arranging sublease agreements with primary tenant airlines.

- Inconvenient and frequent gate reassignments in circumstances not favorable to the operational needs of new tenants.

[1] *Entry Conditions in the U.S. Airline Industry: Issues and Opportunities*, Report of the National Research Council's Transportation Research Board (August 1999), p. 3-19 (advance copy).

- Classification of new entrants as "non-signatory" carriers despite their willingness to lease gates and become "signatory" carriers.

- Fee differentials for gates and other facilities at the same airport.

- Lack of access to a gate except at the least desirable times.

- Bundling of facilities and ancillary services when a new entrant subleases a gate (e.g., the subleasing air carrier must use the ground-handling services of the primary tenant airline).

- Inability of new entrants to have new facilities constructed at airports due to the opposition of signatory air carriers, as well as their ability to delay or prevent airport capital-development projects through MII clauses.

- Lack of priority for gates and other facilities, since these are offered first to dominant airlines at airports rather than to new entrants.

- Uncertainty regarding what the airport requires to obtain a gate or to expand operations at the airport.

Access Is Essential

Airline deregulation can work well only if market forces can discipline the pricing behavior of all air carriers. As documented in numerous academic and government reports, significant new entry in concentrated airline markets results in lower airfares, often dramatically lower. But if airlines cannot gain access to gates, baggage claim areas, passenger check-in and hold rooms, and other essential airport facilities on reasonable terms, they will be unable to compete successfully against air carriers that do have such access. Moreover, unless there is a reasonable likelihood that a new entrant's short-term and long-term needs for gates and other facilities will be met, it may simply decide not to serve a community.

Task Force Established

To address the issue of how airport business practices affect airline competition, Secretary Slater established a Task Force jointly staffed by the Office of the Secretary (OST) and the Federal Aviation Administration (FAA). This report presents the results of the Task Force study, including actions for immediate implementation by the Department and issues for further consideration by the Congress, industry and DOT.

RESULTS IN BRIEF

The Task Force focused on two basic questions:

- Are certain airport business practices discouraging or preventing entry by new air carriers or hindering competition among the carriers already operating at an airport?
- What has been the impact of Passenger Facility Charges on airport capacity and airline competition?

Airport Business Practices

Airport business practices play a critical role in shaping airline competition. Access at many of the Nation's most heavily used airports is limited, not only because of airside constraints, but also because of long-established airport business practices. The financial viability of an airline, especially a new entrant airline, may depend on serving a few key business and leisure markets. But such service requires access to airport gates and other facilities on reasonable terms.

Airport managers often cite long-term, exclusive-use gate-lease agreements with incumbent airlines as one business practice that makes it difficult for new entrant air carriers to begin serving an airport. While airport business practices can limit the ability of airport managers to assign gates and other critical facilities to new entrant airlines, airport managers have a legal obligation to accommodate all qualified airlines that wish to serve their airport. (An airport may adopt reasonable and nondiscriminatory minimum standards

to ensure safe and efficient airport operation; such standards may include creditworthiness, for example). Stated simply, airport managers cannot allow dominant airlines to become *de facto* airport managers. The Department, meanwhile, must be vigilant in assuring that all airports meet their legal obligations to accommodate all qualified airlines.

Passenger Facility Charges

Passenger Facility Charges (PFCs) have played an important role in financing airport capital development projects. Between 1992 and 1998, FAA approved 3,900 projects and authorized collection of PFCs totaling almost $19 billion. (By January 1999, approved funding reached $23 billion.) Several projects allowed airport operators to build or refurbish terminals and gates, and thus accommodate new entrant air carriers or incumbent carriers that wanted to expand their operations. However, due to a lack of data regarding the effects of PFC-financed projects on new entrant usage, and because many terminal projects have not yet come on line, the extent to which PFCs have had a direct effect on enhancing airline competition is not clear. Changes to the PFC Program are needed before its full competitive potential is achieved.

SCOPE AND METHODOLOGY

To gather information on airport business practices and the impact of PFCs, the Task Force obtained information from the public and the airport and airline communities. Task Force staff also worked closely with the Airports Council International-North America (ACI-NA), which developed a questionnaire on airport capacity, operations, and practices. Finally, Task Force members visited 13 large airports to gain information about airport practices and airline competition.

Public Comments

The Task Force provided several opportunities for the public, the aviation industry, and the airport community to provide input to the study. On April 10, 1998, DOT published a request for comments in the *Federal Register*. Comments were collected and filed in a public docket (Docket No. OST-98-4025). Airport and airline representatives have also met

with the Task Force to discuss airport business practices and issues of interest to the study team.

Survey Data

The Task Force also relied upon a survey conducted by the ACI-NA. The survey was designed to gather information about the ability of airports to provide air carrier access to gates and related facilities and how any such limitations in access to them could constrain airline competition. The survey also asked several questions about PFCs and their effect on airport capacity and airline competition.

Case Studies

To better understand how airport business practices affect airline competition, Task Force members visited 13 large airports to meet with airport and airline officials in order to understand the economic, financial, legal, and competitive factors that motivated airport executives to adopt specific business practices.[2] These discussions also provided a way to gather information about the scope and pace of changes in business practices and which practices promoted or discouraged airline competition.

AIRPORT OPERATORS MUST PROVIDE ACCESS

Federal law requires airport operators to provide access to all qualified air carriers on reasonable terms and without unjust discrimination, and prohibits them for granting an exclusive right to operate at their airports. Airport practices that have the effect of unreasonably denying or hindering access by air carriers in effect regulate their routes, contrary to the federal preemption authority over fares, routes, and services.

Prohibited Practices

To receive federal airport improvement funds, an airport operator must agree that it will operate the airport in an economically nondiscriminatory manner. The "economic non-discrimination" grant assurance implements the provisions of 49 U.S.C. 47101(a)(1) through (6). In pertinent part, these provisions require the airport sponsor to make

[2]The airports are located in the following communities: Atlanta, Baltimore, Charlotte, Cincinnati, Dallas, Denver, Detroit, Houston, Minneapolis, Pittsburgh, Phoenix, Salt Lake City, and San Jose.

the airport available for public use on reasonable terms and without unjust discrimination to any aeronautical user.

Airport operators also may not: (1) deny access by disapproving an otherwise-qualified air carrier's application or by unreasonably delaying access; (2) adopt unjustified standards prohibiting a certain class of carrier from operating at the airport or containing criteria not relevant to operations, not reasonably attainable, not uniformly applied, or intended to protect incumbents; (3) claim lack of gate availability when, in fact, gates are not fully used; (4) defer completely to incumbent tenants' determinations on whether or not, and how, to accommodate requesting airlines; (5) permit unreasonable sublease fees or conditions to be imposed on new entrants; or (6) unreasonably deny signatory status to an authorized air carrier willing to assume the obligations of a signatory carrier.

Public Benefit & Use

Providing access to new entrants comports with the federal grant assurances' overriding policy to assure that the airport is operated for the benefit of the public and is available for public use. Further, since access must not be unjustly discriminatory, airports must be sensitive to assuring that a new entrant is accommodated on terms reasonably similar to an incumbent's and that anti-competitive effects do not result from an airport's action.

BENEFITS OF COMPETITION DEPEND ON AIR CARRIER ACCESS

Numerous empirical studies of airline pricing practices since deregulation have concluded that average airfares in concentrated markets are higher, often considerably higher, than they are in competitive markets. High fares can have adverse consequences for local economic development and employment, as state and local officials have come to appreciate. However, when new low-fare entry occurs in a market, average fares decline, often dramatically. Of course, high fares are not limited to travelers enplaning only at large, concentrated hub airports. Travelers based in smaller cities -- the "spoke" in a large carrier's route network -- may also pay high fares.

New entrant air carriers often operate in short to medium-haul markets with significant passenger volumes, the markets where airfares are often high. In order to bring the benefits of price competition to these markets, new entrants need reasonable access to airport gates, facilities, and services.

Facilities Usage

Airports differ in how fully their facilities are used. Some difference is appropriate: air carriers differ, both in terms of the markets they serve and the frequency of the service they provide, and weather and other factors also affect airport utilization. It appears, however, that some airports could make better use of their facilities. Indeed, current limitations on airport-terminal access at some airports may be as much a function of airport-airline contractual arrangements and airport management practices as they are a function of terminal and other physical constraints.

Contractual Arrangements

Airports and airlines have developed complex contractual arrangements (so-called use and lease agreements) to govern their ongoing business relationships. These agreements are legally binding contracts that specify the terms and conditions of the airlines' use of and payment for airfield and terminal facilities. In many cases these agreements formed the foundation for the original financing of existing airport facilities. Such agreements are often grouped into three broad categories: compensatory, residual, and hybrid.

Types of Agreements

Generally, under a *compensatory* agreement, an airport operator charges its airline tenants fees and rental charges in an amount necessary to recover the actual cost of operating the airport for each group's respective benefit; accordingly, the airport assumes the financial risk of any overall revenue shortfall. Under a *residual* agreement, signatory airlines generally agree to pay any costs of operating the airport that are not allocated to other users or covered by non-airline revenues. Signatory carriers thus assume the risk of overall revenue shortfall and receive the benefit of any revenue surpluses. *Hybrid* agreements combine elements of both the

compensatory and residual agreements and have grown in popularity since airline deregulation.

The nature of the agreement can influence an airport's rate-setting and investment practices. The MII clauses that often accompany a residual agreement, for example, grant signatory airlines the right to review and approve airport capital development projects. Moreover, residual agreements are often structured to provide investors with added security for their purchase of airport revenue bonds; accordingly, the terms of these contracts are frequently longer than is the case with compensatory agreements.

Types of Gate Use

Airports lease gates to air carriers under exclusive-use, preferential-use, and common-use arrangements. Many airports have entered into all three types of arrangements, although one type will generally be dominant at an airport. Based on the results of the ACI-NA survey, many airports have begun to opt for preferential-use leases, although exclusive-use leases remain the most popular contractual arrangement at large hub airports.

Many of the business practices in effect today at airports were adopted decades ago for specific economic, financial, and political reasons. Some airport business practices, such as entering into long-term, exclusive-use gate lease agreements, were considered to be essential for securing a long-term financial commitment from tenant air carriers, thus reducing the perceived investment risk of airport bonds and the cost of capital for airports.

Barriers to Entry

In this regard, previous academic and government studies have identified certain contractual arrangements between airports and airlines, especially long-term, exclusive-use gate-lease agreements, as a barrier to entry. DOT remains concerned about the potentially adverse competitive consequences of long-term, exclusive-use gate leases, especially at concentrated hub airports. However, several factors have begun to mitigate their anti-competitive effect, including the growing popularity of preferential-use leases, the role

PFCs have played in requiring airports to adopt preferential or common-use leases, and the somewhat diminished popularity of exclusive-use agreements within the financial community.

MII Clauses

The traditional MII provisions authorize a prescribed percentage of airlines that have signed an airport's use and lease agreement to review and then approve or disapprove a proposed capital project that will be financed through the rates and charges assessed against them. Most large and medium hub airports have MII clauses in their use and lease agreements. Because MII clauses could be used to delay or prevent the construction of terminal and other projects that would benefit new entrant and smaller air carriers, they have been identified as a barrier to entry. While there is little "hard" evidence to demonstrate their anti-competitive effect, there is anecdotal evidence, based on comments to the docket and the ACI-NA survey responses, that air carriers have either invoked or threatened to invoke MIIs to delay or prevent entry at a few airports.

Subleases

Generally, a sublease agreement for the use of a gate or other facility will be negotiated directly by an entrant and an incumbent airline, with little, if any, involvement by airport management. Many airports exercise no control over fees charged for subleased facilities. Subleasing may not be an optimal solution for accommodating air carriers that want to establish a significant market presence. By its nature, a sublease agreement will be based on the operational needs of the primary tenant airline; indeed, some subleases permit the primary tenant to regain control over a subleased gate on short notice or require the subleasing carrier to shift its operations to different gates when the tenant airline requires it to do so. In short, subleasing arrangements may make it difficult for new entrant carriers to schedule flight operations or to offer customers an acceptable level of service.

"Bundled" Services

Smaller air carriers offering only a few flights a day at an airport may not have the crew on hand and the facilities available to provide all the support services they need to

operate (e.g., baggage handling, fueling, towing, catering, minor maintenance). When faced with this situation, a new entrant will contract with an incumbent carrier or, perhaps, an independent contractor to provide necessary services. By doing so, a new entrant may be required to purchase a "bundle" of services rather than the specific services it needs, or to pay higher than expected fees.

Grant Assurances And Access

Notwithstanding specific features that have been incorporated into airport-airline use and lease agreements, one fact remains unchanged: all federally assisted airports are bound by federal grant assurances that require the airport operator to accommodate reasonable requests for access by a new entrant carrier or by an incumbent carrier that wants to expand its operations. While an air carrier tenant is not required to cancel flights or to forfeit its use of airport facilities, an airport operator may not deny access to its facilities based solely on existing lease arrangements. Airport operators also have the legal authority to oversee gate usage for purposes of efficient operation and to accommodate airline requests for access. As a result of the PFC Program, airport managers have the financial tools to expand terminals and other facilities to accommodate all airlines that want to serve their communities.

PFCs AND COMPETITIVE ACCESS

The governing statute and the implementing regulations require that PFCs be used to finance eligible airport projects that preserve or enhance safety, capacity, or security of the national air transportation system; reduce noise or its impact; or enhance airline competition. FAA's primary role in administering the program is to approve or disapprove the projects submitted to it, based on the governing statute and its regulations. Tenant airlines cannot block an airport from imposing PFCs for approved projects.

By allowing airports to assess a fee of up to $3 per enplaned passenger, PFCs provide an important and growing source of funds to improve and expand airport infrastructure.

Moreover, PFCs may be used to fund a broader range of terminal projects than can be funded under the Federal Airport Improvement Program (AIP). Unlike AIP grants, PFCs may also be used to pay a project's interest costs, which can be critical to undertaking the project and assuring investors of its financial viability.

Potentially Significant Competitive Tool

The PFC program embodies provisions that provide airport managers with potentially powerful tools for ensuring airline competition. For example, PFCs are an independent source of funds that can be imposed by airports without the approval of incumbent air carriers. Baltimore/Washington International Airport, for example, used this tool to construct gates for a low-fare carrier over the objection of incumbent carriers. PFCs cannot be used to build facilities that are subsequently leased to air carriers on a long-term, exclusive-use basis. And while PFCs may be used to build facilities that are subsequently leased to air carriers under preferential-use terms, leases cannot contain automatic "carry-over" provisions, whereby a short-term, preferential-use lease becomes a *de facto* long-term, exclusive-use lease. Further, any lease between a public agency and an air carrier for PFC-financed facility must contain a provision that allows the agency to terminate the lease if the carrier also leases facilities at the airport on an exclusive-use basis, does not fully use the facilities, and does not share them. This provision enables airport managers who impose PFCs to finance the construction of terminal facilities to establish more control over all airport facilities, including those already leased to air carriers under exclusive-use agreements. In this regard, Detroit Metropolitan Wayne County Airport required the dominant carrier with exclusive-use gates to share two underutilized gates with a low-fare carrier.

Competitive Impact Uncertain to Date

Between 1992 and April 1998, FAA approved 3,900 projects and authorized the collection of $18.9 billion in PFCs. Although airside, ground access, and noise-mitigation projects have all been critical in providing efficient and safe infrastructure for all users of the airport system, approved

terminal projects (531) are the most likely to have a direct effect on airline competition. As of April 30, 1998, approved PFC terminal projects accounted for $6.9 billion in authorized collections. A review of the 531 projects showed that 217 terminal projects, which accounted for slightly more than $6.0 billion in PFC approvals, were likely to have the greatest direct impact on airline competition. However, we were unable to measure the impact of these projects on competition because:

- FAA databases have not tracked the specific number of gates, loading bridges, hold rooms, or other terminal facilities.
- Discussions of conditions that limit competition and initiatives to foster competition, although required by FAA regulation, have not been emphasized by most airports in their PFC applications for new terminal facilities.
- Interpretation by airport operators as to what constitutes a competitive enhancement has been subjective.
- Available data suggest most new terminal facilities built with PFC funds have gone to incumbent airlines, but it is unknown whether this resulted in freeing up gates for new entrants.
- Many of the approved projects have not yet come on line.

AIRPORT MANAGERS & BEST PRACTICES

Airport managers play a critical role in determining whether a new entrant carrier is given a reasonable opportunity to compete at an airport. Some airport managers recognize this fact and are adopting new practices or modifying old ones to create an "entry-friendly" environment. State and local public officials are also taking actions to encourage airline competition and to take steps to ensure competitive

access to their airports. Positive initiatives by state and community leaders in Baltimore, Minneapolis, Charlotte, and Atlanta are good examples.

There is a broad range of business practices being used among the Nation's airports. Airport managers clearly exhibit important differences as to how much they seek out airlines to serve their airports and what actions they are prepared to take to assist new-entrant airlines. Some airport officials are quite comfortable adopting a "let-the-carriers-work-it-out approach" to managing their facilities. Other officials are willing to take bold and innovative actions to secure the benefits of increased airline competition for their communities. Such "best practices" by airport managers and operators include:

- Promoting new entry by becoming advocates for competition.
- Continually monitoring gate-utilization practices of airlines.
- Invoking "use-it-or-lose-it" authority if incumbent carriers are not using their gates fully.
- Providing clear guidelines and a timeline to prospective entrants on what they must do to gain access to an airport and when they will be able to begin operations, and clear standards to incumbent carriers that seek additional space to expand operations.
- Monitoring all sub-lease agreements to ensure that fees are reasonable.
- Creating an environment where third-party contractors provide competitive ground-handling and support services.
- Taking actions to recover gates when they become available and to convert gates and other facilities to common-use status.

- Working to ensure that any new MII agreements entered into do not prevent or delay projects that could be beneficial to new entrants or smaller airlines serving their airports.

- Using the tools provided by the PFC program to finance terminal expansion projects that provide greater opportunities for new entrants and increase airline competition.

A commitment on the part of all airport managers to adopt these "best practices" would go a long way toward ensuring that all communities receive the fare and service benefits that have resulted from airline deregulation.

RECOMMENDATIONS

To enhance competitive access to airports, the Task Force recommends the following actions for immediate implementation by the Department.

- The Secretary should designate the Assistant Secretary for Aviation and International Affairs as the Department's "competition advocate" for promoting competitive access to airports. Responsibility for administering the airport access requirement associated with the AIP and PFC programs, however, should remain with the FAA Administrator.

- The FAA Administrator should direct the appropriate FAA offices to:

  - ✓ Ensure that airports meet their legal obligation to provide reasonable access in support of competition and provide training and guidance to field offices and airports for assistance in meeting this goal.

  - ✓ Ensure that PFC applications for terminal projects include the required explanation of any competitive limitation at the airport before approving terminal development projects.

- ✓ Provide AIP funding only for master plans that include a description of competitive effects resulting from the addition of gates or related facilities, as shown in the airport master plan filed with FAA.

- ✓ Implement a new database that will provide current information on various aspects of PFC projects, including the numbers of terminal gates, ticket counters and baggage carousels built or renovated, the net increase in those facilities and their respective funding source (PFC or non-PFC), and the types of air carriers to which the facilities are or will be leased and the specific terms that apply.

- ✓ Conduct a public outreach effort to explain how the PFC program, including the grant assurance provisions, can be used to enhance airline competition.

- ✓ Ensure that airports comply with the regulatory requirements of 14 CFR Part 158, Assurance 7, by encouraging airports to establish a "terminal use monitoring program" before any PFC applications are approved for terminal projects.

- ✓ Require airport operators to (1) resolve new entrant access complaints within a reasonable period and (2) clearly specify and publish what is required for a new entrant to acquire a gate and for an incumbent carrier to expand.

ISSUES FOR FURTHER CONSIDERATION

During the course of the Task Force study, several issues were raised in the public docket or during discussions with airport and airline officials regarding specific ways to ensure access to airport gates and other facilities and to institutionalize the "best practices" for promoting competitive access. The Task Force believes that implementation of its recommendations, coupled with a pro-competitive airport management philosophy, will provide

the tools needed to ensure that airport business practices enhance airline competition. However, the Task Force also believes that in the event progress in ensuring competitive access proves elusive, the issues described below represent additional steps that are worthy of further discussion and debate by the Congress, industry, and Department for possible implementation.

- **Should "ensuring competitive access" be made an explicit requirement in legislation?**

A statutory provision requiring an airport operator to assure "competitive access" could incorporate the provisions of the report's "best practices" guidance into legislation. A "competitive access" provision could be added to the grant assurances as codified in Title 49, section 47107.

- **Should "reasonable" fees be defined in order to charge signatory carriers for building a limited number of gates and related facilities for new and expanded access?**

Many airports construct new facilities on agreement with the signatory airlines for future use. The issue is whether, under the statutory requirement that airport-air carrier fees be "reasonable " (49 U.S.C. 47129; 47107(a)(1); 40116(e)(2)), to allow an airport to charge users for gates built on speculation or in anticipation of demand. The traditional view is that users of public utilities (such as airports) may be charged when the facility is used and useful, not during construction.

- **Should DOT prohibit adoption of majority-in-interest clauses for landside facilities? Allow "consult-only" MII clauses for landside projects? Allow MII clauses for airside projects?**

Restricting the ability of signatory airlines to use their majority-in-interest powers may facilitate the ability of an airport to plan and finance new construction to include

common-use gates and facilities for new entrants. Majority-in-interest clauses, under which signatory carriers have the ability to veto or delay certain capital construction projects, have been criticized by some airports, GAO, and others as potentially anti-competitive tools of the incumbent airlines. The airline industry and some airports have responded that signatory carriers have a legitimate interest in participating in financial and other key aspects of future projects, since they are committed to remain at the airport and to pay the future rates and charges.

Information from the ACI-NA survey and from the docket (OST-98-4025) indicates that carriers have used their MII powers at some airports to delay projects, but these projects eventually were built with PFC or other financing.

- **Should airport sponsors be required to file competition plans when undertaking long-term, exclusive-use leases or special facility bond financing, or when incorporating MII clauses in their master use and lease agreements?**

Long-term exclusive-use arrangements have been criticized by GAO and others as anti-competitive. Some airports and the airline community defend long-term, exclusive-use leases as necessary to guarantee certain financing arrangements. We have found that exclusive-use arrangements are subordinate to the airport's obligation to assure that the airport is publicly available for reasonable access and to the statutory prohibition against the grant of an exclusive right to use the airport. 49 U.S.C. 47107(a)(1) and (a)(4); 40103(e). Accordingly, we have concluded that an airport generally has the authority to require an exclusive-use airline tenant to share or sublet unused gate space, when requested by another airline, where common-use or other gate space is not available, and on reasonable terms and conditions.

Although exclusive-use arrangements do not necessarily shield airport managers from the obligation to assure reasonable access, long-term, exclusive-use arrangements

are not optimal for facilitating easy access for new entrants. To both accommodate the perceived need for future application of exclusive-use leases as well as to enable reasonable access for requesting airlines, it may be necessary for an airport to develop and file with the Department a competition plan demonstrating how it will provide for new entrant access.

Special facility bond financing generally is associated with long-term, exclusive-use lease arrangements. Accordingly, a competition plan explaining how the airport will provide for access by new entrants and for expansion by existing carriers could also be considered.

Majority-in-interest clauses also have been criticized as anti-competitive, but carriers state that MII clauses protect them from fee increases attributable to unnecessary improvements. Competition plans could be useful to determine how an airport proposes to enhance competition given the planned adoption of an MII clause.

- **Should DOT require (1) airports to inform tenants simultaneously when gates are available and (2) large hub airports to develop and file gate usage policies?**

(1) We have found that gate availability may be informally communicated by airport management to its dominant airline while the needs of other carriers are overlooked. Requiring an airport operator to inform all tenants simultaneously of gate availability could facilitate expansion opportunities by smaller carriers or by carriers with a limited presence at the airport.

(2) The development of gate usage policies and practices is not new. These policies are indicated in the PFC competitive access assurance #7 (14 CFR Part 158, Appendix A) for tenant airlines that also will be tenants at PFC-financed facilities. Additionally, the Bankruptcy Code provides an airport with the opportunity to provide gate usage data when arguing for timely disposition of gate leases. 11 U.S.C. 365(d)(9). Airports with preferential-use leases that include minimum operations or gate usage requirements currently

are practicing gate usage management. Development of gate usage practices and policies can assist in ensuring that underused facilities are made promptly available for new entrants.

- **Should DOT permit passenger facility charges to be imposed only for common-use facilities?**

Passenger facility charges may be used for leased facilities but not for long-term (5 years or over) exclusive-use facilities. 49 U.S.C. 40117(f)(2); 14 CFR 158.3, Appendix Assurance 5. Additionally, a lease for a PFC-financed facility may not contain a carry-over provision with an automatic renewal option for the tenant carrier (PFC Assurance 6) and must provide for competitive access (PFC Assurance 7). In light of the pro-competitive nature of the statute and the fact that these facilities are built with federally-authorized fees, an issue to be addressed is whether the PFC-financed facilities should be common-use so as to provide a level playing field for all carriers.

- **Should airport managers be required to (1) oversee economic terms of sublease arrangements and (2) ensure that non-tenant fees do not include charges for unneeded services?**

(1) Many airports do not have limits on sublease fees and do not oversee sublease fees and economic terms. Rather, they let tenant carriers negotiate these with subtenants. New entrants have complained about fee differentials and fee premiums in subleases as well as location and time of day arrangements. New entrants also may be forced to use the tenant as ground-handler, when they desire to self-handle or use another party. While an airport's statutory responsibility to assure reasonable access extends to sublease terms, (49 U.S.C. 47107(a)(a)(1) and (a)(2)), most airports believe that marketplace negotiations between airlines produce "reasonable" terms and conditions. Accordingly, specific authority on the part of airports to oversee these terms may be necessary to ensure accountability and to facilitate new entrant access on reasonable terms.

(2) At some airports, carriers are required to purchase a bundle of services, including some they do not need or can purchase less expensively elsewhere or provide themselves. This can raise the price of entry and unduly hinder the ability of a low-fare carrier to compete. More authority to ensure that non-tenants are treated reasonably may facilitate entry and lower costs.

CHAPTER 1: OVERVIEW OF THE AIRPORT SYSTEM

The competitive landscape of commercial aviation within the United States has undergone a remarkable transformation since Congress passed the Airline Deregulation Act of 1978. Today, U.S. air carriers transport about 270 million more passengers a year than they did during the last year of economic regulation. On average, domestic consumers pay a third less (in constant dollars) than they did 20 years ago. And airline operating profits are also at record levels, totaling roughly $20 billion over the last three years. These gains are largely the result of more efficient industry operating practices and the critical role played by low-fare air carriers in creating a more competitive environment.

In response to deregulation, the major airlines greatly expanded the use of hub-and-spoke networks and created connecting hub airports around the country. With a hub-and-spoke system, an airline, using banks of connecting flights, can serve the maximum number of city-pair markets with a minimum number of airplanes. Among other things, this strategy allows air carriers to better match the size and frequency of aircraft serving spoke routes, while maximizing traffic flow by consolidating connecting passengers with different destinations on each flight.

Operating at a hub creates service advantages for many travelers, since it gives travelers at hub cities many more flights and enables airlines to offer more service in markets without enough traffic to sustain non-stop service. On the other hand, the efficiency gains of hub operations make it more difficult for other air carriers to challenge the dominant carrier in local markets, thereby allowing it to charge high average fares in many local hub markets.

A large number of new airlines attempted to break into the airline industry immediately following domestic deregulation, but virtually all failed or were acquired by established airlines. What followed was a period dominated by large, network air carriers until Southwest Airlines altered the competitive landscape. Today, a number of low-fare carriers[1] provide service, resulting in substantial consumer benefits, and new service by

[1] As used in this report, a low-fare carrier is an air carrier whose primary business strategy is to offer fares lower than those offered by all or most incumbent carriers in any given market.

low-fare airlines has proven to be an efficient way to inject competition into concentrated markets.[2]

Numerous studies have suggested, however, that despite the overall benefits of airline deregulation, there are a number of factors that prevent airline passengers and the airline industry itself from enjoying the full benefits of economic deregulation. In particular, barriers to entry within the industry exist with respect to computer-reservation systems, frequent-flyer programs, travel agent commission overrides, exclusionary behavior, economies of scale of operation, and external airport constraints (e.g., the High Density Rule, airport-specific perimeter rules, and environmental constraints). These potential barriers to entry have received a significant amount of attention from public officials. Less attention has been devoted to airport business practices and their role as a potential barrier to entry.

The remaining sections of this chapter describe the general nature of airport ownership and management, the source of airport funds, airport-leasing agreements, and the study's scope and methodology.

AIRPORT OWNERSHIP AND MANAGEMENT

There are approximately 18,300 airports in the United States, of which 5,300 are for public use. Of the public use airports, the majority (4,166) are publicly owned, and approximately one-eighth are commercial-service airports.[3] All of the commercial-service airports are included in FAA's National Plan of Integrated Airport Systems. While most commercial-service airports are owned by local governments, such as cities and counties, some state and local governments have established special entities, such as single-purpose airport authorities or multi-jurisdictional regional authorities, to manage their airports. Table 1.1 on page 3 describes the ownership of public use airports.

[2] For example, the Department's April 1996 study of low-cost airlines examined the effects of the low-fare service offered by Morris Air and Southwest, which acquired Morris, in a number of Salt Lake City markets. Average fares in these markets dropped by about 50 percent and traffic tripled while fares in other Salt Lake City increased. As a result, by late 1998, the average fares in the market served by Morris and Southwest were only one-third the level of fares in other Salt Lake City markets.

[3] Commercial service airports are legally defined as airports (1) with scheduled passenger service, (2) that annually enplane 2,500 or more passengers, and (3) that are publicly controlled, with public ownership of the airfield (49 U.S.C. 47102(7)). Commercial service airports are also categorized by hub size. Large hub airports are airports with at least 1.0 percent of total national enplanements; medium hub airports are airports with less than 1.0 percent of total national enplanements, but at least 0.25 percent; small hub airports are airports with less 0.25 percent of total national enplanements, but at least 0.05 percent; non-hub airports are defined as airports with less than 0.05 percent of total national enplanements.

Table 1.1
Ownership of Hub and Non-Hub Airports

Ownership	Percent of Total
City	40.2
Single County	14.4
State	9.3
Port Authority	4.1
Regional	22.7
Multi-jurisdictional	6.2
Other (private, etc.)	3.1
Total	**100.0%**

Source: Airports Council International-North America, 1997 General Survey.

Private ownership of commercial airports, while gaining in popularity internationally, remains the exception. In the United States, only one commercial service airport, Stewart Airport, has an application under consideration at FAA under a pilot program that permits up to five airports to shift from public to private ownership or control. Some public airports, however, have increased their reliance on commercial management in response to the changing regulatory and economic environment in which they operate. Burbank Airport, for example, contracts out its daily management to a private company; Indianapolis, a city-owned airport, operates under contract with BAA, a private company whose parent corporation is based in England and operates the London airports; and Albany Airport is managed by a private company. In the United States, increased reliance on companies that provide management services has been most prevalent at medium hub airports. According to the Airports Council International-North America (ACI-NA), no member of the organization that is a large hub airport is privately operated.[4]

AIRPORT FUNDING

Airports are funded through a variety of means. Factors influencing an airport's choice of financing include ownership, airport type, size, and maturity of the airport. All of these factors are taken into account in the airport's master plan.[5] The primary focus of airport planning and capital development is to provide safe and efficient air carrier service and to enhance airport capacity. The promotion of air carrier competition has not been an integral part of most airports' planning processes. Funding decisions have

[4] According to the "1997 General Survey" conducted by ACI-NA, only five percent of its members have some form of private operation and management. Three were medium hub airports, one was a small hub airport, and one was a non-hub airport.

[5] An airport master plan is a concept of the ultimate development for a specific airport. Its objective is to provide guidance for future development which will satisfy aviation demand in a financially feasible manner.

typically focused on carrying out the objectives of the airport's master plan. Airport managers are beginning to recognize that the choice of financing arrangement influences the degree to which they can accommodate new entry and encourage competition among air carriers.

Major sources of airport funding include airport user charges, airport revenue bonds, Passenger Facility Charges (PFCs), the Airport Improvement Program (AIP), and state and local programs. Airport user charges are generally used to recover an airport's operating costs and its debt-service costs for bonds; the other sources of funds have provided the majority of direct capital funding, as summarized in Table 1.2 for the period 1990 to 1996. Ultimately, airport user charges and other revenue sources (commonly referred to as "concessions" revenue), through payment of debt service costs, fund the capital projects that are financed by airport revenue bonds.

Table 1.2
Major Sources of Airport Capital Funding (billions $)

Funding Sources	1990	1991	1992	1993	1994	1995	1996
Airport Revenue Bonds	4.6	3.2	4.8	1.6	3.0	3.2	4.0
AIP Grants	1.4	1.8	1.9	1.8	1.7	1.5	1.5
Passenger Facility Charges (PFCs)	n/a	n/a	0.1	0.5	0.8	1.0	1.1
State/Local Grants	0.5	0.5	0.5	0.5	0.5	0.5	0.5
Total	**$ 6.5**	**$ 5.5**	**$ 7.3**	**$ 4.4**	**$ 6.0**	**$ 6.2**	**$ 7.1**

n/a = Not Applicable.
Source: The American Association of Airport Executives, "America's Future in Airport Infrastructure"

Airport User Charges

Aeronautical user charges include aircraft landing fees; apron, gate-use or parking fees; fuel-flowage fees; and terminal charges for rent or use of passenger hold rooms, ticket counters, baggage claims, administrative support, hangar space, and cargo buildings. Non-aeronautical user charges encompass rentals and fees to terminal concessionaires, automobile parking, rental car fees, rents and utilities for facilities, non-aviation development fees (e.g. airport hotel, gas station, etc.), and communication fees.

Bonds: Revenue, General Obligation, and Special Facility

The issuance of bonds remains the primary means of financing airport capital-development projects at the Nation's commercial service airports. Bond debt service for interest, capital, and other costs is a major component of airport rates and charges. Most airport bond financing has utilized tax-exempt, general airport revenue bonds

(GARBs). During the 1990's, GARBs accounted for between 36 percent and 70 percent annually of capital-development expenditures at airports -- over $3 billion per year on average. When small, locally owned airports finance capital projects with bonds, they often pledge the "full faith and credit" of the local government entity.

Some facilities are financed with tax-exempt, special facility bonds secured solely by the revenues of the facility constructed -- for example, an aircraft maintenance facility -- rather than an airport's total revenues. Terminal facilities have also been financed with special facility bonds. The introduction of PFCs as an additional source of funds has led to the evolution of a version of the GARB that relies partially or totally on PFC revenues for repayment. Due to the conservative nature of the tax-exempt bond market, these PFC-backed bonds often require special commitments from FAA to reduce the likelihood of any bond default resulting from some federal actions that could affect future PFC collections.

Airport Improvement Program (AIP)

Federal AIP grants have played a critical role in the building of the Nation's airport infrastructure. AIP funds are distributed by statutory formulas or based on FAA's discretion. During the 1990s, AIP grants accounted for between 21 percent and 40 percent annually of the total airport capital-development expenditures. Airport sponsors and non-federal contributors must provide, at a minimum, a ten percent share of any project funded by AIP grants.

Table 1.3 below summarizes the grants awarded under AIP for fiscal years 1982-1997. As of August 1999, the Program was authorized $1.66 billion in obligational authority for fiscal year 1999.

Table 1.3
Airport Improvement Program
Cumulative Total Grants Awarded, Fiscal Years 1982-1997

Type of Grant	Total Grant Funds ($ bil.)	Percent of Total
Planning	$ 0.400	1.9%
Safety & Security	1.214	5.9
Landing Area Construction	10.863	52.9
Noise Control (exc. Landings Areas)	2.288	11.1
Lighting, Navaids, Weather Equipment	1.146	5.6
Buildings	1.033	5.0
Land (other than Noise)	1.615	7.9
Roadways	0.980	4.8
Miscellaneous	0.497	2.4
State Block Grants	0.503	2.4
Total	**$ 20.539**	**100.0%**

Source: FAA

Passenger Facility Charges (PFCs)

In 1990, Congress reversed a prior federal prohibition and authorized airports to charge a per-passenger enplanement fee to finance airport capital improvements and the expansion and repair of airport infrastructure. Once approved, a $1, $2, or $3 fee on each enplaned passenger can be imposed to fund specified projects. The three objectives for which PFCs can be applied are (1) to preserve or enhance safety, security, or capacity of the national air transportation system; (2) to reduce noise or mitigate noise impacts resulting from an airport; and (3) to furnish opportunities for enhanced air carrier competition.

Since the inception of the PFC Program, FAA, as of May 1, 1998, had approved 632 applications at 290 airports (approximately 3,900 individual projects) for the collection of PFCs. In 1996, PFCs accounted for 15 percent of total airport capital development expenditures.[6]

State and Local Programs

State and local governments have contributed to the development and operation of community airports, offering matching grants to secure federal support, providing direct grants to fund airport maintenance projects, and financing the installation of navigation aids. To expand air service and to encourage competition, state and local governments have also supported airport marketing initiatives. As the availability of federal funds has declined relative to capital needs, the efforts of state and local governments have become increasingly important, especially as AIP grants have been targeted on airport projects and facilities of national importance. During the 1990's, state and local grants accounted for between 7 percent and 11 percent of annual expenditures for airport capital-development purposes. States have used a variety of revenue sources to support their local airports. While aviation fuel taxes are the most significant source of state funds, aircraft registration fees, airport licensing, pilot registration, and taxes (income, personal property, and sales/use) are also important revenue sources.

[6] Airport revenue streams are not entirely independent. PFCs and AIP can be viewed as complementary programs. In fact, Section 47114(f) of Title 49 U.S.C. requires that AIP funds apportioned to a large or medium hub airport be reduced according to a formula if a PFC is imposed at that airport. This reduction takes place in the fiscal year following the approval of authority for PFC collections at that airport and continues in each succeeding fiscal year in which a PFC is imposed.

AIRPORT LEASING ARRANGEMENTS

The financial and operational arrangements at commercial airports are primarily defined in terms of use and lease agreements. These agreements specify the financial obligations, terms of use, and other responsibilities that each party assumes with regard to the use of the airport's facilities as well as the occupancy of the land and buildings. Although practices differ greatly among commercial airports, use and lease agreements have generally been classified into three types: residual, compensatory, and hybrid agreements.

The structure of an airport's use and lease agreements can influence the degree to which it can promote airline competition and new air carrier entry. Table 1.4 illustrates the distribution of agreement types by hub size for airports that responded to a 1998 ACI-NA survey.

Table 1.4
Airport Use and Lease Agreements
Distribution by Type and Airport Size (percent)

Use and Lease	Large	Medium	Small
Residual	41%	38%	57%
Compensatory	41	19	14
Hybrid/Other	18	43	29
Total	**100%**	**100%**	**100%**
Respondents (number)	*22*	*21*	*14*

Source: Airports Council International–North American (ACI-NA), "1998 Airport Gate Availability/PFC Survey."

Residual Use and Lease Agreements

Under residual use and lease agreements, signatory airlines agree to assume the financial risk of running the airport. Airlines assure that the airport will break even by paying fees that generate revenues equal to the remaining ("residual") costs of operations once all (or a specified percentage of) non-airline sources of revenue have been taken into account. The average length of a residual agreement at a large hub airport is approximately 28 years.

The typical trade-off an airport makes in exchange for this transfer of risk is (a) forgoing the opportunity to realize significant revenue surpluses to apply toward development projects, since surpluses are credited to the signatories, and (b) forfeiture, to some extent, of autonomous decisions over capital expenditure programs to the signatories through a majority-in-interest provision in an airport's use and lease agreement.

Based on the 1998 ACI-NA survey, 84 percent of the residual use and lease agreements have a majority-in-interest (MII) clause. These provisions allow MII airlines to approve or disapprove (or at least delay) specific capital projects, the costs of which could be included in the rates and charges of the signatory airlines.[7] The potential for disapproving or delaying a project that would benefit new entrants, to the detriment of competition, is obvious. If the project does not receive MII approval, the airport may have to reframe or abandon its plans. [In such situations, airports could use AIP, PFC, or special facility bonds to finance contended projects.] Not all airport projects require MII approval, however. For instance, projects funded by PFCs or special facility bonds do not generally require airline approval. Airports are legally required to consult with their major carriers when contemplating a PFC-funded project, but MII carriers are legally barred from exercising veto rights over PFC-financed projects.

Compensatory Use and Lease Agreements

Under compensatory use and lease agreements, airlines typically pay only for the facilities and services they actually use, leaving the airport to assume the financial risks and rewards from non-airline facilities. For example, with regard to an airport gate, an airline will pay a rental rate that will recover its allocated cost. The average length of a compensatory use and lease agreement at large hub airports is approximately 17 years. By transferring the financial risk of the day-to-day operations to the airport and allowing the airport more latitude in its use of funds, airports have the ability and incentive to entice additional air service. Of the airports surveyed by ACI-NA that had compensatory use and lease agreements, only 20 percent had an MII provision in their agreements.

Hybrid Use and Lease Agreements

A "hybrid" use and lease agreement (also know as a "cost center" approach) is a variation of the two types of agreements discussed above. Hybrid agreements generally take the form of excluding selected non-airline activities from the residual cost pool. A typical example of a hybrid use and lease agreement is one in which only the airfield remains in the residual pool; i.e., through landing fees signatory air carriers cover the cost of airfield operations that remain after aircraft parking fees and fuel-flowage fees have been collected.

Although this form of agreement limits an airport's control of its sources and uses of funds, it can be used to reduce the financial risk an airport faces. By recovering its airfield operations and development costs, an airport is assured of a significant revenue

[7] Some residual agreements provide for agreed-upon capital improvement and other funds from which the airport may draw without prior airline approval.

stream regardless of competitive or cyclical trends in the industry or economy. At the same time, however, the airport has an incentive to increase non-aeronautical sources of revenue. Diversification or sharing of the financial burden can result in a more stable revenue stream for these airports.

Approximately 74 percent of those airports that responded to the ACI-NA survey and reported having hybrid agreements also reported that they have MII clauses associated with those agreements. The average length of a hybrid use and lease agreement at large hub airports is approximately 20 years. To the extent that the choice of use and lease agreements influences airline competition, a hybrid agreement can be considered "middle ground." It offers an airport more control over its sources and uses of funds than a residual agreement, but less control than a compensatory agreement. Meanwhile, air carriers appear to retain a marked degree of influence in the airport planning process through the presence of MII clauses.

SCOPE AND METHODOLOGY

A key objective of our study was to understand how airport business practices affect airline competition. We also were interested in knowing how the PFC Program has affected airport capacity and airline competition. Data collection problems had made it difficult for academics and others to do the type of study we have undertaken. Moreover, the most comprehensive government reports on airport business practices, airport capacity, and airline competition were prepared almost a decade ago.[8]

Our research program had five elements: (1) meetings with airline managers to discuss the types of problems air carriers have encountered at specific airports; (2) information gathered from a survey instrument; (3) information developed through DOT databases; (4) information and comments provided in the public docket (Docket No. OST-98-4025); and (5) data and information gathered through interviews with airport and airline officials (i.e., case studies).

To ensure broad-based study participation, DOT/FAA provided several opportunities for the general public, the aviation industry, and the airport community to provide critical input. On April 10, 1998, DOT published a request for comments in the *Federal Register*. Comments were collected and filed in the public docket. Airport and airline representatives have also met with members of the Task Force to discuss the study's

[8] For example: U.S. Department of Transportation, *Secretary's Task Force on Competition in the U.S. Domestic Airline Industry: Airports, Air Traffic Control, and Related Concerns (Impact on Entry) (1990)*; and General Accounting Office, *Airline Competition: Industry Operating and Marketing Practices Limit Market Entry*, August 1990. GAO also prepared an October 1996 study, *Airline Deregulation: Barriers to Entry Continue to Limit Competition in Several Key Domestic Markets*, but it focused on entry conditions at a limited number of airports.

scope. Additional opportunities to participate in the study included a survey conducted by ACI-NA and 13 airport case studies conducted by the Task Force. Details about the survey and case studies are presented below.

ACI-NA Survey

In the fall of 1998, ACI-NA conducted a survey on gate availability and PFCs. The purpose of the survey was to elicit information about the limitations on an airport's ability to provide air carriers access to gates and related facilities, and how these limitations could constrain competitive service at the airport. Issues regarding the use of PFCs were also examined. The survey results supplemented the Task Force analysis of competitive issues.

The survey questionnaire was sent to all 144 ACI-NA airport members, which included 31 large hub, 47 medium hub, 33 small hub, and 33 non-hub airports.

Survey results were tabulated for the Task Force using the double-blind keypunch method to ensure data accuracy. Additional quality control was performed on each completed survey. Inconsistent responses and tabulation errors were identified and resolved with the assistance of ACI-NA and the responding airports.

Case Studies

To better understand how airport business practices affect airline competition, members of the Task Force visited 13 airports to meet with airport and airline officials. The principal reason for visiting specific airports was that it offered the best way for the Task Force to understand the economic, financial, legal, and competitive factors that influenced the decisions made by airport executives to adopt certain business practices. It also allowed the Task Force to gather information on how airport business practices are changing, the pace of change, and which practices serve to promote airline competition.

A major strength of the case study method is that it allows analysts to assemble data from various sources and to gather information and opinions about critical issues, decisions, and relationships.[9] Case study analysis, like any credible research program, relies upon the judgment of the individuals who undertake the research. When undertaking a case study, it is necessary to organize the information obtained around a few key issues. The issues of importance to the Task Force were whether specific airport busi-

[9] For a discussion of the merits and limitations of case study research, see, Joseph Feagin, Anthony Orum, and Giedon Sjoberg, *A Case for Case Study*, University of North Carolina Press, 1991; also, Robert E. Stake, *The Art of Case Study Research*, Sage Publications, 1995.

ness practices have made it more difficult, and therefore costly, for air carriers to begin serving an airport.[10]

The airports chosen for on-site visits were selected for various reasons. Charlotte/Douglas International Airport, Greater Pittsburgh International Airport, Minneapolis/St. Paul International Airport, Detroit Metropolitan Wayne County Airport, and Greater Cincinnati International Airport have been named in GAO studies as having adopted business practices that have made it difficult for new entrant air carriers to serve these airports, especially if they desire to do so with more than a few flights per day during peak travel hours.

Other airports, such as Atlanta-Hartsfield International Airport, Dallas/Fort Worth International Airport, Houston Intercontinental Airport, and Denver International Airport, are major traffic hubs for certain large air carriers and, as such, play a critical role in the Nation's air transportation system.

Two airports, Baltimore/Washington International Airport and Salt Lake City International Airport, have experienced significant growth in low-fare air service as a result of new entry and increased competition since the early 1990's.

One airport, Phoenix's Sky Harbor International Airport, has adopted new business practices in the wake of airline deregulation. The Phoenix market also is of interest because two low-fare air carriers, Southwest Airlines and America West Airlines, have extensive operations based at Sky Harbor.

At another airport, San Jose International Airport, officials appear to have made a decision not to become overly dependent on any one airline, since the airport's ability to expand and thus accommodate new entry is extremely limited.

In sum, each airport selected for in-depth analysis provided the Task Force with an opportunity to study important aspects of airline operations, airline competition, and airport business practices.

[10]There is a vast economic literature that discusses the definition, measurement, and importance of entry barriers for influencing market competition. For a valuable survey of this literature see, Richard J.Gilbert, "Mobility Barriers and the Value of Incumbency," *Handbook of Industrial Organization, Volume 1*, Richard Schmalensee and Robert Willig, eds., Elsevier Science Publishers, 1989; also the relevant sections in Jean Tirole's, *The Theory of Industrial Organization*, MIT Press, 1988. For a recent discussion of entry barriers and new entrant airlines, see: Sveinn Vidar Gudmundsson, *Flying too Close to the Sun: The Success and Failure of New Entrant Airlines*, Ashgate Publishing, Brookfield, Vermont, 1998, pp. 18-58.

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CHAPTER 2: AIRPORTS' LEGAL OBLIGATION TO PROVIDE REASONABLE AIR CARRIER ACCESS IN SUPPORT OF COMPETITION

A key objective of the Department's airport and airway programs is to promote airline competition, consistent with the goals of the Airline Deregulation Act of 1978, in addition to assuring a safe national airport system with adequate capacity. This chapter describes the legal and regulatory standards that govern the actions of airport operators to provide reasonable access to their facilities.[1] The economic nondiscrimination grant assurance, including the reasonable access provision, and the statutory prohibition on grant of exclusive rights, require airport operators to ensure that the airport is consistently available for public use and is operated for the benefit of the public.[2] Airport operators are required to provide access on reasonable terms, without unjust discrimination, and are prohibited from directly or constructively granting an exclusive right to operate at the airport, in order to provide the public the full benefit of competition in air services. In addition, an airport may not deny access to its facilities solely based on the leasing arrangements of the currently existing facilities. While some arrangement for accommodation of new entrants must be made, an air carrier tenant is not required to cancel flights or to forfeit its use of airport facilities.

As a general rule, an airport operator may not directly or indirectly ban access to an airport by an otherwise qualified air carrier operator. To prevent or impede a carrier's service at an airport is inconsistent with the airport's contractual grant assurances to provide reasonable and not unjustly discriminatory access to the airport and not to grant an exclusive right at the airport. Moreover, the Airline Deregulation Act of 1978 (Pub. L. No. 95-504, 92 Stat. 1705, 1708 (1978)) prohibits a state or local government's regulation of an air carrier's rates, routes, or services.[3] An action by an airport operator to unreasonably or discriminatorily deny or hinder access to air carriers effectively

[1] In addition, the United States, under the Chicago Convention and our bilateral air transport agreements, must give reasonable, non-discriminatory access to foreign air carriers, a number of which are code-share partners with U.S. carriers.

[2] 49 U.S.C. 47107(a)(1)-(6); 40103(e). FAA may enforce these obligations, after providing the opportunity for a hearing, through withholding approval of a project grant application, under 49 U.S.C. 47106(d), or by withholding payments under project grant agreements, under 49 U.S.C. 47111(d). Additionally, administrative investigations and hearings may be held under section 47122 and judicial enforcement sought pursuant to section 47111(f).

[3] 49 U.S.C. 41713(b).

regulates their routes, contrary to the federal preemption authority over rates, routes, and services.[4]

Actions that thwart an air carrier's access or operations also can be contrary to the pro-competitive purposes of the exclusive rights prohibition, have anti-competitive implications inconsistent with the anti-discrimination assurance, and undermine the goals of the Airline Deregulation Act to foster competition and encourage new entry into air transportation markets.

Prohibited airport actions include, for example: denials of access by disapproving an otherwise qualified air carrier's application or by unreasonably delaying access; adopting unjustified standards prohibiting a certain class of carrier from operating at the airport or containing criteria not relevant to operations, not reasonably attainable, not uniformly applied, or intended to protect incumbents; claiming lack of gate availability when, in fact, gates are not fully utilized; relinquishing control of airport facilities to incumbent carriers for purposes of negotiating access with a new entrant; permitting unreasonable sublease fees or conditions to be imposed on new entrants; and unreasonably denying signatory status to an authorized carrier that assumes the obligations established for signatory status. These actions may be considered failing to grant reasonable access, unjustly discriminating against a class or between classes of carriers, or granting a prohibited exclusive right. Also, unreasonable denials of access can effectively regulate a carrier's routes, contrary to the federal preemption provision.

Airport proprietors may exercise their proprietary rights and powers, but these rights are circumscribed. They must rationally and demonstrably relate to protecting the safe and efficient operation of the airport or relieving noise or congestion at the airport. Exercise of proprietary rights must be reasonable, non-arbitrary, nondiscriminatory, and justified. They may not unduly burden interstate commerce or be used as a proxy for unjustifiably prohibiting new entry or unreasonably protecting incumbents, or for regulating an air carrier's routes inconsistent with federal preemption.

[4] *Federal Aviation Administration v. Arapahoe County Public Airport Authority*, FAA Order No. 1999-1, Feb. 18, 1999 (pending appeal, *sub nom., Arapahoe County Public Airport Authority v. Federal Aviation Administration*, Case No. 99-9508 (10th Cir.). [But see *Arapahoe County Public Airport Authority v. Centennial Express Airlines, Inc.*, 956 P.2d 587 (S. Ct. Colo. 1998).] *Love Field Service Interpretation Proceeding*, Declaratory Order 98-12-27 (December 23, 1998); Order on Reconsideration, 99-4-13 (April 14, 1999) (pending appeal, *sub nom., The City of Fort Worth v. Department of Transportation*, Case No. 99-60239); *New England Legal Foundation v. U.S. Department of Transportation*, 883 F.2d 157 (1st Cir. 1989).

AIRPORT OPERATORS MUST PROVIDE REASONABLE ACCESS AND NOT ENGAGE IN ECONOMIC DISCRIMINATION

To receive federal airport improvement funds, an airport must agree that it will operate its airport in an economically nondiscriminatory manner. The "economic nondiscrimination" grant assurance implements the provisions of 49 U.S.C. 47107(a)(1) through (6). In pertinent part, these require the airport sponsor to make its airport available as an airport for public use on reasonable terms and without unjust discrimination, to any person, firm, or corporation, to conduct or to engage in any aeronautical activity for furnishing services to the public at the airport. 49 U.S.C. 47107(a)(1); Grant assurance 22a, 62 *Federal Register* 29761, 29766 (June 2, 1997).

This provision is intended to assure that the airport is consistently available for public use and is operated for the benefit of the public. *Airport Compliance Requirements*, FAA Order 5190.6A, ¶4-13a. (1989). The airport operator is obligated to make all airport facilities and services available on fair and reasonable terms and without unjust discrimination. Order 5190.6A, ¶3-1. This may be referred to as the "reasonable access" component of the economic nondiscrimination assurance.

The "reasonable access" provision of the "economic nondiscrimination" assurance requires an airport to make reasonable efforts to accommodate new entrants by providing the necessary facilities or the opportunity for the new entrant to obtain those facilities. This can be accomplished by having common-use gates available on a per-turn or other basis, sharing preferential-use gates at underused times, or arranging for use of exclusive-use gates at unused periods. An airport operator is not required to divest a tenant carrier of facilities in use; however, the airport operator can work with the carrier to ensure more effective utilization of scarce facilities to better accommodate requesting airlines. Providing access to new entrants comports with the grant assurance's overriding policy to assure that the airport is operated for the benefit of the public and is available for public use. Further, since access must not be unjustly discriminatory, airports must be sensitive to assuring that a new entrant is accommodated on terms reasonably similar to an incumbent's and that anti-competitive effects do not result from an airport's actions.

Accommodation is relatively easy if the airport has its own airport-controlled gates and facilities available for common use. If common-use gates do not exist at the airport, the airport can offer use of preferential-use facilities. This can be accomplished by reviewing the airline tenants' schedules and usage of the facilities, and then making necessary adjustments for the new entrant's operations. Where an airport has exclusive-use gates

and facilities, the operator can oversee the new entrant's sublease attempts and intervene, if necessary, to enable the new entrant to gain access from a tenant carrier.

Access to the full complement of facilities is part of the reasonable access assurance. This includes parking positions, loading bridges, hold rooms, ticket counters, and baggage make-up areas. FAA Order 5190.6A, ¶4-15d. (1989). In order that access is not unjustly discriminatory, the time of day appropriate for accommodation may be significant to a new entrant attempting to initiate service into a market. Therefore, the airport, to the extent reasonably possible, must see that the new entrant's time-of-day access is compatible with its operational needs.

FAA has interpreted the reasonable access provision as requiring access for new entrants. FAA Order 5190.6A (1989) recognized that since the passage of the Airline Deregulation Act of 1978, there was an influx of air carriers into airports. Many of these airports were operating at capacity before passage of the act, insofar as counter, gate and ramp space were concerned. In some instances, space was made available to new carriers from carriers established on the airport. However, in other cases, no space was made available and the carrier was denied access to the airport. FAA determined that some arrangements for accommodation must be made if reasonably possible, and that a carrier may not be denied access to an airport solely based on the non-availability of currently existing facilities. In some cases, the airport operator may provide temporary facilities, such as a mobile ticket office and gate facilities, to relieve the situation. Otherwise, FAA and the airport operator together can develop a solution to the problem. Order 5190.6A, ¶4-15d.

Timely access is an essential component of reasonable access. In a case involving Westchester County's temporary hold on Midway Airlines' application to serve the airport, the court concluded that the county was entitled to exercise its proprietary rights to hold Midway's application for about four months from the date of Midway's completed application to serve Westchester, after which it must provide access to Midway or any other carrier entitled to access.[5] The court specifically ordered the county to conclude its study of airport usage within 30 days of the date of the judicial decision and promulgate rational and nondiscriminatory rules governing the allocation of ground facilities and flight slots within 20 days thereafter. This reasonable delay in providing access was justified given the demonstrated congestion at the airport and the fact that the county was in the process of formulating plans to allocate its scarce resources. The court acknowledged that entry by Midway Airlines into the Westchester County airport

[5] *Midway Airlines, Inc. v. County of Westchester*, 584 F. Supp. 436 (S.D.N.Y. 1984).

"would increase the competition for passenger patronage along certain interstate routes" in accordance with the competitive policies of the Airline Deregulation Act.

Unreasonable delay of over a year by the Port Authority of New York and New Jersey in allowing timely access by the Concorde into John F. Kennedy International Airport was deemed discriminatory by the Second Circuit. The court, in the *Concorde II* proceeding, enjoined the Port Authority from further prohibition of Concorde operations (pending formulation of a noise program).[6]

Providing timely access is important for purposes of complying with the grant assurances and ensuring that the public receives the benefit of competitive service. Generally, access should be provided with dispatch, since the airport operator is presumed to be familiar with the usage of the airport's space and facilities and with management of sublease or sharing arrangements. Delays occasioned by the airport management investigating "reasonable accommodation" arrangements should not be necessary, since the airport has undertaken the assurance that, as a public facility, it will be able to provide reasonable access to the public. Unless the airport is demonstrably congested or there is a significant safety, noise or environmental concern, access should be provided with reasonable dispatch.

Anti-competitive effects can result when an airport does not provide access. For example, the City of Dallas was held to have acted unreasonably and with unjust discrimination in denying Southwest Airlines access to Love Field airport since carriers of similar size and function to Southwest were permitted to make similar use of the airport.[7] The court found that the City's:

> "…unsystematic classification discriminates not only between different types and kinds of aeronautical use, but also between uses within the same general class as well. Such discrimination is particularly objectionable because of the anti-competitive effects it has on the airlines and the public they serve." 371 F. Supp. 1015, 1030.

In this regard, the court noted that Southwest's presence in the short-haul market generated "vigorous competition" and "very substantial savings to the traveling public." 371 F. Supp. 1015, n. 8.

[6] *British Airways Bd. v. Port Authority of N.Y.* , 564 F.2d 1002 (2nd Cir. 1977).

[7] *City of Dallas v. Southwest Airlines Company,* 371 F. Supp. 1015 (N.D. Tx. 1973), *aff'd on other grounds*, 494 F.2d 773 (5th Cir.), *cert. denied*, 419 U.S. 1079 (1974).

More recently, FAA has held that a ban on access, as well as unreasonable delays in adopting minimum standards for access (about two years), was unreasonable and unjustly discriminatory.[8] FAA concluded that Arapahoe County was not justified in banning from Centennial Airport the operation of a scheduled Part 135 operator while permitting similar operations by nonscheduled Part 135 operators.

TERMS AND CONDITIONS

The airport operator must assure that terms imposed on those who use the airport and its services, including rates and charges, are fair, reasonable, and applied without unjust discrimination, whether by the owner or tenant. 49 U.S.C. 47107(a)(2), Order 5190.6A, ¶4-13b.[9]

Airports must charge air carriers reasonable fees for aeronautical use. 49 U.S.C. 47107; 47129. An airport may choose either a residual fee methodology, a compensatory fee methodology, or any combination of the two. Section 47129(a)(2).[10]

The revenue generated by the airport may be used, in a non-discriminatory manner, to foster competition at the airport by advertising new air service and by funding cooperative advertising for an airline's services.[11] Airport management can offer air carrier fee discounts or waivers during promotional periods, also.

Each air carrier using the airport (whether as a tenant, non-tenant or subtenant of an air carrier tenant) must be subject to substantially similar rules, conditions, and charges as

[8] *Federal Aviation Administration v. Arapahoe County Public Airport Authority*, FAA Order No. 1999-1, Feb. 18, 1999 (pending appeal, *sub nom., Arapahoe County Public Airport Authority v. Federal Aviation Administration*, Case No. 99-9508 (10th Cir.) But see *Arapahoe County Public Airport Authority v. Centennial Express Airlines, Inc.*, 956 P.2d 587 (S. Ct. Colo. 1998).

[9] Legislative history of the provision indicates Congressional intent that "…it cannot take an unreasonable or inordinate amount of time…" to achieve status as a tenant, if a carrier so desires. 122 *Cong. Rec.* S4306 (daily ed., Mar. 25, 1976), Statement of Sen. Cannon.

[10] Whether or not fees must be cost-based is an issue currently under our consideration in Docket No. 29303, Advance Notice of Proposed Policy Regarding Airport Rates and Charges, 63 Federal Register 43228 (August 12, 1998) . Our previously issued Final Policy Regarding Rates and Charges, 61 Federal Register 31994 (June 21, 1996), was substantially vacated by a three-judge panel of the D.C. Circuit Court of Appeals *in Air Transport Association of America v. Department of Transportation*, 119 F.3d 38, 43 (D.C. Cir. 1997), as amended on rehearing, 129 F.3d 625 (D.C. Cir.1997). At the court's suggestion we are now examining, among other issues, the extent of an airport's monopoly power over airline fees.

[11] Department of Transportation/Federal Aviation Administration *Policy and Procedures Concerning the Use of Airport Revenue*, 64 Federal Register 7696 (February 16, 1999), §§ V.A.2. and VI. B. 12, petition for review pending, sub nom. *City of Los Angeles v. FAA*, Docket No. 99-70452 (9th Cir. 1999).

are applicable to similarly situated users. The airport operator may make reasonable classifications such as tenants or non-tenants and signatory and non-signatory carriers. The airport may also impose different charges, regulations, and conditions on non-tenants, on the one hand, and tenants, on the other hand (or signatory vs. non-signatory carriers), as long as these charges, regulations, and conditions are reasonable and the classifications are reasonably applied. 49 U.S.C. 47107(a)(2)(B).

Classification or status as tenant or signatory shall not be unreasonably withheld by the airport, however, provided an air carrier assumes obligations substantially similar to those already imposed on air carriers in such classification or status. 49 U.S.C. 47107(a)(2), (3). Grant assurance 22.e, Order 5190.6A, ¶4-14a(1). An air carrier that is willing to sign a contract, assume appropriate financial obligations, and become a signatory carrier with the airport should not be subject to unreasonable delays or conditions for classification as a signatory carrier.

It is clear from the statute and grant assurances that an airport operator must provide reasonable access on reasonable terms and conditions not only to tenants, but to subtenants and non-tenants as well. When a carrier will be operating at the airport as a subtenant, the airport operator is responsible for assuring that terms and conditions in the sublease provisions are reasonable and that similar users are subject to substantially comparable charges.[12]

Approximately one-third of the large hub airports responding to the ACI-NA survey question regarding subleasing reported that they have not actively reviewed sublease fees and terms.[13] Some commented that the marketplace adequately disciplines the fees. It has been asserted by some new entrants that there are sublease fee differentials at the same airport. Also, some airports do not assist new entrants in gaining access to sublease facilities. Further, subtenants may be required to undergo inconvenient relocation at the discretion of the incumbent tenant. At other airports, new entrants have complained that they were subject to unreasonable conditions, such as requirements to use the leasing airline's ground personnel or to contract for a bundled package of services. An airport operator has the responsibility to determine whether these terms and conditions are reasonable and non-discriminatory, including whether they unjustly or adversely affect a new entrant's operations and ability to remain competitive.

[12]In addition, under the Chicago Convention, fees must be reasonable, cost-based, and non-discriminatory when applied to foreign air carriers.

[13]The 1998 ACI-NA Gate Availablity/PFC survey question on was: "Has your airport invoked this authority (review/approve sublease)? Yes/No. Describe the airlines involved, when, and the outcome."

The grant assurances permit the airport operator to charge non-signatory carriers higher landing fees than those of signatory carriers due to the relatively uncertain service by the non-signatory carrier, potentially causing fluctuations in the airport's revenues and requiring higher reserves and more intensive administrative costs. Carriers also may choose non-signatory status rather than take on the obligation of a long-term commitment, due to marketing decisions, economic or traffic uncertainties, or otherwise.[14] Signatory carriers generally obligate themselves to the unexpired portion of the master use and lease agreement, agree to service the airport's general airport revenue bonds, and/or furnish a deposit or bond. In return, signatories pay lower landing fees, may receive a credit of concession or other airport revenue, and may have approval power over future capital construction. Our study identified five large hub airports that no longer grant signatory status: Phoenix's leases are on a monthly basis; San Francisco offers only permits except for its pre-existing 15 signatory carriers; Atlanta's recently adopted management policy is not to offer signatory status; Miami has not granted signatory status since 1989; and Boston-Logan does not have a signatory agreement relating to airfield use.

Carriers that intend to establish a permanent market presence, however, generally prefer signatory status, if available. The grant assurances prohibit an airport from unreasonably withholding classification or status as a signatory or tenant if an air carrier assumes obligations substantially similar to those of a signatory or a tenant. We have found that some large hub airports require carriers to commit to certain conditions such as operating a minimum number of flights and/or leasing certain space, in order to obtain signatory status. Newark and LaGuardia airports have refused signatory status to airlines whose operation levels did not meet the minimum standards, and Baltimore-Washington International refused signatory status to a carrier that did not meet the airport's policy of leasing a full complement of space. Additionally, lack of gate space prevented at least one new entrant from attaining timely signatory status at Detroit despite its willingness to otherwise assume the obligations of a signatory.

Airports must be careful not to unreasonably withhold signatory status to a new entrant that is willing and qualified to assume signatory obligations but whose ability to meet them is hindered by airport policy or facility shortage. For example, an airport may reconsider its minimum operating standards to see if they are too high and constructively prevent a new entrant from attaining signatory status.[15] Additionally, the lack of

[14]*See* Policy Regarding Airport Rates and Charges, 61 FR 31994, 32015, discussion of *Charges to Non-Signatory Carriers*, para. 3.1.1 (June 21, 1996). The United States Court of Appeals for the District of Columbia Circuit did not vacate this DOT/FAA policy provision in its decision in *Air Transport Association,* 119 F. 3d 38, *supra, n. 10*.

[15]FAA's *Airport Compliance Requirements* Order 5190.6A encourages airport owners to develop and publish minimum standards to be met by commercial operators in advance of negotiations with any prospective tenant or

a gate -- through no fault of the new entrant's -- cannot, by itself, be used as an excuse for refusing signatory-type status to a new entrant willing to assume such obligations.[16] In this type of situation, the airport management can impose alternative obligations on the new entrant.

PROHIBITION AGAINST EXCLUSIVE RIGHTS

An airport operator must treat new entrants in a similar fashion to incumbents and not impose standards that impede their ability to compete. An airport is prohibited from granting an "exclusive right" to conduct a particular aeronautical activity. 49 U.S.C. 40103(e) and 47107(a)(4); Grant assurance 23, 62 FR 29761 (1997).

In 1941, then Attorney General Robert H. Jackson explained the purpose of Section 303 of the Civil Aeronautics Act, the predecessor to 49 U.S.C. 40103(e), was to promote and encourage competition in the provision of air services:

> "[L]egislative history … shows that the purpose of the provision is to prohibit monopolies and combinations in restraint of trade or commerce and to promote and encourage competition in civil aeronautics in accordance with the policy of the act… [but this] does not mean that in administering the provisions of section 303 it is necessary to permit such competition as would endanger the safety of the public and of persons engaged in air commerce."[17]

This covenant enjoins the airport operator from granting any special privilege or monopoly in the use of public use airport facilities. FAA Order 5190.6A, ¶3-1. The prohibition against exclusive rights applies whether the grant of an exclusive right results from an express agreement, from the imposition of unreasonable standards or requirements, or by any other means. The concern is that an exclusive right limits the usefulness of the airport and deprives the public of the benefits of a competitive airport. FAA Advisory Circular 150/5190-2A, ¶ 7. (1972). Exclusive-use, long-term leases do not contravene the prohibition against grant of an exclusive right when there is no

operator. ¶3-17a., *Use of Minimum Standards***.** FAA will make an official determination on proposed minimum standards "…only when the effect of a standard denies access to a public-use airport, and the determination should be limited to a judgment as to whether failure to meet the qualifications of the standard is a reasonable basis for such denial or the standard is an attempt to create an exclusive right." ¶3-17.b.

[16]49 U.S.C. 47107(a)(3).

[17]40 Op. A.G. 71 (1941) ; *Niswonger v. American Aviation, Inc.*, 411 F. Supp. 763, 766 (E.D. Tenn. 1975), aff'd 529 F.2d 526 (6th Cir. 1976); *City of Pompano Beach v. Federal Aviation Administration*, 774 F.2d 1529 at 1541 (11th Cir. 1985); *City of Dallas, supra*, n. 7, 371 F. Supp. at 1030; *Midway Airlines, supra*, n. 5, 584 F. Supp. at 441.

understanding, commitment, express agreement, or intent to exclude other reasonably qualified airlines. Order 5190.6A, ¶3-9a. Such leases, however, should be limited to only such space "as is demonstrably needed". Order 5190.6A, ¶ 3-9.c(2).[18]

An airport is permitted to establish minimum standards for engaging in commercial activity at the airport in order to ensure the safe and efficient operation of the airport. These conditions, however, must be fair, equal and not unjustly discriminatory. More specifically, they must be relevant to the proposed activity, reasonably attainable, and uniformly applied. FAA Order 5190.6A, ¶3-12. If the minimum standards affect access to an airport, FAA can determine whether failure to meet the qualifications is a reasonable basis or whether the standard results in an attempt to create an exclusive right. Further, manipulating the standards solely to protect the interest of an existing tenant or tenants is unacceptable. FAA Order 5190.1A, *Exclusive Rights* (1985).

It has been held that conduct effectively granting an exclusive right to an incumbent fixed base operator occurred where the airport did not offer a new enterprise lease terms (including length of lease, required improvements, sublease requirements, minimum standards, etc.) that enabled the new enterprise to be competitive with incumbents providing similar services.[19] For example, the airport had imposed financial obligations on the fixed base operator (FBO) that were not imposed upon or were more than those imposed by the leases between the airport and the incumbent FBOs (e.g., $500,000 investment for new entrant FBO versus $200,000 investment for others for a 30-year lease; $5,000 versus $0 deposit; higher rental rate for unimproved land; and requirement to comply with current and future minimum standards versus lock-in requirements to older minimum standards). The court found these provisions to be unjustly discriminatory because they were disadvantageous to the new entrant FBO, would impose an undue hardship upon its proposed business operation, and would render it non-competitive with the existing FBOs. The court held that there was no reasonable justification for the differences in the airport's treatment between the new entrant FBO and the incumbents.

Violations of the exclusive rights prohibition have also been found in Dallas' ban on service at Love Field by Southwest, a then-intrastate air service provider, and in Arapahoe County's ban on scheduled Part 135 service at Centennial Airport by Centennial Express.[20]

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[18] *Niswonger, Id.* (finding a violation of exclusive right prohibition because a fixed base operator had acquired control and exclusive use of more area of the airport than it reasonably needed or could be expected to use in conducting its business).

[19] *City of Pompano Beach v. Federal Aviation Administration*, 774 F.2d 1529 (11th Cir. 1985).

[20] *City of Dallas, supra,* n. 7*; Federal Aviation Administration v. Arapahoe County Public Airport Authority, supra,* n. 8.

FEDERAL PREEMPTION

Airport management's response to requests for access must not be contrary to the Airline Deregulation Act, which relies on the marketplace, not state and local governments, to regulate airline rates, routes, and services. Denial of access or delay in approving access can result in the airport operator's unlawfully affecting a carrier's routes by impeding access to an airport market. This can have the anti-competitive effects of foreclosing entry and impeding the public benefits of a competitive air transportation system.

The Airline Deregulation Act of 1978 placed "maximum reliance on competitive market forces and on actual and potential competition" consistent with the public safety, for the provision of the national air transportation system. 49 U.S.C. 40101(a)(6). To prevent state and local governments from impeding competitive market forces in the airline industry, the act prohibited a state or political subdivision from enacting or enforcing any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of air carriers providing air transportation. 49 U.S.C. 41713(b)(1); 49 CFR 399.110(a) (1997).[21]

Additionally, it is the policy of the United States to carry out the airport and airway program to foster competition, consistent with the Airline Deregulation Act's reliance on the marketplace to provide the needed air transportation system and to encourage new carrier entry into air transportation markets to ensure a more effective and competitive airline industry. 49 U.S.C. 47101(d).

An airport operator's denial of access to, or untimely grant of access to, a carrier can be tantamount to a prohibited regulation of an air carrier's routes. For example, FAA has found that Arapahoe County's delay in adopting standards for and eventual ban on Part 135 scheduled service was an unlawful regulation of air carrier routes because the ban prohibited regular operations over any route involving Centennial Airport. Moreover, the ban was found to create an "inherent conflict with federal law, which permits an air carrier holding authority to provide scheduled passenger service to provide that service to any airport in the United States."[22]

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[21] *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374 (1992).

[22] Director's Determination, issued August 21, 1998; affirmed in FAA Order No. 1999-1, *supra*, n. 8.

Additionally, the Department held certain locally proposed restrictions at Dallas' Love Field are inconsistent with the "Shelby Amendment"[23] and constitute an impermissible regulation of airline routes.[24] Further, these restrictions are inconsistent with the purpose of the Airline Deregulation Act, which is intended to benefit the public by providing airlines with the freedom to choose which markets they will serve in response to market demands.

An improper regulation of rates, routes, and services was tentatively found in *New York Airlines, Inc. v. Dukes County*, 623 F. Supp. 1435 (D. Mass. 1985), in a decision partially denying the airport's motion to dismiss the airline's claims. Martha's Vineyard Airport had denied access to New York Airlines on the grounds that the carrier's proposed service would be unnecessarily redundant of the service of the incumbent carrier, Provincetown-Boston Airways. New York Airlines also alleged that the airport commission was concerned about the potential effect of its proposed service on competition with other carriers. The court determined that considerations of adequacy of existing service at the airport and the potential competitive effect of the new entrant's proposed service on the incumbent were impermissible local concerns since they related to "rates, routes, and services" -- matters within the federal domain.

AIRPORT PROPRIETARY POWERS

An airport operator does have limited proprietary powers to impose reasonable and non-discriminatory restrictions on the use of an airport. These powers are exceptions to its general obligation to allow use by all types, kinds, and classes of aeronautical activity and the general public, and to the general prohibition against grant of exclusive rights.[25] They are recognized in 49 U.S.C. 41713(b)(3) as an exception to the rule generally prohibiting a state or political subdivision from regulating air carrier rates, routes, or services.

An airport's exercise of its proprietary powers must be reasonable, nondiscriminatory, not unduly burdensome to interstate commerce, and designed to accomplish a legitimate state objective in a manner that does not conflict with the Airline Deregulation Act and related statutes. 14 CFR 399.110 (1997).

[23]The Shelby Amendment is contained in section 337 of the Department of Transportation and Related Agencies Appropriations Act, 1998, P.L. No. 105-66, 111 Stat. 1425, 1447 (October 27, 1997).

[24]*Love Field Service Interpretation Proceeding*, *supra*, n.4.

[25]The Attorney General interpreting the legislative history to the 1938 exclusive rights prohibition indicated that an airport proprietor could exercise its proprietary prerogative to protect safety at the airport. (See n. 17, *supra*).

The airport operator may restrict aeronautical use under certain conditions, subject to FAA review. Grant assurance 22h recognizes the right of the airport operator to establish uniform conditions necessary for the safe and efficient operation of the airport. Grant assurance 22i allows the sponsor to prohibit or limit any given type, kind, or class of aeronautical use of the airport if that action is necessary for the safe operation of the airport or necessary to serve the civil aviation needs of the public. As explained in Order 5190.6A, an airport operator may control the use of the airport so as to eliminate hazards to aircraft and to people on the ground. ¶4-7b, 4-8a. Restrictions on access to promote safe and efficient operations must be well justified and not serve as a proxy for discriminatory or unreasonable treatment of air carriers.[26] Further, potential economic harm to another airport would not justify an access restriction.[27]

In accordance with the Airport Noise and Capacity Act of 1990 (49 U.S.C. 47521 *et seq.*; 14 CFR Part 161), an airport operator may impose restrictions on Stage 3 aircraft to alleviate demonstrated noise and environmental impacts, subject to FAA approval. Any such restrictions must (1) be reasonably consistent with reducing non-compatibility of land uses around the airport; (2) not create an undue burden on interstate or foreign commerce; (3) not be unjustly discriminatory; (4) not derogate safety or adversely affect the safe and efficient use of airspace; (5) meet both local needs and the needs of the national air transportation system to the extent practicable; and (6) not adversely affect other FAA laws or powers. Order 5190.6A, ¶4-8f. While not subject to FAA approval, restrictions on Stage 2 aircraft must undergo an analysis and public review process that applies the same criteria. 14 CFR 161.305.

An airport operator may regulate an airport's noise levels only in a "reasonable, nonarbitrary and non-discriminatory manner" and only when justified.[28]

An airport operator may also impose certain use restrictions for reasons of congestion. Where the volume of air traffic is approaching or exceeding the maximum practical

[26] *Federal Aviation Administration v. Arapahoe County Public Airport Authority, supra*, n. 4.

[27] *Love Field Service Interpretation, supra*, n. 4.

[28] *City and County of San Francisco v. Federal Aviation Administration*, 942 F.2d 1391 (9th Cir. 1991), finding discriminatory city exclusion of certain aircraft since the city permitted operation of similarly noisy aircraft; *Santa Monica Airport Ass'n v. City of Santa Monica*, 481 F. Supp. 927, 938-39 (D.C. Cal. 1979), *aff'd*, 659 F.2d 100 (9th Cir. 1981); *United States v. County of Westchester*, 571 F. Supp. 786, 797 (S.D.N.Y. 1983), enjoining all-night curfew imposed regardless of accompanying emitted noise as arbitrary, unreasonable, discriminatory and overbroad; *British Airways Bd. v. Port Authority of N.Y. and N.J.*, 558 F2d. 75 (2nd Cir.1977); 564 F.2d 1002 (2nd Cir. 1977), enjoining the proprietor from further delaying access to its airport by a supersonic plane when it was shown that the plane satisfied the proprietor's decibel-based noise standard.

capacity of the airport, an airport owner that owns a multi-airport system may designate a certain airport in a multiple airport system for use by a particular class or classes of aircraft. The owner of the airport system must be able to assure that all classes of aeronautical needs can be fully accommodated within the system without unreasonable penalties to any class and that the restriction is fully supportable as being beneficial to overall system capacity. Order 5190.6A, ¶4-8d.

The Port Authority of New York and New Jersey justified a perimeter rule at LaGuardia to force airlines to use John F. Kennedy International Airport, another Port Authority airport, for all nonstop long-haul flights. It showed that LaGuardia Airport was operating at or near capacity, creating delays and congestion, and that this rule would alleviate the problem.[29] A showing of severe congestion justified a reasonable delay (a matter of several months), but not a ban, on new entrant access.[30]

UNFAIR AIRLINE COMPETITION

The Department has the authority to prohibit anti-competitive airline practices. 49 U.S.C. 41712.[31] This power covers unfair methods of competition by airlines, including violations of antitrust laws or antitrust principles derived from those laws.[32] The antitrust statute applicable to the airport practices discussed here is the Sherman Act of 1890, codified at 15 U.S.C. 1 *et. seq.* Section 1 of the statute prohibits contracts in restraint of trade, interpreted as those that have the purpose of restricting competition or have a significant tendency to reduce competition. Section 2 of the Sherman Act prohibits monopolization and attempted monopolization, but not if the firm has obtained monopoly power for legitimate reasons.[33] The Department will not apply

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[29] *Western Air Lines v. Port Authority of N.Y. and N.J.*, 658 F. Supp. 952 (S.D.N.Y. 1986), *aff'd*, 817 F.2d 222(2nd Cir. 1987), *cert. denied*, 485 U.S. 1006.

[30] *Midway Airlines v. County of Westchester, supra*, n. 3.

[31] Unfair and deceptive practices and unfair methods of competition. "On the initiative of the Secretary of Transportation…the Secretary may investigate and decide whether an air carrier...has been or is engaged in an unfair or deceptive practice or an unfair method of competition in air transportation... If the Secretary, after notice and an opportunity for a hearing, finds that an air carrier...is engaged in an...unfair method of competition, the Secretary shall order the air carrier...to stop the practice or method."

[32] *See, e.g., United Airlines v. Civil Aeronautics Board,* 766 F.2d 1107 (7th Cir. 1985).

[33] Airport practices, even if they restrain competition, would be immunized from antitrust liability under the "state action" doctrine, which usually shields state and local governments from antitrust liability. The Supreme Court, in *Parker v. Brown* , 317 U.S. 341 (1943), held that federalism and state sovereignty principles immunize anti-competitive restraints imposed by states as an act of government from the Sherman Act, (15 U.S.C. 1 *et. seq.).*

antirust principles to airport practices, however, since its authority under 49 U.S.C. 41712 does not extend to potentially anti-competitive airport practices.

The Department can apply these antitrust principles to airline practices at airports where the airline practice is found to be an unfair method of competition. For example, the "essential facilities" doctrine of Section 2 of the Sherman Act could be applied to compel dominant airlines to surrender control of airport gates. The essential facilities doctrine requires a firm controlling a facility essential for competition to make that facility available to competitors when four tests are met:

(1) control of the essential facility by a monopolist;

(2) a competitor's inability practically or reasonably to duplicate the essential facility;

(3) the denial of use of the facility to a competitor; and

(4) the feasibility of providing the facility.[34]

Accordingly, the essential facilities doctrine could justify requiring an airline controlling a monopoly share of gates at an airport to share or sublease its underutilized gates to competing airlines unable to obtain their own facilities.

Another example of a violation of an antitrust principle could involve sublease tying practices by airlines. An airline's insistence on tying a ground handling contract (or a purchase of other services) with its sublease of gates raises the issue of violation of section 1 of the Sherman Act. Unless there is a legitimate business reason for insisting on the tie, a tying contract may be considered a violation of section 1 if the contract involves two separate products or services, the sale of one is conditioned on the purchase of the other, the seller has sufficient economic power in the market for the tying product or service to enable it to restrain trade in the market for the tied product, and a

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Antitrust suits against publicly-owned airports have been dismissed under the state action doctrine. *See Allright Colorado v. City and County of Denver* , 937 F. 2d 1502 (10th Cir. 1991); *Interface Group v. Massachusetts Port Authority*, 816 F.2d 9 (1st Cir. 1987) (Breyer, J.); *Independent Taxicab Drivers' Employees v. Greater Houston Transportation Co.*, 760 F.2d 607 (5th Cir. 1987); *Commuter Transportation Systems v. Hillsborough County Aviation Authority*, 801 F.2d 1286 (11th Cir. 1986).

[34] *MCI Communications Corp. v. American Telephone & Telegraph Co*., 708 F.2d 1081, 1132-33 (7th Cir. 1983) (upholding a jury verdict finding that AT&T violated section 2 of the Sherman Act when it refused to interconnect MCI with the local distribution facilities of the Bell operating companies). See also, *Delaware & Hudson Ry. v. Consolidated Rail Corp.*, 902 F. 2d 174, 179-180 (2d Cir. 1990), *cert. denied* , 111 S. Ct. 2041 (a long-haul railroad would violate section 2 if it denied a competing railroad access on reasonable terms to its short-haul tracks).

not insubstantial amount of commerce in the tied product or service is affected.[35] Consequently, the airline tenant's tying of subleased gates to the use of the tenant's ground handling services may violate section 1 if (1) there is no legitimate business reason for insisting on the tie, (2) the tenant controlled a substantial majority of gates at the airport, and (3) the tying arrangement affected a significant amount of commerce, such as ground handling.

The exercise of MII clauses may raise additional antitrust concerns since a veto of proposed construction may prevent the building of additional facilities for potential competitors. An airline with market power at an airport that blocks the construction of facilities for competitors merely to maintain its own monopoly power (and not justified for legitimate business reasons) may engage in conduct unlawful under section 2 of the Sherman Act. Its refusal to allow the construction of facilities for competitors would be comparable to its refusal to surrender gates unneeded for its own operations.

Additionally, unreasonable exercise of MII power by two or more airlines to block a capital project for a competitor could be unlawful under section 1 of the Sherman Act. While competitors are permitted to form joint ventures,[36] the members have a limited ability to block other competitors from joining.[37] The veto by two or more airlines could be unlawful if the MII action meant that the airport would be unable to satisfy the demand of other airlines for facilities and if the MII carriers had no legitimate justification for their action.

[35] *Fortner Enterprises v. U.S. Steel Corp.*, 394 U.S. 495, 498-499 (1969).

[36] *Northwest Wholesale Stationers v. Pacific Stationery & Printing Co.*, 472 U.S. 284, 295 (1985).

[37] *United States v. Terminal Railway Ass'n*, 224 U.S. 383 (1912) (competing railroads had to be admitted into a combination formed by several railroads that had acquired control of all of the passages into and out of St. Louis where such passages could not be duplicated). *Associated Press v. United States*, 326 U.S. 1 (1945) (the Associated Press could not exclude prospective members from its pooled news service merely because they competed with a member newspaper).

CHAPTER 3: AIRPORT ACCESS AND ITS EFFECTS ON AIRLINE COMPETITION

Providing airport access to new entrants and to carriers expanding their services is of crucial importance to maintaining airline competition. Yet, gaining access at some major carrier connecting hubs has been difficult and costly for new entrants. Many airports have adopted lease and management practices that may effectively cede control over their airport facilities to the dominant carrier. This transfer of authority has been especially evident in the administration of long-term, exclusive-use lease agreements at large commercial hub airports. These arrangements give incumbent carriers the right to the facilities regardless of their gate usage, and to decide on sublease terms and conditions as well as to whom to sublet, if at all. Thus, limitations on airport terminal access may be a function of airport lease and management practices, including the preference of incumbent airlines to have maximum control of their gates.

Results of the ACI-NA survey indicate a decline in the percentage of exclusive-use gate leases at 15 large hub airports, from 63 percent of gates in the 1992 reporting period to a projected percentage of just under 40 percent of gates in 2004. Conversely, preferential-use gates have become more prevalent, from about 28 percent of gates in 1992 to a projected percentage of 45 percent in 2004. Reliance on the PFC program as an accepted method to finance gates represents a major reason for the increase in preferential-use gate leases. Airports with preferential or common-use gate arrangements state that it is easier to facilitate access for new entrants.

Financing arrangements giving signatory airlines the power to veto or delay capital improvement projects through the exercise of MII clauses have had some direct effects on airport construction planning. The subject projects eventually were either partially or totally constructed, however, using PFCs, tenant financing, or eventual signatory carrier financing. Results of the ACI-NA survey indicate that about two-thirds of the large and medium hub airports have MII clauses and that the MII clauses are prevalent at airports with residual or hybrid use and lease agreements.

Use of exclusive or preferential-use lease arrangements does not relieve the airport operator of the responsibility to make every reasonable effort to accommodate new entrants and carriers expanding operations. As discussed in Chapter 2, the reasonable access, economic nondiscrimination, and non-exclusive rights provisions in the federal statutes and airport grant assurances require the airport operator to assure reasonable access to the airport regardless of the existence of exclusive lease arrangements. Airport-air carrier use and lease agreements also recognize the primacy of the federal

law over rights granted an airline. Accordingly, airport management has various means by which to provide reasonable access to qualified requesting carriers at underused facilities, including leased facilities.

Until recently, the Department was not pro-active in facilitating efforts by new entrants to gain access to airports or in monitoring airports' compliance with the reasonable access assurance. We will need to be vigilant in assuring that airports meet their legal obligations to accommodate all qualified airlines.

ACCESS TO AIRPORTS IS CRITICAL TO AIRLINE COMPETITION

Maintaining a competitive airline industry is essential to preserving the benefits of deregulation. Competition can take many forms, but it is clear that an airline attempting to enter a market cannot compete successfully if it does not have access to essential airport facilities and services on competitive terms.

Lack of Competition Can Result In Fare Premiums

For at least a decade, studies have shown that fares in local markets at connecting hubs, dominated by one major airline, are substantially higher than comparable markets that do not involve a dominated hub airport.[1] DOT has updated its hub premium calculations several times, most recently for 1997. At certain airports (see Table 3.1, next page), these updates show that hub premiums are very high, especially at cities where significant competition from low-fare airlines has not made inroads.

By contrast, at connecting hub airports where Southwest and other low-fare carriers have been able to gain significant access, fare levels are much more moderate. Delta's Atlanta hub, which in 1988 had a hub premium of 47 percent, had a 20 percent premium in 1997 due to low-fare competition primarily by AirTran Airlines in 24 markets. Average fares at Delta's Salt Lake City hub were 21 percent higher than comparable non-hub markets in 1988. In 1997, with Southwest competing in 28 local markets, average fares were actually 15 percent below comparable non-hub markets.

[1] Borenstein, S., 1989, *Hubs and High Fares: Airport Dominance and Market Power in the U.S. Airline Industry*. *Rand Journal of Economics*, Vol. 20, No. 3, Autumn, pp. 344-365; DOT 1990, *Secretary's Task Force on Competition in the U.S. Domestic Airline Industry*; Transportation Research Board, National Research Council, Special Report 230, *Winds of Change: Domestic Air Transport Since Deregulation*, 1991.

Table 3.1
Hub Premiums and Low-Fare Competition

Hub Airport	1988 Hub Premium (%)	1997 Hub Premium (%)	1997 Total Markets	1997 Low-Fare Markets (a)
Atlanta	47.1%	20.2%	155	24
Charlotte	33.6	58.9	91	0
Cincinnati	44.9	66.8	68	1
Denver	-3.6	10.3	138	17
Detroit	2.2	17.6	123	28
Memphis	32.9	35.7	76	6
Minneapolis	23.0	43.7	123	3
Pittsburgh	12.4	56.6	97	1
Salt Lake City	21.1	-15.1	90	28
St. Louis	23.9	13.8	107	40

(a): A low-fare market is any market in which a low-fare airline carries at least 10% of the market. For purposes of this table, low-fare carriers include Air South, AirTran, American Trans Air, Carnival, Frontier, Kiwi, Pro Air, Reno, Southwest, Spirit, Tower, Vanguard, and Western Pacific. Low-fare affiliates of the major carriers are not included in the designation of low-fare markets above because at this time there is no way to differentiate the low-fare affiliate from the mainline carrier operations in the ticket fare database.
Source: DOT

Irrespective of how overall average fares compare from city to city, new low-fare competition on spoke routes typically has a major effect on airfares and passenger volumes. In the absence of a low-fare competitor, the pricing practices of major carriers, including limited seat availability at low fares, results in a very large, low-fare demand sector that goes unserved. This is an important public policy consideration for ensuring that low-fare competitors have access to hub markets.

It is not just the hub cities that suffer from high fares. Travelers pay very high fares at spoke cities in the East and Midwest that have dominated hubs as their primary destinations, as illustrated in Table 3.2 . In 1997, Rochester, New York, and Richmond, Virginia, had fare premiums of 42 percent and 35 percent, respectively, while the premium

Table 3.2
Some Examples of Fare Premiums at Smaller Spoke Cities

Airport	Total Markets	Premium (%)
Buffalo, NY	56	18.2%
Burlington, VT	26	11.9
Des Moines, IA	42	21.2
Richmond, VA	56	35.4
Rochester, NY	49	42.2

Source: DOT

in Des Moines, Iowa, amounted to 21 percent. Such high fares have important negative economic consequences for these cities in their ability to retain and attract businesses.[2]

Connecting hub airports provide individual major airlines that dominate such airports enormous competitive advantages, particularly in markets to and from the hub cities. Flow traffic allows service-frequency advantages in local markets, frequent-flyer programs help to lock in local passengers to the dominant carrier, commission override programs provide incentives to travel agents to sell on the dominant carrier, and computer reservation systems provide advantages to the network carrier. All of these factors raise economic barriers to entry and allow a dominant air carrier to charge higher fares. But none of these advantages presents an absolute barrier to entry, as is the case when a new entrant cannot obtain access to gates, ticket counters, and other airport facilities and services needed to deliver a viable competitive service.

New Entrants Need Access to Major Cities and The Full Array of Airport Facilities to Mount Effective Competitive Service

New entrant airlines must have access to major traffic centers in order to fully develop their operating systems. Their access to major carrier connecting hubs in the interior United States, such as Atlanta, Charlotte, Denver, Detroit, Pittsburgh, and Minneapolis, and major coastal destination cities, such as New York, Newark, Boston, and Los Angeles, are necessary to establish viable new airlines. High fares at many of these cities mean not only that time-sensitive travelers pay high fares, but also that a large number of price-sensitive passengers are not offered the option of affordable air service. Studies have shown that local city-pair traffic doubles or triples when new entrant, low-fare competition enters a market.[3] Carriers with low-fare strategies have told DOT staff that access to major cities is essential if they are to be successful at sustaining operations.

Most of the informal complaints we receive about the difficulty of obtaining competitive access to airports involve major cities, especially those that serve as primary connecting hubs for major network carriers. On the one hand, this tendency is understandable. Connecting hubs do support high-frequency service to scores of cities by the hubbing carriers. To a significant extent, it is necessary for the hubbing carrier to have substantial facilities at an airport, since it needs to operate a large number of flights during

[2] See, for example, the discussion of economic impacts of high fares on Rochester, New York summarized in DOT 1999, *Aviation in the 21st Century* (forthcoming).

[3] See *The Low Cost Airline Service Revolution*, April 1996, http;//OSTPXWEB.DOT.GOV/DomAv/1cs.pdf; and *Competition in the U.S. Domestic Airline Industry: The Need for a Policy to Prevent Unfair Practices*, Revised May 1999, http://Ostpxweb.dot.gov/aviation/DomAv/comp.rev.pdf.

incoming and outgoing banks of flights to optimize convenient connections for passengers. However, to the extent a hubbing air carrier controls the availability of airport facilities and other services through financing, leasing, or other arrangements, it has little incentive to share these facilities, especially with airlines that may be aggressive price competitors.

During the course of our study, new entrant carriers repeatedly told us that, in order to plan and operate new services and to mount a competitive effort, they need timely and predictable access to a gate or gates on the same concourse with good jetways and aprons, ticket-counter positions with baggage belts, and the ability to contract for baggage handlers, caterers, maintenance personnel, cleaning services, and office space, among other things. While some of these facilities and services may be available, they may only be available at very high rates or may take months to acquire by contract. Beyond that, the new entrant carriers noted the need for the opportunity to expand their operations in order to become effective competitors.

New entrant carriers also told us that, in most cases, they achieved access to an airport, but at a cost that put them at a competitive disadvantage. For example, one carrier noted that it was unable to become a signatory airline at an airport and was required to pay high landing fees. To become a signatory carrier, the new entrant was required to lease a gate. Even though the carrier was prepared to do so, it was told none was available. A second carrier found itself paying 60 percent of the terminal's payment with 25 percent of its usage because payment was based on a ratio of flights/departures/enplanements rather than square footage. In this airline's view, it was being penalized for making efficient use of its gate space. A third carrier noted the cost and inconvenience of having to engage in separate agreements from different leaseholders for ticket and gate space while "similarly situated" carriers that were not competing with the carrier leasing the facilities paid roughly one-half that of the new entrant. This same new entrant also noted that, because its lease was about to expire and it could not find other facilities, it was forced to use the international terminal to operate some of its flights, but was subject to a "head" fee for the use of the international terminal even though it would only be offering domestic services not requiring customs or immigration services.

CONTRACTUAL ARRANGEMENTS BETWEEN AIRPORTS AND AIRLINES CAN INFLUENCE COMPETITION

Contractual agreements between airports and airlines specify air carrier usage of an airport's facility. Gate leasing arrangements, MII contractual clauses, subleasing requirements, and ground handling agreements have all been cited by various studies

as barriers to entry that affect a new entrant's ability to gain reasonable access to an airport.

Long-term leasing arrangements can influence competition by ensuring continued access to incumbent carriers but making access for new entrants uncertain. Particularly at airports with a high percentage of exclusively leased gates, incumbent carriers often have the practical authority to determine gate usage, subleasing arrangements, and ground handling. A new entrant negotiating exclusively with the dominant incumbent carrier tenants can encounter significant difficulties gaining timely access to needed gates and facilities on reasonable terms and conditions. Preferential-use gates, by comparison, give the airport operator the power to require the tenant to share the gate under specified conditions. Airport-controlled common-use gates give the airport operator more flexibility to assign gates and to facilitate entry.

Gate Availability

Table 3.3 on the next page shows reported peak-period gate use compared to the reported number of gates for 23 large hub airports that responded to the 1998 ACI-NA survey. Reported peak-hour gate use is the number of aircraft movements on average during the busiest consecutive three-hour period in a 24-hour span during the busiest peak month. Twelve of the large hub airports listed in the table reported that approximately 10 percent or more of their gates were unused during their peak periods. Based on data from the ACI-NA survey, it appears that gates are available at many of the Nation's busiest airports during peak periods. Indeed, limitations on airport access may be as much a function of the current airport-airline use and lease agreement as it is a matter of physical constraints, although some airports, such as Phoenix's Sky Harbor International, do face physical constraints that limit their ability to accommodate new airline services. The key to determining the extent gates are available even at reported gate-constrained airports, particularly those with exclusive-use lease arrangements, is for airport managers to monitor gate use.

Table 3.3
Total Available Gate Capacity at Large Hub Airports, 1998 (a)

Airport	Reported Gates	Reported Peak Hour Gate Use	Share of Peak Hour Unused
Atlanta	171	171	0%
Baltimore-Washington	75	40	47%
Boston	93	88	5%
Chicago O'Hare	175	175	0%
Cincinnati	120	105	13%
Dallas-Fort Worth	120	115	4%
Houston	89	70	21%
Las Vegas	93	69	26%
Los Angeles	146	90	38%
Miami	121	114	6%
New York Kennedy	113	102	10%
New York LaGuardia	72	65	10%
Newark	94	94	0%
Orlando	79	60	24%
Phoenix	84	84	1%
Pittsburgh	100	85	15%
Reagan Washington National	44	44	0%
Salt Lake City	72	48	33%
San Diego	45	41	9%
San Francisco	75	75	0%
Seattle	76	70	8%
St. Louis	84	76	10%
Tampa	60	37	38%
Total	**2,201**	**1,917**	**13%**

(a): Table excludes six large hub airports that either did not respond to 1998 ACI-NA survey regarding gate usage or whose responses were not usable.
Source: 1998 AC-NA survey.

Gate Leasing Arrangements

How an airport's gates and related facilities are to be used depends on whether the contractual agreement specifies either an exclusive, preferential, or common-use arrangement. Agreements vary by length of lease and type of control exerted by the airport. Contractual arrangements may differ by gate elements and also by gate.[4] For

[4] Gate elements include aircraft parking facilities and passenger loading and unloading facilities, such as loading bridges, mobile lounges, and so forth. Other gate elements necessary to provide passenger service include passenger-hold rooms, check-in facilities, baggage claim facilities, aircraft servicing, and aircraft handling.

example, many airports lease passenger hold rooms, aircraft parking positions, and loading bridges on an exclusive or preferential-use basis and arrange for baggage claim activities on a common-use basis. Miami leases ticket counter and airline operational and administrative space on a monthly basis while it assigns gates on a daily basis.

Gate leasing arrangements at large and medium hub airports are summarized in Table 3.4 below. Appendix A describes gate leasing types for each of the large and medium hub airports that responded to the ACI-NA survey question.[5]

Table 3.4
Summary of Gate Usage Practices of Large and Medium Hub Airports

1992	Number of Airports	Exclusive-use gates	Preferential-use gates	Airport-controlled gates	1992 Total
Large hubs [6]	15	778	342	111	1,231
Percentages		63.2%	27.8%	9.0%	100.0%
Medium hubs [7]	15	151	213	71	435
Percentages		34.7%	49.0%	16.3%	100.0%
1998	**Number of airports**	**Exclusive-use gates**	**Preferential-use gates**	**Airport-controlled gates**	**1998 Total**
Large hubs	15	787	453	172	1,412
Percentages		55.7%	32.1%	12.2%	100.0%
Medium hubs	15	136	218	110	464
Percentages		29.3%	47.0%	23.7%	100.0%

[5] The ACI-NA survey question was: List the Number of Gates According to Type (Exclusive Use/Control; Shared Use/Control; Airport Use/Control, for the years 1992, 1998, and planned 2004.

[6] Although all of the 24 large hub airports responding to the ACI-NA survey submitted complete data to the question about distribution of gates by lease types for 1998, a number of airports did not respond uniformly to the question for the other two years. Detroit did not fully respond to the question about distribution of gates by lease types for 1992. Pittsburgh did not respond to the 1992 question. Detroit, Los Angeles, Phoenix, San Diego, and Tampa did not respond to the question about estimated distribution of gates by lease types for 2004, and Dallas/Ft. Worth, New York-Kennedy, and Miami did not respond fully to the question for 2004. Hence, in order to facilitate "apples-to-apples" comparisons, totals have been computed without the data for these nine airports.

[7] All of the 22 medium hub airports responding to the ACI-NA survey submitted complete data to the question about distribution of gates by lease types for 1998. Portland did not respond to the ACI survey questions about distribution of gates by lease types for 1992 or 2004. Five other medium hub airports, Kansas City, Nashville, Memphis, Omaha, and Ontario, did not respond to the question for 2004, and Oakland did not respond fully to the questions for 1992 and 2004. As with the large hub airports data, totals have been computed without the data for these seven airports.

Table 3.4, Cont…

2004 (Planned)	Number of airports	Exclusive-use gates	Preferential-use gates	Airport-controlled gates	2004 Total
Large hubs	15	608	711	208	1,527
Percentages		39.8%	46.6%	13.6%	100.0%
Medium hubs	15	164	238	142	544
Percentages		30.1%	43.8%	26.1%	100.0%

Source: 1998 ACI-NA survey.

The ACI-NA survey results show that exclusively leased gates were the predominant gate arrangement at 15 large commercial hub airports in 1992 and 1998, as depicted in Table 3.4. Preferential-use leases, however, are projected to become more prevalent by the year 2004 at large hub airports, as noted in the table. The number and percentages of airport-controlled gates have been increasing at large hub airports that responded to the ACI-NA survey question.

At those medium hub airports responding to the ACI-NA survey question, exclusively leased gates have amounted to and are projected to amount to approximately 30 percent of total gates. The percentage of preferential-leased gates has declined and is projected to decline somewhat, while the number and percentage of airport-controlled gates have markedly increased, a trend that is projected to continue in 2004.

For 1998, most of the 24 large hub airports responding to the ACI-NA survey have their gates mixed among exclusive use, preferential use, and airport controlled, with varying percentages of each type among airports.[8] (See Appendix A, Tables A-3 and A-4.) While 21 large hub airports use more than one gate leasing arrangement, only Reagan Washington National reported all preferential-use gates, and only Miami and Phoenix

[8] The airports responded to the following question in the ACI-NA survey device: "List the Number of Gates According to Type- Exclusive Use/ Shared Use/ Airport Use." The survey defined "Exclusive Use" as "Gates that typically are assigned exclusively to one airline for the duration of the lease with no provisions for shared use or airport control, except that the airport may still retain sublease review/approval." "Shared Use" was defined as: "Recognizing that there are numerous variations on shared use and/or control of gates, commonly referred to as "preferential use" and "common use", this category includes those types and variations of shared use and controlled gates. Shared use and control may be between one or more airlines and the airport or between two or more airlines. Also include gates [leased] on a preferential basis where the lease requires the [lessee] to allow another to use the facility to the extent such use does not interfere with the [lessee's] actual use of the facility. Also include gates where the preferential [lessee] has the 'right to bump' another carrier from the gates as the [lessee's] operational needs expand." "Airport Use/Control" is defined as "Gates that are totally under the control of the airport. These could be assigned on a temporary, per use basis or short term (e.g., 30 day) arrangement."

reported all airport-controlled gates.[9] There were a total of five large hub airports reporting a complete absence of exclusive-use gates: Baltimore-Washington International, Reagan Washington National, Miami, Phoenix; and Seattle). Of the 22 medium hub airports responding to the ACI-NA survey, 17 have their gates under at least two types of leasing agreements. Half of the medium hub airports (eleven) reported no exclusive-use arrangements, three airports have all preferential-use gates, and one has all airport-controlled gates. Milwaukee is the only airport with all exclusive-use gate leases. Tables B-1 and B-2, Appendix B, list the expiry date of each large and medium hub airport's use and lease agreement.

Exclusive-Use Contractual Agreements

Exclusive-use gate arrangements remain the predominant type of airport-air carrier rental agreement among large commercial hub airports. An exclusive-use lease typically assigns to one airline the right to use and occupy gates and facilities for a specified duration and the right to sublet or assign the facilities, conditioned on the prior written approval of the airport management.

As indicated in Table 3.4, the percentage of exclusive-use gates has been declining and will continue to decline. Over 55 percent of the gates (787 gates out of a calendar year 1998 reported total of 1,412 gates) are leased on an exclusive-use basis at the large hub airports responding to the ACI-NA survey question. In 1992, by contrast, exclusive-use gate arrangements had amounted to 63 percent (778 of a total of 1,231) of total gates. The projected percentage of exclusive-use gates for 2004 will be just under 40 percent (608 gates out of a forecast total of 1,527 gates).

Long-term, exclusive-use leases for gates and ancillary facilities have been criticized by the Department, GAO, and others as potential barriers to entry.[10] The concerns have rested on complaints by new entrant carriers that the incumbent airlines hoard gates, require substantial sublease premiums, offer access at less preferable times, force the

[9]Forty-seven of Miami's reported airport-controlled gates are under a use arrangement to American Airlines that is, in effect, an exclusive-use agreement.

[10]*Airline Deregulation*, GAO/RCED-99-92 (March 1999); *Airline Competition: Options for Addressing Financial and Competition Problems*, GAO/T-RCED-93-52, Statement of Kenneth M. Mead, at 16, encouraging the use of preferential-use, as opposed to exclusive-use, leases; *Airline Competition: Industry Operating and Marketing Practices Limit Market Entry*, GAO/RCED-90-147 (August 1990), at 40 concluding that "exclusively leased airport facilities, including gates, may represent a substantial barrier to entry at some airports;" *Secretary's Task Force on Competition in the U.S. Domestic Airline Industry*, February, 1990; *Winds of Change*, Transportation Research Board (1991); Hardaway, Robert, *Economics of Airport Regulation*, 20 Transp. L.J. 47, 54 (1991); Hardaway, Robert and Dempsey, Paul, *Airlines, Airports and Antitrust: A Proposed Strategy for Enhanced Competition*, 58 J. Air L. and Comm. 455, 480 et. seq. (1992).

new entrant to use the incumbent's ground personnel, or refuse to sublease altogether.[11] In other words, new entrants assert that these leases prevent the airport operator from providing cost-competitive access to unused or underused facilities.

Critics have referred to long-term, exclusive-use leases as "a willful anti-competitive practice because [particularly with MII clauses] they allow the incumbent airlines to maintain dominance by barring both access to existing gate space and construction of new airport facilities."[12] Also, if all airport gates are leased, new entrant carriers seeking signatory status can be frustrated.[13] The Minnesota State Planning Department recently issued a report concluding that long-term leases to Northwest did not promote competition at Minneapolis, and suggested, among other courses of action, prohibiting any airline from holding long-term leases on a specified percentage of gates.[14]

Some large hub airports commented that long-term leases "are not in the best interest of the airport or new entrants."[15] Chicago's comments recognized that the exclusive-use nature of the gates can "tie up underutilized gate capacity in the hands of the incumbent airline."[16]

Several airports have complained that long-term, exclusive-use leases prevented them from promptly recovering gates from bankrupt carriers. Additionally, financial analysts have expressed concern that long-term, exclusive-use leases to a dominant airline may be riskier to holders of airport debt than a long-term, preferential-use lease with the same carrier.[17]

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[11] *Id*., See also, GAO/T-RCED-89-66, Statement of Kenneth M. Mead, *Barriers to Competition in the Airline Industry*; GAO/RCED-97-4, *Barriers to Entry in the Airline Industry*.

[12] Note, *The Antitrust Implications of Airport Lease Restrictions*, 104 Harv. L. Rev. 548, 557 (1990).

[13] The Department/FAA's case study at Detroit revealed that new entrants were frustrated due to the lack of available gates at the airport.

[14] Minnesota Planning, *Flight Plan: Airline Competition in Minnesota*, St. Paul, Minnesota, March 1999, p. 19.

[15] Comments of Jerald K. Lee, Deputy Executive Director, Los Angeles World Airports, U.S. Department of Transportation Docket OST-98-4025, August 24, 1998.

[16] Comments of Mary Rose Loney, A.A.E., Commissioner, City of Chicago, Department of Aviation, U.S. Department of Transportation Docket OST-98-4025, December 30, 1998.

[17] Detroit's comments to the docket noted that "the County received favorable comments from the rating agencies on its new preferential use lease with Northwest;" our case study revealed that the bond rating agencies had expressed concern to Wayne County because so many of the airport's gates were tied up in exclusive leases to Northwest.

Some large airports visited by Task Force members explained that they were transitioning from long-term, exclusive-use leases as a means to gain control over gates. For example, Atlanta airport management requires average minimum utilization at some exclusive-use, long-term gates, allows only short-term ticket counter leases. Similarly, San Jose is transitioning to month-to-month agreements for carriers as its current long-term leases expire.

Some airports support long-term, exclusive-use lease arrangements, since they historically relied on the backing of a specific airline tenant to finance the construction of new and improved facilities.[18] The Air Transport Association defends long-term leasing practices as providing assurance to carriers who make substantial financial commitments that they will be able to use specific facilities over the long term.[19] Similarly, the Maryland Aviation Administration believes that long-term leases offer the security of knowing that construction costs will be repaid.[20]

Preferential-Use Contractual Arrangements

Preferential or shared-use contractual arrangements generally give the tenant airline the primary right to use the facility when it has operations scheduled. These arrangements represent a shared control between the airport and the airline tenant; the airline tenant acknowledges the airport's authority, under specified circumstances, to allow use of the leased facility by other airlines. Unlike traditional exclusive-use lease arrangements, preferential-use contracts afford the airport explicit contractual authority to use a tenant's gates for new entrants or carriers wanting to expand service.

Preferential-use leases differ in the amount of "preference" or "priority" the airport gives to the tenant. For example, some arrangements give absolute preference to the tenant airline if it meets the minimum utilization threshold.[21] If minimum utilization criteria are not met, the leases may subject the tenant to "use-it-or-share-it" requirements or to the "use-it-or-lose-it" rule. Some preferential-use leases give the primary

[18]US Airways' entered into its long-term, exclusive-use arrangements at Pittsburgh in the 1980's to secure the airport's debt for its new terminal.

[19]Comments of the Air Transport Association of America, Docket OST-98-4025.

[20]Comments of Maryland Aviation Administration, Docket OST-98-4025.

[21]Gate utilization may be based on number of daily operations (generally requiring at least a minimum of three flights/weekday) or may be calculated based on a percentage of the historical average utilization of similar airline tenants. These provisions may give the airline tenant the right to "cure" within a certain period after its utilization has dropped below the minimum.

tenant the right to charge the secondary tenant for facility usage. (Some leases allow "bumping" rights by the primary tenant in the event it increases its operations). Some airports retain the right to recapture the facilities and reallocate excess capacity, under "use-it-or-lose-it" provisions that are not triggered by a specific minimum usage threshold.[22] Some airports use short-term, preferential-use leases for more control. Others have the right to periodically reallocate preferential-use gates based on utilization and other factors.[23] Minimum usage thresholds can range from three flights per day to over seven flights per day, or be based on average utilization of similar signatory carriers over a historical period.

Preferential-use lease terms often have provisions, such as minimum use, that enable the tenant airline to avoid sharing facilities. Some long-term, preferential-use gate contracts are similar to exclusive-use leases with "reasonable accommodation" clauses. In its administration of the PFC program, FAA has treated any lease that accords absolute preference to an air carrier based on flight threshold as a *de facto* exclusive-use lease.

As shown in Table 3.4, preferential-use leases have become more prevalent at the large hub airports responding to the ACI-NA survey, increasing from about 28 percent of gates in 1992 (342 of 1,231 total gates) to 32 percent in 1998 (453 of 1,412 total gates), and are projected to increase to over 46 percent in 2004 (711 of 1,527 total gates). One large hub airport, Reagan Washington National, has reported a gate composition of all preferential-use gates. Boston Logan commented that, upon the 2001 expiration of its exclusive-use leases, its gate composition will include only preferential and common-use gates. Detroit Metropolitan Airport also is transitioning to all preferential and common-use gates as it builds and renovates terminal facilities with PFC funds.

Airport-Controlled Gates

Airport-controlled or common-use arrangements describe gates totally under the control of the airport. The airport may assign gates on a temporary, per-turn basis or on a short-term (e.g., 30-day) arrangement. This facilitates the airport's assignment of gates to new airlines initiating service or to established carriers expanding service.

[22]Kent County, for example, "reserves the right at all times, however, to determine when any Airline is utilizing excess space beyond its reasonably foreseeable needs and to take such space back with a corresponding reduction in Airline's rentable space." (Response to September 1998 ACI-NA Gate Availability/ PFC Survey).

[23]The Metropolitan Washington Airports Authority, for example, has a list of factors used to determine continued need by the incumbent airline at Washington Reagan and Washington Dulles—including past, current, and projected utilization; amount of air traffic; number of gates and leased space; practicality of constructing new space; and imbalanced usage.

Although the number of airport-controlled gates at the respondent large hub airports is projected to jump considerably, from 111 gates in 1992 to 208 gates in 2004, this growth is overshadowed by the growth in the number of preferential-use gates, as discussed above. As shown in Table 3.4, in 1992, nine percent of the 15 large hub gates consisted of airport-controlled gates, increasing to a projection of nearly 14 percent in 2004. The number of airport-controlled gates is expected to double, from 71 gates in 1992 to 142 gates in 2004, at the medium hub airports responding to the ACI-NA survey question. However, this number represents a greater percentage increase of airport-controlled gates compared to total medium-hub gates, from 16 percent in 1992 to 26 percent projected for 2004.

Two airports reported in the ACI-NA survey that they have all airport-controlled gates: Miami, with 121, and Phoenix, with 84. Seattle expects to have all of its 82 gates under airport control by 2004. Miami indicated that its control of gates and terminal facilities has helped new entrants gain access, allowed code-sharing partners to achieve proximity of space, and enabled more efficient use of its Federal Inspection Services facilities. Miami explained that it has the right to assign gates daily based on its gate utilization policy; as a practical matter, most carriers operating at gates are able to remain there.[24] Phoenix stated that it uses a month-to-month system and controls the loading bridges and baggage systems to better facilitate and manage entry. Seattle asserted that available operating space constrains expansion and that the airport is gaining more control over its facilities to better manage its operations.

Majority-In-Interest Clauses

A traditional MII clause is a contractual provision in the master airport-air carrier use and lease agreement requiring the airport operator to consult with and seek approval of a prescribed percentage of signatory carriers for a proposed capital project to be financed by the carriers. The MII carriers generally have assumed the financial risks of long-term leasing commitments and/or guarantees for debt financing, generally under residual financing arrangements. For example, Orlando, which has an MII, uses a residual agreement under which all airport revenue is credited to reduce signatory airline rates and charges, and the signatory airlines agree, jointly and severally, to pay the airport authority rates and charges in a sufficient amount for the authority to satisfy its obligations under its bond resolution.

[24] American Airlines' month-to-month agreement for 47 gates at its new international concourse guarantees the carrier the right to use the terminal assuming it meets minimum usage conditions that American fully expects to meet. Therefore this agreement, unlike Miami's other month-to-month arrangements, is considered by DOT to be a long-term, exclusive-use agreement.

Studies have indicated that a problem exists when incumbents can control airport development, since MII carriers may use their powers to forestall capacity improvements that would facilitate entry by providing additional capacity.[25] Others acknowledged that an MII clause may have been justifiable before airline deregulation to balance the power of the airport/airline potential monopolists, but that giving incumbent airlines power to potentially block entry could hamper the pro-competitive goals of deregulation.[26] GAO has indicated that MII powers could limit an airport's ability to expand and increase its capacity to raise revenue.[27] Others claimed that MII clauses are anti-competitive because they allow incumbent carriers to bar market entry.[28]

The American Association of Airport Executives expressed the views of a number of airports by asserting that the desire of the signatory airlines to maintain the status quo at the airport runs counter to the needs of communities to invest in airport facilities and to attract new businesses or to provide new fare offerings. It suggests "consult-only" MII clauses.

The Port Authority of New York and New Jersey commented that MII provisions allow "dominant carriers to control capital development at the airport." It uses special facility financing for privately owned gates at several of its airports or relies on its ability to issue consolidated financing, which does not require airline approval. Similarly, the Massachusetts Port Authority commented that MIIs can hamper competition. Boston Logan relies on special facility financing or on general revenue bonds backed by consolidated port revenues. Miami commented that MII agreements allow a few large carriers to have veto power over airport development and can seriously limit the airport's attempts to make the environment more competitive.

MII carrier opposition to projects was described by several airports in comments to the docket or in the ACI-NA survey responses.[29] At each of these airports, however, the

[25] *Secretary's Task Force on Competition in the U.S. Domestic Airline Industry* (February, 1990) at v. and ch. 3.

[26] *Winds of Change, Domestic Air Transportation Since Deregulation.* Transportation Research Board, National Research Council (Washington, D.C. 1991).

[27] *Barriers to Competition in the Airline Industry*, Testimony of Kenneth M. Mead, GAO/T-RCED-89-66 (September 21, 1989); *Airline Competition*, GAO/RCED-90-147 (August 1990).

[28] Notes, *The Antitrust Implications of Airport Lease Restrictions*, 104 Harv. L. Rev. 548 (1990).

[29] Large and medium hub airports that responded affirmatively to the ACI-NA survey question: "Have the carriers exercised MII powers in order to prevent the airport from expanding gates or other essential facilities to accommodate other carriers/competition?" were Miami, Detroit, Colorado Springs and Fort Myers. Miami indicated

projects were either partially or totally constructed, and the airport used PFCs, tenant financing, or eventual signatory carrier financing.

A traditional MII provision authorizes a prescribed percentage of carriers that are signatory to the airport's use and lease agreement to approve or disapprove a proposed capital project to be financed through their rates and charges. These carriers are generally defined in terms of "weighted votes," comprising at least half of the signatories who together have landed at least half of the total landed weight or operations of all the signatories during the preceding year. (Therefore, a signatory carrier that no longer serves the airport would be excluded from MII participation). A weighted vote may also be defined as half of all signatories that pay more than half of the terminal rentals, landing fees, and preferential apron area fees. Seattle, for example, considers MII approval to occur when the airport management has received a favorable response from 55 percent of the responding airlines, providing that the approving airlines collectively paid at least 55 percent of the landing fees.

The MII may constitute a specific number of airlines paying a supra-majority of fees or a numerical majority of airlines paying half the fees, such as at Chicago O'Hare. At some airports, the MII clause is drafted to require the vote of the dominant carrier for project approval.

Terms of the agreement generally obligate the airport operator to allow the signatory airlines a period of time within which to review the proposed project and to respond by approving or disapproving the proposal. At some airports, an absence of response by the MII carriers within a specified amount of time is deemed to be an approval of the project. At BWI, for example, the MII clause provides:

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that the MII carriers filed suit to block a current massive capital expansion project largely for American Airlines, the largest carrier at Miami International. The court found, however, that the MII clause was not applicable to this project. *Air Canada et al. v. Dade County et al*, (S.D. FL 1998), No. 95-2037-Civ; Miami-Dade County ACI-NA Survey Response. Miami has since not renewed the MII clause. The airport project is being constructed and financed by both PFCs and carrier rates and charges (according to the equalization methodology). Colorado Springs indicated that its signatories approved only a portion of the permanent facilities needed for a new entrant; the new entrant constructed and financed its own interim facility. The Lee County Port Authority commented that certain signatories with sufficient operational space at Southwest Florida successfully delayed both the addition of new gates for other carriers that had requested more space as well as construction of a new Federal Inspection Services facility and runway extension, to be used by the new carriers. The latter projects eventually were financed by PFCs. In its comments, the Los Angeles World Airports said that one carrier was able to block proposed improvements at the city's Ontario airport; the airport has let the MII clause lapse at LAX and has improved Ontario, largely with PFCs. Also, the Metropolitan Washington Airports Authority commented that the signatory carriers at Reagan Washington National airport were resistant when informally approached about a proposed gate addition to Washington Dulles to accommodate anticipated growth and demand. The project eventually was financed with PFCs.

> "It is agreed that during the basic term of this Agreement no Airfield Capital Expenditure shall be made by Lessor, nor shall an expenditure in excess of $25,000 be made by Lessor for an Airport development study or Airport master plan, without Majority-in-Interest approval, provided that failure either by 50% or more of the Airlines in number, or by Airlines together landing 50% or more of the total weight landed by all Airlines at the Airport during the immediately preceding calendar year to specify disapproval in writing within thirty (30) days of written notice...to each Airline by Lessor seeking approval shall constitute Majority-in-Interest approval of such expenditure." (Baltimore/Washington International Airport response to ACI-NA Gate Availability/PFC Survey, September 1998).

Some agreements require the airport to provide the signatories with detailed descriptions of the project, construction schedules, justifications, cost-benefit analysis, cost allocation, and proposed financing arrangements.

At several airports, there is no minimum capital expenditure triggering the MII process and signatory carriers can have a veto power over most projects. Some airports have relatively low expenditure thresholds for MII approvals, such as a $50,000 capital replacement threshold at Cincinnati and a $25,000 capital improvement threshold at Dallas/Fort Worth (except that no MII approval at DFW is needed if a signatory has agreed to fund its own facility).

At other airports, MII approval is limited to projects with relatively high costs, such as a $100 million threshold at Reagan Washington National Airport (the MII ceases to exist in the year 2000); $500,000 at St. Louis; $553,925 at San Francisco (the MII refers only to signatory carriers from the 1980's agreement); and a $10 million airfield project at Tampa (terminal renovation financing is permitted if approved by just one signatory).

Many MII clauses pertain to both landside (such as terminal construction and improvements) as well as airside projects, and to other types of expenditures. Additionally, some clauses, such as those of Denver and Seattle, require MII approval for changes in rate methodology.

Generally excluded from the MII approval process are the following project types: required for public safety; undertaken to comply with pertinent laws or to maintain FAA certification of the airport; constructed with an airport's capital; or below a predetermined dollar amount.

Some airports have significant restrictions on MII powers. There is at least one airport (Seattle) that requires carriers not to withhold MII approval due to competitive impacts.

Some MII clauses specifically provide that new facilities can be constructed without MII approval and that airport revenue bonds can be used for funding such a facility provided the proposed lessee executes a lease agreement obligating itself to the monetary obligation imposed on the airport as a result of the new facility.

Other MIIs do not give a veto power to the airlines but provide that they may delay a project (for periods of from six months to two years) after which the airport may construct the project and charge the signatories. For example, Las Vegas' MII clause permits carriers to delay for up to two years an airport-proposed project; after that, however, the project could go forward.

At least two airports, however (Salt Lake City and Tampa, for terminal projects), have provisions allowing the airport to charge all signatories for improvements proposed in writing by just one signatory and agreed to by the airport.

Table 3.5 summarizes the types of use and lease agreements and status of MII clauses at the large and medium hub airports responding to the ACI-NA survey questions.[30] As shown in the table, most of the responding large and medium hub airports have MII clauses.

Table 3.5
Summary of Type of Gate Control and Financing Arrangements
At Large and Medium Hub Airports (1998)

Large Hub Airports:

With MII Clauses	#	%	Where MII Clauses have been invoked	#	%	Type of Use & Lease Agreement	#	%
Yes	15	65.2%	Yes	2	10.0%	Compensatory	9	40.9%
No	8	34.8%	No	18	90.0%	Residual	9	40.9%
Total airports	23	100.0%	Total airports	20	100.0%	Hybrid	4	18.2%
						Total airports	22	100.0%

Medium Hub Airports:

With MII Clauses	#	%	Where MII Clauses have been invoked	#	%	Type of Use & Lease Agreement	#	%
Yes	15	68.2%	Yes	2	12.5%	Compensatory	4	19.0%
No	7	31.8%	No	14	87.5%	Residual	8	38.1%
Total airports	22	100.0%	Total airports	16	100.0%	Hybrid	9	42.9%
						Total airports	21	100.0%

Source: 1998 ACI-NA survey.

[30] These questions included: (a) Do you have "Majority-In-Interest" or "No Additional Rates, Fees, Charges" provisions in your airline use and lease agreement(s)? Yes/No. (b) Have the carriers exercised MII powers in order to prevent the airport from expanding gates or other essential facilities to accommodate other carriers/competition? Yes/No. What type of use and lease agreement do you have in effect? Compensatory/Residual/Hybrid/Other.

Specifically, about two-thirds (15) of the 23 large hub airports responding to the ACI-NA survey question reported having MII clauses. Similarly, among the medium hub airports responding to the ACI-NA survey question, about two-thirds had MIIs.
Appendix B lists the airport-by-airport financing arrangements and MII clause status for the large and medium hub airports responding to the ACI-NA survey. MII clauses are common at large and medium hub airports with residual or hybrid use and lease agreements, and infrequent at airports with compensatory use and lease agreements. The survey data also indicate comparatively infrequent use of MII powers to delay or veto projects. The docket comments, however, reflect additional concerns by airports that carriers can exercise MII clauses to stall projects that can enhance competition.

Subleasing

A sublease is a contractual arrangement between an airline tenant of an exclusively or preferentially leased airport facility and an airline subtenant. Typically, a sublease arrangement must receive airport approval; some airport leases will say that the "approval shall not be unreasonably withheld." Generally, subleases will be negotiated by the tenant carrier and requesting airline, without airport management involvement. Subleasing, when used and managed effectively, can be a significant tool for the accommodation of new entrant airlines.

Some commenters criticized the nature of the airport sublease market as enabling incumbent carriers to wield too much power over sublease terms and conditions so as to artificially raise the price of entry and thwart the aims of airline deregulation.

Some new entrants have complained of a lack of assistance from airport management in arranging competitive sublease terms and conditions; inconvenient, forced gate reassignments for subtenants; unfair sublease fee differentials at the same airport; and difficulty in negotiating with dominant incumbent airlines for subleased gates at desirable times and at reasonable costs.

Many airports do not review sublease fees and conditions.[31] Numerous large hub airports have no fixed limits on sublease fees, including:

- Cincinnati
- Charlotte
- Chicago O'Hare
- Dallas/Ft. Worth
- Detroit
- John F. Kennedy
- LaGuardia
- Las Vegas
- Los Angeles
- Newark
- Orlando
- St. Louis
- San Diego
- Tampa

[31] As discussed in Chapter 2, results of the ACI-NA survey indicate that approximately one-third of the large hub airports responding reported that they have not actively reviewed sublease fees and terms.

Several airports (including Boston-Logan, Chicago, Dallas, Detroit, John F. Kennedy, LaGuardia, Los Angeles, Newark, and San Diego) indicated, either in the ACI-NA survey or in comments to the docket, that although they have no set limit on sublease fees, they nevertheless oversee terms to ensure that they are fair and reasonable.

Two large hub airports (Atlanta and Salt Lake City) reported that they limit sublease fees to the rate charged the primary airline tenant. Five other large hub airports (Baltimore-Washington International, Reagan Washington National, San Francisco, Seattle, and Washington Dulles) reported that their master use and lease agreements contained specific limits on sublease fees, ranging from markups or administrative fees of 10 percent to 50 percent. At least three large hub airports (Boston-Logan, Miami, and Phoenix) reported that they do not currently allow sublease arrangements for gates.

Ground Handling

Ground handling includes the array of services necessary to maintain and operate the airline, such as fueling, air conditioning, ground power, baggage handling, communications access, towing, catering, minor maintenance, and similar services. A typical signatory airline handles itself, generally at a lower cost than it would pay to a fixed base operator or a third-party contractor. A new entrant, however, may not have the crew and facilities available at an airport to begin self-handling. If a new entrant subleases gates from a signatory, the signatory may require the new entrant to use the signatory for ground handling.

The ACI-NA survey responses indicate that aircraft handling and service for a new entrant typically is provided by a fixed base operator, another airline, or the new entrant itself (subject to the airport's rules). The ACI-NA survey did not provide comparative information on ground handling service fees, terms, and conditions between prime tenants / subtenants, fixed base operators, or others.

Some new entrants complain of requirements to use the prime airline tenant for ground handling, rather than a more competitive option. The State of Minnesota Planning Commission, in response to the 1998 pilots' strike that idled Northwest Airlines, found that sublessees are often required to use the leasing airline's ground personnel and suggested limiting this practice because it restricts competition.[32]

Some new entrants also claim that airport management does not oversee ground handling arrangements, leading to higher fees. Additionally, our case study at Denver International Airport found that some new entrants complain about the airport's prac-

[32] Minnesota Planning, *op. cit.*, p. 19.

tice of requiring all carriers to purchase the "bundled" package of services. Some air carriers claim that they are required to pay for services they do not use and to pay third parties for services they can perform themselves.

CONTRACTUAL ARRANGEMENTS DO NOT PRECLUDE REASONABLE ENTRY

Contractual arrangements between an airline and airport do not relieve the airport operator of the responsibility to make reasonable efforts to accommodate new entrants and carriers expanding their operations. The reasonable access, economic nondiscrimination, and non-exclusive provisions in the federal statutes and airport grant assurances require the airport operator to assure reasonable access to the airport, regardless of the existence of exclusive lease arrangements.

Statutory and grant assurance obligations typically are incorporated in the airport-air carrier agreement. These agreements recognize the paramount nature of the federal law over rights granted an airline. An airport-air carrier contractual arrangement, accordingly, may contain the following non-exclusivity condition:

> "It is hereby specifically understood and agreed that nothing herein contained shall be construed to grant or authorize the granting of an exclusive right to provide aeronautical services to the public as prohibited by Section 308(a) of the Federal Aviation Act of 1958, as amended, [now 49 U.S.C. 40103(e)], and City reserves the right to grant to others the privileges and right of conducting any one or all activities of an aeronautical nature." (Chicago-O'Hare lease agreement.)

A use and lease agreement alternatively may contain the following clause that acknowledges the paramount nature of the federal grant assurances:

> "This agreement shall be subordinate to the provisions of any existing or future agreement between Lessor and the United States relative to the operation or maintenance of the Airport, the execution of which has been or may be required as a condition precedent to the expenditure of Federal funds for the development of the Airport." (Detroit Metropolitan Wayne County Airport agreement.)

The statutory provisions and grant assurances obligate the airport manager to oversee access to assure that the airport is operated for the benefit of the public and is available for public use. While such contractual arrangements can clearly be factors influencing air carrier access to an airport, airports cannot use them to cede control over the airport facilities to tenant airlines. An operator of a federally assisted airport is bound by the

grant assurances to reasonably accommodate qualified new entrants and carriers expanding their operations, regardless of the airport's contractual arrangements with signatory carriers. When exclusive-use gates are the only option for a requesting airline, airport management is not required to divest the tenant carrier of the facilities in use, or to void a flight. Rather, it is reasonable for airport management to determine the gate usage of the tenant carrier and to try to fit the requesting airline in at times the tenant is not fully using a gate.

For a period following airline deregulation, the Department was in the forefront of attempts to assure that airport operators provide access to new entrants, thereby widening the competitive benefits of deregulation. For example, in 1984, the Department and FAA supported the efforts of Midway Airlines for immediate entry into Westchester airport and were parties to Midway's litigation against the County of Westchester.[33] FAA determined that some arrangements for accommodation of new carriers generated by the advent of airline deregulation must be made if reasonably possible, and that an airport may not deny access to a carrier solely based on the non-availability of currently existing facilities. In 1989, FAA issued its Airport Compliance Requirements, Order 5190.6A, interpreting the economic nondiscrimination assurance as requiring reasonable access for new entrants. Until recently, however, the Department has not been pro-active in facilitating efforts by new entrants or in monitoring airports' compliance with the reasonable access assurance.

Due to a number of factors, the pervasiveness of exclusive-use leases is declining in any event. First, the bond market no longer requires long-term, exclusive-use leases as a general matter for many commercial airports. In recent years, the bond market has relied more on the strength of the underlying passenger base at the airport and local economic conditions, partially due to reluctance by the rating agencies to depend too heavily on guarantees by one dominant carrier. Second, some airport managers are negotiating lease arrangements so as to avoid the potentially lengthy proceedings associated with the disposition of an unexpired exclusive-use gate leasehold of a bankrupt carrier.[34] Third, the utilization of the PFC program at many large and medium commercial hub airports has effectively facilitated the conversion of exclusive-use into preferential-use leases, potentially subject to greater airport control. Pending the outcome of these factors, however, long-term, exclusive-use leases will represent a significant presence at airports, requiring active management to ensure reasonable access.

[33] *Midway Airlines, Inc. v. County of Westchester*, 584 F. Supp. 436 (S.D.N.Y. 1984).

[34] The unexpired leasehold of an exclusive-use, long-term gate lease is subject to the Bankruptcy Code processes, including the assumption or assignment of a bankrupt carrier's airport gates and the timing of those activities. 11 U.S.C. 365.

The airport operator also may not unreasonably withhold tenant status from an air carrier that assumes obligations substantially similar to those already imposed on tenant airlines.[35] With regard to subleasing arrangements, airport management is obligated to assure nondiscriminatory and reasonable access. It may do so by overseeing fees, locations, and time-of-day arrangements. For a new entrant to be treated reasonably and fairly, airport management may intercede or monitor subleasing arrangements and take a more pro-active role to encouraging new entrant access.

Moreover, airport management is required to see that ground-handling arrangements do not hinder the ability of a new entrant, non-signatory carrier to be competitive. Fees, terms, and conditions for ground-handling should be reasonable and non-discriminatory. Reasonable safety standards may be imposed on ground-handling arrangements.[36]

With regard to MIIs, there is some evidence to suggest that such clauses can give signatory carriers the ability to block capacity expansion, force a delay in capital improvements, or demand design changes, with the goal of impeding entry and expanding their own facilities. Information from the docket and the ACI-NA survey suggest that, at some airports, incumbent carriers have threatened to invoke or have exercised MII provisions to block entry.

On the other hand, airports often agree to MII clauses in connection with commitments from airlines to long-term leases on a residual financing arrangement. These clauses protect airline signatories from incurring significant rate increases the airlines had not anticipated when they agreed to guarantee certain of the airport's financing and costs. The Air Transport Association commented that MII clauses give the carriers that "must fund projects an important check on extravagant or unnecessary spending." A number of airports, including Tucson and Nashville, believe the cooperative relationship fostered by the MII facilitates airport improvements.[37] Orlando commented that the MII provision has required it to "present a persuasive financial case" to the signatory airlines and to obtain commitments to lease a substantial portion of the space to be constructed.

[35] 49 U.S.C. 47107(a).

[36] FAA Order 5190.6A, ¶3-9e(3).

[37] Airports without MII clauses also describe how they negotiate expansion of the facilities with signatory carriers. Phoenix, for example, stated that it negotiates rate adjustments with the airlines "to promote good business relationships." Boston-Logan reported that it is cognizant of the effects of airport fees on airline costs and tries to keep costs within a certain range. While dialogues with major carriers may be beneficial to avoid rates and charges disputes, these consultations should not be used as methods to constrain an airport's ability to facilitate entry by potential competitors.

CHAPTER 4: USING PASSENGER FACILITY CHARGES TO ENHANCE COMPETITION

Collectively, the statutory and regulatory provisions embodied in the Passenger Facility Charge (PFC) Program empower public agencies to use PFCs to enhance competition. The PFC Program, which is codified in Title 49 United States Code, section 40117, supplements the Airport Improvement Program (AIP) by providing an additional source of financing for the needs of commercial service airports through an airport charge per passenger of $1, $2, or $3 per trip segment, up to a maximum of two segments per one-way trip and four segments per round trip. Air carriers collect and remit the fees directly to an eligible public agency authorized by FAA in accordance with statutory and regulatory requirements.

The PFC statute and implementing regulations (14 CFR Part 158) require that PFC revenues be used to finance eligible airport-related projects that accomplish one or more of the following objectives: preserve or enhance safety, capacity, or security of the national air transportation system; reduce noise or mitigate noise impacts resulting from an airport that is part of such system; or furnish opportunities for enhanced competition between or among air carriers (Part 158, section15(a)). FAA must also find that the projects are adequately justified.

The PFC statute and regulations provide that a "public agency" that controls a commercial service airport may submit an application to fund a specific project with PFC revenues. A public agency may be a state or any agency of one or more states, a municipality or other political subdivision of a state, an authority created by federal, state, or local law, a tax supported organization, or an Indian tribe or pueblo. The sponsor of an airport participating in the Pilot Program for Private Ownership of Airports (49 U.S.C 47134) may also submit a PFC application.

FAA's role in the project selection process is to approve or disapprove the projects submitted. FAA may only deny a public agency the authority to impose and use a PFC for a project if one or more of the following conditions apply to the project: it is not eligible for PFC funding as set forth in statutory and regulatory eligibility criteria; it does not meet at least one of the PFC objectives (of which enhancing competition is one); it is not justified adequately; or it does not conform to other applicable regulatory requirements as referenced in Part 158 (e.g., environmental requirements, specified implementation schedules). Unless FAA can demonstrate that one of the above conditions

for denial exists, it is compelled by statute to approve the particular project for PFC funding within 120 days of receipt of the PFC application.

Our review of the PFC Program found that: (1) it can be a useful tool for increasing airline competition; (2) existing data, while supporting the valuable contribution PFCs have made to funding critical airport infrastructure and capacity projects, provide only limited information regarding how PFC-financed projects have enhanced competition; and (3) additional actions are needed to better understand how the Program enhances competition.

PFCs: A POTENTIALLY SIGNIFICANT TOOL FOR INCREASING COMPETITION

Airports can use PFCs to enhance safety, security, capacity, noise, and competition. Congress clearly understood that PFCs could be important for enhancing competition at airports. During congressional hearings leading to passage of the PFC statute, statements by the Secretary of Transportation and others frequently referred to the competitive benefits of PFCs. For instance, GAO testified that PFCs would shift more control over airport expansion decisions from airlines back to airports by reducing airports' need for airline approval of capital projects. Further, a PFC would be especially useful at airports where one or two airlines control most of the traffic or most of the gates and other essential facilities through restrictive leases.[1]

In addition to specifying the enhancement of airline competition as one of the principal qualifying PFC objectives, Congress incorporated into the PFC legislation a number of provisions that were intended to make the PFC Program effective for funding pro-competitive projects. The PFC regulations also emphasized the intended role of PFCs to promote competition.

Statutory Provision

By permitting up to a $3 per enplanement charge, the statute enables public agencies to receive large annual revenue streams sufficient to undertake major infrastructure projects (§40117(b)(1)). This is particularly true for large and medium hub airports where access to airport facilities is most often a problem for new entrant air carriers. Ninety-one percent of the $1.44 billion in PFC revenues collected nationally in 1998 accrued to large and medium hub airports.

[1] *Airline Competition: Passenger Facility Charges Represent a New Financing Source for Airports*, (GAO/RCED-91-39), Dec. 13, 1990, p. 2.

The PFC statute clearly establishes that no contractual relationship between an airport and its airlines may be used to block an airport from pursuing a PFC project. In particular, the statute prohibits the following practices that might restrict the use of PFCs to enhance competition:

- Airport-air carrier contracts that would impair the authority of the public agency to impose a PFC or to use PFC revenues for a project permitted by the statute (§40117(f)(1));

- An exclusive long-term lease or use agreement for any PFC-financed project (§40117(f)(2));

- Any lease or use agreements for a PFC-financed project that would restrict the public agency's ability to finance, develop, or assign new capacity at the airport with PFC revenue (§40117(f)(3)).

Consequently, no air carrier can block a PFC-financed project that will result in adverse competitive effects to it, even if an MII agreement applies to the use of other airport revenues.

In establishing the PFC Program, Congress expanded PFC project eligibility beyond the statutory limits of eligibility for AIP grants to facilitate the funding of infrastructure projects essential to enhancing airline competition at airports.

- PFCs may be used to fund a broader range of terminal projects than can AIP, including leased gates and other areas related to passenger movements (49 USC §40117(a) (3)(E)). Federal assistance, in the form of AIP entitlement grants, may be used to build some common-use terminal facilities (public-use areas associated with baggage claim delivery; automated baggage handling equipment; holding areas; and loading bridges) at large and medium hub airports, but airline ticketing areas and gates, including passenger check-in, are not eligible for AIP funding at these airports because they are considered revenue generating facilities (*Airport Improvement Program Handbook*, Order 5100.38A, para. 551 (1989)). An important source of funding for large capital projects -- AIP discretionary grants -- may not be awarded for terminal improvements at large and medium hub airports.

- PFCs may be used to pay the debt-service costs of airport projects, thus permitting major infrastructure projects to be built more expeditiously (§40117(b)(1)). Except in a limited number of projects under a trial innovative finance program, AIP grants may not be used to pay the interest costs of airport projects.

- PFCs are permanently authorized and are not subject to congressional re-appropriation. Moreover, because PFCs are earned from passenger enplanements, the revenues generated are generally subject to predictable and rising levels from year to year.

Regulatory Provisions

Use of PFC revenue obligates an airport to conform to the various regulatory assurances of the PFC Program, which are intended to implement the statute's prohibition on long-term, exclusive-use lease agreements (§40117(f)(2)). These assurances are listed in appendix A of Part 158.

- Assurance 5: Non-exclusivity of contractual agreements. The public agency will not enter into an exclusive long-term lease or use agreement with an air carrier for projects funded by PFC revenue. "Long-term" is defined by the regulation to be five years or more (Part 158.3). Long-term, preferential-use leases are permitted, provided that the terms of such leases truly are preferential and not *de facto* exclusive.

- Assurance 6: No carryover provisions. The public agency will not enter into any lease or use agreement with an air carrier for a PFC-funded facility if the agreement contains a carryover provision. A carryover provision is a renewal option which, upon expiration of the original lease, would operate to automatically extend the term of the agreement with the carrier in preference to any potentially competing air carrier seeking to negotiate a lease or use agreement for such facility. This assurance guarantees that a "short-term," exclusive-use lease does not become a *de facto* long-term, exclusive-use lease.

- Assurance 7: Sharing of underused/exclusive-use facilities. Any lease or use agreements between the public agency and an air carrier for a PFC-funded facility will contain a provision that permits the public agency to terminate the lease or use agreement if (1) the air carrier has an exclusive lease or use agreement for existing facilities at the airport, and (2) any portion of its existing exclusive-use facilities is not fully utilized and is not made available for use by potentially competing air carriers. In effect, this assurance gives airport managers substantially greater control over any exclusive-use facilities at their airports.

In addition, Part 158, section 25(b)(7) requires a public agency, in its justification for a terminal development project, to discuss any existing conditions that limit competition between or among air carriers at the airport, any initiative it proposes to foster opportunities for enhanced competition, and the expected results of such initiatives.

Case Studies and ACI Survey Illustrate Statutory and Regulatory Tools in Use

Our case studies at Denver, Baltimore, and Detroit airports illustrate how these statutory and regulatory provisions have been used to support competition. At Denver International Airport, we found that because PFCs helped to finance the airport, no gates or other facilities have been leased to air carriers for exclusive use. Baltimore/Washington International Airport used PFCs to build or refurbish 22 gates, several of which have been leased to Southwest Airlines, a low-fare carrier.

Detroit Metropolitan Wayne County Airport (DTW) is a large hub airport serving the Detroit-Ann Arbor metropolitan area. In 1997, the largest carrier at DTW, Northwest Airlines and its partner Mesaba, had a market share of 80 percent, up from 76 percent in 1992. Six domestic gates were recently built and funded with PFCs and are leased on a preferential-use basis to Northwest. Because Northwest has leased the six gates built with PFCs at DTW, the County has been able to take advantage of the provisions in PFC Assurance 7 that require the leasing air carrier to share its underused exclusive-use space. Backed by the requirements of Assurance 7, the County successfully encouraged Northwest to share two underutilized exclusive-use gates with a low-fare carrier. In addition, the County has undertaken a major PFC-financed terminal building construction and rehabilitation program that will facilitate the elimination of exclusive-use leases at DTW.

The ACI-NA survey responses showed that airport managers' control of terminal or other facilities has increased, in part because the PFC funding option allowed them to increase airport capacity, especially gates and terminal facilities. PFCs have also allowed them to overcome the resistance of incumbent carriers and the MII provisions in their airport/airline agreements. Airport officials also noted the competitive benefits of the PFC Program:

- Dulles International: A major terminal-expansion project was facilitated by PFC funding. "Without the PFC option, incumbents would have blocked expansion."

- Dallas/Forth Worth International: The Airport pointed to the need for a stable and adequate funding source to ensure it could build needed infrastructure. "Undoubtedly, the Passenger Facility Charge represents the most viable funding mechanism to meet its needs."

- Los Angeles and Ontario International Airports: These airports specifically pointed to PFC funding as greatly aiding in the development of reliever capacity.

- Baltimore/Washington International and Colorado Springs Municipal: Both airports credited the PFC Program for allowing the airport to respond to terminal needs. In both cases, the expansions accommodated low-fare market entrants.

PFC FUNDING HAS CONTRIBUTED TO OVERALL AIRPORT FUNDING, BUT ITS COMPETITIVE IMPACT IS UNCLEAR

Existing data support the valuable contribution the PFC Program has made to overall funding for airport improvement, but provide only limited information on how PFC-funded projects have furnished opportunities for enhanced competition. It has been approximately seven years since the first PFC application was approved in 1992. Since 1992, when $85 million in PFCs were collected, annual PFC collections at the Nation's airports grew rapidly to $1 billion in 1995 and to $1.44 billion by 1998. As of April 30, 1998, FAA had approved a total of approximately 3,900 PFC projects with a total value of $18.9 billion. By January 1999, approved funding had reached $23 billion. Actual PFC collections realized by airports during the period 1992-1998 were $6.2 billion. Table 4.1 shows how projects approved through April 30, 1998, were distributed among major project categories.

Table 4.1
PFC Projects by Major Category (as of April 30, 1998)

CATEGORY	$ Billions
Terminal Projects*	$ 6.9
Airside Projects	3.3
Access Road/Rail	2.5
New Denver Airport	2.3
Project Financing Costs**	2.3
Noise Mitigation	1.2
Land for Development	0.4
Security	0.1
Total	**$18.9**

*Includes $2.2 billion in PFC funds used for interest.
**Excludes terminal project financing.
Note: Total does not add due to rounding.
Source: FAA data.

- Airside projects typically involve capacity and safety-related facilities that have a positive effect on all carriers because they permit improved aircraft movements. Among many important airfield projects funded in part under the PFC Program are new airports at Denver and Austin and new runways at Seattle-Tacoma International, Phoenix Sky Harbor, Indianapolis International, Philadelphia International, Dallas/Ft. Worth International, and Kent County International.

- Access road and rail projects involve general access by passengers and employees to airports, and, as such, benefit patrons of all airlines serving an airport. Important airport access projects being funded with PFCs include the Light Rail System to John F. Kennedy International Airport, the monorail system at Newark International, the Airport MAX light rail connection to Portland International Airport, and numerous airport access road projects.

- Project financing costs associated with non-terminal projects. The financing costs of terminal projects are included directly in that category of Table 4.1.

- Noise mitigation projects typically make airports more compatible with surrounding communities. At Los Angeles International, Chicago O'Hare International, Lambert-St. Louis International, Louisville International, Boston-Logan, Cleveland-Hopkins International, Milwaukee-General Mitchell International, Cincinnati-North Kentucky, and other airports, PFCs are funding important noise mitigation programs.

- Land for development projects typically involving land acquisition for airside development. Among numerous land acquisitions funded with PFCs are those at Tampa International, Ft. Lauderdale, Southwest Florida International, and Memphis International Airports.

- Security projects address issues with few direct competitive impacts. In some instances, however, inadequate security systems can impede the ability of an airport to accommodate new air carriers or expanded operations by existing air carriers. A good example of the flexibility of PFC funding for security projects is the recent PFC decision for Chicago O'Hare International. PFC funding was approved for explosive blast mitigation, airside fencing, acquisition of security and fire equipment, security checkpoint equipment, portions of a police facility, and a perimeter intrusion-detection system.

Although all of the project categories listed in Table 4.1 could have some effect on competition, terminal projects are most likely to provide facilities needed for competitive entry or expansion. In contrast to airfield or access roads, terminal facilities are often leased to particular carriers and are not available as common-use facilities. In drafting the PFC statute, Congress acknowledged the role of terminal facilities in promoting competition by expanding PFC eligibility to gates and related areas and by precluding the leasing of PFC-funded facilities to air carriers on a long-term, exclusive-use basis.

To determine whether PFC-funded terminal projects have had a positive competitive impact, Task Force members reviewed all 531 terminal projects, totaling $6.9 billion

(including $2.3 billion of interest). Of these 531 terminal projects, 314 ($800 million) were excluded from further analysis because they focused on: (1) compliance with the Americans with Disabilities Act or other federal mandates, and thus were intended to achieve other important public policy objectives; (2) renovations to utilities or common structures such as roofs and restrooms; and (3) improvements to common systems (e.g., public address systems) that did not have a direct link to enhanced competitive opportunities for air carriers.

The remaining 217 terminal projects have a total PFC-financed value of $3.8 billion in direct project costs, and $2.2 billion of interest, for a total of $6.0 billion. These projects, summarized in Table 4.2, comprised approximately 32 percent of PFC approvals through April 1998 (in terms of dollars of PFC commitments).

Table 4.2
PFC Projects at Terminals ($ Mil.)

Airport Hub Classification (airports represented)	Number of PFC Approved Projects	Capital Value	Interest	Total
Large Hubs (18)	47	$2,356.7	$1,600.2	$3,956.9
Medium Hubs (22)	53	$982.1	$466.3	$1,448.4
Small Hubs (26)	35	$364.1	$127.1	$491.2
Non-Hubs and Commercial Service (70)	82	$116.6	$27.8	$144.3
Grand Total (136)	**217**	**$3,819.4**	**$2,221.4**	**$6,040.8**

Source: Review of FAA PFC database—projects through 4/30/98.

Having developed a subset of 217 projects that potentially could have a direct impact on airline competition, we were unable to determine from our review of the applications submitted or the existing PFC database whether there were any direct competitive effects. We were unable to quantify the number of gates, loading bridges, ticket counters, or other facilities that were constructed. We were also unable to determine whether facilities that were constructed supported incumbent carrier growth, new entrants, or competitive access. The reasons for this are:

- FAA's current databases do not track the specific numbers of gates, loading bridges, hold rooms, baggage carousels, and other terminal facilities that have been constructed to date and financed in whole or in part with PFCs. Moreover, these databases have no current capability to track the effect of PFC funding on

net gates available (PFC and non-PFC) at an airport, or the effect of PFCs on exclusive-use gate lease arrangements.

- Comments submitted by airports to the docket for this study, as well as comments formerly submitted to GAO during studies it has undertaken on airline competitive issues, reveal that only a few airport managers view inadequate facilities at their airports as imposing a barrier to air carrier competition. Accordingly, the role of new terminal facilities in enhancing airline competition has not been emphasized by most airports in their PFC applications.

- To some extent, interpretations by airport managers as to what constitutes "competitive enhancements" are subjective. Thirty-two of the airports that participated in the ACI-NA survey responded that PFCs helped to fund projects that enhanced airline competition. While terminal projects were frequently identified, some parties expressed the view that airfield and airport-access projects were beneficial to competition, too. Unfortunately, the range of opinions offered by respondents -- everything from adding gates to the expansion of taxiways and ramps -- made it impossible to quantify, or even accurately represent, the full effect of PFC-financed projects on airline competition.

- Gates and terminal facilities typically take several years to plan and construct. The competitive impacts of some large scale terminal projects, such as at Detroit Metropolitan or Phoenix, will not be known until the facilities are operational.

- Data are not available to gauge the competitive effects of PFC terminal projects intended for incumbent carriers. Based on data from the ACI-NA survey (despite some limitations), it is clear that most new terminal facilities financed with PFCs have been allocated to incumbent airlines. However, what the available data do not show is whether some pro-competitive benefits, such as freeing up non-PFC gates for new entrants or allowing airports to eliminate some of their exclusive-use gate lease agreements with incumbent airlines, may have occurred.

PFC Funding at Key Gate Constrained Airports

In March 1999, GAO issued a report, *Airline Deregulation: Changes in Airfares, Service Quality, and Barriers to Entry*. GAO noted that it had previously identified six important Airports -- Charlotte, Cincinnati, Detroit, Minneapolis, Newark, and Pittsburgh -- where new entrant (post-deregulation) airlines reported problems in gaining access to gates. As of 1999, GAO found little change in competitive conditions at these airports.

GAO noted in particular that most gates at these airports are leased to airlines on a long-term, exclusive-use basis, usually to one dominant airline. Table 4.3 shows that the majority of gates at most of these airports are leased to one established airline. According to GAO, even when gates were available, few non-incumbent airlines expressed interest in serving these airports because access remains difficult, and other factors, generally relating to the size of the incumbent carrier and its associated market strength, have discouraged them from entering these markets.

Table 4.3
Airports Where Post-Deregulation Airlines Reported Difficulty Gaining Competitive Access to Gates and the Leasing Arrangements at those Airports

Airport	Total Number of Jet Gates	Gates under Exclusive-Use Leases	Major Lease Holders, Number of Gates Operated, and Date Lease Expires
Charlotte	46	44	37 gates leased to US Airways until 2016.
Cincinnati	68	68	50 gates leased to Delta; 8 of the leases expire in 2015 and 42 expire in 2023.
Detroit	87	75	56 gates leased to Northwest until 2001.
Minneapolis	70	70	54 gates leased to Northwest; 22 of the leases expire in 2015 and 32 convert to preferential use leases beginning in 1999.
Newark	94	79	42 gates leased to Continental until 2008.
Pittsburgh	75	65	50 gates leased to US Airways until 2015.

Source: GAO's presentation of the airports' data. Gate data for DTW has been updated based on interviews with the airport manager.

Two of the six gate-constrained airports -- Pittsburgh and Charlotte -- identified by GAO have never imposed a PFC. In the course of our case study interviews, we were told by airport officials at these airports that they have not imposed PFCs because other funding sources have been available. Other concerns, such as competition from other airports and a perception that PFCs are a "tax," were also cited as reasons why PFCs have not been imposed.

The Port Authority of New York and New Jersey has committed all of its PFC funding at Newark International Airport (estimated at $631million through the year 2008) to projects to provide rail-ground access to Newark and John F. Kennedy International Airports. In its comments, the Port Authority stated that "ground-access projects are critical to both the capacity and competitiveness of the New York region's airports."

Cincinnati-Northern Kentucky International Airport (CVG) is the most concentrated hub airport in the United States, with Delta and Delta Connection-Comair accounting for 94 percent of enplanements. The Airport has been approved for $177 million in PFC

collection authority, extending through May 2000. Most of the funds will be allocated to airfield projects and noise-mitigation projects; none of the money has been allocated to terminal-enhancement projects.

Minneapolis-St. Paul International Airport (MSP) has used PFC funds for two major terminal projects: $36 million in PFC revenues to fund a Federal Inspection Services facility and $43 million in PFCs to build a Ground Transportation Center. Neither project resulted in a greater number of gates at the airport. MSP recently submitted a PFC application to help finance a replacement terminal from which the scheduled operations of Sun Country Airlines will be accommodated.

Detroit Metropolitan Wayne County Airport (DTW) has initiated the most aggressive terminal building project of the six gate-constrained airports identified by GAO. Six domestic gates were recently built and funded with PFCs; they have been leased on a preferential-use basis. The County is also funding a major $2 billion terminal expansion and modernization program. The great majority of this funding is from PFC collections. Construction has begun on a new Midfield Terminal passenger complex, and existing terminal space will be renovated and improved. Northwest Airlines and its code-share partners will be the occupants and principal beneficiaries of the Midfield Terminal, although the County is committed to meeting the terminal space requirements of all airport tenants through renovations and modifications to the three existing terminals. Once the initial phase of the planned new terminal construction plan is completed (2001), DTW will have a complement of at least 106 jet gates, for a net gain of 19 jet gates. Moreover, unlike the current situation at DTW, airport officials will then be able to add new gates to accommodate future demand.

County officials emphasize that their use of PFC financing has facilitated the objective of acquiring greater management control over terminal facilities. The use of PFC funding to build and renovate terminal facilities precludes any exclusive-use leases for these facilities, strongly supporting the County's goal of converting existing exclusive-use leases to preferential-use agreements. Once the building program is completed, the County expects that there will be no exclusive-use leases for terminal facilities at DTW.

PFC Decisions Marked by Controversy Over Competitive Effects

The PFC statute and regulatory program require that all air carriers serving an airport be given the opportunity to comment on -- but not veto -- proposed PFC projects prior to the submission of the application to FAA. Moreover, a public comment period, during which any interested party can submit comments to the docket, is required after an application is submitted to FAA. The forums provided by these processes are invaluable for the identification of either the possible failure of a project to address competi-

tive problems at an airport, or, in some cases, the possible anti-competitive effects of a proposed project. When anti-competitive effects have been suggested by opponents of certain terminal projects, FAA has investigated such charges prior to approving PFC application for all or part of the project.

Our review of the 217 PFC terminal projects cited in Table 4.2 that potentially could have a direct impact on competition revealed only 12 projects with a value of over $5 million each in which competitive issues were raised by air carriers or others during the PFC approval process. These 12 projects are summarized in Table 4.4 on the next page.

FAA was able to resolve the issues identified in Table 4.4. The agency investigated all assertions pertaining to exclusive-use leases and, when they did not conform to the PFC assurances, required them to be modified. In one instance a lease could not be modified, and FAA subsequently approached the airport operator to amend its proposed PFC funding for certain terminal facilities.

In a few instances, FAA did not agree with the assertions made against the projects. In other cases, certain parties objected to funding air cargo, general aviation, or international projects. The use of PFC funds for cargo or international facilities is permitted by statute and regulation, even if the use of PFC funds for projects that benefit certain parties is disproportionate to the PFC funds paid by those parties (cargo and general aviation operators do not collect PFCs). Application of PFC funds by a public agency to noise or capacity projects, in preference to other PFC objectives, such as enhancing airline competition, is also permitted by statute and regulation. However, FAA has not permitted a project to proceed by satisfying one PFC objective if that project would obstruct any other PFC objective, including enhancing airline competition.

STEPS NEEDED TO BETTER UNDERSTAND THE COMPETITIVE BENEFITS OF PFC-FUNDED PROJECTS

Our review of the PFC Program and its application shows that PFC statutory and regulatory requirements are largely in place to enhance air carrier competition. However, it is also clear that additional steps are needed to fully realize the competitive benefits of PFC-funded projects.

Table 4.4
Summary of Comments on Competitive Effects -- PFC Dockets

City and State	Summary of Comments on Competitive Effects
Boston Logan ($434.1 million)	Carriers certified disagreement with the project because they believed that the project, which serves 15% of BOS passengers, received a disproportionate allocation of PFC funding.
Chicago O'Hare ($546.5 million)	The Suburban O'Hare Commission suggested that the PFC application failed to discuss or disclose the impact of the ORD PFC Program on the existing "Fortress Hub" problem at ORD.
Dallas/Ft. Worth ($84.3 million)	Most carriers certified disagreement with the TRAAM rail station construction. They claimed that the new station is essentially a long-term, exclusive-use capital improvement for one carrier, in violation of Part 158 assurances.
Detroit Metro ($1,576.3 million)	Carriers certified disagreement with the Midfield Terminal. They asserted that while the County's use agreement for the new terminal is described as "preferential," the terminal, in reality, will be a long-term, exclusive-use facility, in violation of the Part 158 assurances.
Ft. Lauderdale ($2 million)	An airline certified disagreement with the West Side Apron project. It argued that PFCs should not be used to fund improvements for the cargo carriers or other tenants that do not participate in the PFC Program, which is based on fees paid by passengers.
Miami ($42 million)	Numerous airlines certified disagreement with Concourse A expansion phase II and Concourse A phase II aprons and utilities. These carriers argued that these projects will create a competitive advantage to one carrier at Miami, violating the PFC requirement that it furnish opportunities for enhanced competition.
Miami ($232.1 million)	One carrier certified disagreement with all projects, concluding that they are all associated with or as a result of the "Super A" terminal (see above).
New Orleans ($19.5 million)	Carriers certified disagreement primarily because a number of the specific improvements provided benefits to general aviation and cargo airlines, which do not contribute to the PFC funding base.
Orlando ($156.3 million)	Carriers disagreed with the International Terminal and Airside 1 projects. They disapproved of the projects' scope and the fact that the projects, which benefit international passengers, account for use of over 70% of PFC revenue generated while international traffic accounts for 10% of PFC revenue collected. Carriers disagreed with the West Ramp Rehabilitation project, because it benefits cargo and non-passenger carriers.
Philadelphia ($666.1 million)	While there were no *Federal Register* comments on this PFC application, FAA, on its own initiative, requested and obtained modifications to the terminal lease agreements, based on the "competitive access" PFC assurances (5, 6, and 7).
Lambert-St .Louis ($43.7 million)	Most carriers disagreed with the East Terminal Expansion project. Several carriers questioned the use of PFC revenue in lieu of "traditional or conventional" funding methods for this project. Others disagreed with the project because they believe that the expanded terminal will be leased exclusively to one carrier in violation of the PFC regulations.
Lambert-St. Louis ($14.6 million)	One carrier questioned whether a supposed exclusive-use lease to one air carrier is in violation of the PFC regulation. Additionally, airlines certified disagreement with the Terminal B and C Connector and a Federal Inspection Service Vertical Transportation project because they believed the projects to be for the exclusive use of one air carrier.

Source: Review of FAA Records of Decision.

Improved Public Information on Competition Initiative

FAA's PFC database contains a comprehensive listing of every project evaluated by the agency for PFC funding, including approved PFC amounts, project type and objectives, and authorized collection periods. This database has been evaluated by GAO, and was found to have a high degree of reliability *(Passenger Facility Charges: Program Implementation and the Potential Effects of Proposed Changes*, GAO/RCED-00-138, May 1999). However, the database does not contain sufficiently detailed information to answer certain fundamental questions about the role of PFCs in enhancing airline competition. For example, it does not contain information on the specific number of terminal gates, ticket counters, and baggage carousels being built or renovated with PFC revenues at each airport or the net increase in such facilities (PFC and non-PFC) that will result at the airport. In addition, FAA's database lacks detailed information on the specific carriers or types of carriers to which these facilities are or will be leased and the specific terms that apply (except, of course, to preclude long-term, exclusive-use leases).

Even though benefits to competition cannot be measured simply by a count of PFC gates, or even net gate increases, the availability of such data can serve to illustrate where particular needs of new entrants are, or are not, being addressed with PFCs.

Increased Attention to Existing Conditions That Limit Competition

As justification for a terminal development project, regulations require that a public agency discuss any conditions that limit competition between or among air carriers at the airport, any initiatives it proposes to foster opportunities for enhanced competition, and the expected results of such initiatives. FAA has consistently required that public agencies respond fully to any air carrier or public assertions that a project -- terminal or otherwise -- is anti-competitive. However, public agencies have submitted only minimal information in their PFC applications for terminal-development projects concerning conditions that limit competition among air carriers, except insofar as the proposed PFC project affects or is intended to correct such limitations. One reason for this lack of affirmative response to Part 158, section 25(b)(7), appears to be that few public agencies believe there are conditions under their control that limit airline competition at their airports. The lack of barriers to competition attributable to airport infrastructure was commonly expressed by public agencies in their comments to the public docket for this study.

FAA has not challenged the lack of descriptive material on conditions that limit competition, in part because the regulation does not require PFCs be used to address such conditions on a priority basis. However, by not emphasizing this requirement, an

opportunity to focus public agency attention on competition-enhancing projects is not being utilized.

FAA has been reviewing PFC applications submitted by public agencies since 1992. Prior to 1996, when applications for several large PFC terminal projects were submitted, the agency relied on comments from the public and affected air carriers to reveal any adverse competitive consequences of terminal projects submitted for PFC funding. Since 1996, FAA has increasingly queried public agencies for information on terminal lease arrangements to verify that particular assurances are being met prior to granting approval for PFC funding of terminal facilities. But FAA has not required public agencies to review their lease arrangements for PFC-funded facilities to ensure that all relevant provisions are consistent with existing regulatory requirements, particularly Assurance 7. Improved oversight by FAA of all relevant information about actual and proposed lease arrangements would promote the use of these assurances for pro-competitive purposes.

Education on the Pro-Competitive Role of PFC Assurances

Interviews with airport managers at the case study airports, as well as the operational experience of FAA-PFC program office, revealed that some public agencies are unaware of all the ways PFCs may enhance competition. Most, if not all, airport managers understand that PFCs constitute a substantial, independent, and flexible source of funds for capital projects. Moreover, virtually all are aware that PFC-funded facilities cannot be leased to an air carrier on a long-term, exclusive-use basis. However, in some cases, it did not appear that airport managers were aware of the full range of competitive benefits associated with Assurances 5, 6, and 7. Assurance 7, in particular, requires that an air carrier that leases PFC-funded terminal space must either fully use its own, non-PFC-funded exclusive-use terminal space, or make that space available to other air carriers if they require it. As such, even where PFCs are used to meet the terminal space needs of incumbent carriers, the ability of the airport to accommodate entry is enhanced. Greater education about PFC assurances may encourage public agencies to make greater use of PFCs to fund terminal projects. In addition, more aggressive implementation of the PFC assurances would give airport managers an improved ability to accommodate new airline entry with existing terminal facilities.

Promote PFCs as an Independent Source of Revenue

The airport case studies, comments to the public docket, ACI-NA airport survey, and project-level information available to DOT confirm that the ability to impose PFCs has

augmented the "leverage" of public agencies in their discussions with airlines regarding proposed projects. Under the PFC statute and regulation, air carriers may comment on, but not veto, the use of PFCs for airport development purposes, unlike the use of airport revenue under an MII agreement.

Nevertheless, our case studies at Pittsburgh, Charlotte, and Houston suggest that air carriers may still be able to influence how public agencies use PFCs to promote airport access. One of these public agencies stated that the opposition of its dominant air carriers influences its decision not to seek PFC authority. Another public agency cited concern that imposing a PFC would hurt its standing relative to other traffic hubs, suggesting that it is concerned about the potential response of its dominant air carrier if it imposed a PFC. Each public agency also cited other reasons, including local opposition to new taxes, as to why it had not imposed a PFC.

It also appears that at some large hub airports, air carriers may be able to influence the use of PFCs for some projects by conditioning their MII approval of other projects that are not PFC funded. An official interviewed stated that the airport's MII carriers asserted their airfield MII rights to direct PFC funds to where they want them. Finally, the need to debt finance certain large projects may require that a public agency obtain air carrier approval to pledge other airport revenues as a backup to a potential shortfall in PFC revenues. FAA has already taken steps to enhance the viability of PFC stand-alone debt financing so as to minimize the need for air carrier approval.

CHAPTER 5: AIRPORT MANAGEMENT PRACTICES AND SUCCESSFUL AIRLINE ENTRY

This chapter draws upon the results of the case study interviews conducted by the Task Force and the comments filed by airport officials in the public docket that was opened by the Department to gather information for this study. As discussed in Chapter 1, 13 airports were selected for in-depth study. The principal reason for undertaking our case studies was to gain a better understanding of how current airport business practices affect airline competition and whether different practices would promote airline competition.

Airport business practices do affect airline competition, and some airport officials are adopting new business practices to promote airline competition in their communities. Indeed, a pro-competitive management philosophy, an interest by community leaders in promoting airline competition, and a commitment by airport officials to use the tools available to assist new entrant and smaller air carriers can result in a more competitive airline marketplace and generate substantial benefits for the public.

AIRPORT MANAGERS PLAY A CRITICAL ROLE IN THE SUCCESS OR FAILURE OF AIR CARRIERS

In the course of our case study interviews, it became clear that many airport managers desire greater control over gates and other facilities at their airports. As explained in Chapter 3, however, at some airports tenant air carriers and airport officials have entered into long-term contractual relationships that in the view of airport officials restrict their ability to reallocate gates or to adopt other policies that would make it easier for air carriers to begin operating at their airports. Even when such agreements are in effect, however, some airport officials have established new business practices and have adopted innovative policies to encourage entry.

Every airport official interviewed for this study stated that no air carrier that wished to serve his or her airport had been denied access. But during the interviews it also became apparent that some airport officials are more comfortable adopting a "let-the-carriers-work-it-out" approach to new entry than they would be serving as "ombudsmen for competition." There is, in short, a significant difference in management philosophy among airport officials as to how actively they should encourage air carriers to operate at their airports and what actions they are prepared to take to make entry a reality.

The commitment of airport managers to promoting competition at their airports can be critical to the success or failure of new entrant air carriers**.**

To ensure that all air carriers that want to serve an airport have reasonable access to gates, facilities, and ancillary services on reasonable terms, airport officials must use all the policy tools at their disposal. Airport officials at Salt Lake City, for example, have been willing to establish business practices that have increased airline competition in their community:

> "The [Salt Lake City International] Airport has followed a general policy of encouraging strong competition and open access for many years. The Airport's current use agreement has been a primary tool for promoting that policy… The Airport has retained control over several gates and a limited amount of counter space. This gives the Airport the ability to provide space to new entrants on reasonable terms, and helps regulate subleasing prices. The Airport has also retained the right to reject subleases, and on a few occasions in the past, has rejected a sublease due to unreasonable pricing."[1]

A more competitive airline marketplace can generate enormous benefits for a community. During the 1990's, airline passengers using Baltimore/Washington International Airport (BWI) have reaped the benefits of lower airfares and more service. Officials at BWI never made a strategic decision to "market" the airport as a regional center for low-fare air service. Like other airports, BWI has a marketing program in place that seeks to entice airlines to serve the airport. For a period of approximately ten years, BWI officials worked to entice Southwest Airlines to serve the airport. In the words of a senior BWI executive, "The inauguration of air service by Southwest Airlines to the greater Washington/Baltimore region in 1994 was the most significant event in BWI's history concerning enhancing competition among air carriers."[2]

Many economic, financial, and competitive factors influenced Southwest's decision to serve BWI. But the business practices in place at BWI, including a willingness to impose PFCs to construct and refurbish gates over the opposition of some incumbent air carriers, were important factors in Southwest's decision. Moreover, because BWI officials monitor gate-utilization practices, have adopted preferential-use lease agreements, and have chosen to retain control over several gates, the requests of other new

[1] Comments of Russell C. Widmar, Executive Director, Salt Lake City Airport Authority, Docket No. OST-98-4025, August 28, 1998.

[2] Nicholas J. Schaus, Airports Council International – North America, *Airport Gate Availability/PFC Survey*, September 1998.

entrant carriers, including US Airways' Metrojet, Pro Air, America West, and Frontier, to serve the Airport have also been met.

These policies have resulted in significant benefits for airline passengers. According to GAO, between 1990 and 1998 average airfares adjusted for inflation declined significantly in markets served from BWI. Specifically, average airfares declined 49 percent, 35 percent, and 38 percent in short-haul, medium-haul, and long-haul markets, respectively.[3] Because air carriers operating from Dulles International and Reagan National had to lower their fares in certain markets in response to the fares set by air carriers at BWI, these figures actually understate the full effect of lower airfares at BWI on air travel in the Washington-Baltimore metropolitan region.

Market concentration is also relatively low at BWI. For the first six months of 1999, the combined market shares of the four largest air carriers was 71 percent. (Market shares of 30 percent, 27 percent, 8 percent, and 6 percent, respectively, for Southwest Airlines, US Airways, United, and Delta.) This level of market concentration is considerably lower than level at other large hub airports. For example, during the same period one air carrier enplaned more than 50 percent of passengers at 15 large hub airports.[4]

The experience of BWI in attracting new airline service demonstrates how a commitment on the part of airport management to work with air carriers, combined with a set of "entry friendly" business practices, can produce substantial economic benefits for an airport, air travelers, and an entire region. Airline competition at BWI is vigorous and, given the airport's business practices and policies now in effect, is likely to remain so.

SOME COMMUNITIES ARE REVIEWING AIRPORT BUSINESS PRACTICES TO IMPROVE OPPORTUNITIES FOR NEW AIRLINE ENTRY

Many of the business practices in effect today at airports were adopted decades ago in response to specific economic, financial, and political conditions. Some airport business practices, such as entering into long-term, exclusive-use gate lease agreements, were considered to be essential to securing long-term financial commitments from tenant air carriers, thus reducing perceived risk for investors in airport bonds and lowering the cost of capital for airports.

[3] U.S. General Accounting Office, *Airline Deregulation: Changes in Airfares, Service Quality, and Barriers to Entry*, RCED-99-92 (Mar. 4, 1999).

[4] *Aviation Daily*, September 24, 1999.

Following the bankruptcies of several large air carriers in the 1980's and early 1990's, however, airport managers now recognize that long-term contractual relationships with air carriers are no assurance that their airports will not suffer financially if their tenants do. Many airport managers now believe the financial community places relatively more weight on the economic fundamentals of a capital-development project -- the strength of the local economy and traffic base -- and relatively less weight on whether an airport has a long-term contractual agreement with tenant airlines.

Some state and local officials are questioning whether the airport business practices in effect in their communities reinforce the market power of incumbent airlines. Two communities, Charlotte and Minneapolis, are studying the competitive situations at their airports.

Airline Competitive Issues at Charlotte

Charlotte/Douglas International Airport serves as a major connecting hub for US Airways, which enplanes approximately 93 percent of scheduled passengers at the airport. As a long-term business strategy, airport officials have sought to position Charlotte/Douglas to be a connecting hub for a major carrier. Airport officials regard US Airways as a "partner," and contend that the Charlotte metropolitan region receives more air service and enjoys important economic benefits because of US Airways' hub operations.

While Charlotte/Douglas has the capacity to accommodate some new service, and some gates are under city control, airport officials appear to have adopted a neutral approach to encouraging new airline entry. Airport officials, moreover, do not generally review sublease agreements, maintaining that there is enough unused space at the airport to ensure that fees charged for subleased gates are reasonable. In the view of airport officials, Charlotte enjoys the benefits of a large, single-carrier connecting hub operation at what would otherwise be a medium hub airport. This strategy, according to airport officials, has provided Charlotte with additional air service and other economic benefits.

But Charlotte/Douglas does not have to choose between the economic benefits of a network hub, on one hand, and price competition, on the other: pro-competitive airport practices could enable it to reap both. Low-fare airlines have successfully entered markets dominated by one large, network carrier. At these airports, airfare premiums declined, often significantly; moreover, consumers continued to enjoy the service benefits that are available as a result of hub operations. Studies have found that average fares in nonstop city-pair markets served from Charlotte are among the highest in the nation. A recent DOT study, for example, estimated that the average fare premium at

Charlotte was 47 percent. And, according to GAO, airfares from Charlotte for short, medium, and long-distance trips were 58 percent, 63 percent, and 42 percent higher, respectively, than average fares from other airports of comparable community size.[5] There is simply no reason for many Charlotte markets not to benefit from more price competition.

Moreover, according to airport officials, some critics of current airport policy claim that US Airways does not pay an appropriate share of the airport's costs, and that it has no incentive to lower fares at Charlotte -- or to offer air travelers the option of flying on Metrojet, its low-fare subsidiary -- because of its market power. Other critics argue that the City of Charlotte should assume more control over airport practices, and that the airport's discretionary funds should be spent to build gates and other facilities to attract low-fare carriers. These parties, according to airport officials, also maintain that new facilities at Charlotte/Douglas should be financed with general obligation bonds, rather than through general airport revenue bonds, which traditionally have been accompanied with long-term, exclusive-use gate lease agreements and majority-in-interest provisions.

The Mayor of Charlotte appointed a task force to address the issues of airline competition at Charlotte. Additionally, the Aviation Department, pursuant to a directive from the City's Advisory Committee, hired a consultant to evaluate the competitive situation at Charlotte and to develop strategies to improve it. The Mayor's task force is to use the information gathered by the consultant to recommend to the City Council an appropriate course of action.

Airline Competitive Issues at Minneapolis

Following the strike at Northwest Airlines in September 1998, public officials in Minnesota began to focus on what they need to do to increase airline competition in their communities. To get the views of the public, Congressional representatives, airport officials, DOT staff, and local officials participated in a meeting to discuss airline competition at Minneapolis-St. Paul International Airport (MSP). At that time, airport officials were quick to point out that limited access to gates and other facilities at MSP was not affecting the ability of new entrant air carriers to serve Minneapolis. Since then, airport and state and local officials have begun to address what they can do to promote

[5] U.S. Department of Transportation, *Domestic Airline Fares Consumer Report, Third Quarter 1998 Passenger and Fare Information,* April 1999; and U.S. General Accounting Office, *Changes in Airfares, Service Quality, and Barriers to Entry,* RCED-99-92 (Mar. 4, 1999).

airline competition, including the critically important role of ensuring reasonable access for air carriers that want to serve Minneapolis.[6]

In certain ways, the competitive situation at Minneapolis is similar to that in Charlotte. One carrier, in this case Northwest Airlines, enjoys a dominant position, controlling 53 of 70 airport gates and carrying 81 percent of all passengers passing through the airport.[7] In September 1998, Northwest had no nonstop competition on 12 of its busiest routes.[8] Moreover, several academic and government studies have concluded that local passengers at Minneapolis pay substantially higher airfares than do passengers flying in comparable city-pair markets from other airports. For example, a March 1999 GAO report concluded that average airfares at Minneapolis in 1998 were 49 percent higher than average fares at other airports that serve communities of similar size.[9]

When interviewed by members of the Task Force, airport officials at MSP were not clear about the criteria an air carrier must meet to be assigned a gate, and stated only that they expect a carrier to disclose its reasons for requesting a gate, including the type and frequency of the service it intends to provide. Airport officials also stated that when they were presented with a request by an air carrier that would not require the use of a dedicated gate, they refer it to incumbent air carriers and leave it up to the parties to complete a subleasing agreement. Airport officials do not intervene unless the airline attempting to gain access complains of unfair or unreasonable treatment.

Although airport officials have the authority to force incumbent carriers to share gates, they acknowledge that they need better information on gate-utilization practices. Airport officials were also uncertain as to how far they should go to ensure that new entrant airlines receive access to gates and other facilities -- that is, how far they should go to promote new airline entry, as opposed to attempting to guarantee nondiscriminatory treatment of all air carriers.

When interviewed by DOT staff, representatives from smaller air carriers that serve MSP stated that gaining access to gates, as well as related support services, was difficult

[6] For a discussion of these issues, see, Minnesota Planning, *Flight Plan: Airline Competition in Minnesota,* St. Paul, Minnesota, March 1999.

[7] Minnesota Planning, *op. cit.*, p. 4.

[8] Minnesota Planning, *op. cit.*, p. 10. The markets included: Los Angeles (three airports), San Francisco, Washington, DC (three airports), Boston, Orlando, Detroit, Seattle, San Diego, Miami, Milwaukee, Indianapolis, and New York (LaGuardia).

[9] GAO, *Changes in Airfares, Service Quality, and Barriers to Entry, op. cit.*, Table 4.

and costly. In particular, they explained the problems they encountered when they undertook to enter into sublease agreements with incumbent air carriers. These smaller airlines also alleged that they have been forced to pay extremely high fees for subleased gates and facilities.

In 1996, the State of Minnesota decided to expand MSP rather than build a new airport. As a result of that decision, MSP is implementing a $2.3 billion capital development plan, which is intended to meet the region's long-term air transport needs. Long-term, exclusive-use gate leases with air carriers operating from the Blue, Green, and Red concourses expired in 1996. Airport and airline officials are renegotiating these agreements; gates on these concourses are now being leased on a month-to-month basis. Airport officials also intend to adopt several new business practices, including a greater reliance on shorter-term, preferential-use gate leases. (Many gates on the Gold Concourse will continue to be leased to Northwest under a long-term, exclusive-use arrangement that will not expire until 2015.) In addition, airport officials propose to modify the existing MII agreement to give them more discretion to undertake capital projects without first having to gain the approval of incumbent airlines.

But as useful as these proposals may be for improving airline competition at MSP over a period of several years, some parties support the adoption of new business practices at MSP now because, "…[t]he airport is a public facility, and public officials have a duty to promote free and fair commerce."[10] Strategies to achieve this end include (1) ensuring open access to new and existing airport gates for air carriers that want to serve or are serving MSP; (2) devising incentives and recruiting air carriers to serve MSP; and (3) monitoring airfares at MSP to detect unfair or predatory practices against new entrants and smaller carriers.

Among the policies being advanced to ensure competitive access for new entrants at MSP: (1) reserving a major share of any new gates built (12 are scheduled to be built) for carriers other than Northwest; (2) limiting the number of long-term, gate-lease agreements at MSP; (3) restricting the number of gates an incumbent carrier could control under long-term lease; and (4) reviewing all sublease agreements to ensure that new entrant and smaller air carriers are not unfairly disadvantaged.[11]

Furthermore, airport management has expressed its support and commitment to implement the "best practices" described in this report. Management believes this action will help to assure that no barriers to entry are created, either to new entrants or to expand-

[10]Minnesota Planning, *op. cit.,* p. 19.

[11]Minnesota Planning, *op. cit.,* pp. 19-20.

ing incumbent carriers, as the result of poor communications on MSP's part or because of the absence of useful information on the part of interested airlines.

Meanwhile, the competitive environment is changing at MSP. An established charter operator, Sun Country, has begun providing low-fare, scheduled passenger service from MSP to many of the markets previously served only by Northwest. Sun Country's operations, if successful, could generate substantial consumer benefits for air travelers in the Minneapolis region. Sun Country and the Metropolitan Airports Commission recently reached an agreement that provides the carrier with the gates and other facilities it needs at MSP.[12]

AIRPORTS CAN PROMOTE COMPETITION BY ADOPTING PRACTICES ALREADY IN USE AT OTHER AIRPORTS

In our discussions with airport, airline, and local public officials, numerous ideas were proffered regarding which airport business practices best furthered the goal of ensuring a competitive environment. While no one airport can be identified as offering the "perfect" environment for new entrant air carriers, some airports combine elements -- often several elements -- of the following "best practices."

Airport Managers Promote New Entry and Become Advocates for Competition

Some large airports have staff whose primary job is to market the airport's facilities, services, and commercial potential to domestic and international air carriers. In some cases, however, an airport's marketing effort is narrowly focused toward "achieving a full service pattern"-- that is, more service to markets or regions airport officials believe to be "under served" -- or obtaining more international service. Some airport officials even express the view that anything they can do to promote entry at their airports is, at best, secondary in terms of importance to the other economic and financial factors that influence whether an airline begins serving an airport.

New entrant and smaller air carriers at heavily used airports are often in a weak position when they negotiate with incumbent carriers for the use of gates and other facilities. For this reason, some airports have adopted business practices that reduce the likelihood that new entrants will be treated unfairly. Some airports, for example, have common-use gate arrangements that forbid airline tenants from subleasing gates or

[12]"Sun Country Airlines to Sign Landmark Agreement to be Anchor Tenant at New Terminal, After Months of Intense Negotiations," *Minneapolis Star-Tribune*, April 6, 1999.

other facilities.[13] Other airports closely monitor subleases to ensure that one carrier is not placed at a competitive disadvantage.[14] Still other airports give tenant and new entrant carriers a short period of time to reach an agreement, but then intercede if the parties have been unable to do so.[15]

Even when such pro-competitive business practices are in place, airport officials that are advocates for competition continue to work closely with new entrant and smaller airlines during the startup period at their airports. Their efforts center on ensuring that entrants have timely access on reasonable terms to necessary gates, facilities, and services.

For example, even when a new entrant gains access to a gate through a sublease agreement at a heavily used airport, the lessor airline may require the lessee to adjust its operations and use a different gate depending upon the lessor's schedule. Such actions can be costly and disruptive to the lessee; however, a new entrant or smaller airline may be reluctant to complain because it is concerned that the lessor may cancel the sublease or choose not to renew it. In such situations, some airport officials have assisted new entrants. To ensure that new entrants are not unfairly treated or placed at a significant competitive disadvantage, such efforts have included negotiating with incumbent air carriers on behalf of new entrants.

Airport Managers Closely Monitor Gate-Utilization Practices

Many airport officials interviewed by the Task Force had a detailed knowledge of gate use at their airports; others had, at best, an imperfect understanding of how gates and other facilities were being used. Managing an airport's facilities to ensure that all gates are fully used is critical to being able to make gates available to new entrants and incumbent carriers that want to expand service. The initiatives underway at Hartsfield Atlanta International Airport illustrate how one airport is attempting to maximize the use of its gates and thereby increase capacity.

[13] "Airlines are not permitted to sublease terminal facilities … ." Comments of Gail P. Fels, Aviation Department, Metropolitan Dade County, Florida, Docket No. OST-98-4025. December 29, 1998, page 7.

[14] "The Lee County Port Authority monitors the prices charged [for subleased facilities or ancillary services] and attempts to resolve disputes between carriers." Comments of Debra M. Lemke, Lee County Port Authority, Fort Meyers, Florida, Docket No. OST-98-4025, August 19, 1998, page 3.

[15] "Under our current airline agreement if there is no vacant space, a new entrant airline must work with existing airlines for 30 days. If they are unsuccessful the Airline Authority will step in and work out a joint use." Comments of Tom Medland, Airport Authority of Washoe County, Reno/Tahoe International Airport, Docket No. OST-98-4025, August 10, 1998, page 1.

The business practices in place at Hartsfield have been influenced by a number of factors: the steady expansion of Delta Air Lines, the demise of Eastern Airlines, the periodic establishment of mini-hub operations by other carriers (e.g., ValuJet), the dramatic increase in international service, and the emergence of significant airspace, airfield, and terminal congestion. Major capacity expansion projects are still in the planning stage, and thus will not significantly alleviate congestion at Hartsfield for several years.

Although some gates at Hartsfield are operated under 30-day leases, and some are leased on a "per-turn" basis, the majority are leased under long-term, exclusive-use agreements.[16] There is, according to airport officials, concern in the business community about high airfares and the lack of competition at Atlanta.

A 1996 study found that Delta's average gate use at Hartsfield was 6.4 departures per gate per day -- approximately the industry average. (Delta managers interviewed by members of the Task Force stated that average gate use is now between seven and eight operations per day.) In addition to a large block of gates operated under exclusive-use leases, Delta also operates five gates under 30-day leases. Delta is required to use these gates an average of at least 7.3 operations per day. Hartsfield's management also was able to secure a commitment from Delta to increase its gate-utilization practices when it acquired non-terminal assets from the bankruptcy estate of Eastern Airlines. To explore additional ways to increase "effective" capacity, Hartsfield's management hired a consultant to conduct a study of gate and ticket counter utilization, focusing on the facilities that have been leased until 2010 under an exclusive-use agreement.

Airport officials are also taking actions to expand existing facilities. In January 1999, representatives from AirTran Airways approached airport officials with a request for four new gates. The airport has tentatively committed to adding four gates, which will be accomplished by adding new loading bridges and re-spacing certain gates that were designed to accommodate Eastern's wide-body aircraft. Hartsfield will pay for these facilities out of discretionary funds. The Airport will recover its costs through 30-day lease agreements or a fixed fee per operation, not a long-term lease, which was AirTran's preferred financing arrangement.

Over the longer term, Hartsfield officials will decide whether to impose a moratorium on long-term, exclusive-use gate and ticket counter leases, will convert certain facilities to common-use status, and will seek improved utilization of all facilities from tenant carriers. In sum, airport managers that analyze how gates and other facilities are being used at their airports and identify ways to increase their use are in a better position to

[16]By one recent count, Hartsfield had a complement of 171 gates, of which 147 were used for domestic flights and 24 were used for international flights (common use gates). Of the 147 domestic gates, 125 were leased on an exclusive-use basis, 14 were leased on a 30-day basis, and eight were operated on a per-turn basis.

accommodate new entrant airlines or to assist incumbent air carriers that want to expand.

Monitoring gate use is also a practical way for an airport to protect itself against disruptions in operations in the event of a bankruptcy of an air carrier tenant. An airport that has continually monitored gate use will be in a better position to argue for a timely resolution of a gate lease disposition under the Bankruptcy Code provisions. In considering the timing of the disposition of an unexpired gate lease of a carrier in default, a bankruptcy court is required to consider, among other factors:

> "…the level of actual use of the terminals or gates which are the subject of the lease, the public interest in actual use of such terminals or gates, the existence of competing demands for the use of such terminals or gates.…" 11 U.S.C. 365 (d)(9).

Demonstrating to the court that it has attempted to fully utilize the gate lease -- and to assure competitive entry when the gate was not fully used by the tenant air carrier -- can help the airport operator in arguing that the public interest warrants a speedy disposition of the gate lease to enable the airport to receive the benefits of airline competition.

Airport Managers Invoke 'Use-It-Or-Lose-It' Authority if Incumbent Carriers Are Not Using Their Gates Fully

The ability to reallocate underutilized gates is a potentially important tool for promoting entry. Some airports recognize the importance of reallocating gates:

> "[T]he City [Chicago] has the ability at Midway to recapture gates from a carrier that does not meet certain specified utilization requirements at its gates for a specified period of time. In at least one incident in the last several years, the City indicated to one major incumbent carrier that was not meeting the utilization standard that the City intended to enforce those lease provisions and to reclaim gates. That carrier quickly increased its service at its gates. In addition, these 'use it or lose it' provisions enabled the City to reallocate the gates of MarkAir and Kiwi Airlines when those carriers were in bankruptcy proceedings. When Valujet suspended service at Midway in 1996, the City also used the lease provisions to reallocate Valujet's facilities to other airlines seeking to enter the market."[17]

[17]Comments of Mary Rose Loney, Commissioner, Department of Aviation, City of Chicago, in Docket No. OST-98-4025, December 30, 1998, page 16.

However, some airport managers appear to be reluctant to invoke their authority to recapture gates from air carriers if they are not being used fully. This is unfortunate, especially if it precludes access by another willing user. As airports renegotiate their existing preferential-use gate lease agreements with tenant air carriers -- or adopt preferential-use agreements with minimum-use provisions -- airport officials have the opportunity to assign gates to air carriers in ways that maximize the use of their facilities.

Airport Managers Provide Prospective Entrants With Clear Guidelines and a Time Line on What They Must Do to Gain Access

Some airport officials also appear to be reluctant to challenge the views of incumbent air carriers as to whether new entry can be accommodated. Not surprisingly, incumbent carriers may determine that new entry -- and the increased competition that accompanies it -- is not feasible. Incumbent airlines at heavily used airports may be able to make it difficult for new entrant airlines to begin operating, even if partially used gates are available.

At some heavily used airports, airport officials compel new entrants to negotiate for the joint use of gates and other facilities with incumbent carriers. This negotiating process may not have a time limit, and could be used by incumbents to delay entry for months or, conceivably, block it entirely. The longer it takes to begin operating, the greater the costs incurred by prospective entrants, both in terms of direct outlays and forgone revenues. Moreover, because they are uncertain as to when they will begin operating, air carriers placed in this position will find it difficult to market their services to travel agents and potential customers.

AirTran Airways, for example, sought to offer limited service from Newark to Atlanta. Over a period of several months, AirTran attempted to reach an agreement with incumbent air carriers to share a gate at Newark International Airport. No incumbent airline would sublease a gate to AirTran, despite the fact that some gates were not, according to data gathered by AirTran, being used fully. Officials from AirTran discussed the situation with officials from the Port Authority of New York and New Jersey; nevertheless, it was still denied access to a gate. Officials at AirTran requested DOT's assistance, and the carrier did, eventually, gain access to Newark International Airport.
Airport officials, not incumbent airlines, should decide when new entrants and smaller air carriers should begin operating at an airport. Adopting clear guidelines and a time line as to what air carriers must do to gain access to an airport and expand their operations could prevent incumbent carriers from delaying or preventing airline entry.

Airport Managers Monitor All Sublease Agreements to Ensure That Fees Are Reasonable

Officials at many of the Nation's airports monitor sublease agreements between air carriers to ensure they are not structured in a way that would unfairly disadvantage a new entrant or a smaller airline. For example:

> "Massport monitors the cost of subhandling and sublease agreements at Logan Airport pursuant to the terms of Massport's standard terminal lease. Prime tenant air carriers are not permitted to charge excessive handling charges or rents under such subhandling or sublease agreements, and, in general, Massport retains the right to approve these arrangements on a case by case basis."[18]

Airports have adopted various business practices to prevent new entrants from being placed at a competitive disadvantage. For example, air carriers are not permitted to enter into sublease agreements at Miami International Airport.[19] Other airports do not permit subleasing if the airport authority has space available (e.g., gates or ticket counters).[20]

Of course, if an airport has a substantial amount of underused capacity, an air carrier would be able to sublease a gate from either an incumbent carrier or from the airport authority. Officials at three of our case study airports -- New Denver International, Pittsburgh International, and Cincinnati-Northern Kentucky International -- stated that their airports had "excess" capacity. At these airports, and others, competition among incumbent carriers to sublease their underused gates, as well as gates that could be leased directly from the airport authority, presumably ensures that fees charged for the use of these facilities are reasonable. However, at those airports where capacity is limited, airport officials can monitor sublease agreements and, if necessary, disapprove any agreement that results in a serious competitive disadvantage for a subleasing carrier.

[18]Comments of David Y. Bannard, Massachusetts Port Authority, in Docket No. OST-98-4025, December 23, 1998, page 14.

[19]Comments of Gail P. Fels, Assistant County Attorney, Metropolitan Dade County, in Docket No. OST-98-4025, December 29, 1998, page 7.

[20]Comments of Efren T. Gonzalez, Department of Aviation, City of San Antonio, in Docket No. OST-98-4025, August 3, 1998, page 2.

Airport Managers Create an Environment Where Third-Party Contractors Provide Competitive Ground-Handling and Support Services

To be competitive, new entrant and smaller airlines require access on reasonable terms to all airport facilities *and* support services. Many airports, such as Miami International, Atlanta's Hartsfield, and Orlando International, have adopted business practices to ensure that competition exists for ground-handling and other essential services. At Orlando International, for example, the airport:

> "…will not consent to a sublease that requires the sublessee to obtain ground handling or other services on an exclusive basis from the Signatory Airline that is subleasing the space. This assures that the Fixed Based Operators at OIA are not precluded from competing for these services … Competition between the Signatory Airlines and the Fixed Based Operators has assured that ancillary services are available to all airlines at reasonable prices at OIA."[21]

Airport officials interested in promoting airline competition can establish business practices that allow third-party contractors to provide competitive ground-handling and other support services.

Airport Managers Take Action to Recover Gates When They Become Available and to Convert Gates And Other Facilities to Common-Use Status

To promote airline competition, some airports have replaced their exclusive-use gate lease agreements with preferential-use or common-use agreements:

> "Since 1990 the Lee County Port Authority has actively pursued the purchase of the jet bridges on the gates, as well as repurchasing the preferential rights, in order to maximize gate utilization at RSW [Southwest Florida International Airport]. The Authority has seen gate utilization of up to ten turns per day on the gates which it controls since the policy has been enacted. Currently the Authority controls eight of the fourteen existing gates and jet bridges at RSW."[22]

[21]Comments of Egerton K. van den Berg, Greater Orlando Aviation Authority, in Docket No. OST-98-4025. December 18, 1998, pages 6-7.

[22]Comments of Debra A. Lemke, Lee County Port Authority, in Public Docket No. OST-98-4025, August 19, 1998, page 2.

By gaining greater control over their facilities, airport managers may be able to improve gate utilization and ensure that new entrant and smaller air carriers are able to compete with incumbent air carriers.

Airport Managers Are Working to Ensure That Any New Majority-In-Interest Agreements Do Not Prevent or Delay Projects Beneficial to New Entrants

It is not hard to understand the logic behind MIIs: airlines that are assessed rates and charges to pay for capital development projects believe they should be able to review and approve or disapprove such projects before they are undertaken. But, for competitive reasons, some airports have chosen not to enter into MIIs:

> "Massport has no MII agreements. Massport believes that such agreements can hamper competition by, for example, granting air carriers, which have an incentive to reduce competition, the ability to block capital improvements which could provide facilities which would enhance competition."[23]

Other airports contend that MIIs "significantly stifle the growth, flexibility, and competitiveness of an airport."[24] Airport officials who want to foster airline competition can make sure that any newly negotiated MIIs cannot be used by incumbent air carriers to block or delay capital development projects that would encourage new entry and foster airline competition.

Airport Managers Are Using the Tools Provided in the PFC Program to Finance Terminal Expansion Projects That Provide Greater Opportunities for New Entrants

As discussed in Chapter 4, PFCs have not only become a major source of funds for airport capital development projects, they are an *independent* source since they can be imposed by airports without the approval of incumbent airlines. Also, of course, a PFC-financed project may not result in an airline obtaining a long-term "lock" on the facility. Consequently, airport managers are adopting business practices that promote entry and competition (e.g., use-it-or-lose-it provisions, non-exclusive use of facilities, subleasing approval and standards).

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[23]Comments of David Y. Bannard, Massachusetts Port Authority, in Public Docket No. OST-98-4025, December 23, 1998, page 13.

[24]Comments of Donald L. Smithey, Airport Authority of the City of Omaha, in Public Docket No. OST-98-4025, August 26, 1998, page 21.

Officials at most of the case study airports that have chosen to impose PFCs could identify capital development projects that improved competitive opportunities for new entrants and incumbent carriers. These airport managers also recognized that PFCs could, under appropriate conditions, be "leveraged" as a revenue stream to support bond issues.

As additional demands are placed upon it, the Nation's airport system will need additional funds for expansion and modernization. The Administration's FAA reauthorization legislation proposed raising the current $3 PFC cap to $5. However, to receive the fifth dollar, large airports served by a "dominant" carrier would have to submit to DOT a plan on how they intend to promote airport access, entry, and competition. The ability to impose PFCs is a powerful tool for those airport managers who are interested in promoting airline competition.

Table A-1.
Gate Usage Practices of Individual Large Hub[1] Airports[2]

Airport	Rank[3]	1992 Exclusive-use gates	1992 Shared-use gates	1992 Airport-controlled gates	1992 total gates	Summary characterization
ATL Atlanta	1	102	0	0	102	All exclusive-use
BOS Boston	17	26	52	14	92	Mixed
BWI Baltimore-Washington	28	0	55	10	65	Mixed
CVG Covington, KY/ Cincinnati, OH	25	43	38	0	81	Mixed
DCA Washington, DC Reagan National	26	0	44	0	44	All shared-use
DFW Dallas-Fort Worth	4	103	0	9	112	Mixed
DTW Detroit	9	-	0	6	-	Undetermined
EWR Newark	8	86	8	0	94	Mixed
IAH Houston	15	66	6	11	83	Mixed
JFK New York	10	99	14	0	113	Mixed
LAS Las Vegas	12	47	0	20	67	Mixed
LAX Los Angeles	3	0	94	25	119	Mixed
LGA New York LaGuardia	21	63	1	10	74	Mixed
MCO Orlando	16	60	6	13	79	Mixed
MIA Miami	7	0	0	141	141	All apt-controlled
ORD Chicago O'Hare	2	149	10	0	159	Mixed
PHX Phoenix	11	0	0	76	76	All apt-controlled
PIT Pittsburgh	23	-	-	-	-	Undetermined
SAN San Diego	27	27	4	0	31	Mixed
SEA Seattle	18	0	50	25	75	Mixed
SFO San Francisco	5	78	0	3	81	Mixed
SLC Salt Lake City	24	46	3	5	54	Mixed
STL St. Louis	14	12	69	0	81	Mixed
TPA Tampa	29	37	12	3	52	Mixed
Large hub totals[4]		778	342	111	1,231	
Percentages		63.2%	27.8%	9.0%	100.0%	

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[1] The hub status of all airports in these tables is determined according to criteria applicable to 1998.

[2] Source: 1998 ACI-NA survey, except as noted.

[3] Source: FAA Report VP, "Primary Airport Enplanement Activity Summary for CY1997".

[4] These subtotals have been computed without the data for the nine large hub airports -- DFW, DTW, JFK, LAX, MIA, PHX, PIT, SAN, and TPA -- that did not respond uniformly to the ACI survey question about distribution of gates by lease type for 1992, 1998, and 2004 (planned).

Table A-2.
Gate Usage Practices of Individual Medium Hub Airports

Airport	Rank	1992 Exclusive-Use Gates	1992 Shared-use gates	1992 Airport-controlled gates	1992 total gates	Summary characterization
AUS Austin	53	0	19	0	19	All shared-use
BNA Nashville	42	82	0	2	84	Mixed
COS Colorado Springs	62	6	0	0	6	All exclusive-use
FLL Fort Lauderdale	32	0	26	13	39	Mixed
GEG Spokane	72	19	1	0	20	Mixed
IAD Washington, DC (Dulles)	30	0	55	16	71	Mixed
JAX Jacksonville	61	20	0	11	31	Mixed
MCI Kansas City	34	57	1	0	58	Mixed
MEM Memphis	37	70	0	2	72	Mixed
MKE Milwaukee	55	42	0	0	42	All exclusive-use
MSY New Orleans	40	37	4	8	49	Mixed
OAK Oakland	38	-	20	1	-	Undetermined
OMA Omaha	67	12	0	9	21	Mixed
ONT Ontario, CA	52	0	0	25	25	All apt-controlled
PBI West Palm Beach	54	0	29	0	29	All shared-use
PDX Portland, OR	31	-	-	-	-	Undetermined
RSW Fort Myers	60	0	14	0	14	All shared-use
SAT San Antonio	47	0	29	0	29	All shared-use
SJC San Jose	35	12	19	0	31	Mixed
SNA Orange County, CA	42	0	0	14	14	All apt-controlled
TUL Tulsa	69	15	0	3	18	Mixed
TUS Tucson	66	0	17	6	23	Mixed
Medium hub totals[1]		151	213	71	435	
Percentages		34.7%	49.0%	16.3%	100.0%	

[1] These subtotals have been computed without the data for the seven medium hub airports -- BNA, MCI, MEM, OAK, OMA, ONT, and PDX -- that did not respond uniformly to the ACI survey question about distribution of gates by lease type for 1992, 1998, and 2004 (planned).

Table A-3.
Gate Usage Practices of Individual Large Hub[1] Airports[2]

Airport	Rank[3]	1998 Exclusive-use gates	1998 Shared-use gates	1998 Airport-controlled gates	1998 total gates	Summary characterization
ATL Atlanta	1	125	0	46	171	Mixed
BOS Boston	17	26	49	18	93	Mixed
BWI Baltimore-Washington	28	0	66	9	75	Mixed
CVG Covington, KY/ Cincinnati, OH	25	67	53	0	120	Mixed
DCA Washington, DC Reagan National	26	0	44	0	44	All shared-use
DFW Dallas-Fort Worth	4	112	0	8	120	Mixed
DTW Detroit	9	56	26	6	88	Mixed
EWR Newark	8	79	15	0	94	Mixed
IAH Houston	15	75	0	14	89	Mixed
JFK New York	10	99	14	0	113	Mixed
LAS Las Vegas	12	16	38	39	93	Mixed
LAX Los Angeles	3	12	96	38	146	Mixed
LGA New York LaGuardia	21	60	5	7	72	Mixed
MCO Orlando	16	57	16	6	79	Mixed
MIA Miami	7	0	0	121	121	All apt-controlled
ORD Chicago O'Hare	2	149	26	0	175	Mixed
PHX Phoenix	11	0	0	84	84	All apt-controlled
PIT Pittsburgh	23	89	1	10	100	Mixed
SAN San Diego	27	42	3	0	45	Mixed
SEA Seattle	18	0	49	27	76	Mixed
SFO San Francisco	5	72	0	3	75	Mixed
SLC Salt Lake City	24	49	20	3	72	Mixed
STL St. Louis	14	12	72	0	84	Mixed
TPA Tampa	29	18	23	19	60	Mixed
Large hub totals [4]		787	453	172	1,412	
Percentages		55.7%	32.1%	12.2%	100.0%	

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[1] The hub status of all airports in these tables is determined according to criteria applicable to 1998.

[2] Source: 1998 ACI-NA survey, except as noted.

[3] Source: FAA Report VP, "Primary Airport Enplanement Activity Summary for CY1997".

[4] These subtotals have been computed without the data for the nine large hub airports -- DFW, DTW, JFK, LAX, MIA, PHX, PIT, SAN, and TPA -- that did not respond uniformly to the ACI survey question about distribution of gates by lease type for 1992, 1998, and 2004 (planned).

Table A-4.
Gate Usage Practices of Individual Medium Hub Airports

Airport	Rank	1998 Exclusive-use gates	1998 Shared-use gates	1998 Airport-controlled gates	1998 total gates	Summary Characterization
AUS Austin	53	0	18	0	18	All shared-use
BNA Nashville	42	81	0	4	85	Mixed
COS Colorado Springs	62	0	18	2	20	Mixed
FLL Fort Lauderdale	32	0	20	19	39	Mixed
GEG Spokane	72	19	1	0	20	Mixed
IAD Washington, DC (Dulles)	30	0	52	39	91	Mixed
JAX Jacksonville	61	22	0	9	31	Mixed
MCI Kansas City	34	46	0	11	57	Mixed
MEM Memphis	37	70	0	2	72	Mixed
MKE Milwaukee	55	42	0	0	42	All exclusive-use
MSY New Orleans	40	26	3	13	42	Mixed
OAK Oakland	38	0	19	5	24	Mixed
OMA Omaha	67	13	0	8	21	Mixed
ONT Ontario, CA	52	20	0	7	27	Mixed
PBI West Palm Beach	54	0	29	0	29	All shared-use
PDX Portland, OR	31	0	39	14	53	Mixed
RSW Fort Myers	60	0	12	5	17	Mixed
SAT San Antonio	47	0	29	0	29	All shared-use
SJC San Jose	35	12	19	0	31	Mixed
SNA Orange County, CA	42	0	0	14	14	All apt-controlled
TUL Tulsa	69	15	0	3	18	Mixed
TUS Tucson	66	0	17	6	23	Mixed
Medium hub totals[1]		136	218	110	464	
Percentages		29.3%	47.0%	23.7%	100.0%	

[1] These subtotals have been computed without the data for the seven medium hub airports -- BNA, MCI, MEM, OAK, OMA, ONT, and PDX -- that did not respond uniformly to the ACI survey question about distribution of gates by lease type for 1992, 1998, and 2004 (planned).

Table A-5.
Gate Usage Practices of Individual Large Hub[1] Airports[2]

Airport	Rank[3]	2004 Exclusive-use gates	2004 Shared-use gates	2004 Airport-controlled gates	2004 Total Gates	Summary characterization
ATL Atlanta	1	143	0	0	143	All exclusive-use
BOS Boston	17	26	49	21	96	Mixed
BWI Baltimore-Washington	28	0	77	13	90	Mixed
CVG Covington, KY/ Cincinnati, OH	25	67	53	0	120	Mixed
DCA Washington, DC Reagan National	26	0	44	0	44	All shared-use
DFW Dallas-Fort Worth	4	142	-	14	-	Undetermined
DTW Detroit	9	-	-	-	-	Undetermined
EWR Newark	8	109	18	0	127	Mixed
IAH Houston	15	64	33	14	111	Mixed
JFK New York	10	99	16	-	-	Undetermined
LAS Las Vegas	12	0	64	29	93	Mixed
LAX Los Angeles	3	-	-	-	-	Undetermined
LGA New York LaGuardia	21	60	5	7	72	Mixed
MCO Orlando	16	57	39	12	108	Mixed
MIA Miami	7	-	-	69	-	Undetermined
ORD Chicago O'Hare	2	0	179	-	179	All shared-use
PHX Phoenix	11	-	-	-	-	Undetermined
PIT Pittsburgh	23	125	0	0	125	All exclusive-use
SAN San Diego	27	-	-	0	-	Undetermined
SEA Seattle	18	0	0	82	82	All apt-controlled
SFO San Francisco	5	70	0	27	97	Mixed
SLC Salt Lake City	24	0	75	3	78	Mixed
STL St. Louis	14	12	75	0	87	Mixed
TPA Tampa	29	-	-	-	-	Undetermined
Large hub totals[4]		608	711	208	1,527	
Percentages		39.8%	46.6%	13.6%	100.0%	

[1] The hub status of all airports in these tables is determined according to criteria applicable to 1998.

[2] Source: 1998 ACI-NA survey, except as noted.

[3] Source: FAA Report VP, "Primary Airport Enplanement Activity Summary for CY1997".

[4] These subtotals have been computed without the data for the nine large hub airports -- DFW, DTW, JFK, LAX, MIA, PHX, PIT, SAN, and TPA -- that did not respond uniformly to the ACI survey question about distribution of gates by lease type for 1992, 1998, and 2004 (planned).

Table A-6.
Gate Usage Practices of Individual Medium Hub Airports

Airport	Rank	2004 Exclusive-use gates	2004 Shared-use gates	2004 Airport-controlled gates	2004 total gates	Summary characterization
AUS Austin	53	0	25	0	25	All shared-use
BNA Nashville	42	-	-	-	-	Undetermined
COS Colorado Springs	62	0	16	0	16	All shared-use
FLL Fort Lauderdale	32	0	20	28	48	Mixed
GEG Spokane	72	19	4	0	23	Mixed
IAD Washington, DC (Dulles)	30	0	79	52	131	Mixed
JAX Jacksonville	61	30	0	9	39	Mixed
MCI Kansas City	34	-	-	-	-	Undetermined
MEM Memphis	37	-	-	-	-	Undetermined
MKE Milwaukee	55	46	0	0	46	All exclusive-use
MSY New Orleans	40	40	0	2	42	Mixed
OAK Oakland	38	-	-	30	-	Undetermined
OMA Omaha	67	-	-	-	-	Undetermined
ONT Ontario, CA	52	-	-	-	-	Undetermined
PBI West Palm Beach	54	0	29	0	29	All shared-use
PDX Portland, OR	31	-	-	-	-	Undetermined
RSW Fort Myers	60	0	0	28	28	All apt-controlled
SAT San Antonio	47	0	29	0	29	All shared-use
SJC San Jose	35	12	19	0	31	Mixed
SNA Orange County, CA	42	0	0	14	14	All apt-controlled
TUL Tulsa	69	17	0	3	20	Mixed
TUS Tucson	66	0	17	6	23	Mixed
Medium hub totals[1]		164	238	142	544	
Percentages		30.1%	43.8%	26.1%	100.0%	

[1] These subtotals have been computed without the data for the seven medium hub airports -- BNA, MCI, MEM, OAK, OMA, ONT, and PDX -- that did not respond uniformly to the ACI survey question about distribution of gates by lease type for 1992, 1998, and 2004 (planned).

Table B-1.
Type of Financing Arrangements and MII Status
At Individual Large Hub Airports, 1998

Large Hub Airports	Rank	MII Clause?	MII Invoked?	Type of Use & Lease Agreement	Length of Use/Lease Agreement (Years)	Expiry date of Use/Lease Agreement
ATL Atlanta	1	Yes	No	Compensatory	30	09/20/2012
BOS Boston	17	No	No	Compensatory	-	-
BWI Baltimore-Washington	28	Yes	No	Hybrid	10	02/28/2003
CVG Covington, KY/ Cincinnati, OH	25	Yes	No	Residual	45	12/01/2015
DCA Washington, DC National	26	Yes	No	Hybrid	25	01/01/2004
DFW Dallas-Fort Worth	4	Yes	No	N-R	35	12/01/2009
DTW Detroit	9	Yes	Yes	Residual	16	01/01/2009
EWR Newark	8	No	N-R	Compensatory	20	01/01/2018
IAH Houston	15	No	N-R	Compensatory	-	-
JFK New York	10	No	N-R	Compensatory	17	12/30/2015
LAS Las Vegas	12	Yes	No	Hybrid	5	06/30/2002
LAX Los Angeles	3	No	No	Compensatory	-	-
LGA New York LaGuardia	21	No	N-R	Compensatory	1	12/31/1998
MCO Orlando	16	Yes	No	Residual	30	09/30/2008
MIA Miami	7	Yes	Yes	Residual	-	01/01/2020
ORD Chicago O'Hare	2	Yes	No	Residual	33	05/18/1999
PHX Phoenix	11	No	No	N-R	-	-
PIT Pittsburgh	23	Yes	No	Residual	30	01/01/2018
SAN San Diego	27	N-R	No	Residual	5	-
SEA Seattle	18	Yes	No	Residual	32	01/01/2001
SFO San Francisco	5	Yes	No	Residual	30	06/01/2011
SLC Salt Lake City	24	No	No	Compensatory	25	06/01/2003
STL St. Louis	14	Yes	No	Hybrid	40	12/31/2005
TPA Tampa	29	Yes	No	Compensatory	7	09/30/2006

Source: 1998 ACI-NA Survey.

Table B-2.
Type of Financing Arrangements and MII Status
At Individual Medium Hub Airports, 1998

Medium Hub Airports	Rank	MII Clause?	MII Invoked?	Type of Use & Lease Agreement	Length of Use/Lease Agreement (Years)	Expiry date of Use/Lease Agreement
AUS Austin	53	No	N-R	Hybrid	10	04/30/1999
BNA Nashville	42	Yes	No	Residual	30	09/01/2017
COS Colorado Springs	62	Yes	Yes	Residual	5	12/01/1999
FLL Fort Lauderdale	32	Yes	No	Hybrid	30	09/01/2011
GEG Spokane	72	No	No	Compensatory	5	-
IAD Washington, DC Dulles	30	Yes	No	Hybrid	25	01/01/2004
JAX Jacksonville	61	Yes	No	Compensatory	20	01/01/2007
MCI Kansas City	34	Yes	No	Hybrid	5	05/01/2003
MEM Memphis	37	Yes	No	Residual	28	02/01/1999
MKE Milwaukee	55	Yes	No	Residual	25	01/01/2010
MSY New Orleans	40	Yes	No	Hybrid	5	01/01/1997
OAK Oakland	38	No	No	Hybrid	0.083	-
OMA Omaha	67	No	N-R	Compensatory	1	01/01/1998
ONT Ontario, CA	52	Yes	N-R	Residual	20	-
PBI West Palm Beach	54	No	N-R	Hybrid	12	09/01/2000
PDX Portland, OR	31	Yes	N-R	N-R	10	06/01/2001
RSW Fort Myers	60	Yes	Yes	Residual	25	12/01/2008
SAT San Antonio	47	Yes	No	Hybrid	10	09/01/1999
SJC San Jose	35	No	No	Residual	29	01/01/2007
SNA Orange County, CA	42	No	N-R	Compensatory	-	12/31/2005
TUL Tulsa	69	Yes	No	Hybrid	30	06/01/2008
TUS Tucson	66	Yes	No	Residual	30	09/01/2006

Source: 1998 ACI-NA Survey.