U.S. Department
of Transportation
**Federal Aviation
Administration**

Office of Airport Compliance
and Management Analysis

800 Independence Ave., SW.
Washington, DC 20591

February 12, 2016

Ms. Laura A. McKee
Vice President, Airline Services
Airlines for America
1301 Pennsylvania Avenue, NW
Washington, DC 20004-1707

Dear Ms. McKee:

Thank you for your letter dated December 17, 2014, regarding the concern held by your member air carriers that a number of smaller airports may be implementing rates and charges mechanisms that are unjustly discriminatory. I apologize for our delayed response, which took longer than anticipated due to our comprehensive review and extensive coordination process. In your letter, you seek our perspective, in light of our Policy Regarding Airport Rates and Charges, 78 FR 55330 (Sept. 10, 2013), adopted under 49 U.S.C. § 47129(b) (the Policy), regarding your view of these mechanisms. As part of our analysis, we shared your correspondence with the Airports Council International – North America (ACI-NA) and the American Association of Airport Executives (AAAE), and we have enclosed a copy of their response.

The Policy guides airports sponsors in the setting of fees imposed on aeronautical users, requiring that fees be fair, reasonable, not unjustly discriminatory, and equitably apportioned among categories of users. The Policy encourages direct negotiations between the airport and aeronautical users at the local level, in recognition of the unique conditions and issues affecting rates and charges negotiations at each airport and establishes standards for the Secretary of the U.S. Department of Transportation (DOT) and the Federal Aviation Administration (FAA) to use in determining the reasonableness of fees charged to users in the event a fee dispute arises. The Policy further provides that "[a]irport proprietors should consider the public interest in establishing airport fees, and aeronautical users should consider the public interest in consulting with airports on setting such fees." In light of these dictates of the Policy, we refrain from setting forth an opinion without the benefit of the particular factual background giving rise to specific rates and charges mechanisms.

As you know, various statutory provisions require that airport fees be reasonable, including the Anti-Head Tax Act (49 U.S.C. § 40116(e)(2)), the Airport and Airway Improvement Act of 1982 (AAIA), as amended (49 U.S.C. § 47107(a)(1)(2)(13), and 49 U.S.C. § 47129, "Resolution of Airport-Air Carrier Disputes Concerning Airport Fees." The terms of the AIP

grant agreements – specifically Grant Assurance 22, Economic Nondiscrimination – implement Section 47107(a) with a requirement that the airport be available "as an airport for public use on reasonable terms and without unjust discrimination to all types, kinds and classes of aeronautical activities, including commercial aeronautical activities offering services to the public at the airport." Grant Assurance 22 further provides, in pertinent part, that:

> (e) Each air carrier using such airport (whether as a tenant, non-tenant, or subtenant of another air carrier tenant) shall be subject to such nondiscriminatory and substantially comparable rules, regulations, conditions, rates, fees, rentals, and other charges with respect to facilities directly and substantially related to providing air transportation as are applicable to all such air carriers which make similar use of such airport and utilize similar facilities, subject to reasonable classifications such as tenants or non-tenants and signatory carriers and non-signatory carriers. Classification or status as tenant or signatory shall not be unreasonably withheld by any airport provided an air carrier assumes obligations substantially similar to those already imposed on air carriers in such classification or status.
>
> (h) The sponsor may establish such reasonable, and not unjustly discriminatory, conditions to be met by all users of the airport as may be necessary for the safe and efficient operation of the airport.

The following addresses the general principles raised in your questions. However, as I am sure you know, the specific, and often complex, circumstances at each airport will affect a determination of whether a particular fee or methodology is reasonable and not unjustly discriminatory. The responses below should not be taken as an indication of how FAA or the Office of the Secretary (OST) would decide a particular issue after a full investigation of the facts and the opportunity for the airport sponsor to explain the basis for its methodology.

- *Can an airport discriminate between airlines by discounting the terminal rental rate for one concourse by an arbitrarily picked percentage but not applying the same discount to another concourse; in other words, in establishing differential terminal rental rates, can the airport ignore the actual costs (such as debt and operating expenses) for each facility?*

  Section 3.4 of the Policy provides that costs properly included in a rate base must be "allocated to aeronautical users by a transparent, reasonable, and not unjustly discriminatory rate-setting methodology." Section 3.1.1 allows an airport sponsor to make reasonable distinctions among aeronautical users in establishing fees, but, in keeping with Section 3.4, the resulting cost allocation must be reasonable and any degree of discrimination among the users must be justifiable. There may be reasons why carriers would be charged different rates that are not unjustly discriminatory, including, for example, differences in the carrier's category of operation, difference in the condition, quality, or features of facilities, differences in the actual cost of providing the terminal facilities, or possibly the use of a blended rate to distribute capital improvement costs among all facilities over time.

- *Does the Policy allow airports to calculate turn charges (whether at the gate or ticket counter) based on a methodology that does not achieve full cost recovery even if the facility is fully utilized? For example, an airport sets the turn rate assuming usage will be at the maximum of 8 turns per day but even that usage would not achieve full cost recovery and actual usage may, in fact, be less.*

  As with any of these questions, the facts and circumstances at the relevant airport would need to be considered, including here the number of gates and ticket counters and how these facilities are being used. The Policy provides that airport sponsors "must maintain a fee and rental structure that in the circumstances of the airport makes the airport as financially self-sustaining as possible." However, the policy does not dictate a single approach to rate-setting, and under Section 2.1, fees may be set using any rate-setting methodology, including a residual or compensatory methodology, or any combination of the two, as long as it is "applied consistently to similarly situated aeronautical users and conforms" with the Policy.

- *When calculating facility charges, are airports required to use reasonable usage and space assumptions? For example, an airport sets the turn charge based on 8 turns per day when actual and projected usage is 4 turns per day.*

  As noted above, airport sponsors may use any reasonable rate-setting methodology that complies with the Policy and results in transparent, reasonable, and not unjustly discriminatory fees. Section 2.4.3 of the Policy also encourages airport sponsors to consider "economy and efficiency" in setting fees. Airport sponsors may consider all relevant factors and assumptions in setting rates, and, if challenged, we would need to consider the methodology used and determine whether it complied with the Policy.

- *If an airport wishes to offer airlines rate methodology options, does the Policy allow an airport to discriminate between airlines by excluding an airline from an option made available to other airlines? For example, can an airport offer a turn charge methodology to some airlines but not others? If so, under what circumstances can an airport discriminate in this manner between operators?*

  Carriers making similar use of the airport (e.g., same terminal, same general number of operations, same signatory status) would generally need to be offered the same options for fee methodology. Where there are differences in the carriers' use of the airport, the airport sponsor may determine that those differences warrant a different approach to fee determination and not offer the use of every methodology to every carrier. We would need to review all of the relevant facts of the respective carriers' circumstances at the airport to determine whether the airport sponsor's approach is unjustly discriminatory.

- *May an airport discriminate between airlines in implementing a cost methodology by fully allocating the costs of facilities to some airlines but not others?*

Section 3.1 provides that "aeronautical fees imposed [under a cost-based methodology] on any aeronautical user or group of aeronautical users may not exceed the costs allocated to that user or user group" unless otherwise agreed. Section 3.4 further states that "[a]llowable costs—costs properly included in the rate base—must be allocated to aeronautical users by a transparent, reasonable, and not unjustly discriminatory rate-setting methodology. The methodology must be applied consistently and cost differences must be determined quantitatively, when practical." Consistent with Section 3.1.1 referenced above, however, an airport may make reasonable distinctions among carriers to justify assessing one user group higher fees than another. Again, as noted above, the specific circumstances at each airport will affect a determination of whether a particular fee or methodology is reasonable and not unjustly discriminatory.

- *Does the Policy permit a rate methodology that charges air carriers different rates based solely on the number of their scheduled daily departures?*

  Section 3.1 requires that the airport apply "a consistent methodology in establishing fees for comparable aeronautical users of the airport." A rate methodology would be expected to result in the same charge per operation for all carriers if it were based solely on the number of their scheduled daily departures. However, consistent with Section 3.1.1, it is possible that other circumstances may exist to allow the airport to make reasonable distinctions among users and justify different rates, such as differences in the arrangement between an airport and signatory carriers as compared to non-signatory carriers.

- *Is a common use space/facility rate methodology that is strictly use-based and does not include a component to allocate some portion of fixed costs evenly to all users reasonable under the Policy when that methodology disproportionately shifts costs to signatory carriers and results in competitively advantageous charges for limited use per-turn users?*

  The Policy does not require a fixed-fee component. As with any other methodology, a use-based methodology would have to be applied consistently to similarly-situated aeronautical users and otherwise comply with the Policy.

- *Is imposing or threatening to impose Ordinance Rates if carriers refuse to sign a lease agreement they believe discriminatory considered good faith negotiations under the Policy?*

  The Policy emphasizes consultation with users and encourages negotiation in setting rates and charges. Nonetheless, Section 2.1 of the Policy permits an airport sponsor to set fees by ordinance, statute, or resolution, regulation, or agreement. While the airport sponsor has the same responsibility for consultation and transparency in adopting a fee by ordinance as in negotiation, ultimately the sponsor can adopt the

ordinance fee unilaterally. Users of course have a right to bring a complaint to FAA or OST that an imposed fee is unreasonable or unjustly discriminatory.

In July 2013, FAA/OST began a comprehensive review of the Rates and Charges Policy. As we continue our review, we are keeping in mind the issues raised in your letter as well as ACI-NA's and AAAE's response letter.

This letter provides only the initial view of this office based on the information provided and does not bind or constrain the FAA's enforcement discretion or preclude any changes in our view. This letter does not represent final agency action, or an order within the meaning of 49 U.S.C. § 46110.

Please contact me if you have any additional questions.

Sincerely,

Byron K. Huffman
Acting Director, Office of Airport Compliance
and Management Analysis

Enclosure