



FAA
Airports

Feedback from the Policy Regarding Airport Rates and Charges Listening Sessions

In three meetings held September 12th, 16th, and 20th, 2013, the Federal Aviation Administration (FAA), in conjunction with the U.S. Department of Transportation Office of the Secretary (DOT) solicited feedback from industry regarding the Policy Regarding Airports Rates and Charges. The purpose of the meetings was to seek both historical and forward-looking feedback regarding industry developments and practices to assist us in our comprehensive review of the Policy and whether revisions or other future actions may be necessary.

Three sessions were held with the following groups: 1) Airports, 2) Airlines, and 3) Consultants, Attorneys and Financial Advisors.

This document does not in any way imply FAA/DOT concurrence or agreement with the substance of the input received. These meetings were held solely to obtain representative industry views and not to seek consensus or develop agency policy.

The input is organized loosely into general topic groups and numbered solely for ease of reference. Nothing in the organization of this document may be construed as implying FAA/DOT's view of the priority, importance or validity of the input received.

Background

The Airport and Airway Improvement Act of 1982 requires that air carriers have access to federally obligated airports "on reasonable conditions," and that air carriers "making similar use of the airport be subject to substantially comparable charges." The Anti-Head Tax Act (49 U.S.C. § 47129) permits "reasonable" charges by airport operators for use of the airport. The 1994 FAA Reauthorization Act adopted new a 49 U.S.C. § 47129, which required DOT to adjudicate airline-airport fee disputes on an expedited basis, and also required DOT to issue a policy for determining the reasonableness of airport fees.

OST and FAA adopted the 1996 final policy on rates and charges after multiple rounds of notice and comment in the Federal Register and several industry listening sessions.

Soon after the policy was adopted, both Airports Council International-North America (ACI-NA) and Air Transport Association (ATA, now known as A4A, Airlines for America) immediately petitioned for review of the policy, resulting in a District of Columbia Circuit Court decision vacating key sections of the original policy statement.

The agency issued an advance notice of proposed policy in 1998 to solicit industry comments on replacing the deleted sections of the policy, but withdrew the notice in 2003. A DOT notice soliciting comments on congestion management was issued in 2001, but no further action was taken on that notice after comments closed in July 2002.

Since then, the policy enforced by OST and FAA has undergone other changes as a result of court decisions, determinations in agency proceedings, and amendments adopted by the agency itself in 2008.

Some of those actions were reflected in the revised policy statement itself, (such as the deletion of the sections voided by the Court of Appeals and the addition of the Department's 2008 amendments) while others (such as the courts' opinions in some of the Section 302 cases) had not yet been reflected in the policy statement. On September 10th, 2013, the FAA/DOT published an updated Policy Regarding Airport Rates and Charges that included the 2008 amendments.

In considering a comprehensive review of the rates and charges policy, FAA/DOT sought to ensure a revised policy statement accurately reflects all the judicial decisions and agency amendments and policies since 1996. Additionally, while any revised policy statement will still need to conform to the statutory framework for airport charges, FAA/DOT wished to consider feedback from the industry to keep the agency policy current with actual industry practices.

Feedback from Airports

Overall Rates and Charges

1. There were no proposals for formal changes or revisions to the existing Rates and Charges Policy, as it provides the needed flexibility for all levels of airports and various business models. Airport operators stated that the Policy provides adequate flexibility for negotiating reasonable rates and charges that are non-discriminatory and sufficient to sustain daily operations and capital programs. Making the Policy more specific would be disruptive to current airport-airline business practices.
2. Participants indicated that, in the rare cases where there is no agreement among the airports and airlines, the expedited dispute resolution provision in the Policy provides a valuable tool. They also believed the local negotiation process is working, and setting rates and charges by litigation should be avoided.
3. In an effort to attract more air service, some small airport sponsors desire the ability to expand incentives to airlines above and beyond what is now permitted in the existing air carrier incentive program under the Revenue Use Policy. They believe this will better enable them to attract and sustain air service for their communities.
4. The Policy affords each airport the flexibility to have a different business model which can consist of one or more types of rate setting methodologies. For example, while most airports absorb the cost of public space, some reported that they use commercial compensatory rate setting methodology, allocating the cost of public space across all airport tenants.

Monopolies and Monopoly Pricing

1. Many airports feel that in order to compete with other similarly situated airports for air service (especially low-fare air service); they cannot charge more than the prevailing rates. Accordingly, they could not possibly charge a monopoly rate.
2. Some smaller airports believe there is a threshold of airport size below which an airline has greater power than the airport sponsor in negotiations, especially where the airline has the largest presence in a region.
3. National and regional market forces tend to prohibit individual airports from raising rates and charges to a level that is non-competitive.

Airport Cash Reserves

1. Participants reported that a change in the Policy limiting allowable cash reserves could be detrimental to an airport's access to capital. A change would likely impact investors' views of the financial health and viability of the airport. Cash reserves are a key indicator of health in institutions such as airports. There is concern that small changes in their bond rating can have a huge impact (increase) on the cost of capital.
2. Airports stated that rating agencies would like to see sufficient cash reserves to service outstanding debt for a specific period (e.g., in hundreds of days), rather than airports only using current operating revenue for debt payments.
3. Although airlines generally want cash deployed, airports believe cash reserves are necessary to avoid the negative financial consequences on the airport and remaining airlines in the event of a loss of service by a major air carrier at that airport.
4. Some airports use cash balances for those capital projects that are rated at a higher risk than normal by investors. Generally, borrowing is used when capital projects will generate sufficient revenue streams to pay back the debt.
5. Some airports negotiate their cash reserve levels with their tenant airlines.

Issues of Negotiations and Transparency

1. In response to questions regarding whether airports are transparent in their accumulating cost and calculation of rates and charges, the participants reported that they generally do not have transparency issues in negotiations with the airlines. They explained that airport financial data is readily accessible due to their fiscal reporting requirements.
2. The percentage of airports that have rates and charges by ordinance is small. Most operate by agreement. The airports indicated that they consult the Policy in formulating rates, whether by ordinance or agreement, and the Policy is working as intended by encouraging negotiations.
3. The Policy provides adequate guidance for congestion pricing and offers a wide range of options.

Additional Comments

1. Some smaller airports would like to see a change in the Revenue Use Policy¹ that would allow them to provide additional incentives or subsidize airline operating costs using airport revenue.

Feedback from Airlines

Overall Rates and Charges

1. There were no proposals from the airline participants to make formal changes or revisions to the Policy. Airlines indicated the Policy works well as intended with give and take on both sides during negotiations.
2. The airline participants would like to have additional guidance, clarification and enforcement in regard to cash reserves and lease negotiations.

Monopolies and Monopoly Pricing

1. Some airlines are concerned that larger airports exercise dominant market power. As a result, Airlines contend that monopolistic airports tend to accumulate excessive cash reserves and fail to adequately negotiate construction of new projects.
2. Some airlines believe smaller airports are more sensitive to airlines' financial needs, since airlines can more easily withdraw from their airport. The effects of such a withdrawal would cause lack of revenue to cover operational costs and loss of air service to the community.

Airport Cash Reserves

1. Airports should be financially healthy with good credit ratings, but they should be limited to only sufficient cash reserves, such as 450 days of restricted and unrestricted cash reserves. There is concern that airports want to be above the "average" airport with days cash on hand for rating purposes, and the target 500-600 days cash is on top of all protected reserve funds.
2. There is concern that the major credit rating agencies push airports to have excess cash reserves because to a rating agency, more cash reserves are better.
3. There is concern that large cash reserves may become a target for revenue diversion by municipal airport sponsors.
4. Some airports are preparing for capital projects with accumulated unrestricted cash and charging airlines, before beneficial use or occupancy, for the finished capital project.

Issues of Negotiations and Transparency

1. Airlines are concerned that airports may impose rates by resolution or ordinance rather than through negotiation and agreement. Airlines suggested, in the case of no agreement,

¹ Section VI(B) of *Policies and Procedures Concerning the Use of Airport Revenue* addresses prohibited uses of airport revenue. "12. Direct subsidy of air carrier operations. Direct subsidies are considered to be payments of airport funds to carriers for air service." See 64 Federal Register 30, 7720 (February 16th, 1999)

that the airport retain its expiring rates and charges agreement or a traditional compensatory rates and charges until a new agreement can be worked out.

2. Some airlines expressed concern that they believed they needed to rely on the FAA/DOT-administered fee dispute process in order to obtain needed financial information from the airports. This is a disadvantage for the airlines, because the airport operator can consider its legal fees for the challenges an operating cost of the airport; if the airport is on a residual fee structure, then the airport's legal fees may wind up being paid by the airlines. Some airlines expressed an interest in developing an interim process to resolve fee disputes, after the negotiation period and before a formal administrative or judicial proceeding.
3. Airlines caution that some of the new rates and charges models include going back in time and including a retroactive charging clause, which would effectively adjust the previous agreement. They are concerned that rates and charges are increasing faster than the consumer price index.
4. Operators at a partially-privatized terminal or other airport facility do not always include airline tenants in planning and cost sessions and may overbuild.

Additional Comments Pertaining to Revenue Use Policy² and Air Carrier Incentive Program

1. Some airlines are concerned that while incentives to airlines help airports market their facilities for a limited period, the final outcome is market driven by passenger demand. Additionally, incentives interfere with an airline's business model to determine routes, frequency of flights, and size of aircraft.
2. Regional and other airlines are concerned with incentives for up-gauging because they distort the market and affect carriers' networks.

Feedback from Consultants

Overall Rates and Charges

1. There were no proposals for formal changes or revisions to the Policy. Participants working for both airports and airlines indicated that the existing Policy provides sufficient flexibility for airlines and airports to negotiate reasonable rates and charges at the local level.
2. Some participants questioned who should pay for public space and how those costs should be allocated. If an airport does not share concession revenue, they questioned why airlines should pay for public space.
3. There was disagreement amongst participants regarding whether an airport is a proprietor or a utility. Participants who argued that airports are utilities suggested that they be regulated in a similar fashion to other public utilities. They argued that airports are not a commercial business and therefore commercial compensatory rate setting should be curtailed. Others rejected the notion of an airport as a public utility and suggested the airport is an enterprise that should have the ability to compete.
4. Participants discussed different circumstances as between larger and smaller airports, saying that airline mergers and acquisitions have caused competition among small

² Section V and Section VI of Policies and Procedures Concerning the Use of Airport Revenue addresses allowable and prohibited uses of airport revenue. See 64 Federal Register 30, 7715 (February 16th, 1999)

airports for air service. Consequently, some smaller airports desire more flexibility to use rates and charges as an incentive to promote air service, in order to maintain competitiveness. They suggested that the FAA/DOT consider allowing different rates for network carriers versus low-cost less-than-daily carriers.

5. Participants had conflicting views on the role of the FAA/DOT in rate setting disputes. Some commenters suggested that the government is rather ill-equipped to address disputes due to manpower and lack of expertise, and that conflict is best handled locally through the courts or through an Alternate Dispute Resolution (ADR) process. In contrast, others argued that FAA/DOT staff are the experts in Rates and Charges Policy and that disputes should not be decided by federal judges.
6. Participants had different views regarding the judicial decision affirming the 2008 Policy amendment.³ Some viewed the case as rejecting the Airline Deregulation Act (ADA) challenge, while others thought it was still an open question, in recognition that airport rates can have effects on an airline's rates, routes, and services that were not covered by the court's decision.

Monopolies and Monopoly Pricing

1. There was discussion about the extent of market power or monopoly power among airports, and whether market discipline and the Policy temper any possible abuse of such powers. In general, participants observed that airlines tend to have more market power in small hub airports, but that market power shifts to the airport at larger hub airports.
2. Concerns were expressed that certain airports may exercise monopoly power by unilaterally imposing commercial compensatory rates and charges. On the other hand, it was pointed out that airports do not typically exert market power, because they do not charge market-clearing rates and may have incentive programs to seek new airline service. Airlines often have no choice whether to operate at an airport in a market they wish to serve. The fact that they have no feasible means of using or building a competing airport confers effective market power and monopoly status on the airport operator. Airline representatives also expressed a concern that major airports have monopoly power and airlines do not have a sufficient voice in rates and charges.

Airport Cash Reserves

1. Some suggested that there is not clear guidance regarding limits to an airport cash reserve and that airports may be attempting to get around the issue of pre-financing projects by building larger reserves.
2. Others believed that the FAA/DOT should not set a rule on cash reserves and that accumulation of cash can only be determined on a case-by-case basis as there are too many unique circumstances at any given airport, such as preparing for substantial loss of revenue due to changes in market strategies by airline tenants.

Issues of Negotiations and Transparency

1. In some cases, commenters suggested that the flexibility of the Rates and Charges Policy creates transparency issues. They said that the Appendix to the Policy does not cover all

³ See, Air Transport Ass'n v. DOT, 613 F.3d 206 (D.C. Cir. 2010).

aspects of fees, and, for example, does not discuss information required for cost allocation decisions. They suggest that if an Airport switches from one type of acceptable rate setting methodology to another acceptable methodology, the airport should have to show a reason. Others argued that the airport should only have to demonstrate that the new methodology is reasonable, and not have to justify why they switched. Some airlines feel that the only cost increases should come from increased operating and capital costs—not from market adjustments.

2. There was some disagreement about whether certain rate structures would be considered unjustly discriminatory. An example was provided of a situation where a carrier who turns gates quickly may prefer negotiating costs per square foot rather than per operation because they have more operations at each gate per day. On the other hand, it was suggested that an airport operator should be able to consider alternative gate charge methodologies to address the unique situation at its airport.
3. Participants noted that other regulated industries require certain, more specific information on what is considered fair and reasonable.
4. In general, there were varied opinions on transparency associated with negotiations. Some voiced concerns that the burden of proof to challenge a rate is on the airlines. Many felt that transparency becomes a bigger issue during the dispute resolution process. One participant mentioned that the negotiation process provides an incentive to both parties to provide information.
5. Participants were unclear as to when and to what extent FAA/DOT can provide assistance in rates and charges disputes.

September 2013 Rates and Charges Industry Listening Session Feedback

	Overall Rates & Charges	Monopolies and Monopoly Pricing	Airport Cash Reserves	Negotiations and Transparency	Additional Comments
Airports	<ul style="list-style-type: none"> No Change to Policy! Policy is flexible Expedited dispute resolution provision in the Policy is a valuable tool 	<ul style="list-style-type: none"> Regional market forces prevent all but the largest airports from acting as a monopoly; others charge market rates Believe larger airlines in a region have greater market power 	<ul style="list-style-type: none"> Cash reserves are driven by rating agencies; Cash reserves are necessary to maintain bond rating Cash reserves provide a contingency for loss of service by a major air carrier May use cash for higher risk capital projects 	<ul style="list-style-type: none"> Do not consider transparency an issue in negotiations Rates by ordinance is uncommon 	<ul style="list-style-type: none"> Smaller airports request changes to the Revenue Use Policy allowing more incentives and subsidies for airline operational costs FAA should limit the costs passed on to airports for ATC/Navigation expenses at the airport Want ability to expand airline incentives
Airlines	<ul style="list-style-type: none"> No Change to Policy! Believe Airports maintain unnecessarily large cash reserves Want additional help from FAA/DOT to prevent Rates by Ordinance 	<ul style="list-style-type: none"> Larger airports exercise dominant market power Some believe smaller airports are more sensitive to airlines' financial needs, since airlines can more easily withdraw from the airport. 	<ul style="list-style-type: none"> Credit Rating agencies/underwriters push for larger cash reserves Large cash reserves may become a target for revenue diversion Cash reserves should only be 450 days 	<ul style="list-style-type: none"> Concerned about rates by ordinance Airports can rely on FAA/DOT dispute process and bill costs to carriers If renegotiation not possible, airport should retain expiring agreement until a new agreement can be worked out Concerned about retroactive charging 	<ul style="list-style-type: none"> Air Carrier Incentive Program unnecessary because final outcome is determined by market demand Incentives for up-gauging distort market and carrier's networks Partially-privatized terminal Operators do not always include airlines in planning
Consultants	<ul style="list-style-type: none"> No Change to Policy! Disagreement about whether an airport is a proprietor or a public utility Desire flexibility within a general framework, rather than detailed requirements 	<ul style="list-style-type: none"> Airlines have market power in small hub airports; power shifts to the airport at larger hub airports Airlines often have no real choice whether to serve an airport 	<ul style="list-style-type: none"> Disagreement: some say guidance on cash reserves necessary; others say it should be set on case-by-case basis 	<ul style="list-style-type: none"> Disagreement on whether an Airport that switches from one type of rate methodology to another must justify change Disagreement on negotiation transparency 	<ul style="list-style-type: none"> The differing opinions of this group not surprisingly aligned with the opinions of the clients they represent