

Chapter 9. Unjust Discrimination between Aeronautical Users

9.1. Introduction. This chapter contains guidance on the sponsor's responsibility to make the airport available on reasonable terms and without unjust discrimination. This guidance is primarily economic and focuses on charging comparable rates to similarly situated aeronautical users. Issues of unjust discrimination arising from access restrictions are addressed in chapters 13, *Airport Noise and Access Restrictions*, and 14, *Restrictions Based on Safety and Efficiency Procedures and Organization*, respectively. It is the responsibility of the airports district offices (ADOs) and regional airports divisions to advise sponsors on their obligations in this area.

a. Federal Grant Obligations. Grant Assurance 22, *Economic Nondiscrimination*, requires the sponsor to make its aeronautical facilities available to the public and its tenants on terms that are reasonable and without unjust discrimination. This federal obligation involves several distinct requirements.

First, the sponsor must make the airport and its facilities available for public use.

Next, the sponsor must ensure that the terms imposed on aeronautical users of the airport, including rates and charges, are reasonable for the facilities and services provided.

Finally the terms must be applied without unjust discrimination.

The prohibition on unjust discrimination extends to types, kinds and classes of aeronautical activities, as well as individual members of a class of operator. This is true whether these terms are imposed by the sponsor or by a licensee or tenant offering services or commodities normally required at the airport. The tenant's commercial status does not relieve the sponsor of its obligation to ensure the terms for services offered to aeronautical users are fair and reasonable and without unjust discrimination. (See



An air carrier that assumes the same obligations imposed on other tenant air carriers shall enjoy the same classification and status. This applies to rates, fees, rentals, rules, regulations, and conditions covering all the airport's aeronautical activities. (Photo: FAA)

paragraph 12.5.a of this Order.)
27

b. Other Federal Obligations.

These same requirements apply to the Federal Aid to Airports Program (FAAP) and the Airport Development Aid Program (ADAP) agreements. These requirements are also reflected in surplus property and nonsurplus property agreements.

9.2. Rental Fees and Charges: General.

a. Comparable Rates, Fees, and Rentals. For facilities that are directly and substantially related to air transportation, regardless of whether an air carrier or user is a tenant, subtenant, or nontenant, the sponsor must impose nondiscriminatory and substantially comparable rates, fees, rentals, and charges on all air carriers and users that assume similar obligations, use similar facilities, and make similar use of the airport.

Aside from rates, fees, and rentals, the sponsor must also impose comparable rules, regulations, and conditions on the use of the airport by its air carriers and users, regardless of whether they are tenants, subtenants, or nontenants.

b. Signatory and Nonsignatory Air Carriers.

The sponsor may establish a separate rate, fee, and rental structure for the use of airport facilities depending on whether an air carrier chooses to assume the obligations of a signatory carrier to a sponsor's



An airport might have fixed-base operators (FBOs) that provide commercial services such as the sale of aviation fuel and oil, tie-down and aircraft parking facilities, ramp services, flight training, aircraft sales, or avionics repair. Some FBOs may not be similarly situated, especially in regard to investment in facilities. A sponsor may have different fee schedules for FBOs not similarly situated. One of the most common and needed aeronautical services is aircraft parking. In the photograph above, the typical tie-down spot and rigging is illustrated. Another common aeronautical service is aircraft sales, shown below. (Photos: FAA)



²⁷ The obligations under the grant assurances to afford reasonable access extends only to aeronautical users engaging in aeronautical activities. The grant assurance obligations do not extend to nonaeronautical users.

airport use agreement or chooses not to assume those obligations and be classified as a nonsignatory carrier. The primary obligation of a signatory is to lease space in airport facilities and commit to long-term financial support of the development and operation of the airport. The debt for airport facilities is typically secured by signatory tenant leases. In return for their financial commitment, signatory carriers may have a rate, fee, and rental structure that differs from nonsignatory carriers choosing not to make the same financial commitment. The sponsor cannot unreasonably deny signatory status to an air carrier willing and able to assume the obligations of a signatory carrier.

c. Fixed-base Operators (FBOs).²⁸ The sponsor must impose the same rates, fees, rentals, and other charges on similarly situated fixed-based operators (FBOs) that use the airport and its facilities in the same or similar manner. However, FBOs under different types of sponsor agreements may have different fees and rentals. For example, an FBO leasing a sponsor-owned aeronautical facility may pay more in rent to the sponsor than an FBO that builds and finances its own facility. In the first case, the FBO is not servicing debt while in the second case, the FBO is servicing debt.

d. Changes in Rates Over Time. A sponsor is not foreclosed from revising its rental rate structure from time to time. An airport sponsor does not engage in unjust discrimination simply by imposing different lease terms on carriers and users whose leases have expired. FAA recognizes rate differences based partly on differences in other lease terms and facilities. Ideally, a new rate should be imposed at a time when the rates can be changed for all similarly situated tenants at the same time to avoid any claims of unjust discrimination. In some cases, however, the sponsor will have reason to revise rates even though existing contracts at lower rates have not yet expired. In such cases, the sponsor should make every effort to provide terms for new contracts that will support any difference in rates between new tenants and existing tenants. The sponsor should also consider limiting the term of new agreements to expire when existing agreements expire in order to bring all similarly situated tenants under a common rate structure at one time. While circumstances may allow differences in rental rates among tenants, landing fee schedules generally must be applied uniformly to all similarly situated users at all times (i.e., a signatory rate and a separate nonsignatory rate).

e. Complaints. The FAA does not normally review airport fees or question the fairness or comparability of the sponsor's rates, fees, and rental structure. Accordingly, the FAA normally investigates only upon receipt of a properly documented complaint that alleges sponsor noncompliance with an applicable assurance, such as Grant Assurance 22, *Economic Nondiscrimination*, Grant Assurance 23, *Exclusive Rights*, Grant Assurance 24, *Fee and Rental Structure*, or Grant Assurance 25, *Airport Revenues*.

²⁸ A fixed-base operator (FBO) is a commercial entity providing aeronautical services such as fueling, maintenance, storage, ground and flight instruction, etc., to the public.

f. Additional Information.

Refer to chapter 18 of this Order, *Airport Rates and Charges*, for a further discussion on airport rates and charges, and chapter 15 of this Order, *Permitted and Prohibited Uses of Airport Revenue*, for use of airport revenue.

9.3. Types of Charges for Use of Airport Facilities.

The sponsor may use direct charges (such as landing and tie-down fees) to charge aeronautical users for use of airport facilities. It may also use indirect charges through its FBO such as fuel flowage fees or percentages of gross receipts fees where it factors into the price of fuel and other aeronautical services the cost of providing airport facilities. For example, an FBO may have a ground lease, on which it erects hangars and other facilities, and also pay the sponsor a percentage of the receipts from fuel and aeronautical services provided to aeronautical users.

9.4. Airport Tenant and Concessionaire Charges to Airport Users.

At most airports, profit-motivated private enterprise can best provide fuel, storage, and aircraft service. When negotiating agreements with tenants and concessionaires, it is the sponsor's responsibility to retain sufficient oversight to guarantee that aeronautical users will be treated fairly. A sponsor is encouraged to include a "subordination clause" in its contracts' standard terms and conditions. Such a clause subordinates the sponsor's contract with tenants to



A sponsor may establish two classes of FBO, one serving primarily high performance aircraft and another that caters to piston powered aircraft. Rates that may not be comparable because entities are not similarly situated should, nevertheless, be equitable. (Photos: FAA)



its federal obligations, preserving its rights and powers under Grant Assurance 5, *Preserving Rights and Powers*.

The sponsor has a federal obligation to ensure that aeronautical users have access to airport facilities on reasonable and not unjustly discriminatory terms. The sponsor is not obligated by federal grant agreements or property deeds with the United States to oversee the pricing and services for nonaeronautical concessions such as public parking and ground transportation, food and beverage concessions, and other terminal area concessions.

9.5. Terms and Conditions Applied to Tenants Offering Aeronautical Services.

a. Signatory and Nonsignatory. An air carrier that is willing and able to assume the same obligations assumed by other tenant air carriers shall enjoy the same classification and status. This applies to rates, fees, rentals, rules, regulations, and conditions covering all the airport's aeronautical activities.

b. Signatory Fees and Rentals. The sponsor may



All grant agreements contain an assurance that the sponsor will neither exercise nor grant any right or privilege that would have the effect of preventing the operator of an aircraft from performing any services on its own aircraft with its own employees. Two entities to which this applies are charter operators (below) and flight schools (above). (Photos: FAA).



grant lower fees and rentals to an air carrier willing and able to be a signatory to a sponsor's airport use agreement. When an air carrier is unwilling or unable to become a signatory, the sponsor may charge the air carrier higher nonsignatory rates.

c. Different Rates to Similar Users. If the sponsor can show that different rates are nondiscriminatory and if the rates are substantially comparable, it may charge airport tenants different rates for similar airport uses. For example, the rental rates in different airline terminals may vary because of differences in debt and physical layout of rental and public space, but only to the extent justified by the difference in circumstances.

d. Differences of Value and Use. The FAA may consider factors such as minimum investment requirements, demand, location, venture risk, ownership of facilities, time remaining on contract terms, and condition of facilities as reasons that may justify differing rates. For example, a sponsor may establish two classes of FBO, one serving primarily high performance aircraft and another that caters to piston powered aircraft. Nonetheless, rates that may not be comparable should be equitable.

e. Escalation Provision. Ground leases with terms of five (5) or more years should contain an escalation provision for periodic adjustments based on a recognized economic index. This will facilitate parity between new and established lessees. An escalation provision also helps the sponsor comply with Grant Assurance 24, *Fee and Rental Structure*, which requires the sponsor to make the airport as self-sustaining as possible under the circumstances.

9.6. Fixed-Base Operations and Other Aeronautical Services.

a. Similarity of Facilities. If one FBO rents office and/or hangar space from the sponsor and another leases land from the sponsor and builds its own facilities, the sponsor would have justification for applying different rental rates and fee structures. Even though the operators offer the same services to the public, the cost of their facilities is different due to circumstance.



Grant Assurance 22, Economic Nondiscrimination, requires an airport sponsor to make available suitable areas or space on reasonable terms to those willing and qualified to offer aeronautical services to the public such as air taxi, charter, aircraft storage (hangar), and aircraft maintenance services. An airport sponsor may not have a hangar available for a prospective service provider but might have land available at the airport. In order to make the airport available on reasonable terms, that airport sponsor must, at a minimum, make that land available to the prospective service provider (i.e. through a ground lease) so that it can develop its aeronautical facility. (Photos: FAA).

b. Location. If one FBO is in a prime location and another FBO is in a less advantageous area, the sponsor could logically charge different rental rates and fees to reflect the advantage of the location.

c. Similarity of Services. An airport might have an FBO that provides aeronautical services to air carriers and private operators such as fueling, ramp services, aircraft parking, crew transport, and catering while another FBO may focus only on general aviation (GA) services such as the sale of aviation fuel and oil, tie-down and aircraft parking, ramp services, flight training, aircraft sales, or avionics repair. These differing services may require different space, facilities, and other requirements based on their business needs. If the services are not similar, sponsors are not required to charge the FBOs the same rates. Nonetheless, all rates charged must be equitable.

d. FAA Determination. If the FAA determines that the FBOs at the airport are making the same or similar uses of the airport facilities under the same circumstances, then the same rates, fees, and rental structure will apply

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e. Minimum Standards. To aid in establishing uniform rates and charges applied to aeronautical activities on the airport, the sponsor should establish minimum standards to be met as a condition for the right to conduct an aeronautical activity on the airport. (See Appendix O of this Order, *Sample Minimum Standards for Commercial Aeronautical Activities*. See also Advisory Circular (AC) 150/5190-7, *Minimum Standards for Commercial Aeronautical Activities*.)

f. New Airport. At a new general aviation airport, the sponsor frequently must offer reduced rental rates and other inducements to attract FBOs. This arrangement recognizes that the FBO may not be profitable for some time. In order to secure FBO services for aeronautical users, the sponsor may provide an incentive rate during an initial startup period, which should run for a specific period of time and be reflected in a written agreement. Once the startup period ends, the airport sponsor should charge the airport standard rates and charges based on current values.

g. Unreasonable Restraint. If the sponsor requires an FBO to procure fuel, services, or supplies from a source that the sponsor provides, the FAA may determine that the requirement is an unreasonable restraint on the FBO's use of the airport and not consistent with Grant Assurance 22, *Economic Nondiscrimination* or Grant Assurance 23, *Exclusive Rights*.

h. Aeronautical Activities Conducted by the Airport Sponsor (Proprietary Exclusive). The sponsor of a public use airport may elect to provide any or all of the aeronautical services needed by the public at the airport. As discussed in chapter 8 of this Order, *Exclusive Rights*, the

statutory prohibition against exclusive rights does not apply to the sponsor-operator of a public use airport. The airport owner may exercise, but not grant, the exclusive right to conduct any aeronautical activity.

However, these owners must engage in such activities as principals using their own employees and resources. An independent commercial enterprise that has been designated as agent of the owner may neither exercise nor be granted an exclusive right at the airport.

(1). As a practical matter, most sponsors recognize that these services are best provided by profit-motivated private enterprise. The exceptions are usually those instances in which a sponsor elects to provide fuel service or aircraft parking. If it does so, whether on an exclusive or nonexclusive basis, it may not refuse to permit an air carrier, air taxi, or flight school to fuel its own aircraft with its own personnel and equipment.

(2). The airport owner may establish reasonable standards covering the refueling, washing, painting, repairing, etc., of aircraft. However, unless the airport owner is providing such services itself on an exclusive basis, it may not refuse to negotiate for the space and facilities needed to meet such standards by an activity willing and qualified to provide aeronautical services to the public.

If the airport sponsor reserves unto itself the exclusive right to sell fuel, it can prevent an airline or air taxi from selling fuel to others, but it must deal reasonably to permit such operators to refuel their own aircraft.

If the airport owner reserves unto itself the exclusive right to sell fuel, it can prevent an airline or air taxi from selling fuel to others, but it must deal reasonably to permit such operators to refuel their own aircraft. The self-service fueling by such flight operators, however, must be done with their own employees and equipment. For information regarding fueling, refer to *Aircraft Fuel Storage, Handling, and Dispensing on Airports*, Advisory Circular (AC) 150/5230-4A. (See chapter 11 of this Order, *Self-service*, for additional information on self-service.)

(3). Aircraft operators do not have a right to bring a third party, such as an oil company, onto the airport to refuel their aircraft. This would be an aeronautical activity undertaken by the fuel company, which has only such rights as the airport owner may confer. It should be noted that air carriers frequently insist on a standard condition in their airport contracts reserving the right to obtain fuel from a supplier of their choice. Under this arrangement, the air carrier-owned fuel can be delivered to the airport fuel farm with fueling handled by the airport's contractors.

9.7. Availability of Leased Space. The sponsor's federal obligation under Grant Assurance 22, *Economic Nondiscrimination*, to operate the airport for the public's use and benefit is not satisfied simply by keeping the runways open to all classes of users. The assurance federally obligates the sponsor to make available suitable areas or space on reasonable terms to those willing and qualified to offer aeronautical services to the public (e.g. air carrier, air taxi, charter, flight training, or crop dusting services) or support services (e.g. fuel, storage, tie-down, or flight

line maintenance services) to aircraft operators. Sponsors are also obligated to make space available to support aeronautical activity of noncommercial aeronautical users (i.e., hangars and tie-down space for individual aircraft owners). This means that unless it undertakes to provide these services itself, the sponsor has a duty to negotiate in good faith for the lease of premises available to conduct aeronautical activities. Since the scope of this federal obligation is frequently misunderstood, the following guidance is offered:

a. Servicing of Aircraft. All grant agreements contain an assurance that the sponsor will neither exercise nor grant any right or privilege that would have the effect of preventing the operator of an aircraft from performing any services on its own aircraft with its own employees. This does not, however, federally obligate the sponsor to lease space to every aircraft operator using the airport. It simply means that any aircraft operator entitled to use the airfield is also entitled to tie down, adjust, repair, clean, and otherwise service its own aircraft, provided it does so with its own employees and conducts self-servicing in accordance with the sponsor's reasonable rules or standards established for such work. Accordingly, the assurance establishes a privilege of self-service, but it does not, by itself, compel the sponsor to lease the facilities necessary to exercise that privilege.

b. Facilities Not Providing Service to the Public. When adequate facilities are otherwise available, Grant Assurance 22, *Economic Nondiscrimination*, does not compel sponsors to lease property to entities that desire to construct facilities for private aeronautical use. Examples would include making property available so that private aircraft owners or flying clubs may construct their own hangars while vacant hangars are available on the airport that can meet the potential tenant's needs. However, if the entity is not able to arrange satisfactory terms for hangar space, facilities, or support services from existing airport entities, the assurance does require the sponsor to lease available property identified on the sponsor's airport layout plan (ALP) for such use to such entities on reasonable terms. (See Grant Assurance 38, *Hangar Construction*, regarding hangars for private aircraft storage.)

c. Activities Offering Services to the Public. If adequate space is available on the airport and the sponsor is not already providing identical aeronautical services, Grant Assurance 22, *Economic Nondiscrimination*, requires the sponsor to negotiate in good faith and on reasonable terms with prospective aeronautical service providers.

If adequate space is available on the airport and the sponsor is not already providing identical aeronautical services, Grant Assurance 22, Economic Nondiscrimination, requires the sponsor to negotiate in good faith and on reasonable terms with prospective aeronautical service providers.

The FAA interprets the willingness of a prospective provider to lease space and invest in facilities as sufficient evidence of a public need for those services. In such a situation, the FAA does not accept a sponsor's claim of insufficient business activity as a valid reason to restrict the prospective provider access to the airport.

9.8. Air Carrier Airport Access.

With the passage of the Airline Deregulation Act of 1978 (Deregulation Act), air carriers have had no restrictions on entry into new markets. Even before the Deregulation Act's passage, however, many airports already operated at or near capacity in terms of ticket counter, gate, and ramp space. Consequently, new air carriers wishing to serve an airport often faced a lack of available facilities. In some instances, established air carriers made space available for the newcomers. However, in other cases, no space was made available, and sponsors subsequently denied the newcomers access to the airport.

a. Mandatory Access. In accordance with Grant Assurance 23, *Exclusive Rights*, which prohibits a sponsor from directly or indirectly conveying an exclusive right to an air carrier, the FAA Office of Chief Counsel determined that a sponsor may not deny an air carrier access solely based on the nonavailability of existing facilities. The sponsor must make some arrangements for accommodations if reasonably possible. Consequently, access issues can often be complex and are not always easy to resolve. (See FAA Docket No. 16-98-05 for additional information, available online.)

b. Reports of denial of access. Grant Assurance 39, *Competitive Access*, requires operators of large and medium hub airports to report to the Secretary any denial of a request by an air carrier for access to the airport. A report is due on February 1st or August 1st if there has been any denial of access in the preceding six-month period.

c. FAA Headquarters Airport Compliance Division (ACO-100) Review. The ADOs or regional airports divisions should notify the ACO-100 if the region cannot develop a feasible solution to an air carrier access situation. The division will coordinate the effort of the regional airports division with the FAA Office of Chief Counsel to achieve a viable solution to the problem.

9.9. Civil Rights. The ADOs or regional airports divisions and the Office of Civil Rights are responsible for enforcing Grant Assurance 30, *Civil Rights*. More information is available at 49 Code of Federal Regulations (CFR) Part 21 *Nondiscrimination in Federally Assisted Programs of the Department of Transportation*, and 150/5100-15, *Civil Rights Requirements for the Airport Improvement Program*, available online.

The Office of Civil Rights advises, represents, and assists the FAA Administrator on civil rights, diversity, and equal opportunity matters that ensure the elimination of unlawful discrimination on the basis of race, color, national origin, sex, age, religion, creed, and individuals with disabilities in federally operated and federally assisted transportation programs.

9.10. FAA Policy on Granting Preferential Treatment Based on Residency. The FAA has received complaints about a sponsor's policy of granting preferential treatment in the assignment of aircraft storage hangars or other services to residents of the sponsor's locality. Such preferential practices are unreasonable and unjustly discriminatory, and can result in the granting of an exclusive right contrary to Grant Assurance 22, *Economic Nondiscrimination*, and Grant

Assurance 23, *Exclusive Rights*, implementing 49 United States Code (U.S.C.) § 40107(a) and 49 U.S.C. § 40103(e) respectively.

A federally obligated airport sponsor has received federal aid in support of the national air transportation system. All users of the national airport system pay taxes to support and maintain the system and all its component airports, including the airport in question. The fact that certain users at a particular airport pay district or other local taxes, while others do not, does not justify preferential treatment, differential rates, or other unjustly discriminatory practices having the effect of unreasonably restricting or excluding users who do not pay those local taxes.

Nonresident aeronautical users have the same rights as resident aeronautical users regarding reasonable access to, and services provided at, a federally obligated airport. Accordingly, the airport must be available on reasonable terms to all public aeronautical users, and a local tax obligation does not establish a reasonable basis upon which to discriminate between resident and nonresident airport users.

The national air transportation system is dependent on each airport properly functioning as part of the whole system. Allowing airport sponsors to invoke local preferences, such as granting preferential treatment in the assignment of aircraft storage hangars to resident aeronautical users, could result in a patchwork of local preferences that would be inconsistent with a national air transportation system.

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