

**U. S. Department of Transportation
Federal Aviation Administration
FAA Docket 2009-1144**

**Record of Decision
For the Participation of
Luis Muñoz Marín International Airport, San Juan, Puerto Rico
In the Airport Privatization Pilot Program**

I. Introduction

This Record of Decision sets forth the basis for the Federal Aviation Administration (FAA) decision to approve the application of the Puerto Rico Ports Authority (PRPA or the Authority) for the participation of Luis Muñoz Marín International Airport (SJU/Airport) in the Airport Privatization Pilot Program (Program). The FAA issues this decision including certain exemptions from existing requirements under the authority of Title 49 U.S. Code, § 47134 (Section 47134). Approval of the exemption of the Authority from certain federal obligations and the approval of Aerostar Airport Holdings, LLC (Aerostar) for a limited exemption from existing airport revenue use restrictions, and the assumption of the operation of the Airport is made under the authority of Sections 47101 et seq, 47133, 47134 of Title 49 U.S. Code, and the Airport Privatization Pilot Program: Application Procedures (62 Federal Register 48693) September 16, 1997 (Application Procedures).¹

Section 47134 authorizes the Secretary of the U.S. Department of Transportation and through delegation, the FAA Administrator (Administrator), to exempt a public sponsor of a public use airport that has received federal assistance from certain federal requirements, in connection with the privatization of an airport by sale or lease to a private party. Specifically, the Administrator may exempt the public sponsor from all or part of the requirements to use airport revenue for airport-related purposes (for a primary airport, upon approval by 65 percent of the scheduled air carriers serving the airport and by the scheduled and nonscheduled air carriers having 65 percent of the total landed weight of all aircraft serving the airport in the preceding calendar year), to pay back federal grants, and to return airport property deeded by the Federal Government. The Administrator is also authorized to exempt the private purchaser or lessee from the requirement to use all airport revenues for airport-related purposes, to the extent necessary to permit the purchaser or lessee to earn compensation from the operations of the airport. The Application Procedures and the complete Final Application for SJU are available for review at www.regulations.gov under FAA Docket No. 2009-1144.

¹ See also Policy Amendment, 62 FR 63211-01, (November 26, 1997).

Congress established the Airport Privatization Pilot Program (Program) in 1996, giving the Secretary of Transportation authority to approve a sale or lease of a total of five airports, under certain conditions, to private operators.² The legislative history indicates that the congressional intent was to determine “if new investment and capital from the private sector can be attracted through innovative financial arrangements.”³ Only one large hub airport was allowed to participate and at least one airport in the Program must be a general aviation airport.

In 2000, the FAA approved New York State Department of Transportation’s privatization of Stewart International Airport to National Express Group, through a long-term lease, under the Program.⁴ In 2007, the private operator sold the remainder of its leasehold interest to the Port Authority of New York and New Jersey.⁵ Congress has since expanded the number of airports that may participate in the Program to ten, retaining the limit of one large hub airport and the requirement that one general aviation airport participate in the Program.⁶ With today’s approval of the privatization of the Airport, and two pending applications, seven additional airports may participate in the Program.⁷

II. Background and procedural history

The Airport, owned and operated by the PRPA, is a medium hub airport serving San Juan, Puerto Rico. The Airport serves scheduled and charter air carriers, general aviation, and air cargo service.

The PRPA is a public corporation created by the Government of Puerto Rico to develop and manage Puerto Rico’s airports and maritime port facilities. The PRPA also manages Puerto Rico’s ten other airports including Isla Grande, Ponce, Mayaguez, Arecibo, Aguadilla, Ceiba, Culebra, Humacao, Vieques, and Fajardo. PRPA holds the Part 139 Airport Operating Certificate for SJU, Ponce, Aguadilla, and Vieques. These airports are also subject to the security requirements of Title 49 CFR, Part 1542.

On December 1, 2009, the PRPA filed a preliminary application for participation of the Airport in the Airport Privatization Pilot Program (Program), under Section 47134. On December 22, 2009, the FAA issued a notice accepting the PRPA’s preliminary application for further review. Early in 2011, the PRPA and the Puerto Rico Public Private Partnership

² See, Section 149 of the Federal Aviation Reauthorization Act of 1996, Pub. Law No. 104-264. Only a general aviation airport may be leased or sold; other airports may be leased but not sold.

³ H.R. Conf. Rep. 104-848, 104th Cong, 2d Sess. (1996) at 91. See also, FAA Report to Congress on the Status of the Airport Privatization Pilot Program (Aug. 2004), FAA Docket 2005-21370.

⁴ See, FAA Record of Decision dated March 30, 2000, approving a 99-year lease between the New York State Department of Transportation and the National Express Group and granting exemptions to NYSDOT from any requirements to repay federal grants or return any federal property and granting exemption to the private operator to earn compensation from the operation of the airport including a reasonable rate of return on its investment, FAA Docket 2003-14961.

⁵ See, FAA letter of October 27, 2006 pertaining to FAA consent and requirements for the assignment and assumption of the Stewart International Airport lease. FAA Docket 2003-14961.

⁶ Section 156 of the FAA Modernization and Reform Act of 2012, Pub. L. No. 112-95; 49 U.S.C. § 47134(b).

⁷ Preliminary applications have been filed by Chicago Midway International Airport, a large hub airport and by Hendry County Airglades Airport, a general aviation airport.

Authority (PPPA or PPP Authority) entered into a Memorandum of Understanding with the signatory Airlines (Airlines) establishing basic terms of the Airport-Airline Use Agreement to be entered into by the selected private operator and Airlines. On July 6, 2011, the PRPA and the PPPA published a Request for Qualifications, and six potential bidders were prequalified. On March 15, 2012, the PPPA received Indicative Bids from four of the six Shortlisted Proponents. After evaluation of the Indicative Bids, the PPPA through its Partnership Committee decided to continue the RFP process with Aerostar and one other team. On July 19, 2012, the Government of Puerto Rico selected Aerostar as the private operator for the Airport. Aerostar is a limited liability company organized under the laws of the Commonwealth of Puerto Rico, jointly owned by Aeropuerto de Cancún and Grupo Aeroportuario del Sureste, and Highstar Capital IV, and Highstar Aerostar Prism/IV I-A Holdings.

On July 24, 2012, a Lease Agreement was executed by and between the PRPA and Aerostar. On September 10, 2012, the PRPA and Aerostar (the applicants) filed their Final Application for the privatization of SJU under which Aerostar will operate the Airport under a 40-year lease and compensate the PRPA with \$615 million upon the closing of the transaction and annual revenue payments over the life of the lease.

The Final Application includes the Airport Use Agreement (signed by 12 air carriers) under which, among other things, Aerostar is obligated to operate the Airport in accordance with Operating Standards approved by the PRPA and PPPA. The Lease requires Aerostar to develop an operations plan to be approved by the PRPA and the Airlines to conform to the Operating Standards with respect to safety, security, airfield operations, maintenance, ground access, environmental sustainability, wildlife hazard management, and customer service (community relations programs).

Public Comments

On September 19, 2012, the FAA published a notice in the Federal Register at 77 FR 58208, acknowledging the receipt and availability of the Final Application. The notice commenced the 60 day public review and comment period, and established the date for a public meeting in San Juan to solicit public comments. The notice was published in English and Spanish.

The Office of the Secretary of the U.S. Department of Transportation (the Department), the FAA, and the Transportation Security Administration (TSA) conducted a public meeting, with Spanish/English translation, in San Juan to receive public comment. The 60 day public comment period closed November 19, 2012.

Oral and written comments were received from airport users, airport tenants, airport commercial tenants, and airport public and private company employees, and hotel operators. Comments were received from elected officials. Comments were also received from such entities as the National Business Aviation Association, Airlines for America, Southwest Airlines, the SJU Airline-Airport Affairs Committee, the Airports Council International-North America, the Maryland Department of Transportation, the Puerto Rico Bankers Association, UBS Financial Services Incorporated of Puerto Rico, the Private Sector

Coalition of Puerto Rico, the Puerto Rico Economic Association, U.S. Panama Business Council, the Ports Authority Managerial Employees Association, the Federation of Associations of Management Employees of the Commonwealth, candidates for local elective office, and interested citizens.

The FAA received more than 275 public comments. All comments were posted in FAA Docket 2009-1144 on www.regulations.gov. Verbatim English and Spanish transcripts of the public meeting are included in the Docket of this proceeding. The comments were considered in the FAA's decision on the application. A summary of comments and the Agency's responses are included in the Docket for public review.

III. The Proposed Privatization Transaction

Summary

The PRPA proposes to lease the Airport to Aerostar for 40 years. Under the Lease, Aerostar will take possession of the property, manage, develop and operate the airport, hold the Part 139 Operating Certificate, and manage the Part 1542 Airport Security Program. Aerostar would be eligible to impose Passenger Facility Charges (PFC), and would be considered the sponsor for receipt of federal grants under the Airport Improvement Program (AIP).

Parties to the Transaction

Puerto Rico Ports Authority
64 Lindbergh Street
Isla Grande, Puerto Rico 00907

Aerostar Airport Holdings, LLC
Post Office Box 363507
San Juan, Puerto Rico 00936

The PRPA, owner of the Airport, was created pursuant to Act 125 of the Legislature of Puerto Rico (Act 125), as amended, Title 23 L.P.R.A. §§ 331-352. Under Act 125, the PRPA was granted the authority to manage, operate, and develop all public maritime and airport facilities in Puerto Rico. Act 125 granted the PRPA additional powers to execute contracts, accept grants, and acquire real and personal property. Act 125 and the PRPA By-Laws provide the PRPA, the authority to pursue an action that would result in the privatization of the Airport.

On June 8, 2009, the Government of Puerto Rico approved Act 29 of the Legislature of Puerto Rico, promoting and authorizing the creation of Public-Private Partnerships (PPP) to foster economic development activities in Puerto Rico. On August 13, 2009, the PRPA Board of Directors approved Resolution Number 2009-030 authorizing the PRPA Executive Director to submit an application for the participation of the Airport in the Program.⁸

⁸ See Appendix A to the Final Application, Statement of Public Sponsor's Authority to Lease the Airport.

Following the processes contained in Act 29, in June 2010, the PPP Authority and the PRPA issued a Desirability and Convenience Study, finding the Airport a suitable candidate for privatization. The Partnership Committee, consisting of representatives of the Puerto Rico Government Development Bank (GDB), the PRPA, the Airport, and the PPP Authority subsequently oversaw the negotiations with the Airlines serving the Airport on a new airport-airline use agreement (Airport Use Agreement)⁹ as well as the process that culminated in the selection of Aerostar as the proposed private operator.¹⁰

The Board's action is consistent with its authority granted to the PRPA by its enabling act and bylaws. Accordingly, we find that the PRPA has the authority to lease the Airport to Aerostar, under Acts 125 and 29.

Aerostar is a limited liability company organized under the laws of the Commonwealth of Puerto Rico. The Final Application indicates Aerostar is jointly owned by:

- Aeropuerto de Cancún S.A. de C.V., private company organized under the laws of Mexico, and a wholly-owned subsidiary of Grupo Aeroportuario del Sureste S.A.B. de C.V., a publicly traded company organized under the laws of Mexico. (collectively called ASUR). Aeropuerto de Cancún S.A. de C.V. operates the Cancún Airport.
- Highstar Capital IV, L.P. and Highstar Aerostar Prism/TV I-A Holdings, L.P. (collectively, "Highstar") a limited partnership company is organized under the laws of the State of Delaware.

Airport Property

Luis Muñoz Marín International Airport, a medium size hub commercial service airport, is located in Carolina, Puerto Rico, three miles east of San Juan. It has two runways, one main terminal building with four concourses, and a separate terminal with one concourse.

In 1949, the Commonwealth of Puerto Rico dedicated certain public lands for the construction of what is now known as Luis Muñoz Marín International Airport. The PRPA, through its predecessor, the Puerto Rico Transport Authority, acquired SJU on July 13, 1949, by transfer from the Commonwealth of Puerto Rico.

The SJU property Exhibit A map/plan, dated December 27, 2012, indicates that the Airport consists of ±1,509.68 acres of land. The PRPA Final Application reports that the Airport is bound by PR-187 Carretera Boca de Cangrejos (and the Atlantic Ocean) on the north, PR-26 Expreso Loiza on the west and south and Laguna la Torrecilla on the east.

⁹ Final Application, Appendix R.

¹⁰ Final Application, Appendix L, Partnership Committee Report

Small non-contiguous outparcels that are identified as parcels 1, 2, 3 were previously designated on the Airport Exhibit A Property Map¹¹ and are being transferred by the PRPA for designation on the Isla Grande Airport Exhibit A map/plan. This transfer is approved by the FAA in this Record of Decision. These parcels are now included on the Exhibit A Property Map for Isla Grande Airport, as federally obligated airport property, and cannot be disposed of or otherwise encumbered without prior FAA approval.

The Aerostar leasehold is identified on Exhibit B SJU Obligation Map,¹² excluding the premises described as Hotel Operations (Section 3.19); CAF Operations, (Section 3.20); the Puerto Rico Air National Guard ("PRANG") Airbase (Section 3.21).¹³ The PRPA plans to retain exclusive control over three land leases and several ancillary parcels. The Lease Agreement permits Aerostar to make an offer for the Hotel and CAF Operation leases should the PRPA make them available upon notice of the final unappealable resolution of litigation. The Lease Agreement also permits Aerostar to make an offer to the PRPA for the PRANG property. The FAA considers these three leaseholds as an integral part of the Airport Exhibit A Property Map. Any proposal to transfer these leaseholds must be reviewed by the FAA.

Equipment, Personal Property and Funds in Existing Airport Accounts

Under the Lease Agreement, the PRPA will transfer the SJU Airport Facility Assets to Aerostar. Facility Assets are identified as each of the tangible assets described in the Lease Agreement Schedule 7, and other tangible and intangible assets (including intellectual property) of or relating to the SJU Airport Facility owned by the PRPA. Exhibit A-1 of the Assignment and Assumption Agreement is a list of Grant Agreements which identify certain equipment purchased with federal financial assistance.

All equipment and personal property used in the operation of the Airport and acquired with airport revenue and federal financial assistance will be transferred to Aerostar at the commencement date in accordance with the Lease Agreement.

Lease Term

The PRPA and Aerostar submitted to the FAA a Lease Agreement of the SJU property designated as Exhibit B SJU Obligation Map described above, for a period of 40 years.

Lease Payments

The PRPA will receive a one-time cash payment of \$615 million (hereafter described as the "Leasehold Fee") from Aerostar at the time of closing the Lease. The PRPA will receive annual lease payments of \$2,500,000 for the first five years of the contract; 5 percent of gross airport revenues during the next 25 years; and 10 percent of gross airport revenues during the

¹¹ Exhibit A Property Maps are on file with the Orlando Airports District Office.

¹² Exhibit B SJU Obligation Map is on file with the Orlando Airports District Office.

¹³ While the PRPA is the lessor in the lease with the Puerto Rico Air National Guard, (PRANG) Aerostar will execute the use agreement with the PRANG.

final 10 year period. In addition to the Leasehold Fee, the Airport Use Agreement requires Aerostar to establish the Puerto Rico Air Travel Promotion and Support Fund and provide \$6 million in an escrow account to reward signatory Airlines that increase their service during the first three years of the Airport Use Agreement.

Source of the Lease Payment

Aerostar plans to finance the \$615 million upfront Leasehold Fee through a combination of debt financing of \$350 million of investment grade bonds and \$265 million of equity. A review of the Final Application and Aerostar's letters of commitment indicate that Aerostar has the source of funds for the initial lease payment. Future lease payments beginning at the end of year one will be made from the revenue generated from the operation of the Airport. Aerostar has indicated that neither the Leasehold Fee nor future lease payments will have an impact on airline fees.

During the first five years of the 15-year Airport Use Agreement, the total annual aggregate airline fees (including landing and terminal fees) are capped at \$62 million. After the sixth year, the total annual airline fees will be increased annually by a percentage not to exceed the rate of "core" inflation (i.e. the annual change in the Consumer Price Index, excluding food and energy).

Aerostar will determine fees each year based upon estimated usage provided by the Airlines. Fees will be adjusted at the end of the year based upon actual usage, and airlines will be credited or charged for any overpayment or underpayment. Airlines that choose not to sign the Airport Use Agreement (non-signatory Airlines) will be charged fees equal to 125 percent of the rates available to signatory Airlines.

Fees that are charged to general aviation users will not exceed the "core" inflation percentage increase in fees assessed against signatory Airlines.

IV. Qualifications of the Private Operator

General

Aerostar has satisfied the requirements for experienced airport management, and available financial resources needed to manage the Airport's operating and capital expenses.

Aerostar has developed a plan to manage the transition of the Airport from public to private control that satisfies the requirement for a description of the private operator's airport management and operations experience. Aerostar will initially use key management personnel from its Members, ASUR and Highstar, to manage the transition; post-transition management will be hired after an executive search. ASUR operates Cancun International Airport and holds concessions to operate the airports in Cozumel, Huatulco, Merida, Minatitlan, Oaxaca, Tapachula, Veracruz, and Villahermosa, Mexico. Highstar, an infrastructure investment fund manager, has interests in London City Airport and Ports America, whose subsidiary operates the Seagirt Marine Terminal with the Maryland Ports

Authority. Aerostar plans to hire employees from the existing Airport staff. The transition plan identifies staffing needs for administration, information technology, landside operation, security, airside operations, maintenance, baggage handling systems and quality assurance (See Exhibit G of the Final Application).

Aerostar will have available working capital of \$32 million, \$10 million revolving credit reserve, and a \$50 million capital expenditure fund. The \$50 million fund will handle certain capital expenditures for the initial three years. Aerostar expects that financial resources for operating and capital expenses of the Airport will be funded through a mix of operating income generated at the Airport and limited recourse debt financing incurred by Aerostar. Section 3.8 of the Lease Agreement requires Aerostar to maintain, subject to specified use rights and replenishment obligations, (a) a debt service reserve equal to at least the total amount of debt payable for SJU in the current year, and (b) an operating expense reserve equal to at least 25 percent of the Airport's projected operating expenses for the current year. Each quarter, Aerostar must deliver to the PRPA a certificate in which it warrants that it is in compliance with the reserve requirements.¹⁴

Aerostar is required under the Lease Agreement to complete certain capital improvement projects within 18 months of closing at no additional cost to the Airlines. The Airport Use Agreement also requires Aerostar to expend at least \$34 million to complete certain capital projects to the extent not completed by the PRPA before the transfer.

Airport Operating Certificate under 14 CFR Part 139

Aerostar has applied for an Airport Operating Certificate and approved airport certification program under 14 CFR, Part 139, *Airport Certification*. Review of the application has been completed by the FAA Airports Division Southern Region Office, and the Airport Operating Certificate will be issued to Aerostar effective on the closing of the transaction, under the terms of the Lease Agreement.

Airport Security Program under 49 CFR Part 1542

Aerostar also applied for an Airport Security Program as required by Title 49 CFR, Part 1542, *Airport Security*. The U.S. Department of Homeland Security's Transportation Security Administration must approve an Airport Security Program for Luis Muñoz Marín International Airport under the operation of Aerostar. The Lease cannot commence until the Transportation Security Administration approves the Aerostar Airport Security Program.

AIP Sponsor Qualifications

PRPA, as part of its evaluation of Aerostar's capabilities, has determined that Aerostar has the capability to assume the airport sponsor's obligations under the AIP assurances. Under

¹⁴ Aerostar's Members will not provide financing with recourse to their balance sheets, either for the initial capitalization or ongoing expenses.

Section 3.4(b) of the Lease Agreement, and subject to the terms of the Lease Agreement, and according to the Assignment and Assumption Agreement (Attachment 3), PRPA assigns to Aerostar, and Aerostar assumes and agrees to be bound by, each FAA Agreement. Aerostar shall be responsible for performing all federal obligations under each FAA Agreement to the extent arising from and after the Commencement Date. The FAA Agreements are defined as all agreements with respect to SJU between PRPA and the FAA, and between Aerostar and the FAA, including AIP grant agreements and assurances; PFC Records of Decision, application and assurances; and all amendments, modifications, supplements, renewals subject to any exemptions granted by the FAA pursuant to Section 47134 or otherwise.

Attachment 4 to this Record of Decision contains legal opinions from Aerostar's counsel, stating that Aerostar has the ability to act as an airport sponsor under the terms of Section 47134, to receive AIP funds, and to impose and use PFCs.

Based upon the Lease Agreement, the legal opinions, and 49 U.S.C., § 47134, the FAA concludes that Aerostar has the necessary powers and authorities to act as an eligible airport sponsor, and is legally and financially able to assume and carry out the certifications, representations, warranties, assurances, and covenants required of sponsors of federally assisted airports.¹⁵ Accordingly, the FAA finds Aerostar to be an eligible sponsor under 49 U.S.C., § 47101, et seq. Furthermore, Aerostar's 40-year leasehold interest in SJU qualifies the company as the "private sponsor" for the purpose of complying with Grant Assurance 2 (Responsibility and Authority of the Sponsor) and represents "good title" for the purpose of complying with Grant Assurance 4 (Good Title).

In the Final Application, Aerostar and the PRPA requested a waiver of:

- Grant Assurance 25 (Airport Revenues).

The FAA's response to that request is discussed in Section V. Requests for Exemptions under Section 47134.

The PRPA, as the Airport's owner, will continue to be responsible for all the grant assurances and will retain primary responsibility for compliance with:

- Grant Assurances 4 (Good Title)
- Grant Assurance 31 (Disposal of Land)
- Grant Assurance 35 (Relocation and Real property),

and compliance with the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C., § 4601, et seq. As required by its Lease Agreement with PRPA, Aerostar will comply with the PRPA's existing grant assurances including the efforts to assure compatible land use around the airport; the protection of navigation aids, approach

¹⁵As explained below, under Section 47134(g), Aerostar is not prohibited from imposing a PFC under Section 40117, receiving apportionments under Section 47114, or collecting reasonable rental charges, landing fees, and other service charges from aircraft operators under Section 40116(e)(2). Section 47109(a)(4) designates Government share for a private sponsor under 47134 at 70 percent for discretionary grants under Section 47115.

lights, runway safety areas, and runway protection zones; and the continuation and extension of navigation easements. For the purpose of SJU's participation in the Program, the PRPA is released from its status as sponsor, but will remain responsible for its obligations and compliance with Grant Assurances 4, 31, and 35 for SJU, and as further stated in this Record of Decision. PRPA will also be obligated for Grant Assurances 20 Hazard Removal and Mitigation and 21 Compatible Land Use, on adjacent property owned by the PRPA for the life of the lease term.

Aerostar assumes all grant assurances as an airport sponsor. This is evidenced in the Assignment and Assumption Agreement (Attachment 3), under which Aerostar agreed to assume all the obligations with respect to AIP grants awarded to PRPA and identified in the Assignment and Assumption Agreement at Exhibit A-1.

As provided in Section 47134 (g), Aerostar as private sponsor is not prohibited from applying for and receiving discretionary and entitlement funds under Sections 47114 and 47115, subject to FAA approval. This Record of Decision neither provides nor guarantees federal financial assistance. AIP discretionary funds are available on a competitive basis and at a ratio of 70 percent federal and 30 percent local participation. [Sections 47109(a)(4), 47115]. Entitlement funds shall be available in accordance with 49 U.S.C., § 47114. Although the PRPA is no longer the sponsor of SJU, as the airport owner, it is obligated for the specified obligations set forth in Section 47134(c), which FAA may enforce by means of the Third Party Beneficiary rights granted in the Lease Agreement.¹⁶ The PRPA assumes the federal obligations of Aerostar in the event of default of the Lease, temporary suspension of the Lease, bankruptcy, and surrender at the end of term.

PFC Agency Qualifications

Section 47134(g) does not prohibit an airport sponsor that is a private operator from imposing a PFC notwithstanding the fact that the private operator would not be a "public agency" or "eligible agency" within the meaning of the PFC statute (49 U.S.C. § 40117). Accordingly, PRPA, as part of its evaluation of Aerostar's capabilities, has determined that Aerostar has the capability to assume private sponsor's obligations under the PFC statute, regulation, assurances, and record of decisions. In the Final Application at Part IX, and subject to the terms of the Lease, and according to the Assignment and Assumption Agreement (Attachment 3), PRPA assigns to Aerostar, and Aerostar assumes and agrees to be bound by, each FAA Agreement, including PFC applications, Records of Decision, and assurances; and all amendments, modifications, and supplements.

Pursuant to the Assignment and Assumption Agreement, the PRPA will transfer to Aerostar all PFC payments received by the PRPA for the projects reflected in Exhibit B Attachment 1 of the Assignment and Assumption Agreement (Attachment 3) that have not been disbursed to approved PFC projects. Exhibit B lists two PFC applications, their corresponding

¹⁶ Section 3.4(b) of the Lease Agreement provides that the Secretary and the FAA have third-party beneficiary rights with respect to the Airport enforceable by the Secretary and the FAA in administrative or judicial legal proceedings [and] are granted all right, title and interest in, to and under [the Lease Agreement] as third-party beneficiaries in order to ensure that the statutory objectives of [Section 47134] are satisfied.

FADs 00-04-C-04SJU and 05-05-C-06SJU, and associated projects. These contain a total of 47 airport development projects for which the PRPA has been granted the authority by the FAA to collect and use PFCs at SJU and at other airports controlled by the Authority. Those projects at other PRPA airports have been physically completed. Both of the PFC applications listed in Exhibit B recently have been the subject of notices to the public and to air carriers serving SJU for consultation. These notices pertain to future amendment actions on both applications to change project amounts and scope in order to accurately reflect the final PFC balances for these applications. At the expiration of the notice and consultation periods, usually 60 or more days, Aerostar will be responsible for finalizing these amendment actions and obtaining the approvals from the FAA.

In addition, the PRPA and Aerostar recently filed joint notices to the public and air carriers serving SJU (for consultation), for the proposed refinancing by Aerostar of existing public debt of the PRPA to private debt to be held by Aerostar. Although this proposed amendment is an integral part of the privatization transaction being approved in this ROD, the actual PFC amendment cannot be decided by the FAA until after Aerostar has legally assumed responsibility as the "public agency" (as defined in Section 40117) with PFC authority for SJU.

Upon completion of the transfer of the airport, Aerostar shall notify the air carriers and foreign air carriers required to collect PFC's of any change in the address where remittances and reports are to be filed by carriers in accordance with Section 40117.

The Authority is required to provide to the FAA and to Aerostar an accounting of all PFC funds collected before its release of public agency obligations, and to transfer collected PFC funds to Aerostar that have not been disbursed to approved PFC projects. As of the date of this Record of Decision, the PRPA reports that \$ 25,561,224 in PFCs that it has collected cannot be shown to have been disbursed to specific PFC approved projects. Therefore, PRPA has agreed to pay \$25,561,224 from the proceeds of the privatization transaction into the PFC account for payment of \$25,561,224 in PFC eligible debt, therefore making the PFC account whole. As a result the PRPA will have \$25,561,224 less in Discretionary Funds from the transaction while Aerostar will have \$25,561,224 less in PFC debt that it will be able to refinance. Because at this time it is not known whether the \$25,561,224 in unaccounted for PFC funds were used for allowable airport purposes, neither Aerostar nor PRPA may include any portion of this repayment in the rate base for any of the Puerto Rico airports.

The PRPA submitted a signed Memorandum dated February 25, 2013, and acknowledged by Aerostar on February 25, 2013, agreeing to the conditions stated in the preceding paragraph. The FAA relied on the representations in the Memorandum for its decision in this Record of Decision.

Within 12 months of this decision the PRPA shall complete a full audit of the PRPA PFC account up to the date of transfer to Aerostar by a certified public accounting (CPA) firm acceptable to the FAA. Failure of the PRPA to complete this requirement and deliver the

audit report to the FAA could affect future AIP grant and PFC funding for the remaining PRPA airports.

Accordingly, as part of this Record of Decision, the FAA requires that Aerostar will assume full responsibility from the PRPA for collection, use, and administration of all pre-existing and future PFC authority at SJU, including assurance of compliance with the requirements of the PFC statute, regulation, and any provision of PFC authority approved for SJU. Also, Aerostar must comply with all administrative procedures required for the collection of a PFC; this includes compliance with Part 158 Appendix A-Assurances (Parts A and B), and Part 158, Subpart D, Reporting, Recordkeeping and Audit requirements. Upon completion of the transfer of the airport, Aerostar shall notify the air carriers and foreign air carriers required to collect PFC's of any change in the address where remittances and reports are to be filed by carriers in accordance with § 40117. The PRPA is required to provide an accounting of all PFC funds collected before its release of public sponsor's obligations, and transfer collected PFC funds to Aerostar. Thereafter Aerostar will operate the SJU PFC account pursuant to the PFC statute, regulation, assurances final agency decisions, and policies. Aerostar will be responsible for the collection and use of PFCs at SJU and for the proceeds transferred by the PRPA and collected under PFC Final Agency Decisions. This includes compliance with 49 U.S.C., § 40117, 14 CFR, Part 158 and Appendix A-Assurances.

Competitive Practices

In its review of the application, Section 47134(e) requires the FAA to determine if approval of the Final Application would result in unfair and deceptive practices or unfair methods of competition. To assist in this review, the FAA required applicants to provide a description of all charges of unfair or deceptive practices or unfair methods of competition brought against the private operator. Aerostar reports there have been no charges of unfair or deceptive practices or unfair methods of competition brought against Aerostar or any of its Members.

Aerostar has agreed to be bound by the requirements of 49 U.S.C., § 40103(e) and corresponding Grant Assurance 23 regarding exclusive rights. Aerostar also indicates that it has no intention of exercising its rights as an airport sponsor to offer aeronautical services on a proprietary exclusive basis, and would only do so after consultation with affected stakeholders and circumstances at the Airport warrant the exercise of this proprietary right.

Existing Agreements

In 2010, the PRPA began a process to reevaluate its retail concession program with the objective of assessing its retail concession practices and upgrading the Airport's image into a world class facility. The PRPA reviewed concession contracts that contain terms and conditions that are "below market" standards (i.e., low rents, overly long concession periods, and payment of utilities, extensive exclusive contract rights, among other issues). As a result of this review, the PRPA believes past concession practices have yielded unfavorable terms that have been detrimental to the Airport and the PRPA.

Given this situation, the PRPA, as a part of its internal process to assess the best way to achieve a balance between its own interest and those of the concession operators, implemented a process based on the following two elements:

- Maintaining expiring contracts on a month-to-month basis, and
- Evaluating the validity of arrangements for Terminal A.

The PRPA has indicated that Terminal A was not open in 2010 when the PRPA decided to undertake this review. Therefore, as part of the process to establish operations in Terminal A, the PRPA evaluated the adequacy of concession offerings, taking into consideration relevant legal implications. The PRPA met with interested concessionaires, including those that claim to have rights to concession space in Terminal A. The FAA has received comments from a number of concession operators that disagree with the PRPA's position. Some operators believe that the PRPA has an obligation to negotiate new terms and conditions; others believe the PRPA has an obligation to approve contract options or extensions previously negotiated. Many operators want their contracts negotiated with the PRPA before the Airport is transferred to a private operator.

Section 2.1(d) of the Lease Agreement requires the PRPA to assign the SJU Airport Facility Contracts to Aerostar, subject to certain exceptions. Section 9.1(i) PRPA has represented that each of the Assigned SJU Airport Facility Contract is valid and in full force and effect, and any consent required to assign such Assigned SJU Airport Facility Contract has been obtained. Based on these representations, it is FAA's understanding that all existing material agreements and contracts will be transferred to Aerostar

With respect to non-aeronautical airport concession agreements, the FAA has statutory responsibility to ensure that the airport proprietor's schedule of charges for use of airport facilities and services makes the airport "as self-sustaining as possible," under Section 47107(a)(13), and that appropriate opportunities for small business concerns are provided, under Section 47107(e). Commercial aeronautical operators opposed to the PRPA's re-evaluation of the Airport's commercial program, may file a formal complaint under Title 14 CFR, Part 16 *Rules of Practice for Federally-Assisted Airport Enforcement Proceedings*. However, prior to filing a Part 16 complaint, the party must engage in substantial and reasonable good faith efforts to resolve the disputed matter informally. The FAA recognizes that there are a number of concession operators pursuing litigation through the courts to address their claims, and some are pursuing other remedies.

Lease Compensation

The Lease Agreement at Section 3.22 *Other Aviation Services* states that the Authority shall be required to provide Leasehold Compensation to the Lessee in accordance with Section 15.1 to the extent that the Authority or any other Governmental Authority established under the Laws of the Commonwealth or any other Person that is authorized by the Authority or any other Governmental Authority established under the Laws of the Commonwealth (including under any concession, lease or other similar arrangement) obtains an airport

operating certificate under 14 CFR, Part 139 (or any successor regulation) that would authorize scheduled passenger commercial service at any airport located within the Commonwealth that did not as of the Date of this Agreement have such a 14 CFR, Part 139 Certificate (whether or not such airport existed as of the Date of this Agreement) (a) prior to the 20th anniversary of the Date of this Agreement at any airport located within the jurisdiction of the municipality of Ceiba or (b) prior to the 15th anniversary of the Date of this Agreement at any airport located in the Commonwealth outside the jurisdiction of the municipality of Ceiba.

The section further provides that any such Leasehold Compensation shall be provided only to the extent that the Lessee reasonably demonstrates a decrease in net income as a result of such commercial scheduled passenger service subsequent to the issuance of the Part 139 operating certificate. Scheduled passenger commercial service shall be defined to include services offered or operated by a U.S. or foreign air carrier that constitute a "scheduled operation" or a "public charter" as such terms are defined by 14 CFR, Sections 110.2 and 380.2 or in the relevant foreign equivalent regulations. For the avoidance of doubt, no Leasehold Compensation shall be required under this Section 3.22 in respect of commercial aviation services to the extent that such services (i) represent an expansion of scheduled operations as defined by 14 CFR, Section 110.2 at an airport that has a Part 139 certificate as of the date of this Agreement or (ii) consist of cargo aviation services. Any Leasehold Compensation required under this Section 3.22 shall be paid by the Authority from revenues that do not include revenues from any airport other than the SJU Airport Facility.

This provision as described in the Supplement:

- does not prevent another airport from obtaining a Part 139 Airport Operating Certificate;
- does not apply to existing Part 139 Airports such as Ponce, Aguadilla, and Vieques; and
- does not prevent Non-Part 139 Airports from increasing cargo and charter traffic.

PRPA and Aerostar believe this provision provides limited protection to the development and growth of SJU by discouraging the PRPA from using its resources to develop a competing airport within the first 20 years of the Lease agreement.

In order for Aerostar to obtain compensation, it must demonstrate that the competing commercial service airport decreased net income at SJU. The PRPA contends that Aerostar would have to show that flights at SJU have shifted to the newly Part 139 certificated airport, as opposed to new flights generated independently at the new Part 139 airport. Furthermore, since airline charges are set by agreement, the PRPA contends that Aerostar must demonstrate a loss of non-aeronautical revenue directly related to the loss of passengers.

Finally, the agreement also requires that the PRPA cannot use airport revenue from the other regional airports to compensate Aerostar. Since the PRPA does not have control of SJU airport revenues, the FAA understands this compensation would be derived from PRPA accounts.

Competition Plan

In addition to the review under Section 47134(e), the Secretary of Transportation and the FAA Administrator encourage Aerostar to provide opportunities for airline competition at SJU and to adopt the best practices described in DOT/FAA's October 1999 study, "Airport Business Practices and Their Impact on Airline Competition" and those contained in recurring FAA guidance, "Highlights of Reported Actions to Reduce Barriers to Entry and Enhance Competitive Access." See, www.faa.gov/airports/aip/guidance. Additionally, Aerostar is subject to the competition disclosure requirement for a medium hub airport that is unable to accommodate one or more requests by an air carrier for access to gates or other facilities at the Airport to provide or expand service at the Airport. [Section 40117(s)]

Should SJU become, or SJU is, a "covered airport" within the meaning of Sections 40117 and 47106,¹⁷ it will need to submit a Competition Plan detailing information on the availability of airport gates and related facilities, leasing and sub-leasing arrangements, gate-use requirements, gate-assignment policy, financial constraints, airport controls over air- and ground-side capacity, and whether the airport intends to build or acquire gates that would be used as common facilities. The FAA may not approve a PFC or the execution of a grant under AIP unless a "covered airport" has submitted a written Competition Plan or Competition Plan update conforming to the requirements.

¹⁷ The term "covered airport" means a commercial service airport (A) that has more than .25 percent of the total number of passenger boardings each year at all such airports; and (B) at which one or two air carriers control more than 50 percent of the passenger boardings. [See 49 U.S.C. § 47106(f)]

V. Requests for Exemption under Section 47134

Luis Muñoz Marín International Airport functions as a vital part of the national public-use airport system by serving 25 commercial and international air carriers with 4.6 million passenger enplanements in calendar year 2008. SJU provides a gateway for leisure travelers, including a large number of visiting friends and relatives from the 4.2 million Puerto Ricans on the U.S. mainland. Many of the airport's tourist passengers are destined for the cruise ships docked at San Juan, the fourth largest U.S. cruise port. SJU also serves as a hub connecting tourists connecting to Caribbean Islands and beyond. Additionally, SJU serves 14 all-cargo and commercial carriers that provide cargo services that bring parcels, supplies, food and other essential items to Puerto Rico. The airport has the largest air cargo operations in Puerto Rico, and handled over 200,000 short tons of cargo in fiscal year 2009. [Final Application, Appendix L] We believe that the benefits resulting from the privatization of SJU provide additional support for approval of the application. We also believe the extensive review of this application demonstrates that the FAA has exercised its discretion in the privatization area judiciously and decided to approve this transaction only after it confirmed that PRPA and Aerostar have the interests of the airport and the aviation system in mind. The FAA's consideration of its approval of the three exemptions is specifically premised on the facts and circumstances of this proposed transaction.

PRPA's Use of Lease Proceeds

Section 47134(b)(1)(A)¹⁸ permits the Secretary (and through delegation, the FAA Administrator) to grant an exemption to the sponsor from provisions of Sections 47107(b) and 47133, and any other law, regulation or grant assurance to the extent necessary to permit the sponsor to recover from the lease of the airport such amount subject to air carrier approval and certification (the revenue use exemption) (*see Section VI*).

The PRPA requests a revenue use exemption to use the \$621 million Leasehold Fee for the following purposes:

\$500 million will be applied toward the retirement of PRPA debt, of which approximately \$380 million¹⁹ was incurred to finance SJU operations or capital

¹⁸ (1) USE OF REVENUES.— (A) IN GENERAL.—The Secretary may grant an exemption to a sponsor from the provisions of sections 47107(b) and 47133 of this title (and any other law, regulation, or grant assurance) to the extent necessary to permit the sponsor to recover from the sale or lease of the airport such amount as may be approved—

(i) in the case of a primary airport, by at least 65 percent of the scheduled air carriers serving the airport and by scheduled and nonscheduled air carriers whose aircraft landing at the airport during the preceding calendar year, had a total landed weight during the preceding calendar year of at least 65 percent of the total landed weight of all aircraft landing at the airport during such year;

¹⁹ Per the requirements stated in Section IV Qualifications of the Private Operator, PFC Agency Qualifications, PRPA has agreed to pay \$25,561,224 from the proceeds of the privatization transaction into the PFC account for payment of \$25,561,224 in PFC eligible debt. The PRPA must complete a full audit of the PRPA PFC account up to the date of transfer to Aerostar by a certified public accounting firm acceptable to FAA.

improvements. The remaining \$120 million is non-airport related debt that the PRPA will also retire.

\$50 million for Continuation of Early Retirement Program – The PRPA estimates that 224 employees will be eligible to retire under the Puerto Rico Early Retirement Incentive Program (Act No. 70). Medical insurance reimbursements and bonuses could increase the cost beyond the projected \$47.3 million.

\$15 million for Government Development Bank of Puerto Rico Reserve Fund – The GDB agreed to guarantee certain obligations of the PRPA. Those obligations and the guaranty are outlined in Schedule 15 to the Lease Agreement. As a condition of its guaranty the GDB has a funding reserve of \$15 million to provide some assurance against loss if its guaranty is exercised.

\$20 million Estimated Transaction Costs – Act 29 requires that the transaction costs incurred by the PPP Authority must be paid or reimbursed before the repayment of any debts. These costs include professional services such as technical and financial advisors, legal counsel, tax and accounting specialists, environmental services, aviation advisory services, public communication services, and other services.

\$25 million Regional Airports Reserve Fund – Establish a revenue sharing program to support the operating expenses and capital needs of the remaining ten airports under the PRPA control.

\$5 million IRS Voluntary Closing Agreement Program/Airline Improvements Reserve – The PRPA has initially set aside \$5 million to cover a potential payment to the Internal Revenue Service under the Voluntary Closing Agreement Program to cover the costs of completing certain airport facilities improvements that PRPA had agreed to perform prior to the transaction closing and relating to the termination of certain American Airlines-supported debt that was issued to finance the air carrier's terminal.

\$6 million Puerto Rico Air Travel Promotion and Support Fund – Section 4.9 of the Airport Use Agreement requires Aerostar to set aside \$6 million in an escrow account to reward signatory Airlines (Airlines) that increase their service during the first three years of the Airport Use Agreement. The distribution of funds is based on the number of passengers arriving at the Airport. The Airlines have agreed to the program.

The PRPA states that this exemption request complies with the intent of the statute regarding the use of airport revenue for general purposes and has been approved by more than 65 percent of the scheduled air carriers serving the airport and by more than 65 percent of the scheduled and nonscheduled air carriers by total landed weight. We find, as explained below, that 67 percent of the scheduled air carriers operating at the Airport and 98.2 percent of the total landed weight of the scheduled and unscheduled air carriers operating in 2011 have agreed to permit the PRPA to use airport revenue for non-airport purposes in return for the lease of the airport.

The PRPA will use approximately \$495 million (79 percent) for its "local airport system" as permitted under the revenue use restrictions, Section 47107(b)(1)(B).

Aerostar will fund the Puerto Rico Air Travel Promotion and Support Fund, using \$6 million of its own funds. Payment of a subsidy for air service can be viewed as general regional economic development and promotion, rather than airport promotion. An air carrier subsidy may not be funded with airport revenue, per 49 U.S.C., Sections 47133 and 47107, and doing so contravenes the FAA's *Policy and Procedures Concerning the Use of Airport Revenue*, 64 Federal Register 7696, February 16, 1999 (Revenue Use Policy). Thus the use of proceeds in the amount of \$6 million to fund the Travel Promotion and Support Fund requires an exemption under 49 U.S.C., § 47134(b)(1)(A).

The PRPA exemption request is \$126 million (\$120 million to pay down non-SJU debt associated with the other PRPA transportation assets such as the port facilities and \$6 million for the Puerto Rico Air Travel Promotion and Support Fund) reducing the original application request of \$621 million.²⁰

The PRPA indicates that the requested amounts for the Early Retirement Program, GDB Reserve Fund and transaction costs are current estimates. If the actual amounts incurred are reduced, any savings would be applied toward the payment of PRPA obligations including costs associated with the collective bargaining agreement. If the actual amounts exceed the exemption amount of \$135 million, the PRPA must request approval from the FAA. In any event, the PRPA must provide an audited statement documenting all disbursements.

The Secretary grants this exemption for \$135 million with the condition that the total amount only be used to pay down non-airport PRPA debt. \$135 million provides for a \$9 million variance to cover the difference between actual and estimated numbers. For any amount available above \$135 million, PRPA would need to ask the FAA for a further exemption.

²⁰ PRPA claims the \$120 million (the remainder after payment of the \$380 million) can be lawfully used under the "grandfather" provisions of 49 U.S.C. § 47107(b). Under the "grandfather provision" of the revenue use requirement, 49 U.S.C. §§ 47107(b)(2) and 47133(b)(1), an airport operator may use airport revenues for certain purposes other than those proscribed in 49 U.S.C. §§ 47107(b)(1) and 47133(a) if a provision of law controlling the airport owner or operator's financing enacted on or before September 2, 1982, or a covenant or assurance in an airport owner or operator's debt obligation issued on or before September 2, 1982, provides for the use of airport revenues from any facility of the airport owner or operator to support general debt obligations or other facilities of the airport owner or operator.

Since FAA is granting the PRPA's request for exemption permitting the use of Airport proceeds (airport revenue) for non-airport purposes, there is no need to decide at this time whether a preexisting law or financing covenant or assurance issued before September 2, 1982, qualifies PRPA for grandfathering status. Additionally, the provisions in Section 47115(f) concerning consideration of diversion of revenues by a grandfathered airport sponsor in awarding discretionary grants will not be a factor in Aerostar's ability to apply for and receive AIP discretionary funds for which it would otherwise be eligible.

The Secretary grants this exemption for the following reasons:

1. As required by law to grant this exemption, more than 65 percent of air carriers have given consent to the exemption being granted; and
2. The funds exempted under this provision will be exclusively used to pay down non-airport PRPA debt and the costs associated with the Early Retirement Program. This should still be considered transportation use as the restructured PRPA will still be responsible for regional airports and the PR port system. Debt reduction will allow PRPA to make future investments in the ports and regional airports. Without this debt reduction, PRPA will not be able to meet its transportation infrastructure needs.

Accordingly, we will grant the requested revenue use exemptions to PRPA for use of the lease proceeds in an amount not to exceed \$135 million.

Request for Exemption to Repay Federal Grant Funds under 49 U.S.C., § 47134(b)(2)²¹

The PRPA requests an exemption, to the extent necessary, from the provisions of 49 U.S.C., § 47107 and any other law, regulation or grant assurance requiring repayment of grants received for the benefit of SJU in order to utilize the PRPA's proceeds of the Lease (both upfront and annual payments). The unamortized value of Airport Improvement grant funds is currently estimated at \$49,427,146.

Since 1992, PRPA has received \$160,781,925 (\$115.9 million entitlement, \$44.9 million in discretionary) in Airport Improvement Program Funds. The PRPA received a \$14 million grant in 2012, to improve runway safety areas.

The Secretary grants the exemption for the San Juan Airport privatization because:

- 1) The federal investment is protected, since the airport will continue to function as an airport and all of the facilities and improvements financed with AIP grant funds will continue to be used for the purposes of the original grants.
- 2) We also find it is very important that, in this case, the proceeds from the lease will be used for transportation infrastructure purposes. \$495 million will be used for airport purposes and \$120 million will be used to repay PRPA non- SJU airport related debt. Repaying the non-SJU airport debt will allow PRPA to have the resources necessary to invest in Puerto Rico's ports and regional airports, two areas with critical infrastructure needs.

²¹ (2) REPAYMENT REQUIREMENTS.—The Secretary may grant an exemption to a sponsor from the provisions of sections 47107 and 47152 of this title (and any other law, regulation, or grant assurance) to the extent necessary to waive any obligation of the sponsor to repay to the Federal Government any grants, or to return to the Federal Government any property, received by the airport under this title, the Airport and Airway Improvement Act of 1982, or any other law.

Exemption of Aerostar under 49 U.S.C. § 47134(b)(3)²² from the Prohibition on Use of Airport Revenues to Earn Compensation from the Operation of the Airport

Under Section 47134(b)(3), Aerostar requests an exemption from Sections 47107 and 47133, and any other law, regulation or grant assurance to the extent necessary to earn compensation from the operation of the airport including a reasonable rate of return on the private operator's investment and risk undertaken in operating the Airport over the Lease term.

The following benefits from the 40 year lease have been suggested by PRPA and Aerostar:

1. Positive effect on air carrier and other aeronautical users' fees and charges. The airline use agreement fixes rates and charges at no more than \$62 million for five years and then can only be increased thereafter at the rate of inflation. According to Aerostar, the net present value of the savings to Airlines that will accrue over those 15 years is \$100 million. Rates and charges for general aviation users will receive the same beneficial treatment.
2. The transaction creates multiple revenue streams for PRPA: a) \$615 million cash payment; b) estimated \$550 million in annual payments over 40 years to fund regional airports, c) and an agreement to reimburse PRPA for the provision of police and perimeter security at SJU. This cash infusion will help stabilize PRPA finances, allowing PRPA to reduce its debt burden and create a PRPA that is in a stronger financial position to meet Puerto Rico's development needs.
3. Aerostar claims that SJU capital investments will be nearly four times greater than the PRPA's average annual investments in SJU in recent years. Between FY 2006 and 2012, PRPA averaged annual investments of \$13.5 million. Aerostar proposes to invest about \$46 million per year between 2013 and 2017 to create a world-class airport.
4. Regional airports will benefit from an initial payment of \$25 million from the upfront cash payment to PRPA and a percentage of revenue each year from SJU. Aerostar has estimated that payment to be \$550 million over the term of the lease.

The FAA believes that the public investment is protected through the following:

The agreement between Aerostar and PRPA incentivizes Aerostar to maintain safe operations at SJU and invest in capacity and infrastructure to attract passengers. To stay in compliance with the terms of the 40 year lease, Aerostar must meet certain specified Operating Standards. Aerostar has six months (180 days) after close to develop an Operations Plan in accordance with the Operating Standards, which must be agreed to by PRPA and the Airlines.

²² (3) COMPENSATION FROM AIRPORT OPERATIONS.—The Secretary may grant an exemption to a purchaser or lessee from the provisions of sections 47107(b) and 47133 of this title (and any other law, regulation, or grant assurance) to the extent necessary to permit the purchaser or lessee to earn compensation from the operations of the airport.

To ensure compliance with these conditions, the Lease Agreement requires an annual assessment of both the aeronautical and non-aeronautical facilities (Airfield, Terminal and concourses, Landside and other on-airport facilities) at SJU by an independent licensed professional engineering firm. A Capital Improvement Plan (CIP) is required to be developed outlining the near-, intermediate-, and long-term projects planned to address the findings of the engineer's assessment and any other planning studies (e.g. master plan) conducted by Aerostar. The CIP should prioritize the projects, identify projects that are eligible for FAA funding, and identify the environmental requirements necessary for project implementation, and is to be submitted to the PRPA on an annual basis for their approval.

Aerostar has agreed with the Airlines under the Airport Use Agreement that they will spend not less than \$34 million to meet a specific list of capital improvements within the first 3 years. They must make these improvements regardless if AIP or PFC funds are available. The Lease Agreement also requires Aerostar to complete a list of projects designated as General Accelerated Upgrades, which are estimated to cost approximately \$16 to \$20 million at its sole cost and expense. The Use Agreement's Transition Plan includes a Capacity Enhancement Program which is Aerostar's plan to invest an estimated \$50 million to improve operations, security and airport capacity at SJU. [Exhibit E to Transition Plan].

The Lease Agreement provides for informal dispute resolution, mediation, arbitration and court action. The PRPA can initiate proceedings for arbitration, and the Use Agreement grants the Airlines the right to initiate arbitration also. Engineering or technical disputes arising under or related to the Lease Agreement are to be settled in accordance with the Construction Industry Arbitration Rules for the American Arbitration Association. An award of the Independent Engineering Arbitrator(s) must be in writing and states the reasons upon which it is based; and the award is final and binding on the parties.

In addition, the FAA is granted all right, title and interest in, to and under the Lease Agreement as third-party beneficiaries of Aerostar's obligations with respect to the statutory conditions set forth in Section 3.4(a) of the Lease Agreement and the Grant Agreements in order to ensure that the statutory objectives of 49 U.S.C. § 47134 are satisfied. The third-party beneficiary rights are enforceable by the Secretary and the FAA in administrative or judicial legal proceedings. Additionally, the FAA will conduct regular Part 139 safety inspections and may conduct financial audits, or initiate a Notice of Investigation under CFR, Part 16 if Aerostar, as the airport sponsor, were to violate any of the conditions or grant assurances. In addition, the Secretary may revoke the exemptions if the conditions under Section 47134 are knowingly violated.

As a part of its review, the FAA examined confidential commercial or financial information submitted by Aerostar. The FAA reviewed the acquisition price, the proposed capital structure, cost of capital and the return on equity. The FAA found Aerostar's return on equity, acquisition price for SJU, and proposed capital structure for the acquisition financing to be reasonable. Aerostar's cost of debt financing is competitive with rates the PRPA could achieve for SJU.

Aerostar Airport Holding, LLC., is exempted from the provisions of 49 U.S.C. §§ 47107(b) and 47133, and grant assurances issued under 49 U.S.C. § 47101 et seq., to the extent necessary to earn compensation from the operation of SJU, including a reasonable rate of return on the private operator's investment associated with the operation of the airport over the Lease term. This exemption is subject to the terms and limitations of 49 U.S.C. § 47134, and does not exempt the amount of compensation from review for compliance with § 47107(a)(1), § 47107(b) and § 47133 and associated grant assurances. In addition, this exemption is not unlimited since compensation at any level is only available after Aerostar has met its obligations for investment in airport operations and capital development under the grant assurances and the Lease.

Accordingly, we grant Aerostar's request for an exemption to permit it to earn compensation from the operations of the Airport subject to the terms and limitations of Section 47134 and compliance with the terms of this Record of Decision.

Other Requests

Aerostar Business Information

As stated above, Aerostar requests that certain business information be treated as confidential business information. Counsel for Aerostar claims that if certain sensitive and highly confidential business and financial information is disclosed it would result in substantial harm to Aerostar, ASUR, and Highstar through degradations to its business, operational, financial and competitive positions, particularly in light of similar transactions in the future. These documents include financial sections of Aerostar's proposal, Aerostar's financial pro-forma, term sheets and certain confidential information received by Aerostar from the PRPA. Aerostar believes that its airport budgetary and other commercially sensitive information or intellectual property should be treated as trade secrets and confidential commercial or financial information. Aerostar asserts that this information should be confined to the use of the Secretary and the FAA under the Pilot Program regulations, and not be made available for public disclosure, other than as otherwise currently required by law.

Grant Assurance 26(b) requires the airport sponsor to make all airport records including deeds, leases, operation and use agreements, and regulations available for inspection by Secretary upon reasonable request, including FAA Form 5100-126 Financial Government Payment Report and FAA Form 5100-127, Operating and Financial Summary. There are a number of reasons why an airport sponsor's operating, financial summary and payment report information is subject to the provisions of Grant Assurances 26. First, 49 U.S.C. § 47103 requires the Secretary to maintain a national plan of integrated airport systems (NPIAS) providing estimated costs of eligible airport development necessary to provide a safe, efficient and integrated system of public use airports. SJU is listed in the plan and receives federal financial assistance. The FAA's ability to maintain the NPIAS would be impaired if it could not publish estimated costs of eligible airport development at all federally obligated airports.

Second, restrictions on the FAA access to airport records would impair the FAA's ability to manage its airport compliance program and enforce the grant assurances. Additionally, the FAA may need access to airport records to investigate complaints alleging violations of the grant assurances.

However, Freedom of Information Act (FOIA) Exemption 4, 5 U.S.C. section 552(b)(4), does permit an agency to withhold trade secrets and commercial or financial information obtained from a person and privileged or confidential. Under Exemption 4, one of the standards for assessing the confidentiality of information that parties are required to submit to the government is whether disclosure of the information is likely to cause substantial competitive harm to the competitive position of the person from whom the information was obtained.

The burden is on Aerostar, in its request for confidential treatment, to persuade the FAA that the information should not be disclosed as consistent with existing law. We believe Aerostar has met its burden and find that the financial records of Aerostar, as a private firm, should not in all cases be subject to the same level of public access as the records of governmental agencies. The FAA recognizes that certain information requested from Aerostar to be confidential business information, and is part of the record for this Record of Decision, but will be withheld from the public Docket.

Should Aerostar wish to request confidential treatment in the future, Aerostar may submit the information with a request for confidentiality, and the FAA will consider the request under FOIA 5 U.S.C., § 552(b). In limited cases, information may be reviewed by the FAA in Aerostar offices without the need for submission of documents to the agency. Information from FAA Forms 126 and 127 on operation of the airport will continue to be made available to the public, including the annual reports to the FAA on airport finances and payments to local units of government, and information on the costs of any airport services and facilities that are included in the rate base of air carriers and other aeronautical users of the airport. We would expect Aerostar to establish aeronautical fees in consultation with SJU's aeronautical users, in accordance with DOT/FAA's Policy Regarding Airport Rates and Charges. (See 61 FR 31994, par. 1.1, et seq.)

Comments on Other Grant Assurances

Aerostar must maintain a current ALP in conformity with all applicable FAA design standards and criteria. Aerostar must also maintain a current airport property map (Exhibit A) for submittal with all grant agreements.

The PRPA will retain primary responsibility for land acquisition and disposal as required by Assurances 4, 31, and 35. The PRPA will also retain primary responsibility for Assurances 20, "Hazard Removal and Mitigation," and Assurance 21, "Compatible Land Use" on adjacent property owned by the PRPA. As required by its Lease with the PRPA, Aerostar will comply with the public sponsor's existing grant assurances including the assurance of compatible land use around the airport; the protection of navigation aids, approach lights, runway safety areas, and runway protection zones; and the continuation and extension of

avigation easements. Since Aerostar is also responsible for Assurances 4, 31, and 35, the PRPA and Aerostar will hold joint responsibility for these assurances.

VI. Certification of Air Carrier Approval

Title 49 United States Code, Section 47134(b)(1)(A) permits the Secretary to grant an exemption to the airport sponsor from the airport revenue use provisions of Sections 47107(b) and 47133²³ to the extent necessary, upon certain approvals by air carriers.

More specifically, in the case of a primary airport such as Luis Muñoz Marín International Airport, the issuance of an exemption is contingent upon approval by at least 65 percent of the scheduled air carriers serving the airport during the preceding year, and by 65 percent of the total landed weight of scheduled and nonscheduled air carriers serving the airport during the preceding year.

The PRPA supplied information indicating that 12 of the 18 scheduled air carriers operating at the Airport have approved the issuance of an exemption on the use of airport revenues; (67 percent). The total landed weight of those air carriers serving the Airport in 2011 that approved the issuance of an exemption was 5,976,781,000 compared to the total landed weight of air carrier operations for the same year, 6,088,195,000; (98.2 percent).

The air carriers have submitted executed copies of the signature page of the Airport Use Agreement. All foreign air carriers serving the Airport have been given an opportunity to review the proposed Airport Use Agreement.

Accordingly, we find that 67 percent of the scheduled air carriers operating at the Airport and 98.2 percent of the total landed weight of the scheduled and unscheduled air carriers operating in 2011 have agreed to permit the PRPA to use airport revenue for non-airport purposes in return for the lease of the airport.

VII. Airport Operation and Development

Capital Improvements

Aerostar proposes to expend \$1.4 billion in capital improvements over the 40 year term of the lease; the company has submitted a \$240 million capital improvement program planned during the first three years. Aerostar has submitted the capital improvement plan to the FAA Southern Region Airports Division office for review. Aerostar proposes to use its own funds in addition to Passenger Facility Charges, Airport Improvement Program (AIP) entitlements, and discretionary funds. AIP discretionary funds are not guaranteed. The company has

²³ Sections 47107(b) and 47133 restrict the use of airport revenues to the capital or operating costs of the airport, the local airport system, or any other local facility that is owned or operated by the person or entity owning or operating that airport that is directly and substantially related to the air transportation of passengers or property. Exceptions to the revenue use restriction apply to certain prior laws and agreements enacted not later than September 2, 1982 controlling financing or debt obligations of the airport owner or operator that provide for use of airport revenues to support the general debt obligations or other facilities of the airport owner or operator.

obtained a commitment from major financial institutions to provide \$50 million senior secured term loan facility for capital expenditures.

Aerostar is required under the Lease Agreement to complete certain capital improvement projects within 18 months of closing at no additional cost to the Airlines. Those improvements, the General Accelerated Upgrades, include the repair or replacement of general infrastructure at SJU (loading bridges, elevators, escalators, deteriorated flooring, and deficient lighting) and the installation of wi-fi connectivity and electrical outlets throughout the terminal.

The Airport Use Agreement also requires Aerostar to expend at least \$34 million to complete certain capital projects (the Initial Capital Projects) to the extent not completed by the PRPA before the transfer. These projects include construction of a new access road to the general aviation area, and relocation of certain existing baggage inspection facilities.

Regional Airports

The Puerto Rico Ports Authority owns and operates Luis Muñoz Marín International Airport and ten regional airports: Isla Grande, Ponce, Mayaguez, Arecibo, Aguadilla, Ceiba, Culebra, Humacao, Vieques, and Fajardo. The PRPA holds the Part 139 airport operating certificate for San Juan, Ponce, Aguadilla, and Vieques. These three airports are also subject to the security requirements of Title 49 CFR, Part 1542. With Aerostar assuming control of SJU, the PRPA will have responsibility for the operation of the remaining ten regional airports.

Because the Airport represents the "largest component of PRPA's operations,"²⁴ the FAA, in making a decision to transfer SJU to a private operator, must determine that the PRPA is capable of operating the regional airports without having direct control of airport revenues from the operation of SJU. Equally important, the FAA must determine that the PRPA, as sponsor of the remaining ten regional airports can comply with its federal obligations.

To ensure that the PRPA could operate the ten regional airports, as self-sustaining as possible, the FAA requested the PRPA to submit a regional airport plan projecting the financial operation of the airports and provide a response to several questions regarding the PRPA management practices of its airports.

The PRPA Regional Operational Plan projects total revenues of \$848.4 million and total expenses of \$1,115.5 billion over the next 40 years; this leaves a deficit of \$267.1 million. The PRPA contends that Maritime Net Revenues are expected to grow to \$1,292.8 billion over the next 40 years and states that it can and will use the Maritime Net Revenues to cover PRPA regional airports' maintenance expenses.

The PRPA also projects that the SJU lease payments will produce \$550 million in airport revenue for the regional airports. The PRPA has also committed to establishing a

²⁴ See, Appendix L at 16. The PRPA has shared revenue from the Airport with other regional airports in "the local airport system," under the revenue use restriction, 49 U.S.C. § 47107(b)(1)(B).

\$25 million Regional Airports Reserve Fund from the \$615 million Leasehold Fee. The PRPA projects an annual net surplus after debt service of \$2 million for 10 years from FY2013-2022, which includes an estimated use of \$11.8 million from the Regional Airports Reserve Fund.

To achieve this goal, the PRPA plans to improve revenues and reduce expenses by implementing certain management initiatives including:

- restructuring PRPA divisions involved in capital expenditure decisions;
- requiring Government Development Bank oversight of the capital decision-making process; and
- improving the evaluation and justification for capital decisions.

The FAA commends the PRPA for developing the PRPA Regional Operational Plan. The PRPA was responsive to the FAA's request for a plan to ensure that the PRPA could operate the ten regional airports in a self-sustaining manner. The FAA request the PRPA develop an implementation plan identifying a timetable for completion along with goals, objectives and performance measures for improving management practices.

The FAA is specifically concerned about PRPA leasing practices. The PRPA must develop and formalize its leasing practices into a formal leasing policy for aeronautical and nonaeronautical property at the regional airports. The policy should recognize the PRPA's obligation under Grant Assurance 24. *Fee and Rental Structure*, which states:

[The Sponsor] will maintain a fee and rental structure for the facilities and services at the airport which will make the airport as self-sustaining as possible under the circumstances existing at that particular airport, taking into account such factors as the volume of traffic and economy of collection.

The FAA expects an airport sponsor to maintain a rate and fee schedule that conforms to the grant assurances and is consistent with the DOT/FAA's *Policy Regarding Airport Rates and Charges* 61 Federal Register 31994, June 21, 1996, and as amended at 73 Federal Register 40430, July 14, 2008) and the FAA's *Policy and Procedures Concerning the Use of Airport Revenue*, 64 Federal Register 7696, February 16, 1999. The Self-Sustaining principle maintains the utility of the federal investment.

The self-sustaining principle also requires Airport fees, rates, and charges imposed on aeronautical users for aeronautical use of airport facilities must be fair and reasonable, under the grant assurances, Section 47107(a)(1), the statutory provision on State taxation, Section 40116(e)(2), and the FAA/DOT Policy on Airport Rates and Charges issued under Section 47129(b)(2).²⁵

²⁵ http://www.faa.gov/airports/airport_compliance/media/airports_rates_charges_policy_with_amendments.pdf

Generally, under the Rates and Charges Policy, aeronautical fees for aeronautical use of the airfield may not exceed the airport's capital and operating costs of providing the airfield. In contrast, aeronautical fees for nonaeronautical use of landside and non-movement area airfield facilities (e.g. hangars and aviation offices) may be at fair market value, but are not required to be higher than a level that reflects the cost of services and facilities. Generally, under the Self-Sustaining principle, rates charged nonaeroanautical users must be based on fair market value.²⁶

The PRPA must submit a draft leasing policy for review no later than six months after the transfer of SJU. The policy should be consistent with the sponsor's federal obligations, and FAA Policies on *Airport Rates and Charges*, and *Revenue Use*. The policy should establish self-sustaining, fair market rent rates for the nonaeroanautical use of airport property based upon appraisal, and fair and reasonable rates for the aeronautical use of airport property. The policy should require FAA review of all long term leases exceeding 30 years. The policy should be transparent, and document the process for a potential tenant obtaining a lease. The FAA expects that the leasing policy will be submitted for review, prior to soliciting public comment and review before adoption.

Within six months, of the transfer of SJU, the PRPA must submit for FAA review and approval an implementation plan and timetable for the Regional Operational Plan that clearly defines management initiatives and annual performance measures for improving maintenance, operational, and capital expenditure requirements. The plan must also identify all below market rate nonaeroanautical leases, and the PRPA's plans for bringing these leases up to market rent rate. On an annual basis, the PRPA must submit a status report on the financial performance of the Regional Airports, and the PRPA's ability to improve its management practices of maintenance, operational, and capital expenditure requirements, correct Part 139 deficiencies, and improve its leasing practices.

The PRPA must use all proceeds related to SJU property parcels being retained by PRPA for the regional airports. The PRPA must conduct a final accounting for SJU accounts and turn over any cash balances to the account for the regional airports. In addition,

1. **Regional Airport Funding:** The FAA will place a special condition in grant agreements to require PRPA to continue to fund regional airports at least at a sustainable level. The FAA requires the PRPA to spend all future SJU lease payments on the regional airports.
2. **Regional Airport Funding:** The PRPA must report three months after the close of each fiscal year on the financial viability of the Regional Airports, identifying the amount of SJU lease payments used to fund the Regional Airports, the funds

²⁶ Congressional direction and agency policy define limited exceptions to the self-sustaining principle; these include a) property for community use; b) not-for profit aviation organizations, c) transit projects and systems, and military aeronautical units. Community use does not cover governmental units not directly related to aeronautical use. Accordingly, the airport must generally be reimbursed at fair market rent for airport land used for road maintenance or equipment storage yards or for use by police, fire, or other government departments. See FAA Order 5190.6B, chapter 17 for further information.

used from the Regional Airports Reserve Fund, and the amount of Maritime Net revenues used to support the Regional Airports. The PRPA shall also report on its progress in improving airport revenues and reducing operating expenses.

3. **Regional Airports Operations Plan:** The FAA requests the PRPA to provide further details on their plan for improving airport revenues, leasing practices, operational and maintenance practices. The PRPA should identify goals, objectives, and performance measures for improving management practices. The FAA will ask for annual performance report.
4. **The PRPA Airport Leasing Policy:** The PRPA will develop a leasing policy consistent with the Sponsor's federal obligations on the use of airport revenue. The policy should support a leasing process that is transparent and consistent. The draft policy should be available for public review and comment after FAA review.

VIII. Agency Findings and Determination

Record

This Record of Decision consists of Attachment 1: the signed Lease; Attachment 2: the Final Application; Attachment 3: the Assignment and Assumption Agreement; Attachment 4: legal opinion from Aerostar's counsel. The Record of Decision also includes the FAA's Response to public comments received on the application. The comments and the FAA's Response are posted in the FAA Docket No. 2009-1144. The FAA has considered the comments received in the Docket in making this determination.

Findings

Title 49 U.S.C., Section 47134(c) requires that the Secretary make certain findings before issuing an exemption under Section 47134 for the privatization of an airport. In consideration of information furnished by the PRPA and Aerostar in the application process, and of comments filed in Docket 2009-1144, the Secretary has determined that the Lease Agreement, Airport Use Agreement and Operating Standards for Luis Muñoz Marín International Airport's proposed lease and operation by Aerostar are consistent with the statutory requirements of 49 U.S.C., Section 47134. Specifically, the Secretary, and through delegation, the FAA finds the following:

- (1) *The airport will continue to be available for public use on reasonable terms and conditions and without unjust discrimination*

Aerostar will provide continued access to the airport on fair and reasonable terms, without unjust discrimination in accordance with 49 U.S.C., Section 47134(c)(1).

By its assumption of the grant assurance obligations, Aerostar has committed to make the airport available for public use on terms that are fair, reasonable and applied without unjust discrimination to airport users and those users seeking to provide aeronautical services.

We find that the Lease Agreement includes provisions to ensure that the airport will continue to be available for public use on reasonable terms and conditions and without unjust discrimination.

(2) The operation of the airport will not be interrupted in the event that the lessee becomes insolvent or seeks or becomes subject to any State or Federal bankruptcy

The operation of the airport will not be interrupted in the event that the lessee becomes insolvent or seeks or becomes subject to any State or Federal bankruptcy. The Lease Agreement provides a plan to ensure that the operation of the airport will not be interrupted if the private operator experiences bankruptcy or other financial difficulty.

The application of the Authority and Aerostar may be approved only if the Secretary finds that the lease agreement includes provisions satisfactory to the Secretary to ensure that the operation of the airport will not be interrupted in the event of Aerostar's bankruptcy or other financial or legal impairment.²⁷ We find that the Luis Muñoz Marín International Airport Lease Agreement (Lease) by and between the Puerto Rico Ports Authority (the Authority) and Aerostar Airport Holdings, LLC (Aerostar) sets out a plan for the continued operation of the airport in the event of bankruptcy or other financial or legal impairment of Aerostar, provides for reversion of the airport to the Authority, and requires the Authority to comply with an FAA (or TSA) directive to restore the airport operation in the event of a material impairment.²⁸ While these Lease Agreement terms are extremely helpful, we find it necessary, in the abundance of caution, to add a condition to this Record of Decision to ensure that the Authority PRPA uses its best efforts to assert its police or regulatory powers, under the Bankruptcy Code,²⁹ to enforce its rights to take possession of and operate the airport, to ensure uninterrupted operation of the Airport under 49 U.S.C., Section 47134(c)(2).

The Police Power Exception authorizes a governmental unit, such as PRPA, to enforce generally applicable regulatory laws pertaining to a debtor's actions:

Thus, where a governmental unit is suing a debtor to prevent or stop violation of fraud, environmental protection, consumer protection, safety, or similar police or regulatory laws, or attempting to fix damages for violation of such law, the action or

²⁷ The Secretary may approve an application ... only if the Secretary finds that the sale or lease agreement includes provisions satisfactory to the Secretary to ensure-- the operation of the airport will not be interrupted in the event that the purchaser or lessee becomes insolvent or seeks or becomes subject to any State or Federal bankruptcy, reorganization, insolvency, liquidation, or dissolution proceeding or any petition or similar law seeking the dissolution or reorganization of the purchaser or lessee or the appointment of a receiver, trustee, custodian, or liquidator for the purchaser or lessee or a substantial part of the purchaser or lessee's property, assets, or business. Section 47134(c)(2). See also, 62 Federal Register 48,693 at 48,708.

²⁸ Lease Agreement Sections 3.2; 3.4; 3.7; 16.1(a)(ii),(vi); 16.1(b)(i),(x); 16.4(c),(m).

²⁹ Bankruptcy Code 11 U.S.C. § 362(a), (b), provides for an automatic stay (Automatic Stay) to protect the debtor and also provides that the Automatic Stay does not bar a governmental unit from enforce its police and regulatory power.

proceeding is not stayed under the automatic stay.³⁰

To ensure that operations at SJU the Airport not be interrupted under any of the circumstances contemplated by 49 U.S.C., Section 47134(c)(2), it is a condition of the approval of this application that the Authority PRPA assert its police and regulatory power to ensure that operations are not interrupted, and if necessary to prevent interruption, to activate its reversionary interest in the Airport, obtain possession and control, and ensure that the Airport is operated. Continued operation of the Airport promotes the general welfare of the Puerto Rican people and of commerce in general. As indicated in the application, SJU serves both business, leisure, and other travelers, including tourists, cruise passengers, and relatives of and residents of the island. The Airport also is critical for the transport of cargo shipments and mail at the island. Further, continued safe operation of the Airport is critical to ensure public safety.

Additionally, the PRPA may rely on the Police Power Exception to enforce an FAA regulation or policy,³¹ such as ensuring that SJU remains part of the integrated system of public-use airports adequate for the needs of civil aeronautics and the United States Postal System³² or ensuring safe operations under SJU's Airport Operating Certificate.³³ To be sure, the FAA would stand ready to exercise the Police Power Exception to enforce federal laws and ensure the safe and continuous operation of airports within the national system. However, exercising the Police Power Exception to ensure the continued operation of the Airport as part of the national system of public-use airports and to meet the needs of civil aeronautics and mail also would be a legitimate function of the PRPA.

(3) The lessee will maintain, improve, and modernize the facilities of the airport through capital investments and will submit to the Secretary a plan for carrying out such maintenance, improvements, and modernization

In accordance with Section 47134(c)(3), the arrangement between Aerostar and PRPA will "maintain, improve, and modernize" airport facilities through capital investments.

Aerostar must complete certain capital improvement projects within 18 months of closing at no additional cost to the Airlines. Those improvements known as the General Accelerated Upgrades include the replacement or repair of general airport infrastructure (loading bridges, roadways, elevators, escalators, lighting, and Wi-Fi connectivity through the terminal). Aerostar is also required by the Airlines, under the Airport Use Agreement, to expend \$34 million to complete projects known as the Initial Capital Projects – more replacement or repair of general airport infrastructure such as construction of a new access road to the

³⁰ H.R. Rep. No. 595, 95th Cong., 1st Sess. 343 (1977), reprinted in 1978 U.S. Code Cong. & Admin. News 5963, 6299; S. Rep. No. 989, 95th Cong., 2d Sess. 52, reprinted in 1978 U.S. Code Cong. & Admin. News 5787, 5838; see, In re Methyl Butyl Ether Products Liability Litigation v. Atlantic-Richfield Co., 488 F.3d 112, 132-33 (2d Cir. 2007); In re Corporacion de Servicios Medicos Hospitalarios de Fajardo v. Mora, 805 F.2d 440, 445 (1st Cir. 1986).

³¹ See Lockyer v. Mirant Corp., 398 F.3d 1098 (9th Cir. 2005).

³² 49 U.S.C. § 47103.

³³ 49 U.S.C. § 44706; 14 CFR part 139.

general aviation area, taxiway reconstruction, terminal bathroom remodeling and relocation of certain existing baggage inspection facilities.

Aerostar proposes to expend \$1.4 billion in capital improvements over the 40-year term of the lease; the company has submitted a \$240 million capital improvement program planned during the first three years. Aerostar proposes to use its own funds in addition to Passenger Facility Charges, Airport Improvement Program (AIP) entitlements, and discretionary funds. AIP discretionary funds are not guaranteed. The company has obtained a commitment from major financial institutions to provide \$50 million senior secured term loan facility for capital expenditures.

Private operation of the Airport by Aerostar will not affect grant priority or eligibility, but the FAA will continue to consider the availability of other sponsor resources and the sponsor's use of available funds in granting applications for discretionary grants.

Aerostar must submit periodic progress reports to the FAA during the transition of SJU from PRPA control to private operation. Aerostar must also work with the FAA Southern Region Airports Division to develop an annual status report on Aerostar's compliance with the Operating Standards.

In accordance with 49 U.S.C., Section 47107(a)(15), and Grant Assurance 26, Aerostar is required to annually submit a special airport and financial report to the FAA identifying how it maintained, improved, and modernized the Airport Facility, together with information related to capital investments made in carrying out the Airport maintenance, improvements, and modernization.

The PRPA must develop and submit a Transition Plan in the 35th contract year to ensure an orderly transition at the end of Aerostar's 40-year term. Submission of a Transition Plan five years prior to termination date (or such other term as the PRPA may elect to extend the term, subject to compliance with applicable Law) demonstrating careful planning, coordination of efforts, and consideration of all requirements to guard against the airport premises being in a state of disrepair at the end of the term, as a result of failure to repair, replace, or maintain the airport premises. The Transition Plan should detail how to ensure that when the airport premises are returned to the PRPA, the premises shall be in good condition and operating and maintained to the standards provided at other comparable Part 139 airports. The Transition Plan should identify protocols for the cost and expense, to repair, replace, maintain and restore the airport premises to proper condition and order, subject to ordinary wear and tear prior to return to the PRPA. The Plan should detail how the PRPA will meet its obligations as an eligible airport sponsor.

The FAA will impose a special condition on all PRPA AIP grants to require the PRPA to continue to fund the Regional Airports at least at a sustainable level. The PRPA must submit a draft leasing policy prior to the execution of the next discretionary grant, a draft Regional Airports Operational Plan no later than six months after the transfer of SJU, and an annual status reports on the Regional Airports.

We find that the Lease Agreement includes provisions to ensure that the lessee will maintain, improve, and modernize the facilities of the airport through capital investments and will submit to the Secretary a plan for carrying out such maintenance, improvements, and modernization.

- (4) Every fee of the airport imposed on an air carrier on the day before the date of the lease of the airport will not increase faster than the rate of inflation unless a higher amount is approved*

In accordance with Section 47134(c)(4), Airport fees imposed on air carriers will not increase faster than inflation unless a higher amount is approved by at least 65 percent of the air carriers using the airport and the air carriers having at least 65 percent of the landed weight of aircraft at the airport during the preceding calendar year.

The terms of the Use Agreement set total Airline contribution at \$62 million per year for five years of a 15-year term. Thereafter, the total Annual Contribution escalates with inflation. The rates for non-signatory Airlines are 125 percent of the equivalent rate for signatory Airlines

We find that the Lease Agreement, Section 3(a)(iv), includes provisions to ensure that every fee of the airport imposed on an air carrier on the day before the date of the lease of the Airport will not increase faster than the rate of inflation unless a higher amount is approved.

- (5) The percentage increase in fees imposed on general aviation aircraft at the airport will not exceed the percentage increase in fees imposed on air carriers at the airport.*

In accordance with Section 47134(c)(5), the percentage of increase in fees imposed on general aviation operators will not exceed the percentage increase in fees imposed on air carriers.

Section 3.4(a)(v) of the Lease Agreement requires percentage increase in fees imposed on general aviation will not exceed the percentage increase in fees imposed on air carriers.

We find that the Lease Agreement includes provisions to ensure that the percentage increase in fees imposed on general aviation aircraft at the airport will not exceed the percentage increase in fees imposed on air carriers at the airport.

- (6) Safety and security at the airport will be maintained at the highest possible levels*

Aerostar will operate the airport in accordance with 14 CFR, Part 139 at all times. Aerostar must allow the Administrator, or those acting on behalf, to make any inspection, including unannounced inspections, or tests to determine compliance with 49 U.S.C., Section 44706 and the requirements of Part 139.

The requirement of Section 47134(c)(6), for an Airport Operating Certificate and review of Airport Certification manual for the airport certification program required under 14 CFR,

Part 139, "*Certification of Airports*," have been completed by the FAA Airports Division Southern Regional Office effective on the commencement date of the lease.

Section 47134(c)(6) requires an approved Airport Security Program under Aerostar's operation, pursuant to Title 49, CFR, Part 1542, *Airport Security*. The Transportation Security Administration has approved an Airport Security Program for Luis Muñoz Marín International Airport under the operation of Aerostar.

Changes in Control

Aerostar must provide the FAA with a 60-day notice of intent to transfer its interest, either in whole or in part, including any action affecting ownership interests in Aerostar that would result in a transfer or change of control. Before exercising such a transfer or change in control, Aerostar and the proposed transferee must respond to the FAA information requests on relevant financial terms and qualifications of the transferee, such as those listed in the Application Procedures, 62 FR 48693. The FAA will then have the ability to opine on whether it needs to approve a sponsor change if members of Aerostar or successor entity change. The FAA must approve any change of the airport management firm operating the Airport.

We find that the Lease Agreement, Section 3.4(a)(vi), includes provisions to ensure that safety and security at the airport will be maintained at the highest possible levels.

(7) The adverse effects of noise from operations at the airport will be mitigated to the same extent as at a public airport.

In accordance with Section 47134(c)(7), the Lease requires Aerostar to mitigate the adverse effects of noise from operations at the Airport to the same extent as at the airport under PRPA operation.

Section 3.4(a)(vii) of the Lease Agreement requires Aerostar to mitigate the adverse effects of noise from operations at the airport to the same extent as the public sponsor. Section 5.44 of the Operating Standards requires Aerostar to identify goals for noise reduction.

We find that the Lease Agreement includes provisions to ensure that the adverse effects of noise from operations at the Airport will be mitigated to the same extent as at a public airport.

(8) Any adverse effects on the environment from airport operations will be mitigated to the same extent as at a public airport.

In accordance with Section 47134(c)(8), the Lease Agreement requires Aerostar to mitigate the adverse effects on the environment from Airport operations at the airport to the same extent as at public airport.

Section 3.4(a)(viii) of the Lease Agreement requires Aerostar to mitigate the adverse effects on the environment from Airport operations at the Airport to the same extent as at the public airport. The Operating Standards requires Aerostar to develop and implement an Environmental Sustainability Plan as part of its Airport Operations Plan.

We find that the Lease Agreement includes provisions to ensure that the any adverse effects on the environment from Airport operations will be mitigated to the same extent as at a public airport.

(9) Any collective bargaining agreement that covers employees of the airport and is in effect on the date of the lease of the airport will not be abrogated by the lease.

The application of the PRPA and Aerostar may be approved only if the Secretary (as delegated to the FAA Administrator) finds that the Lease Agreement includes provisions satisfactory to the Secretary/Administrator to ensure that any collective bargaining agreement (CBA) that covers Airport employees and is in effect on the date of the sale or lease of the airport will not be abrogated by the sale or lease. We find that the Lease Agreement contains provisions satisfactory to ensure that the CBA that covers SJU employees, and is in effect as of the date of the Airport lease, will not be abrogated.

PRPA and the members of the Bargaining Unit of the Union of Office, Commerce and Related Branches Employees of Puerto Rico, Inc. (Union)³⁴ approved a four-year CBA (signed December 13, 2012 and effective October 1, 2012)(2012 CBA). The 2012 CBA was finalized during the pendency of the Final Application.³⁵ It covers the Union employees at the PRPA's maritime and air transportation facilities, including the Union employees of SJU.³⁶ The CBA provides for relocation of displaced Union employees in the event of a possible privatization, sale, lease or merger of an Authority facility.³⁷ The PRPA states

³⁴ The Bargaining Unit consists of administration, operation and maintenance workers of the Authority carrying out business or activities related to the maritime and air transportation facilities, or other related Authority activities. 2012 CBA, Article V, Section 1. The Union is recognized by the Authority "as the exclusive representative of all of the workers included in the Bargaining Unit to negotiate collectively with regard to salaries, work schedules, complaints and grievances and other conditions that affect the employment of the workers covered by this Agreement." 2012 CBA, Article I. The Bargaining Unit does not include executive, administrative, supervisory, confidential employees or certain managers, and, in particular legal division attorneys, public relations officers, budget organization, and method technicians, special assistants to, respectively, the executive director, the comptroller, and the head of aviation, personnel technicians, 35 confidential secretaries, budget officer and 2 office clerks in charge of personnel files. CBA, Article V, Sections 2, 5.

³⁵ The PRPA stated, in a supplement to the Final Application, that, as a wholly-owned government instrumentality, it is subject to the Puerto Rico Labor Relations Act, 29 L.P.R.A. Part 1, and not to the National Labor Relations Act or the Labor Management Relations Act.

³⁶ Part VII of the supplement to the Final Application points out that the 2012 CBA provides for increases in monthly salaries to the Union employees, proposes increases in the PRPA's contributions to the Union's wellbeing fund and to the daily expense allowance for eligible employees, and includes a "signing cash" bonus for Union employees. See 2012 CBA, Article XXI.

³⁷ 2012 CBA Article XVI, Section 2 provides:

"Employees who do not join Aerostar will remain employed by the PRPA in other capacities, but under the same compensation and benefit package they currently enjoy under the CBA."³⁸

We find that the terms of the Lease Agreement between the PRPA and Aerostar provide that the 2012 CBA will not be abrogated by the SJU lease to Aerostar.³⁹ The PRPA has shown that it complied with the lease requirement to provide Aerostar with a list of PRPA employees, within 20 days after the date of the Lease Agreement.⁴⁰ Additionally, Aerostar has shown that it has complied with the lease requirements:

- to "use its Reasonable Efforts to interview all Authority employees who apply to [Aerostar] for employment;"
- "to offer, on terms and conditions designated by [Aerostar] taking into account applicable Law, employment to commence following the closing date to such Authority employees who, as determined by [Aerostar], meet [Aerostar's] stated requirements for employment; *provided, however*, that [Aerostar] shall have no obligation to offer employment to any such Authority employee;" and
- to make employer contributions that a government employer would be required to make under the Commonwealth Employment Retirement System (Commonwealth Retirement System) for those PRPA employees hired by Aerostar with 10 or more years of experience under the Commonwealth Employment Retirement System.⁴¹

Aerostar has completed more than 150 interviews of current employees, representing all of the employees that have applied for an interview.⁴² Further, Aerostar intends to continue to interview additional employees during the transition and will "seek to maximize retention of employees." Aerostar states it is committed to offering "fair and market comparable wages."

If due to the possible merger, sale, transfer, privatization, lease or transfer of personnel there are employees displaced from the Bargaining Unit, the regular employees affected will be consigned for relocation in other activities of the industry.

2012 CBA Article XVI, Section 1 further requires the PRPA to notify the Union not less than 120 days in advance of a possible sale, transfer, privatization, lease or transfer of personnel. On August 1, 2012, the PRPA served such notice to the Union.

The PRPA's February 13, 2013 legal opinion on the effects of the 2012 CBA stated:

Although this is the first time that Article XVI has been activated, the interpretation has always been that in this case the Authority will retain the regular employees that are not hired by the private party. The Authority will relocate these employees to other facilities. Because Section 2 does not specifically provide how this relocation of employees will be done, the Authority may need to discuss this matter with the Union while taking into account its needs. See, Acevedo & Acevedo Letter.

³⁸ Supplement to Final Application

³⁹ Lease Section 3.4(a)(ix)

⁴⁰ Lease Agreement, Section 2.5(k)(i). The Acevedo & Acevedo Letter indicates that, by this provision, the PRPA released Aerostar from the possibility that it would be considered a "successor employer" and, consequently, that Aerostar is not bound by the CBA. The supplement to the Final Application also states that Aerostar may not adopt the CBA because some provisions of the CBA do not conform to the National Labor Relations Act or the Labor Management Relations Act.

⁴¹ Lease Agreement, Section 2.5(k)(i)-(ii).

⁴² Supplement to Final Application.

Accordingly, based on the above information, we find that the Lease Agreement contains provisions satisfactory to ensure that the CBA that covers SJU employees, and is in effect as of the date of the Airport lease, will not be abrogated.

(10) *General aviation user interests*

In accordance with Section 47134(f), the interests of general aviation users are not adversely affected by the privatization.

In the Final Application, Aerostar states that it recognizes the value and importance of general aviation to the growth and development of SJU. Aerostar also asserts that general aviation users will benefit from the Airport improvements, including increasing airfield maintenance, during the term of the lease. Additionally, Aerostar commits to designating a general aviation liaison as a point of contact for transition and Airport operation issues and the liaison will provide updates to general aviation users on operational and development issues at the Airport as relevant to the Airport. The PRPA is currently expanding general aviation facilities at SJU. As required by the Airport Use Agreement, Aerostar is committed to completing these projects.

The FAA will impose a special condition on all PRPA AIP grants to require the PRPA continues to fund the Regional Airports at least at a sustainable level. This will help to safeguard that the interests of general aviation users are not adversely affected by the privatization. The PRPA must submit a draft leasing policy prior to the execution of the next discretionary grant, a draft Regional Airports Operational Plan no later than six months after the transfer of SJU, and annual status reports on the Regional Airports.

(11) *Effect on competition*

In accordance with Section 47134(e), the transfer will not result in unfair and deceptive practices or unfair methods of competition.

Both the PRPA and Aerostar agree to comply with statutory provisions regarding exclusive rights and the other federal obligations under the grant assurances. Additionally, as discussed Section IV, we emphasized the importance of competition, the competitive disclosure requirement, and the need to file a Competition Plan should SJU become a "covered airport." Therefore, we find that the approval of the Privatization Pilot Program Application will not result in unfair and deceptive practices or unfair methods of competition.

(12) *Private Operator's Fitness*

The FAA believes that Aerostar has met the requirements for a finding of fitness to operate an airport under the Airport Privatization Pilot Program. The company has demonstrated that it has airport management and operations experience. It has identified the responsibility, experience, and expertise of its key personnel who will handle the transition of the Airport from public to private control. Aerostar has demonstrated that it has the financial resources

to handle operating and capital expenses. Aerostar is eligible to be an airport sponsor; it will comply with the sponsor grant assurances and the requirements for Title 14, CFR, Part 139 and Title 49, CFR, Part 1542 Airport Security

The FAA's finding of fitness for Aerostar is limited specifically to the SJU application. This finding of fitness does not apply to any other applications Aerostar has filed or may file with the FAA or other offices of the Department of Transportation. Each year, ninety days after the close of Aerostar's fiscal year, Aerostar will submit to the FAA Airport Compliance Division financial statements, including a balance sheet and income and cash flow statements prepared in accordance with Generally Accepted Accounting Principles, with all footnotes applicable to the financial statements.

(13) *Private Sponsor and Good title*

Aerostar's 40-year leasehold interest in Luis Muñoz Marín International Airport qualifies the company as the airport sponsor for the purpose of complying with Grant Assurance 2 (Responsibility and Authority of the Sponsor) and represents "good title" for the purpose of complying with Grant Assurance 4 (Good Title).

The PRPA must use its best efforts to require the Government of Puerto Rico to ensure that the National Guard negotiates, within six months of transfer to Aerostar, a use agreement that meets FAA's Revenue Use Policy.

Enforcement

Appropriate enforcement authority exists to resolve any future compliance issues involving the above findings.

Revocation and Third Party Beneficiary Rights

PRPA and Aerostar agree to confer third-party beneficiary rights on behalf of the FAA to enforce the nine specified obligations set forth in Section 47134(c).⁴³ PRPA must also comply with the nine statutory objectives and all grant assurances as a condition of the Airport's participation in the Privatization Program. In addition to the process and sanctions available for enforcement of obligations under the grant assurances, Section 47134(i) provides for revocation of the exemptions granted in this Decision upon a finding of knowing violation of the terms specified in Section 47134(c) for the lease of the Airport.

Aerostar must continue to fulfill all terms and conditions, including all requirements contained in and associated with Section 47134, 14 CFR, Part 139, 49 CFR, Part, 1542, the AIP and PFC assurances, and the related Lease Agreement terms. Aerostar must also file timely and accurate annual financial statements required of every other commercial service airport.

⁴³ The TSA also had third party beneficiary rights.

Section 47134(i) permits the Secretary to revoke the exemptions after notice and the opportunity for a hearing, if the Secretary determines that the private operator has knowingly violated any of the conditions specified in Section 47134(c). As the operator of a federally obligated airport and a private sponsor, Aerostar is obligated to comply with the requirements of the FAA's Airport Compliance Program and is subject to enforcement action conducted under 14 CFR, Part 16, Rules of Practice for Federally Assisted Airport Enforcement Proceedings. Section 47134 also requires that the private sponsor must be given notice and an opportunity to be heard. As a first recourse to correct specific problems, the FAA will continue to rely on FAA Order 5190.6B, its existing airport compliance program and third party beneficiary rights identified in the Lease Agreement. Compliance and enforcement action would be exercised before recourse to revocation of the private sponsor's exemption.⁴⁴

Periodic Audits

Aerostar and PRPA acknowledge the right of the FAA under Section 47134(k) to conduct periodic audits of the financial records and operations of the airport. Aerostar reserves the right to request confidential treatment of this information under the Freedom of Information Act.

Financial Audits required by this Record of Decision are to be conducted by independent auditors in accordance with generally accepted auditing standards covering financial audits and standards presented within OMB Circular A-133.

The PRPA will provide the FAA with a full accounting of remaining funds, in PRPA accounts for SJU at the time of the commencement date of the Lease. Furthermore, the PRPA will provide evidence that those funds have been transferred to an account to support the operation of the regional airports.

In accordance with 49 U.S.C., Section 47107(a)(15), and Grant Assurance 26, Aerostar is required to submit a special airport and financial report to the FAA identifying how it maintained, improved, and modernized the Airport Facility, together with information related to capital investments made in carrying out the Airport maintenance, improvements, and modernization.

Environmental Review

The FAA Record of Decision under the Airport Privatization Pilot Program is limited to approving a change in ownership or lease to a private party, as well as exemptions from certain provisions under 49 U.S.C., Section 47134(b). Categorical Exclusion No. 307m, FAA Order 1050. IE states, "FAA administrative actions associated with transfer of

⁴⁴ The FAA reserves the right at its sole discretion to take action to revoke these exemptions under Section 47134(i), regardless of whether or when PRPA chooses to exercise its right to terminate the Lease Agreement after the notice and cure period provisions set forth in the Lease Agreement. Additionally, the FAA reserves the right to take action under Section 47122 to revoke these exemptions upon a finding that Aerostar has failed to fulfill its obligations under 14 CFR, Part 139, other FAA statutes or regulations, or AIP or PFC assurances.

ownership of operation of an existing airport, by acquisition or long-term lease, as long as the transfer is limited to ownership, right of possession, and/or operating responsibility."

We have therefore determined that the FAA action of approving the Final Application submitted by PRPA for the participation of Luis Muñoz Marín International Airport in the FAA Airport Privatization Pilot Program is categorically excluded.

The FAA's decision does not contain any kind of approval or commitment concerning: (1) current or planned airport development, (2) Airport Improvement Program (AIP) or Passenger Facility Charges (PFC) funding, or (3) further amendments to the Airport Layout Plan (ALP). NEPA review and associated findings would be appropriate when Aerostar actually proposes airport development requiring FAA approval of AIP or PFC funding and/or amendments to the ALP.

IX. DECISION AND ORDER

In consideration of the above, the FAA takes the following action on the application of the Puerto Rico Ports Authority and Aerostar for the lease and private operation of Luis Muñoz Marín International Airport:

1. The application filed jointly by the Puerto Rico Ports Authority and Aerostar for the participation of Luis Muñoz Marín International Airport in the Airport Privatization Pilot Program is approved. The FAA finds that the Lease Agreement, as supplemented by the Final Application and the attachments, includes provisions sufficient to demonstrate that the private operation of the Airport meets the terms and conditions in 49 U.S.C., Section 47134(c), (e), and (f), subject to the conditions stated in the Record of Decision.

2. Under 49 U.S.C., Section 47134(b)(1), the FAA grants the following exemption:

The Puerto Rico Ports Authority is exempted from the provisions of 49 U.S.C., Section 47107(b), Section 47133 and grant assurances issued under 49 U.S.C., Section 47101 et seq., from the prohibition on the use of airport revenue for purposes other than the Airport, the local Airport system or any other local facility owned or operated by PRPA that is directly and substantially related to the air transportation of passengers or property, to permit the PRPA to recover \$126 million (\$6 million for the Puerto Rico Air Travel Promotion and Support Fund and \$120 million for port facility related debt) from the lease of the Airport.

Based on the foregoing, the FAA finds that the exemption request of \$135 million⁴⁵ meets the requirements of the statute, Title 49 U.S.C., Section 47134(b)(1)(A).

3. Under 49 U.S.C. Section 47134(b)(2), the FAA grants the following exemption:

The Puerto Rico Ports Authority is exempted from the provisions of 49 U.S.C., Section 47107, and grant assurances issued under 49 U.S.C., Section 47101 et seq., to the extent necessary to waive any

⁴⁵ Provides for \$9 million variance as discussed in Section V.

obligation to repay the Federal Government for grants under Title 49, upon the lease of Luis Muñoz Marín International Airport to Aerostar in accordance with the Lease Agreement.

4. Under 49 U.S.C., Section 47134(b)(3), the FAA grants the following exemption:

Aerostar Airport Holding, LLC., is exempted from the provisions of 49 U.S.C., Sections 47107(b) and 47133, and grant assurances issued under 49 U.S.C., Section 47101 et seq., to the extent necessary to earn compensation from the operation of Luis Muñoz Marín International Airport, including a reasonable rate of return on the private operator's investment associated with the operation of the airport over the Lease term. This exemption is subject to the terms and limitations of 49 U.S.C., Section 47134, and does not exempt the amount of compensation from review for compliance with Sections 47107(a)(1), 47107(b) and 47133, and associated grant assurances. In addition this exemption is not unlimited since compensation at any level is only available only after Aerostar has met its obligations for investment in airport operations and capital development under the grant assurances and the Lease.

5. On the Commencement Date for the transfer of SJU, the FAA will issue Aerostar an Airport Operating Certificate under 14 CFR, Part 139.

6. On the Commencement Date for the transfer of SJU, the TSA will issue Aerostar an approved Airport Security Plan under 49 CFR, Part 1542.

7. The FAA requires the PRPA to use its best efforts to assert its police or regulatory powers, under the Bankruptcy Code to enforce its rights to take possession of and operate the Airport, to ensure uninterrupted operation of the Airport under 49 U.S.C., Section 47134(c)(2).

8. The FAA approves the transfer of the parcels 1, 2, 3 previously designated on the Airport Exhibit A Property Map for designation on the Isla Verde Airport Exhibit A map/plan, as federally obligated airport property, and cannot be disposed of or otherwise encumbered without prior FAA approval.

9. Any proposal to transfer the leaseholds designated as Hotel Operations, CAF Operations, and the PRANG lease must be reviewed by the FAA.

10. The PRPA must comply with Section VII of the Record of Decision regarding the Regional Airports, including the requirement to spend all future SJU lease payments on the Regional Airports.

11. The PRPA must resolve in a timely manner all airport property issues regarding the airport's boundaries and leasehold interests in litigation.

12. In accordance with 49 U.S.C., Section 47107(a)(15), and Grant Assurance 26, Aerostar is required to annually submit a special airport and financial report to the FAA identifying how it maintained, improved, and modernized the airport, together with information related

to capital investments made in carrying out the Airport maintenance, improvements, and modernization.

13. The PRPA must use its best efforts to require the Government of Puerto Rico to ensure that the National Guard negotiates, within six months of transfer to Aerostar, a use agreement that meets FAA's Revenue Use Policy.

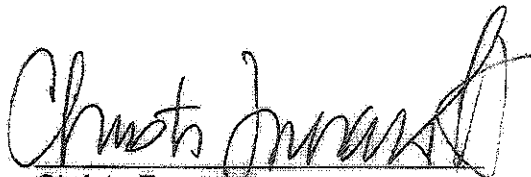
14. The PRPA must develop and submit a transition plan in the 35th contract year to ensure an orderly transition at the end of Aerostar's 40-year term.

15. Aerostar must provide the FAA with a 60-day notice of intent to transfer its interest, either in whole or in part, including any action affecting ownership interests in Aerostar that would result in a transfer or change of control. Before exercising such a transfer or change in control, Aerostar and the proposed transferee must respond to the FAA information requests on relevant financial terms and qualifications of the transferee, such as those listed in the Application Procedures, 62 FR 48693. The FAA will then have the ability to opine on whether it needs to approve a sponsor change if members of Aerostar or successor entity change. The FAA must approve any change of the airport management firm operating the Airport.

16. The Authority is required to provide to the FAA and to Aerostar an accounting of all PFC funds collected before its release of public agency obligations, and to transfer collected PFC funds to Aerostar that have not been disbursed to approved PFC projects. As of the date of this Record of Decision, the PRPA reports that \$25,561,224 in PFCs that it has collected cannot be shown to have been disbursed to specific PFC approved projects. Therefore, PRPA has agreed to pay \$25,561,224 from the proceeds of the privatization transaction into the PFC account for payment of \$25,561,224 in PFC eligible debt, therefore making the PFC account whole. As a result the PRPA will have \$25,561,224 less in Discretionary Funds from the transaction while Aerostar will have \$25,561,224 less in PFC debt that it will be able to refinance. Because at this time it is not known whether the \$25,561,224 in unaccounted for PFC funds were used for allowable airport purposes, neither Aerostar nor PRPA may include any portion of this repayment in the rate base for any of the Puerto Rico airports.

17. Within 12 months of this decision the PRPA shall complete a full audit of the PRPA PFC account up to the date of transfer to Aerostar by a certified public accounting (CPA) firm acceptable to the FAA. Failure of the PRPA to complete this requirement and deliver the audit report to the FAA could affect future AIP grant and PFC funding for the remaining PRPA airports.

This Record of Decision of the U.S. Department of Transportation, Federal Aviation Administration approving the application filed in Docket FAA No. 2009-1144 is issued by:



Christa Fornarotto
Associate Administrator
for Airports

FEB 25 2013

Date