2. General: Proprietary Powers of Airport Operators

Airports commented that the policy adopted must preserve the airport's right, as landlord, to set fees and charges when consensus is not possible. If the policy establishes narrow federal standards, it would eliminate incentives to set fees and resolve disputes at the local level. Policies should not be so rigid as to stifle innovation that may lead to more efficient financing and management of airport facilities.

Airports argued that the Department especially should not allow carriers to invoke the policy to challenge the wisdom of particular infrastructure enhancement or airport expenditures. Such an outcome would be perceived in the capital market as shifting management prerogatives away from the airport and would result in higher financing costs. The policy, airports argued, should make clear that a fee to cover debt service for a completed project cannot be challenged as unreasonable after the project comes on line and the debt service costs are added to the rate base.

Airports are operated by state or local governmental entities to meet community and national needs. Prior Department statements, including the Government's *amicus curiae* brief to the Supreme Court in *Northwest Airlines* v. *County of Kent, Michigan* (510 U.S. _____; 114 S.Ct. 855; 127 L. Ed. 2d 183 (1994) ''*Kent County*'') and Secretary Peña's December 1993 letter, recognize that airport proprietors have latitude to set fees to meet immediate and longer-term needs of airports. Actions of state and local government are presumed at law to be reasonable and lawful. This same presumption, the airport commenters argued, should apply to the establishment of rates and charges, even when imposed unilaterally by a proprietor through ordinance or regulation. The Supreme Court, in the *Kent County* litigation, recently reaffirmed the standard of reasonableness first enunciated in the *Evansville* decision; this standard afforded substantial deference to the airport proprietor. Airport commenters further argued that in keeping with the presumption of validity, air carriers filing complaints under § 113 of the FAA Authorization Act should bear the burden of proving unreasonableness.

ATA stated that airports possess monopoly power, which in recent years has not been kept in check. Section 113 of the 1994 FAA Authorization Act was enacted to respond to this potential monopoly power by providing for active DOT involvement in airport-carrier disputes, ATA argued, and airports should not be permitted to adopt new fees unilaterally after failing to reach a consensus; such a policy would give airports carte blanche to impose an unreasonable fee.

General aviation representatives commented that at hundreds of general aviation airports operated by local governments, unreasonable economic requirements can be imposed without effective challenge.

In light of the enactment of § 113, the Department believes that it is not at all clear that the presumption of validity normally associated with governmental actions applies to the imposition of airport fees on air carriers. Even before enactment of § 113, some judicial decisions recognized that the traditional presumption may not apply in cases of airport rate-setting. See, for example, *Raleigh-Durham Airport Authority* v. *Delta Air Lines,* 429 F. Supp. 1069, 1083 (D.N.C., 1976); *New England Legal Foundation* v. *Massachusetts Port Authority,* 883 F.2d 157, 169 (1st Cir. 1989) (*Massport II*). In *Kent County,* the Supreme Court applied the relatively deferential standard of the *Evansville* decision in part because the parties invited its use, and the Court noted that the Secretary had discretion to ''apply some other formula (including one that entails more rigorous scrutiny).'' *Kent County,* at _____, n. 14. The policy adopted does not expressly affirm or displace the presumption of validity that may apply to local government actions. In response to comments relating to challenge of project decisions, the Department considers the dispute resolution process to apply to significant disputes actually related to fees, and do not intend to make the process available to challenge particular capital construction projects after the fact under the guise of challenging the reasonableness of associated rates and charges.

3. Local Negotiation and Consultation

Air carriers requested that the final policy include a more specific description of the information that airports are expected to provide to carriers in connection with a fee increase, and one carrier suggested that consultations and information exchange be required rather than just encouraged.

Airports commented that the statement that consultations should be conducted well in advance of changes to fees did not acknowledge that local governments must sometimes act quickly, to avoid revenue shortfalls or for other reasons.

The Department has included, in an appendix to the final policy statement, a brief list of the information that the Department believes would provide carriers the justification for a particular fee and sufficient information to assess the reasonableness of the fee. The information, in summary, is historic financial information for the two years prior to the change in the fee at issue; economic, financial and/or legal justification for the change; aeronautical cost information; numbers of passengers and aircraft operations for the two preceding years; and certain planning and forecasting information. The list is general, for adaptability to different airport and local government accounting and recordkeeping, and is not intended to include every category of information that may be relevant to each fee dispute.

The procedural rules adopted for the resolution of airport-air carrier fee disputes address the exchange of information. Following a complaint under 49 U.S.C. § 47129, if the airport proprietor has not previously made that information available to carriers, the rules provide for discovery. The Department has not acted to require disclosure of information on a fee increase by regulation, but the agency will reconsider that decision if experience indicates that airports are not providing sufficient information to carriers during consultation on fee increases.

In the statement on the timing of consultations, the Department has inserted ''if practical'' in the language suggesting consultation well in advance of a fee change. Finally, in response to the recommendation by several commenters for arbitration or mediation clauses in leases, the Department has added language encouraging the use of alternate dispute resolution in lease and use agreements.

4. Fair and Reasonable Rates: Compensatory and Residual Costs Methodology

Airport commenters generally supported the policy approach that recognizes the discretion of an airport proprietor to establish compensatory or residual methodology, or a combination of the two. Airports also generally accepted the policy that airports could not unilaterally impose a residual system absent carrier agreement, although two commenters suggested that § 113 gives an airport proprietor a right to impose a residual costing methodology even absent agreement.

Air carriers stated that the policy must deal realistically with the fact that excessive revenues can and will be generated by an airport's shifting of all costs to airlines and all profits to itself; the policy should not exclude from