Order 95-6-36

UNITED STATES OF AMERICA

DEPARTMENT OF TRANSPORTATION

OFFICE OF THE SECRETARY

WASHINGTON, D.C.

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LOS ANGELES INTERNATIONAL AIRPORT RATES PROCEEDING	Docket 50176

FINAL DECISION

Table of Contents

FINAL DECISION

The Department of Transportation, under 49 U.S.C. 47129(c), has determined after a hearing before an administrative law judge (ALJ) that the increased landing fees charged at Los Angeles International Airport (LAX) are unreasonable insofar as those fees include a rental cost for the airfield land based on the land's estimated fair market value. We otherwise find that the airlines have failed to show that the fees are unreasonable. Since the landing fees paid by the airlines have been higher than justified by the airport's costs, we have determined further that the City of Los Angeles must make refunds of the excess amount to the airlines that filed the complaint that began this proceeding. Many of the other airline parties will obtain refunds under an interim settlement agreement between the City of Los Angeles and the airlines.

Introduction

On March 2, 1995, the Air Transport Association (ATA) and sixteen airlines, Air Canada, Air New Zealand, Alaska Airlines, American Airlines, American Trans Air, America West Airlines, Continental Airlines, Delta Air Lines, KLM Royal Dutch Airlines, Mexicana Airlines, Southwest Airlines, Trans World Airlines, United Airlines, United Parcel Service, USAir, and Varig Brazilian Airlines (collectively the Complainants), filed a complaint with the Department of Transportation against the City of Los Angeles, the City of Los Angeles Department of Airports, and the Los Angeles Board of Airport Commissioners (collectively the City). The complaint asked us to determine whether the increased landing fees charged at LAX are unreasonable and otherwise unlawful under 49 U.S.C. 47107, 49 U.S.C. 40116, and section 113 of the Federal Aviation Administration Authorization Act of 1994, P.L. 103-305 (August 23, 1994) (the Authorization Act), codified as 49 U.S.C. 47129. The complaint further requested that we determine the lawfulness of the fees under the expedited procedures of section 113 of the Authorization Act and our regulations, 14 C.F.R. Part 302, Subpart F, adopted at 60 Fed. Reg. 6919 (February 3, 1995).

A number of other airlines, listed below at page 8, filed complaints against the City on or after March 9 (the follow-on complaints).

Since we found that the airlines' complaints involved a significant dispute about the reasonableness of the increased landing fees at LAX, we set the matter for hearing before an ALJ. Order 95-4-5 (April 3, 1995). The ALJ assigned to the case, Chief Judge John J. Mathias, issued a recommended decision on May 24 that concluded that the fees were unreasonable in certain respects but that on most of the issues the airlines had failed to show that the City's calculation of the fees was unreasonable.

As provided by our order setting the case for hearing, we have taken review of the ALJ's recommended decision and received briefs on the decision from the parties.

A. BACKGROUND

1. Statutory and Regulatory Background

Most airports used by commercial airlines are operated by an agency created by state or local governments. The airlines and other commercial firms using an airport, such as rental car companies, users of the parking lots, and owners of stores and restaurants located at the airport, typically pay fees to the airport operator. In addition, the federal government has awarded many airports, including LAX, grant funds for capital improvements. Airports additionally may obtain funds for capital improvements by imposing passenger facility charges (PFCs), as LAX has done.

Federal law, however, limits the fees that may be collected by an airport operator and the operator's use of its revenues. First, when an airport accepts federal grant money for an airport improvement, it must give certain assurances, including the assurance that the airport will be available for public use on fair and reasonable terms and without unjust discrimination. Section 511 of the Airport and Airway Improvement Act of 1982, now recodified as 49 U.S.C. 47107. In addition, section 1113(b) of the Federal Aviation Act, the Anti-Head Tax Act, recodified as 49 U.S.C. 40116, allows the local airport authority to collect only reasonable rental charges, landing fees, and other service charges from aircraft operators for the use of airport facilities. See Northwest Airlines v. County of Kent, 114 S. Ct. 855 (1994), affirming 955 F.2d 1054 (6th Cir. 1992), affirming in part and reversing in part 738 F. Supp. 1112 (W.D. Mich. 1990) ("Kent County").

Section 511 of the Airport and Airway Improvement Act of 1982 also provides, with some exceptions, that all revenues generated by a public airport, and any local taxes on aviation fuel, will be expended for the capital or operating costs of the airport, the local airport system, or other local facilities owned or operated by the airport that directly and substantially relate to the air transportation of passengers or property. As a result, under current law, any revenues collected by an airport such as LAX may only be used for airport purposes and could not be diverted, for example, to the City's general funds.

The Federal Aviation Administration (FAA) had established enforcement procedures, 14 C.F.R. Part 13, which provided a means for airlines to seek an investigation into the reasonableness of an airport's fees. See, e.g., Investigation into Massport's Landing Fees, FAA Docket 13-88-2 (December 22, 1988), aff'd, New England Legal Foundation v. Massachusetts Port Authority, 883 F.2d 157 (1st Cir. 1989). The FAA procedures, however, did not create a deadline for an FAA decision or ensure that a hearing would be held.

Congress enacted section 113 of the Authorization Act to give airlines (and airport operators) the ability to obtain a prompt resolution of significant disputes over the reasonableness of new or increased airport fees. This section -- the principal basis for this proceeding -- requires the Secretary to determine the reasonableness of a challenged fee within 120 days after the complaint is filed. Although the statute created new procedures for examining the reasonableness of new or increased airport fees, it did not change the substantive rights and duties of the airports or the airlines, as we explained in our order setting this case for hearing. Order 95-4-5 at 3, 12-13.

The statute expressly requires us to determine whether a fee imposed on an air carrier is reasonable, 49 U.S.C. 47129(a)(1), if the carrier files a timely complaint challenging the fee and we find that a significant dispute exists. The act further requires us to publish rules or guidelines stating the standards that shall be used in determining whether a fee is reasonable. 49 U.S.C. 47129(b)(2). Notwithstanding our obligation to determine whether a fee is reasonable, we may not set the level of a fee. 49 U.S.C. 47129(a)(3).

Under the new statute, when an air carrier files a timely complaint against a new or increased fee (or fee in dispute on the date of enactment), we must determine whether "a significant dispute" exists over the fee's reasonableness. If, as in this case, we find that such a dispute exists, we must refer the case to an ALJ for hearing. The ALJ must then issue a recommended decision within 60 days. We must issue our final decision on the reasonableness of the fee within 120 days of the filing of the complaint; if we fail to do so, the ALJ's decision becomes the Department's final decision. 49 U.S.C. 47129(c).

While the complaint is pending, the carriers must pay the new fee, albeit under protest, and the airport may not block the airlines from using the airport. The amounts paid under protest "shall be subject to refund or credit to the air carrier in accordance with directions in the final order of the Secretary . . . ." 49 U.S.C. 47129(d)(1)(B). Unless the airport and the air carriers agree otherwise, the airport must obtain a bond, letter of credit, or other credit facility that is sufficient to cover the amount in dispute that is due during the 120-day period the Department has to decide the matter. 49 U.S.C. 47129(d).

In response to the Authorization Act's mandate that we publish guidelines for determining whether a fee is

reasonable, we issued our Policy Regarding Airport Rates and Charges, 60 Fed. Reg. 6909, on February 3, 1995 (the Policy Statement). The Policy Statement sets forth our guidelines for assessing the reasonableness of airport fees. As explained below at pages 15-17 in our analysis of the issues in this case, the parties disagree over whether we may (or must) follow the Policy Statement in determining whether the LAX landing fees are reasonable.

Pursuant to the requirements of section 113 of the Authorization Act, we also adopted Rules of Practice for Proceedings Concerning Airport Fees, Subpart F, 14 C.F.R. Part 302. 60 Fed. Reg. 6919 (February 3, 1995). Those rules as well as Subpart A of the Department's Rules of Practice, 14 C.F.R. Subpart A, have governed the conduct of this proceeding.

2. The City's Adoption of Compensatory Landing Fees

The Authorization Act reaffirms each airport's authority to use a residual fee or a compensatory fee methodology or a combination of those methodologies. 49 U.S.C. 47129(a)(2). Under a compensatory fee methodology, the fees charged by an airport for a facility or service will be based on the costs attributable to that facility or service; for example, the landing fees charged for using the airfield and apron should be based on the airport's costs of operating the airfield and apron. Under a residual fee methodology, on the other hand, the airport sets the airlines' landing fees so that those fees provide the revenue needed to offset the difference between the airport's total expenses and the revenues collected by the airport from other sources, such as concessions and persons using its parking lots. Under the residual fee system, the airlines' fees will be smaller than they would be under a compensatory fee system, if the fees paid by the airport's other users exceed the airport's costs of providing services for those users. On the other hand, since the airlines using an airport under a residual fee agreement are ultimately liable for any shortfall in the airport's revenues, those carriers have agreed that their landing fees will be high enough to ensure that the airport's overall revenues equal its total expenses. R.D. at 5.

For many years, LAX landing fees were calculated under a residual fee system under agreements with the airlines that expired in 1993. R.D. at 5. In recent years the airport's revenues from other sources, such as its parking lots, were so high compared with its costs that they substantially reduced the airlines' landing fees at LAX. See, e.g., Exhibit LAX-A1 at 3, n. 1 (when the City increased parking fees in fiscal year 1990, the airlines got the entire benefit of the $12 million additional revenue). The Chief Judge found that the landing fees paid by the airlines did not cover the airlines' share of the airport's operating and maintenance costs, much less the airfield's share of the airport's debt expense. R.D. at 21, n. 4.

In light of the coming expiration of the airlines' residual fee agreements, the City determined to adopt a compensatory fee system. The City and the airlines made unsuccessful efforts to negotiate a new fee system acceptable to all parties. Since the City and airlines could not agree on a new fee system, the City unilaterally increased the landing fees at LAX to $1.56 per thousand pounds for passenger aircraft operated by signatory carriers. Although the fee was higher for aircraft operated by non-signatory carriers and lower for cargo aircraft operated by signatory carriers, Exhibit LAX-33 at 2-3, our discussion in the rest of this order will assume that the standard new fee was $1.56. The landing fee in the 1992-1993 fiscal year had been $0.51 per thousand pounds of landed weight.

The City based the new fee on methodology developed by the John F. Brown Company. That methodology used five separate direct cost centers -- the terminal, the apron, the airfield, aviation, and commercial. It also used four indirect cost centers related to service functions supporting the direct cost centers; the costs of each indirect cost center are allocated between the direct cost centers. R.D. at 6; Exhibit LAX-1 at 3-4. The landing fees reflect the City's calculation of the airfield and apron costs together with the indirect costs allocated to these direct cost centers. The landing fees charged for the 1993-1994 fiscal year were based on the airport's estimated expenses and were to be adjusted when the City determined what the actual expenses had been. Exhibit LAX-1 at 9. As discussed below at page 39, the City has not yet made that adjustment.

3. The Airlines' Efforts to Block the New Fees

When the City adopted the new landing fees, a number of airlines filed a district court suit asking that the fees be held unlawful on the grounds that they violated the Anti-Head Tax Act and other laws because they were unreasonable and discriminatory. The court held that the airlines did not have a private right of action to challenge the reasonableness of the fees and therefore dismissed the suit. The court reasoned that the Secretary, not the courts, was responsible for resolving reasonableness issues. Air Transport Ass'n v. City of Los Angeles, 844 F. Supp. 550 (C.D. Calif. 1994). The airline plaintiffs initially appealed the decision to the Ninth Circuit but later withdrew that appeal. Amended Complaint at 40-41, 44.

After the airlines refused to pay the new fees, the City told them that it would not allow carriers to use LAX unless they paid the new higher landing fees. After unsuccessfully seeking an injunction against the City's implementation of this threat, many of the airlines serving LAX accepted a standstill agreement with the City that was effective December 1, 1993. Exhibit ATA-45. The agreement was reached following a mediation by the Secretary and other Department officials. The airlines agreed to pay the new fees under protest, and the City agreed to refund with interest any part of the fees ultimately found unlawful. The agreement preserved the airlines' right to seek a determination of the lawfulness of the fees. Exhibit ATA-45 at 3-4.

B. THE EARLIER PROCEEDINGS IN THIS CASE

1. The Complaints and the City's Response

In August 1994 Congress enacted section 113 of the Authorization Act. ATA and the sixteen airlines filed a complaint with the Department under the new statute on October 21, 1994. Since we had not adopted procedural rules or standards for determining reasonableness, the Complainants asked us to defer acting on the complaint until the rules were adopted. They also asked that action be deferred because they had not been able to obtain additional budget and accounting information they had requested from the City. Complaint at 3-4.

In response, the City argued that the complaint did not come within the scope of the new statute. However, the City expressly recognized that the airlines had the right to obtain a Secretarial decision on the lawfulness of the new fees even if the new statutory procedure did not apply and that in such a proceeding the Secretary could adopt the same procedures created by the new statute. Response at 2-3.

We issued an order, Order 95-1-42 (January 26, 1995), that accepted the airlines' complaint under the new statutory provision, but we deferred processing the complaint by allowing the airlines to file an amended complaint within thirty days of our adoption of final procedural rules. Id. at 4. We published the final procedural rules on February 3, 1995. 60 Fed. Reg. 6919.

The Complainants filed an amended complaint on March 2, 1995. The Complainants asserted that the new fees at LAX were unreasonable and thus violated the Anti-Head Tax Act and the Airport and Airway Improvement Act. Amended Complaint at 46-47. The Complainants claimed that the City's cost methodology was invalid in several respects. They asked us to order the City to stop imposing the new fees and to refund the portion of the fees found unreasonable for the period beginning July 1, 1993. Amended Complaint at 66-67.

The Complainants estimated that the new landing fees greatly exceed the City's costs in operating LAX's airfield and annually produce revenues at least $48 million in excess of the airfield's costs. The LAX landing fee assertedly should be no higher than $0.55 per 1,000 pounds of aircraft landing weight. Amended Complaint at 47-48, 59-63. The complaint also charged that the increased fees at LAX are part of the City's plan to divert airport revenues into its general fund. Amended Complaint at 16-40.

On March 9 a number of airlines filed follow-on complaints asking for an investigation of the increased fees at LAX. The carriers filing such complaints were Aero California, Aerolineas Argentines, Aerovias de Mexico, Air France, Alitalia, All Nippon, American International, AOM Minerve, British Airways, Cargolux, Carnival, Cathay Pacific, Challenge, Corse-Air, El Al, EVA, Evergreen, Iberia, Japan Air Lines, Korean, LAN Chile, Lauda, Lufthansa, Malaysia, Martinair, Philippine Airlines, Qantas, Reno, Rich International, Singapore Airlines, Swissair, Target Airways d/b/a Great American Airways, Tower Air, Viking International, Virgin Atlantic, and World.

In its answer, the City asserted that the fees were reasonable. The City also contended that the fees were not subject to the new statute, since, among other reasons, the statute by its terms applied only to fees either increased or created after its enactment. The City characterized the Complainants' allegation of the City's plans to divert airport funds as a "red herring" designed to divert attention away from the airlines' continuing effort to be subsidized for their use of LAX. Answer at 28. The City represented that its Department of Airports "has not diverted nor does it intend to divert Airport revenue in any unlawful manner." Respondents' Brief at 1.

2. The Instituting Order

After reviewing the amended complaint, the City's answer, and the other pleadings, we determined that the Complainants had shown that a significant dispute existed over the reasonableness of the increased landing fees at LAX. The Authorization Act therefore required us to assign the airlines' complaints to an ALJ for hearing. Order 95-4-5. In our instituting order we directed the ALJ to consider the following specific issues set forth in the Complainants' amended complaint:

1. whether the City improperly included in the rate base rental charges for the land under the airfield and apron;

2. whether the rate base improperly included amortization charges for capital projects already paid for by the airlines;

3. whether the City has improperly allocated to the airfield cost center indirect roadway access costs;

4. whether the City has failed to credit the rate base with net aeronautical revenues derived from other general aeronautical revenue sources;

5. whether the City has improperly failed to credit the airfield and apron cost centers with their proportionate share of the interest income earned by the Department of Airports;

6. whether the City has improperly failed to adjust the fees to reflect actual expenses in the 1993-1994 fiscal year and budgeted expenses in the 1994-1995 fiscal year;

7. whether the City has required the airport to reimburse it at unreasonable levels for direct and indirect City services; and

8. whether the City has wrongly charged the airport for the cost of a police substation located on airport property.

We asked the ALJ to make findings on whether the City's fee methodology and calculation on these specific issues were valid. Order 95-4-5 at 24.

As provided by our procedural rules for cases heard under 49 U.S.C. 47129, we limited the hearing to the specific charges made by the Complainants' complaint and to the evidence submitted by the Complainants and the City before we assigned the matter to an ALJ. Order 95-4-5 at 23-24.

Since we found that the Complainants were entitled to a hearing under 49 U.S.C. 47129 on their complaint against the LAX fees, the procedures required by that statute -- especially the expedited decisional deadlines -- have governed this proceeding. However, when we set the complaint for hearing, we noted that it was not clear whether a number of the airlines asking for an investigation of the LAX fees were entitled to obtain a hearing under 49 U.S.C. 47129. The airlines filing follow-on complaints did not appear to have complied with the statutory 60-day filing requirement for complaints. Order 95-4-5 at 19-20 and 36, n. 25. We also determined that foreign carriers must be given the same rights as U.S. airlines to challenge an airport fee. Id. at 18-19. As to those airlines filing complaints which may not have been entitled to a hearing under 49 U.S.C. 47129, we decided that we would include them as complainants in this proceeding under our preexisting authority to investigate the reasonableness of airport fees charged aeronautical users. Order 95-4-5 at 18-19 and 36, n. 25.

As we explained in that order, we had the authority to investigate the reasonableness of airport fees before Congress enacted 49 U.S.C. 47129 and the authority to choose the procedures to be used in any such investigation. Order 95-4-5 at 15-16. To the extent that 49 U.S.C. 47129 created new procedural rights or remedies, an airline would be eligible for such right or remedy only if it had satisfied the prerequisites of 49 U.S.C. 47129. See, e.g., Order 95-4-5 at 20, n. 15, and 36, n. 25.

3. The ALJ's Decision

Chief Administrative Law Judge John J. Mathias presided over the hearing in this case. In his recommended decision, issued May 24, Chief Judge Mathias held on most of the issues that the airlines had failed to show that the landing fees were unreasonable, although he held that the City had incorrectly valued the land underlying the airfield and that the City's proposed charges for City services appeared to be excessive.

The Chief Judge found that the Policy Statement was consistent with the law and industry practices in effect in July 1993, when the City adopted the new landing fees for LAX. In his opinion, the result of the case would be the same whether he relied on the Policy Statement or on the legal principles followed at that time. He concluded that the two basic principles applicable to the case were the following, R.D. at 13-14:

The revenues produced by airport fees for the use of aeronautical facilities cannot exceed the costs incurred by the airport operator, unless the aeronautical users agree otherwise, and

Assets used for aeronautical purposes must be valued on the basis of their historical cost, unless the aeronautical users accept a different valuation method.

The Chief Judge made the following findings on the elements of the City's methodology challenged by the airlines: (1) the City had improperly valued the airfield land at fair market value rather than historical cost; (2) the airlines had failed to show that the City's inclusion in the rate base of amortization charges for capital expenses was unreasonable; (3) the airlines had failed to show that the City's allocation of the access road costs between the airfield and the other cost centers was unreasonable; (4) the airlines had failed to show that the airport had excess aeronautical revenues which should have been used to offset the airfield costs; (5) the airlines had failed to show that the airfield should have been credited with a share of the interest income earned by the airport; (6) the City had improperly failed to adjust the landing fees for the 1993-1994 fiscal year to reflect the airport's actual expenses; (7) the City allocated an excessive portion of the airport's crash, fire, and rescue costs to the airfield, and the City's planned allocation of other expenses, such as the cost of police services, may be unreasonable; and (8) the City's proposal to allocate the entire cost of the police substation at the airport to the airport appeared to be unreasonable. R.D. at 1. In our own discussion below of each of these issues, we will summarize the Chief Judge's analysis, along with the position of each of the parties. In general, the airline parties urge us to rule in their favor on all of the rate issues and to require the City to refund the fees to the extent they are found unreasonable; the City argues that the airlines have failed to prove that its fees are unreasonable in any respect and that we may not order refunds in this proceeding.

C. THE DEPARTMENT'S DECISION

We have determined to affirm the Chief Judge's recommended decision with some modifications. In view of our decision that the fees paid by the airlines have been unreasonably high, we are determining that the City must refund to the Complainants the portion of the fees paid that was unreasonable due to the excessive valuation of airfield and apron land. The standstill agreement between the City and most of the airlines serving LAX contains specific provisions on refund rights, which will give the airline parties to the agreement, not just the Complainants, the ability to obtain refunds. The City has repeatedly represented that it will comply with that agreement. See, e.g., Los Angeles Response to Formal Complaint at 3, n. 2. We therefore expect that the City will make refunds in accordance with the terms of that agreement.

We will begin our detailed analysis with a discussion of five issues underlying our examination of the challenged elements of the City's rate methodology: the standard for determining whether an airport landing fee is reasonable, our authority to analyze the individual elements of the City's rate methodology, the burden of proof, the applicability of the Policy Statement to this case, and the effect of the change from a residual to a compensatory fee system. We will then discuss the individual elements of the rate methodology challenged by the airlines. Finally, we will discuss our findings on the City's obligation to refund the unreasonable portion of the fees to the airlines.

Before we begin the detailed discussion of the issues, we will summarize certain general principles applicable to airport rates, since our analysis relies in part on these principles. First, the City was entitled to choose to adopt a compensatory fee system when the residual fee agreements expired. The new statute and our Policy Statement recognize that an airport has the right to establish a compensatory fee system if it wishes. Policy Statement, paragraphs 2.1.1, 2.1.4. Under a compensatory fee methodology, the airlines pay fees based on the costs of the airport facilities and services used by them and do not receive any credit for the non-aeronautical revenues received by the airport. Policy Statement, paragraphs 2.1.1, 2.1.2. When the airport has a compensatory fee system, it has no obligation to reduce the fees charged airlines when it receives surplus revenues from non-aeronautical sources such as concessions and parking lots. Ibid.; Kent County, supra, 114 S. Ct. 855. Of course, as explained below, the fees set under a compensatory methodology must be based on the airport's costs.

On the other hand, when the airport fees are based on a residual methodology, as was true of LAX until 1993, the airport reduces the airlines' fees when its other revenues exceed its costs. The airlines, however, are then responsible for guaranteeing that their fees will cover any shortfall if the airport's other revenues do not cover its expenses. The airlines must cover the airport's losses even if the losses are caused because the airport's non-aeronautical expenses exceed its non-aeronautical revenues. Policy Statement, paragraph 2.1.1; Exhibit LAX-A-1 at 2-3.

Thus, the City had the right to adopt a compensatory fee system in 1993 when the residual system expired. The Complainants do not dispute that. Complainants Brief to ALJ at 37. However, the airlines claim that the City's decision -- and the resulting calculation of the landing fees -- was tainted by the City's alleged desire to create large revenue surpluses at the airport that would be available for diversion into the City's general funds, if the law is changed to allow the City to use airport funds to pay non-airport expenses. See, e.g., Complainants Brief to DOT at 1. We have concluded that the City's possible motives are largely irrelevant to our decision. We are basing our findings on the evidence showing whether the LAX landing fees fairly reflect the airport's costs of providing airfield facilities and services.

1. The Standard for Determining an Airport Landing Fee's Lawfulness

As explained above at page 2, both the Anti-Head Tax Act and Section 511 of the Airport and Airway Improvement Act of 1982 allowed airports to impose fees on airline users only to the extent that the fees were reasonable. That limitation on airport fees had been construed as allowing airports to charge landing fees

that were based on the costs associated with an airline's use of airport facilities. See, e.g., New England Legal Foundation v. Massachusetts Port Authority, 883 F.2d 157, 169 (1st Cir. 1989) (Section 511 "appears to us to establish as 'reasonable' any fee or charge by the airport proprietor which fairly and rationally reflects the cost to users that are comparably situated"). As shown, when we reviewed the revised landing fees proposed by the Massachusetts Port Authority, we acted on the ground that an airport landing fee must be based on the airport's cost of providing a service. Investigation into Massport's Landing Fees, supra, FAA Docket 13-88-2 at 8.

The Policy Statement similarly states that each airport is obligated to base its landing fees to aeronautical users on the costs of providing the service, unless the aeronautical user agrees to fees established on a different basis. Policy Statement, paragraph 2.3.

The City nonetheless argues that the laws governing airport rates and charges do not compel an airport to base its aeronautical fees on its costs of providing aeronautical facilities, an argument derived from language in Evansville-Vanderburgh Airport Authority District v. Delta Airlines, 405 U.S. 707 (1972), and Kent County. The City argues that landing fees are reasonable if they reflect the value of the benefits conferred on the airlines without any consideration of the airport's costs. The City bases this argument on the statements in Evansville and Kent County that a fee should not be excessive "in comparison with the governmental benefits conferred." Los Angeles Brief to DOT at 13. In making this argument the City has misconstrued the applicable law. First, as the Court explained in Kent County, the standard applied in Evansville was the standard used for determining whether a fee was reasonable under the standards of the Commerce Clause. 114 S. Ct. at 863-864. In Kent County the Court specifically pointed out that this Department was free to use a more rigorous standard than the Commerce Clause standard used by the courts. 114 S. Ct. at 864, n. 14.

Secondly, the courts have construed the Commerce Clause standard as requiring that airport fees be related to costs. In Evansville itself the Court upheld the taxes at issue on the ground that "the airlines have not shown these fees to be excessive in relation to the costs incurred by the taxing authorities." 405 U.S. at 719. In the Kent County litigation the Court of Appeals wrote, "A fee assessed is reasonable as long as it is based on some fair approximation of the cost of providing the facilities and services . . . ." 955 F.2d at 1061. The district court reasoned that a charge exceeding the airport's costs would be unlawful, 738 F. Supp. at 1119-1120:

However, [the airport] should not be allowed to make a profit on this charge [for aircraft parking]. The Court considers such a profit to be an indirect head charge and violative of the [Anti-Head Tax Act]. . . . The Court . . . will require the Airport to recalculate this fee to result in a true break-even for aircraft parking.

And in American Airlines v. Massachusetts Port Authority, 560 F.2d 1036, 1038 (1st Cir. 1977), the Court of Appeals considered the very argument made here by the City -- the argument that fees should be measured by the value of the benefits provided airport users -- and held that fees should instead be judged by a cost standard.

Thirdly, we have always interpreted the reasonable fee requirement as allowing an airport to charge aeronautical fees that are based on costs, as shown by our decision in Investigation into Massport's Landing Fees, FAA Docket 13-88-2, where we reasoned that the airport's new fee structure would not be lawful unless it was based on the airport's costs of serving different aeronautical users.

This decision is based on the evidence and arguments presented by the parties in this proceeding and on existing legal principles. We are aware that a number of the comments submitted in response to our publication of the Policy Statement ask us to give airports the authority to charge market rates for such exclusively-used facilities as terminal space, even if we maintain the requirement that the fees charged for facilities used in common, such as the airfield, must be based on cost. ACI's briefs in this proceeding urge us to limit our findings on reasonableness to the dispute before us, which involves landing fees, and to the facts

in the record of this proceeding. We will address the broader policy issues in our consideration of the comments filed on the Policy Statement.

2. Our Authority to Examine the City's Rate Methodology

When we set this case for hearing, we determined that we had the authority -- and the responsibility -- to examine the City's landing fee methodology closely enough to determine whether the new landing fees were based on the airport's costs. We accordingly rejected the City's contention that we must accept its fee if it is generally rational, whether or not each individual part of the fee's calculation was reasonable. As we pointed out, by enacting the Authorization Act Congress made us responsible for determining whether disputed airport fees were reasonable and required us to adopt standards for making that determination. We could only carry out that responsibility by examining whether the costs used by an airport to justify its fee were reasonable. Order 95-4-5 at 26-27.

Moreover, in Kent County the Supreme Court stated that our review of a fee's reasonableness is not confined to the limits of a judicial examination of reasonableness: "It remains open to the Secretary, utilizing his Department's capacity to comprehend the details of airport operations across the country, and the economics of the air transportation industry, to apply some other formula (including one that entails more rigorous scrutiny) for determining whether fees are 'reasonable' within [the Anti-Head Tax Act]; his exposition will merit judicial approbation so long as it represents a permissible construction of the statute." 114 S. Ct. at 864, n. 14. As the Court explained, we are better equipped than the courts to engage in public utility-type ratemaking with respect to airport rates. 114 S. Ct. at 863, 865.

We recognize that the statute bars us from setting an airport's fee. The statute gives airports the choice of adopting a residual fee methodology, a compensatory fee methodology, or a combination of the two. 49 U.S.C. 47129(a)(2). The Policy Statement reaffirms the right of each airport to choose between those methodologies. 60 Fed. Reg. 6916 (para. 2.1.4). In the Policy Statement and in this decision we have also given airports substantial flexibility in determining how costs should be allocated. For example, as discussed below at pages 41-44 in connection with the disputes over the access road charges and crash, fire, and rescue costs, we will not prescribe how such costs must be allocated between aeronautical users and non-aeronautical users. Instead, we will review the airport's method of allocation and affirm the airport's allocation if it is reasonable, justified, and transparent. Nonetheless, an airport's right to choose its own fee methodology and structure cannot be transformed into a prohibition against our review of the reasonableness of the result. We believe that under our existing authority and the recently-enacted Authorization Act it is both necessary and proper for us to review an airport's methodology and its cost determinations under that methodology.

Moreover, before Congress enacted the Authorization Act we investigated whether a new fee structure adopted by the Massachusetts Port Authority was reasonable and consistent with the statutory provisions administered by us. When we did so, we examined in detail the Port Authority's allocation of costs between different aeronautical users of the airport and concluded on the basis of that analysis that the new fees were unreasonable. Investigation into Massport's Landing Fees, FAA Docket 13-88-2, Opinion and Order (December 22, 1988) at 8-9. On review the Court of Appeals approved this exercise of our authority. New England Legal Foundation v. Massachusetts Port Authority, supra, 883 F.2d 157.

3. The Applicability of the Department's Policy Statement

As directed by Congress, we adopted the Policy Statement in order to establish standards for determining the reasonableness of an airport's fees. 60 Fed. Reg. 6906 (February 3, 1995). The City has argued that the Policy Statement may not be applied in determining whether its fees are reasonable, an argument made principally in connection with two of the airlines' problems with the LAX landing fees, the City's inclusion in the rate base of the fair market value of the land under the airfield and apron and the City's failure to reduce the landing

fees by the amount of its alleged net aeronautical revenues derived from other sources. The Policy Statement requires an airport to use the historic cost of the airfield land in calculating landing fees and, if the airlines have not agreed otherwise, bars an airport from collecting aeronautical revenues that exceed its aeronautical costs.

Among other things, the City asserted that any application of the Policy Statement in this case would violate the principle against retroactive regulation. The Complainants, on the other hand, have argued that the Policy Statement is consistent with airport and public utility rate-setting principles.

Our order referring this case to an ALJ stated that we would give the City the opportunity to show that the Policy Statement should not be used in determining the reasonableness of its fees. We also asked the ALJ to consider the parties' evidence on the applicability issue and also on whether the City's rate methodology was consistent with standard practices followed by airports during the time that the City developed the rates. Order 95-4-5 at 28.

The Chief Judge concluded, "Based upon the applicable statutes, case law, existing industry practices, and the evidence in the record of this case, it must be concluded that DOT's Policy Regarding Airport Rates and Charges is consistent with the law and industry practices in effect in June of 1993, when the new landing fees and the methodology for computing them were adopted for the Los Angeles International Airport." R.D. at 13.

The City urges us to reverse that determination and continues to contend that any application of the Policy Statement in this case would be inconsistent with the presumption that an agency may not retroactively impose new obligations or burdens. The Complainants maintain their previous position that the Policy Statement should be applied in assessing the reasonableness of the LAX landing fees.

Resolving the Policy Statement issue is largely unnecessary. As noted, the issue is primarily important to the City because the Policy Statement requires the use of historic cost for airfield land and because the Complainants charged that the airport had surplus aeronautical revenues from sources other than the landing fees that should have been used to reduce the landing fees under the Policy Statement's "cap" limitation. As discussed below, pages 34-36, we have determined, as did the Chief Judge, that the Complainants have failed to prove that any such surplus aeronautical revenues exist. And, like the Chief Judge, we find that existing law, apart from the Policy Statement, makes it appropriate to require the City to use historic cost in valuing the airfield land.

However, the City in any event errs in its contention that our application of the statutory requirement of reasonableness to its fees could be considered a retroactive application of new legal standards. As shown, both the Anti-Head Tax Act and the Airport and Airway Improvement Act have allowed airports to charge only reasonable fees to airlines. We are responsible for enforcing those requirements, as the City successfully argued in obtaining a dismissal of the airlines' suit against its adoption of the new fees at LAX. When, as here, we have a proceeding where airlines are asking us to examine the reasonableness of an airport's fees, we must interpret the statutory requirement in the context of that adjudication, even if doing so involves the resolution of specific issues which we had not addressed before.

The Supreme Court has held that an agency may announce a new obligation binding on a regulated firm or person when the agency decides an adjudicatory proceeding involving the application of existing law. See, e.g., SEC v. Chenery Corp., 332 U.S. 194, 203-204 (1947): "Every case of first impression has a retroactive effect, whether the new principle is announced by a court or an administrative agency." As Justice Scalia has written, "[T]he retroactivity limitation applies only to rulemaking. Thus, where legal consequences hinge upon the interpretation of statutory requirements, and when no pre-existing interpretative rule construing those requirements is in effect, nothing prevents the agency from acting retroactively through adjudication." Bowen v. Georgetown University Hospital, 488 U.S. 204, 224 (1988) (Scalia, J., concurring). See also British

Caledonian Airways v. CAB, 584 F.2d 982, 985-986 (D.C. Cir. 1978).

4. The Burden of Proof

With respect to the individual elements of the City's rate methodology challenged by the Complainants, the Chief Judge found that the Administrative Procedure Act gave the Complainants the burden of proof. R.D. at 14, citing the Administrative Procedure Act, 5 U.S.C. 556(d).

We agree with the Chief Judge's conclusion. The Supreme Court has held that the regulatory agencies must follow the burden of proof provision in the Administrative Procedure Act unless the agency is exempt by statute. Director, OWCP v. Greenwich Collieries, 114 S. Ct. 2251 (1994). As a result, to the extent that factual issues are involved, we cannot uphold a challenge to the City's fee methodology unless the Complainants have submitted evidence that overcomes the City's evidence.

However, if the airline complainants in a rate proceeding submit a prima facie case that an airport's rates are unreasonable, we may hold the rates unlawful unless the airport submits sufficient evidence to the contrary.

5. Treatment of the Change from Residual to Compensatory Fees

The dispute before us arose when the City switched from a residual fee system to a compensatory fee system. This switch affects the analysis of several of the issues raised by the Complainants, particularly the Complainants' assertion that the City may not include an amortization charge in the landing fee rate base for capital assets purchased while the residual fee system was in effect. The City's change in fee systems primarily affects the City's accounting for the capital assets purchased under the residual fee system but also affects the payment of the airport's debt expense on airfield land. We will therefore discuss here our treatment of the effects of the change in fee systems.

We are not adopting the approaches taken by the parties and the Chief Judge. In determining whether the City properly included a charge in the landing fee rate base, the Chief Judge considered the issue as though it depended on whether the Complainants could show that the airlines had already paid for the expense under the residual fee system, that is, whether the airlines could trace the funds provided by their fee payments through to the airport's payment of the expense in question. Since the airport did not earmark any fee payments, since money is fungible, and since the landing fees did not cover the operating costs of the airfield, the Chief Judge concluded that the airlines had not paid for any of the expenses at issue. R.D. at 19-21. The City generally favors the same method of analysis. Los Angeles Reply Brief to DOT at 5-8. The Complainants, on the other hand, seem to argue that the City may not include a capital asset cost in the landing fee rate base now if the asset's purchase was funded under the residual fee system. Complainants Brief to DOT at 21.

While we generally agree with the results reached by the Chief Judge on the specific expense items, our analysis is somewhat different. We believe that we should determine whether a challenged expense was paid by anyone under the residual fee system. If the expense was included in the fee calculation at that time, then the airport would be getting paid twice if it included the expense in the rate base under the compensatory fee system, even if the expense was paid with concession revenues.

6. The Challenged Elements of the City's Rate Methodology

a. The Valuation of the Airfield and Apron Land

The first element of the City's rate methodology challenged by the Complainants concerns the City's valuation of the land underlying the airfield and apron. The City did not use historical cost as the basis for the land's valuation. Instead, the landing fee rate base includes a fair market rental value based on the City's estimate of the land's current fair market value, adjusted downward to exclude land acquired with federal grants. The

adjusted fair rental value resulted in a $14.9 million charge in the landing fee rate base. R.D. at 15. The Complainants claim that the City's alleged overvaluation of the airfield and apron land makes the landing fees too high by $0.25 per thousand pounds. Complainants Brief to DOT at 12.

The Complainants argue that the Department should apply the Policy Statement, which allows airports to use only historic cost for airfield land (for convenience, we will refer to the land at issue as airfield land, even though it also includes the apron land). This would be fair, according to the Complainants, since no other airport has used the fair market value of land, rather than the historic value, in setting landing fees when the City adopted the new fees. In addition, the Complainants claim that generally accepted accounting principles require the use of historic value. The Complainants argue further that the City would obtain a surplus greater than its actual costs if the land were not valued at historical cost.

The City argues that the use of historic value will deny it a reasonable return on its property and that it would be irrational as a matter of economic theory to allow the airlines to use the airfield without paying a fee based on the true value of the land. The City also argues that no law or rule prohibited it from using a fair market value for the land when it adopted the new landing fees.

The Chief Judge concluded that both the Policy Statement and preexisting law allowed the City to use only historic cost in valuing the airfield and apron land for the landing fee rate base. As he interpreted the applicable statutes and caselaw, an airport's aeronautical fees would be unreasonable if they enabled the airport to make a profit above costs. In his view the use of historic cost would enable the City to recover all of its actual costs. As a result, including a rental charge based on fair market value in the rate base "must, of necessity, provide a substantial profit above costs to the airport." The airport's capture of such a profit is contrary to the existing law and practices respecting airports as well as the Policy Statement. R.D. at 15-16. The Chief Judge also noted that we had reached the same conclusion -- an airport would obtain revenues in excess of its costs if it valued its land on the basis of fair market value -- when we adopted the Policy Statement. R.D. at 11-12.

The Chief Judge found unpersuasive the City's argument that the Policy Statement's requirement that historical cost be used for valuing land could not be fairly applied to the LAX landing fees. Our order instituting the case authorized him to determine whether the City's 1993 decision to use fair market value was consistent with the practices of other airports. The Chief Judge concluded that the City had failed to show that any other airport in the United States had used any valuation method for airfield land other than historic cost, and the City's consultant testified that he believed that LAX would be the first airport to value its airfield land on the basis of fair market value if the City adopted his firm's recommended fee methodology. R.D. at 12.

Despite the City's claim to the contrary, the Chief Judge reasoned that his decision would not result in an unconstitutional taking of the City's property. Among other things, he pointed out that the historical cost valuation would provide the City a reasonable means of recovering the airfield's costs. And the City had failed to show that the bar against the use of fair market value for land would cause the airport deep financial hardship or keep the airport from recovering its operating and capital costs. R.D. at 33-36.

While the Chief Judge thus concluded that the City's fee calculation had overstated the cost of the airfield land, he ruled that the overstatement was smaller than alleged by the Complainants. They had argued that they already paid for the airfield land, valued at its historic cost, because the landing fees paid under the residual fee system covered the airport's debt expense on the land, except for the small amount of current debt service for the land. The Chief Judge found this claim untenable as a result of his belief that the airlines' earlier fee payments had not covered the operating costs of the airfield, much less the debt service for the airfield facilities. R.D. at 17.

We have determined that the Chief Judge correctly decided that the City could only use historic cost for

valuing the airfield land, although we will not affirm his finding that the airlines' earlier landing fees did not pay for the debt expense on that land.

In their briefs to us, the parties largely rely on their earlier arguments. In explaining the basis for our decision on the land valuation issue, we will discuss the City's arguments and why we find them unpersuasive.

We base our analysis on the same principle relied upon by the Chief Judge: the landing fees charged airlines by airports must be based upon costs, and an airport may not charge landing fees that will produce a substantial surplus of revenues over costs. Requiring an airport to base its landing fees on the historic cost of the airfield land will allow the airport to recover its actual costs. Allowing an airport to include an estimated fair market value for airfield land in the landing fee rate base will enable the airport to recover a surplus above its airfield costs, which would be contrary to law.

Furthermore, as the Chief Judge pointed out, and as the City's witnesses conceded, Tr. 643-644, 829-830, historic cost has been the measure universally used by airports for valuing airfield land. In fact, the City's consultant admitted that the City was the first airport in the United States to value its airfield land at fair market value. Tr. 646. And when the City was developing the new landing fees, its consultant advised it that using fair market value for setting landing fees would be a change from the practices followed by the nation's airports: "To our knowledge this approach [of using fair rental value] has not been used at U.S. airports to set landing fees." Ex. ATA-25 at 4.

In fact, historic cost is the valuation method generally used in public utility rate cases -- and a measure whose use by regulatory agencies has been specifically approved by the Supreme Court. Hope Natural Gas Co. v. FPC, 320 U.S. 591, 605 (1944). See also Tr. 829-830.

Finally, allowing airports to use fair market value for airfield land would create practical problems. As the Chief Judge pointed out, when the estimate of fair market value is based on land adjoining the airport, the estimate uses land parcels whose value is greatly influenced by their location near the airport, which can lead to "bootstrap" accounting. R.D. at 16. If the estimate is based on land that is not near the airport, as the City claims was done in its estimate, Los Angeles Brief to DOT at 35, n. 24, the validity of the estimate will depend on whether the land used for the calculation is comparable to the airfield land, an issue which may be difficult to resolve. We recognize that the Complainants have not challenged the accuracy of the City's estimate of fair market value in this case, and we note the City's representation that it used a conservative estimate of the land value. Los Angeles Brief to DOT at 35-36. Nonetheless, allowing airport operators to use the airfield land's fair market value in a landing fee rate base will make it more difficult for us to assess the reasonableness of landing fees. The Supreme Court, moreover, has noted that regulatory agencies abandoned the use of fair market value as the means of valuing capital investments by public utilities due to the difficulties of calculating fair market value. Duquesne Light Co. v. Barasch, 488 U.S. 299, 308-309 (1989).

As a result, even if we had not adopted the Policy Statement, we would bar the City from valuing the airfield land on the basis of fair market value. However, we considered arguments that we should not define historic value as the only method for valuing airfield land when we developed the Policy Statement, and we concluded that historic cost was the proper method for valuing land -- and a method that would not deny the airport operator the opportunity to recover all of its costs in acquiring the land, 60 Fed. Reg. 6911-6912:

Historic cost is the simplest, most direct, and easiest-to-verify measure of cost. Moreover, in a regulatory system in which the proprietor's revenue is limited to the costs of providing services, historic cost valuation provides for full reimbursement of actual costs incurred by the proprietor. . . . Nor are the surplus funds that would be generated by replacement cost pricing needed for other purposes, since aeronautical users can be charged directly for the amounts needed to maintain debt service and coverage reserves, working reserves for normal operations, and contingency funds. Also, surplus funds for any airport purpose can be accumulated from revenues generated by non-aeronautical uses, which are not covered by the [Policy Statement].

While the City argues that a historic cost requirement is unlawful for a variety of reasons, its arguments do not overcome the arguments in favor of an historic cost requirement and our determination to require the use of historic cost. Moreover, we see no unfairness in applying the requirement to the LAX landing fees. The City knew when it adopted those fees that no other airport was valuing its airfield land on the basis of fair market value rather than historic cost, and the City's consultant had advised it that using historic cost would be the most defensible method of valuing the airfield land. Tr. 644.

The City nonetheless asserts that a historic cost requirement is unconstitutional because it will allegedly deny the City a fair return on its investment in LAX. Despite the City's argument, the historic cost requirement will not deny the City a fair return. First, the use of historic cost will allow the airport to charge fees covering its costs, including its capital costs and the operating and maintenance expenses of the airfield. See 60 Fed. Reg. at 6916 (para. 2.3). And despite the City's argument that the use of historical costs necessarily denies regulated firms the fair return required by the Constitution, the Supreme Court, as shown, has upheld rates fixed by a regulatory agency on the basis of historical costs. Hope Natural Gas Co., supra, 320 U.S. at 605.

Furthermore, our authority over the aeronautical fees charged by LAX does not include fees charged to non-aeronautical users, so a large portion of the airport's revenues are not subject to our regulation. See 60 Fed. Reg. at 6908-6909. And our decision will not affect the City's existing terminal leases with the airlines, which are based on market rates, not on cost. As the Complainants have pointed out, the City's financial statements show that LAX has been quite profitable. For example, in the 1993-1994 fiscal year, the first year of the compensatory fees, the airport's net income from all operations was $71 million, and its operating revenues were almost forty percent greater than its operating expenses. The airport's landing fee revenues were $35 million higher in that year than in the previous year, the last year of the residual fees, but, even if the landing fee revenue had not increased, the airport's operating revenues would still have been twenty percent greater than its operating expenses. Exhibit ATA-11 at 23, 25.

Finally, as explained above at pages 2-3, federal law bars LAX and most other airports from diverting any airport funds away from the airport, no matter the source of the funds. Thus any surplus revenues generated by the airport could not be used by the City in any event for non-airport purposes, notwithstanding its claim that its citizens should be entitled to obtain "dividends" from the airport.

To a large extent the City's arguments are based on the mistaken premise that its fees need not be based on costs. See, e.g., Los Angeles Brief to DOT at 3-4. As shown above, pages 12-14, the courts have consistently construed the reasonable fee requirement as a requirement that landing fees be based on costs, not on an airport's assessment of the value of its facilities to airline users. See, e.g., Kent County, 738 F. Supp. at 1119-1120, where the district court struck down the airport's fees for parking aircraft.

In light of the fact that the City's operation of LAX has been subject to a reasonable fee requirement for many years, we cannot agree with the City's argument that a decision requiring the use of historic cost for valuing airfield land will violate the principle that new regulatory requirements may not usually be applied retroactively. Los Angeles Brief to DOT at 9 et seq. In determining that historic cost must be used for valuing airfield land, we are construing an existing legal requirement, not creating a new one.

Furthermore, the agreement between our construction of the reasonable fee requirement on this issue and the practice of every airport in the United States, except LAX, further undermines the City's suggestion that we have somehow changed the law as to the reasonableness of airport fees. For this reason, we will not follow a Civil Aeronautics Board case cited by the City to show that a new requirement should not be imposed retroactively. Los Angeles Brief to DOT at 17-18, citing Atlantic, Pacific & Latin American Mail Rates, 82 CAB 445 (1979), aff'd, Trans World Airlines v. CAB, 637 F.2d 62 (2d Cir. 1980). In the cited Board proceeding, the Board radically changed the methodology for determining international mail rates and determined not to make the change effective retroactively, as it could have done. Although the City claims that this Board proceeding is analogous, this case is far different -- our decision requiring the use of historic

cost for valuing airfield land is in keeping with established airport valuation practices, while the City's proposal to use fair market value is a substantial change from current practice. Moreover, the City had been valuing the airfield land on the basis of historic cost before it switched to the use of fair market value.

In a related argument, the City asserts that we may not find the use of fair market value unlawful merely because no airport had used that method of valuation before the City adopted the new LAX fees. Los Angeles Brief to DOT at 24. But the substantial evidence showing that no other airport used fair market value, along with the general use of historic cost in public utility ratemaking cases, supports our conclusion here (and in the Policy Statement) that historic cost should be required for valuing airfield land.

The City, joined by ACI, argues that, whatever practices were followed by other airports, nothing in the statutes governing airport fees or in the judicial decisions interpreting those statutes required the use of historic cost. Los Angeles Brief to DOT at 12-14, 21 et seq.; ACI Brief to DOT at 7. The lack of any court decision on this point is, of course, hardly surprising, for no other airport had tried to use fair market value for valuing airfield land before the City adopted the new LAX fees. However, as shown, the judicial interpretations of the Anti-Head Tax Act made it clear that airport fees had to be justified by the airport's costs. Construing the statutory requirement of reasonable fees as mandating the use of historic cost for airfield land is the logical outgrowth of these principles, as the Chief Judge explained in his decision. R.D. at 13-14.

According to the City, however, its use of fair market value for the airfield land is entirely consistent with the statutes governing airports, for the Airport and Airway Improvement Act states that the operator of an airport receiving federal grants must give assurances that it "will maintain a schedule of charges for use of facilities and services at the airport that will make the airport as self-sustaining as possible under the circumstances existing at the airport . . . ." 49 U.S.C. 47107(a)(13). Los Angeles Brief to DOT at 27-28. The City's argument misconstrues its obligation to be self-sustaining, since it assumes that an airport operator is obligated to charge high fees so that it can eliminate or at least minimize its need for federal grants. As shown, we and the courts have interpreted the Anti-Head Tax Act and the Airport and Airway Improvement Act as requiring airports to base their landing fees on their costs and as barring them from charging aeronautical fees that will result in their receipt of unreasonable surpluses. See also the Policy Statement, 60 Fed. Reg. at 6914: "[T]his requirement [to be self-sustaining] does not permit an airport proprietor to establish fees that exceed costs associated with aeronautical users . . . ."

We recognize, as the City argues, that using other measures of costs, such as opportunity costs, could be advantageous in some respects and that using historic cost for valuing airfield land may not be a perfect solution. Los Angeles Brief to DOT at 29-32. Nonetheless, as discussed above, historic cost is the method generally used in ratemaking cases, ensures that the airport recovers its actual costs, and is the easiest valuation method to use for establishing landing fees. A valuation based on fair market value would not have these advantages.

On the ground that airports commonly lease terminal space to airlines at market rates, not at rates based on costs, the City argues that our acceptance of that practice bars us from requiring a different rate methodology for valuing airfield land when establishing landing fees. The City contends that the airlines' willingness to pay rents for terminal space where the land is valued at fair market value makes it unreasonable for them to object to landing fees based on the fair market value of airfield land. Brief at 25-27. This argument is invalid, for the City is comparing apples and an agricultural product for which Los Angeles County was once famous, oranges.

Airline terminal leases based on market value involve facilities dedicated to private use, whereas landing fees are fees for facilities -- the airfield and, at LAX, the apron -- which are in common use. The terminal leases cited by the City are entirely based on market rates, unlike the landing fees, and thus are not based on the cost of providing the terminal facilities. The City's analogy to terminal leases might be persuasive if airports based compensatory landing fees on market rates, but such landing fees instead are based on a cost

calculation established by the airport. Since the LAX landing fees are not based on market rates, the City may not properly calculate one element of the landing fees on market values when the rest of the fee is not based on market rates.

Finally, the City contends that our failure to give it a hearing for determining the fair rate of return on its land in itself constitutes a denial of its constitutional rights. Los Angeles Reply Brief to DOT at 26, n. 16. We disagree. Since the City is entitled to charge landing fees enabling it to recover its actual costs (including its capital costs) from aeronautical users of LAX, there has been no taking of its property without compensation and no denial of due process.

While we accordingly affirm the Chief Judge's conclusion that the landing fees are unreasonable insofar as the rate base includes the fair market value of the airfield land, one of his findings on the land valuation issue is incorrect. He disagreed with the Complainants' assertion that the airlines' earlier landing fee payments had paid for the service of the debt incurred in connection with the acquisition of the airfield land, since he had found that the airlines' fee payments had not covered their share of the airport's operating costs under the residual fee system. R.D. at 17.

As explained above at page 18, the proper analysis on considering the effects of the City's change from a residual fee system to a compensatory fee system focuses on whether the fee calculations undertaken during the fiscal years before 1993-1994 included the expense, no matter what share of the airport's expenses were paid by particular users of the airport. In this case, the City's fee calculation included the debt service as one of the expenses each year. Exhibit LAX-E1 at 11. As a result, those expenses must be deemed as having been covered by the fees paid by the airport's users during those years, and the airport may not charge the airlines now for the debt expense in earlier years. However, as the Chief Judge concluded, the City may include in the landing fee rate base the current debt service created by the airport's acquisitions of land for the airfield.

b. Treatment of Amortized Expenses

The landing fee rate base includes an amortization charge for capital projects of $11.3 million. This charge covers capital assets acquired by the airport while the residual fee system was used, if the asset cost more than $100,000 and was not purchased with federal grant funds or passenger facility charges (the assets subject to the amortization charge are sometimes called locally-funded capital assets). The amortization covers the asset's useful life and includes an imputed interest charge at a rate based on the interest paid on Treasury securities. R.D. at 18. The City also does not amortize the cost of assets purchased with bond proceeds. Los Angeles Brief to DOT at 7.

The Complainants argue that the City improperly included the amortization charges in the rate base, since the airlines allegedly paid for these asset purchases through the landing fees paid under the residual fee system. The Complainants base their claim on two points. First, they note that they were obligated to cover any shortfall in the airport's revenues under the residual fee system. As a result, any increase in the airport's expenses (for example, for the purchase of capital assets) necessarily meant that their landing fees would be increased by the same amount. In addition, they assert that the "940" account used by the airport for capital asset purchases was largely funded by debt service payments made by the airlines.

The Chief Judge concluded that the City's inclusion of the amortization charges in the rate base was reasonable and that the Complainants had failed to show the contrary. He concluded that the airport acquired the capital assets with money from the airport's general revenue fund, whose funds were derived from all of the airport's operations. The money from the airport's various operations was not earmarked for any particular purpose and was therefore fungible. The Complainants accordingly could not show that airline fee payments provided the funds used for the capital asset purchases. As he put it, "Payments for locally-funded capital assets can be no more tracked to a particular account or user than can water from a pond's surface be traced to the latest rain." R.D. at 20.

The Chief Judge additionally pointed out that the airport's concession revenues "dwarfed" its landing fee revenue under the residual fee system. R.D. at 20. In fact, the landing fees did not even cover the airlines' share of the airport's operating expenses. R.D. at 21, n. 4.

Finally, he found that the Complainants' argument that the cited airport account was used to segregate airline-paid debt coverage expenses "is just plain incorrect." The account instead was merely an accounting entry which represented the portion of the general revenue fund available for funding capital improvements. R.D. at 21, 22.

In their briefs to us, the Complainants contend that the City may not properly include an amortization charge in the rate base since the airport has already paid for the capital assets at issue and is incurring no actual costs today for those assets. The Complainants again repeat the argument rejected by the Chief Judge that the funds in the account used for purchasing the assets represented to a large extent the airlines' payments for debt coverage. The City, on the other hand, contends the Chief Judge's findings were correct.

We agree with the Chief Judge's conclusion on the reasonableness of the amortization charge, although, as discussed above at page 18, our analysis is somewhat different. If a cost item was not included in the fee calculation during the period of residual fees, then the airport would not be getting paid twice if it included the cost in the rate base under the compensatory fee system. Thus, if the airport always treated the purchases as capital expenses which would be amortized over a period of time, then the cost of those assets was never included as an expense in the rate base under the residual fee system (except to the extent that part of the cost was amortized during that period), so that no airport user paid those costs. In that event, the airport could properly include an amortization charge in the landing fee rate base.

Here the City submitted evidence that the assets have been amortized since the time of their acquisition. Exhibit LAX E-1 at 8. Our analysis of the record indicates that the airlines submitted no contrary evidence. As a result, the record suggests that the assets' cost was never included as an expense in the rate base under the residual fee system and so may properly be included in the current rate base. We therefore believe that the City is entitled to a ruling in its favor on the issue of its ability to include an amortization charge.

In arguing the contrary, the Complainants contend that the City had recouped the cost of the locally-funded assets from airport users under the residual fee system. This argument seemingly stems from the limitations placed on the City's funding of capital asset acquisitions under the residual fee system. Although we have treated the residual fee system at LAX as requiring the airlines to pay landing fees equal to the difference between the airport's total expenses and its total revenues from other sources, the agreement calculated the fees on the basis of the difference between specified expense and funding requirements, on the one hand, and the airport's revenues, on the other hand. The expense and funding requirements defined in the agreement were not exactly the same as the airport's expenses. Exhibit LAX-A2 at 4-5. One of those requirements was a bond coverage expense, which equalled twenty-five percent of the debt service expense. The bond coverage expense was required by the bond agreements for the protection of the bondholders and by the City's Charter. If the bond coverage payment was not needed for the bondholders' protection in the year in which the payment was made, funds equal to the amount of the payment could be used for capital acquisitions in later years. Exhibit ATA-84 at 51-53.

The locally-funded capital assets were in part purchased with the funds made available by the bond coverage payments. However, a substantial share of the funds used for their purchase came from the interest earned by the City on its bond proceeds. Exhibit ATA-A2 at 5. The record does not show that the airlines paid the bond coverage payments, and the Complainants have not shown that the residual fee agreements treated the bond coverage payments as capital acquisition expenses.

To some extent the Complainants rely on the contention that any airport expenses under the residual system automatically increased the airlines' landing fees, so that the airlines must be deemed as having paid for all

aeronautical expenses during that period. But the capital investments made by the City were not listed as an expense when the residual fees were calculated.

The Complainants appear to argue that the City may not include an amortization charge now because it is incurring no cash expense, since the capital assets were purchased earlier. Complainants Brief to DOT at 21. That proposition is clearly unreasonable, since the airport may follow the common practice of treating capital investments as expenses to be amortized or depreciated over their useful life, even if cash was used to make the investment.

Our decision that the City could include an amortization charge for the locally-funded assets does not entirely resolve the issue of the charge's propriety, for a large part of the charge consists of imputed interest. Complainants Brief to DOT at 23, n. 13. An airport should have some ability to obtain imputed interest on its aeronautical investments, because the airport's use of the funds for the aeronautical investment keeps it from using the funds for another purpose. Imputed interest represents the income lost by not making the alternative investment. In Kent County the courts approved the airport's inclusion of an imputed interest charge. 955 F.2d at 1063; 114 S. Ct. at 865, n. 17.

The Policy Statement, moreover, allows an airport to include an imputed interest charge in some circumstances, paragraph 2.3.1: "Where airport proprietors have expended funds from non-aeronautical sources to finance capital investments for aeronautical use, the implicit capital cost of these funds may be included in the aeronautical rate base in addition to the cost of the asset."

We find the Complainants have failed to show that the City's inclusion of the imputed interest charge is unreasonable. The discussion of the issue in their brief occupies a single footnote. Complainants Brief to DOT at 23, n. 13. After citing the Policy Statement's allowance of imputed interest when non-aeronautical funds are used to purchase the assets at issue, the Complainants argue that the City's failure to show that non-aeronautical funds were used for the locally-funded assets means that it has not shown that it is complying with the Policy Statement. The Complainants, however, have the burden of proof. They accordingly are obliged to show that the funds used to purchase the assets came from aeronautical sources, which they have failed to do. In reviewing the record we found no evidence that aeronautical sources provided the funds at issue.

c. Allocation of Access Road Costs

The City allocated the cost of access roads among the various airport cost centers according to the amount of land occupied by each cost center and then limited the airfield's share of the access road costs so that it did not exceed the share of the terminal cost center. As a result, the two cost centers whose costs are the basis of the landing fees -- the airfield and apron cost centers -- were allocated 32 percent of the cost of the access roads. The rate base includes $9.7 million of operating expenses for the access roads, $1.5 million of amortization expenses, and $2.4 million in debt service expense. Less than five percent of these expenses relates to roads located on the airfield or the apron. R.D. at 21. The Complainants assert that the City's allocation unreasonably increased the landing fees by $0.24 per thousand pounds.

In challenging the City's allocation of access road costs, the Complainants have made a variety of arguments, primarily the claim that none of the costs should be allocated to the airfield and apron cost centers (except for the small cost of the few roads located on the airfield). The Complainants further argue that the access road costs should be offset with road-related revenue, primarily parking lot revenue.

The Chief Judge believed that the Policy Statement and caselaw allowed the City to allocate part of the access road costs to the airfield and apron. R.D. at 22-23. He concluded that the Complainants had failed to show that the City's allocation of 32 percent of the access road costs to the airfield and apron cost centers was unreasonable.

He considered "compelling" the Complainants' argument that the City's initial allocation of access road costs on the basis of the acreage covered by each cost center was unreasonable. If the City had not adjusted that allocation, the airfield cost center's share of the cost would have been thirty times as great as the terminal's share of the cost. R.D. at 22. He concluded, however, that the City's adjustment to the allocation -- the adjustment that made the airfield's share equal to the terminal's share -- had corrected any problems with the original allocation. In his view, the Complainants had failed to show that the City's ultimate allocation of access road expenses was unreasonable. He noted that the Complainants had failed to offer an alternative method for allocating the access road costs. R.D. at 23.

The Chief Judge further concluded that the airlines were not entitled to a share of the airport's road-related revenues, such as parking revenues. He viewed the Complainants' claim as a claim to a share of the airport's non-aeronautical revenues. He pointed out that any such claim was barred by caselaw and the Policy Statement. The Policy Statement states that airlines may obtain a credit for an airport's non-aeronautical revenues "only if the airport proprietor agrees." Paragraph 2.1.1.

In their briefs to us, the Complainants argue that the City may allocate access road costs to the airfield cost center only if it can justify the allocation, that the City has failed to justify its allocation, and that the City's adjustment to the original allocation (the allocation based entirely on acreage) was "plucked . . . out of thin air." Complainants Brief to DOT at 26. The Complainants further contend that they had no obligation to present an alternative allocation. They claim, however, that they did propose a better alternative, allocating the access road costs among the cost centers with direct access to the roads (this alternative would eliminate almost all of the road costs from the airfield cost center, since few of the roads are on the airfield). The Complainants again assert that the City has improperly failed to offset access road costs with related revenues such as parking fees.

The City claims that the 32 percent share of the access road costs assigned to the landing fee rate base is relatively small compared to the allocations used by other airports, that the airfield cost center should bear a substantial share of the cost of the access roads, since people use the roads mainly to reach their flights, and that the Complainants' demand for an offset for other revenues like parking fees shows the Complainants' unwillingness to accept a compensatory fee structure.

We find that the Chief Judge correctly determined that the City's allocation of access road costs should be upheld.

First, we find that an airport may assign part of the costs of building and operating access roads to the airfield cost center, as the City did here. Since access roads are required primarily so that travellers can reach their flights, the City should be able to charge a portion of their costs to the airfield cost center.

As adjusted, the City allocates 32 percent of the costs of the access roads to the airfield and apron cost centers. The City demonstrated that the Grand Rapids airport allocated a much higher proportion of its access road costs -- 65 percent -- to the landing fee rate base; the Grand Rapids fee was, of course, substantially upheld by the courts, although the allocation of access road costs was not discussed in any of the judicial opinions. The City's allocation of 32 percent, moreover, is not much greater than the 27 percent allocation suggested by one of the Complainants' expert witnesses. Tr. 294-295.

In arguing that the City's allocation was improper, the Complainants primarily contend that access road costs should be allocated only to the cost center whose facilities are directly reachable by the roads. Complainants Brief to DOT at 28-29. Since few of the LAX access roads are on the airfield and apron, the Complainants' allocation would allow the City to allocate a significant share of the access road costs to the terminal cost center but not to the airfield. Because the roads are necessary to enable travellers to reach or depart from commercial airline flights, we think the Complainants' proposal is unreasonable. We find that the City's allocation of 32 percent of the costs of the access roads to the airfield and apron cost centers does not appear

to be unreasonable.

Nonetheless, the City provided little justification for the adjusted allocation of access road costs. The City, for example, did not conduct a survey of the vehicles using the roads to see what proportion of the vehicles' passengers had arrived or were departing on an airline flight. While we arguably could invalidate the City's allocation on that ground, such a decision would probably not benefit the Complainants, given the evidence on the allocation practices of other airports. We also note the City's evidence that it made the adjustment to the initial allocation in order to be conservative. Exhibit LAX-A1 at 18. Furthermore, as shown, the Complainants' primary position -- that no access road costs should be allocated to the airfield and apron cost centers, except for the roads on the airfield and apron -- is entirely unreasonable.

We will also affirm the Chief Judge's conclusion that the airlines' share of the access road costs should not be reduced due to the roadway-related revenues, such as parking fees, received by the airport. The airport did offset against the access road costs fees paid by taxicabs, limo services, and buses for using the roads. Exhibit ATA-34 at 13, 83. The so-called road-related revenues in which the airlines want to share primarily consist of parking lot revenues, which are neither charges for using the access roads nor aeronautical revenues. The Complainants thus are essentially seeking a share of the airport's non-aeronautical revenues, just as would be the case if they argued that their share of the terminal costs must be offset with the airport's revenues from concessions in the terminal.

The Complainants' demand is contrary to the established law on airport rates. As the Chief Judge pointed out, the Policy Statement held that the airlines may not share in an airport's non-aeronautical revenues unless the airport owner agrees. Moreover, the Supreme Court specifically held in Kent County, 114 S. Ct. 855, that an airport fee was reasonable even though the airport did not use its surplus concession revenues to offset the cost of the services provided the airlines.

d. Lack of Offset for Net Aeronautical Revenues from Other Sources

Under the Policy Statement, an airport's total aeronautical revenues generally may not exceed its aeronautical costs. Policy Statement, para. 2.1. The City based the LAX landing fees on the costs of the airfield and apron, including a proportionate share of the costs of the indirect cost centers, and did not reduce the landing fees to reflect any excess aeronautical revenues generated from other sources.

The Complainants claim that the City thereby violated the Policy Statement's "cap" requirement, since they assume that the airport received surplus revenues from other aeronautical revenue sources. The other aeronautical revenues cited by the Complainants include $26 million paid by airlines for terminal leases, $15 million paid by airlines for ground leases, and $1 million from airfield sources, such as fuel flowage and aircraft parking fees. The Complainants' witness, Mr. Barker, estimated that the City's failure to credit the landing fee rate base with the excess aeronautical revenues generated from other sources meant that the annual landing fee revenues were excessive by $8.4 million. R.D. at 24. According to the Complainants, the landing fees are too high by $0.17 because the airport's total aeronautic revenues exceed the airport's aeronautical costs with the result that the airport is accumulating substantial surpluses.

The City argues, on the other hand, that the Complainants have miscalculated the airport's aeronautical revenues and expenses, since the airport's aeronautical revenues do not exceed its aeronautical costs. The City further argues that the Policy Statement's "cap" may not fairly be applied retroactively to the City's fees, especially since any excess revenues would largely result from the airport's terminal lease agreements with individual airlines, which were signed before the Policy Statement took effect.

The Chief Judge agreed with the City on this issue for two reasons. First, he found that requiring the City to credit the landing fee rate base with any such surplus would be contrary to the statute, which specifically states that the Department may not injure a party's rights under any existing agreement between an airport

and an airline, since any surplus from terminal leases, for example, would result from the airlines' written lease agreements with the airport. As he noted, the Policy Statement also allows airports to obtain higher fees from the airlines than would be justified under a reasonable cost methodology if the airlines agree to the higher charges. R.D. at 24.

Secondly, the Chief Judge would not have accepted the Complainants' claim even if it were not barred by the statute. He found that they had failed to show that the airport would obtain surplus aeronautical revenues from sources other than the landing fees, since their calculation contained a number of substantial errors. R.D. at 24-26.

Notwithstanding the Chief Judge's findings, the Complainants assert that their evidence shows that the airport's aeronautical revenues from non-airfield sources do exceed its aeronautical expenses for those sources. And they claim that the Chief Judge erred in concluding that their calculation showing that the airport had surplus aeronautical revenues was flawed.

According to the Complainants, moreover, their agreement to pay terminal rents based on fair market value did not constitute a waiver of their right to cap the airport's overall aeronautical revenues, so the existence of the written leases does not prevent the Department from applying the Policy Statement's cap on total aeronautical revenues.

In response, the City argues that the Chief Judge correctly concluded that the Complainants have miscalculated the airport's aeronautical revenues and expenses and therefore failed to show that the airport's aeronautical revenues exceeded its aeronautical costs. The City contends in any event that the Policy Statement's "cap" may not fairly be applied retroactively to the LAX fees, since there was no similar requirement in the law in effect when the City adopted those fees. Finally, the City supports the Chief Judge's conclusion that the statutory provision preserving each party's rights under existing agreements between an airport and airlines bars the Department from using any net aeronautical revenues from the terminal leases to reduce the landing fees. If the Department required the City to use its other net aeronautical revenues as a credit in the landing fee rate base, the City would lose the benefits of the rent rates it obtained in its terminal leases with the airlines.

We could not overturn the Chief Judge's decision on the Complainants' claim for an offset for net aeronautical revenues unless we found that the Complainants demonstrated that the airport is obtaining net aeronautical revenues from sources other than the landing fees. We agree with the Chief Judge, however, that the Complainants failed to make such a showing.

The Complainants' expert, who calculated the surplus at $8.4 million, made a number of errors in his calculation. Among other things, he included over $5 million of non-aeronautical revenues in his calculation of aeronautical revenues, as he admitted at the hearing. Tr. 195-199. While the Complainants contend that this error is not as serious as the Chief Judge thought, since the costs associated with those revenues would have to be subtracted from the Complainants' estimate of aeronautical costs, Complainants Brief to DOT at 33, the witness had testified that he did not know what costs were associated with those revenues. Tr. 200-201. His calculation also adopted the Complainants' position that a smaller proportion of the access road costs should be allocated to the aeronautical cost centers, which caused him to understate the aeronautical costs by $2 million. R.D. at 24-25.

In addition, the expert's calculation assumed that the terminal was split evenly between aeronautical and non-aeronautical uses. His assumption was not based upon any formal study. Tr. 206-207. His calculated cost estimates, however, would change significantly if the amount of terminal space actually occupied by the airlines was a little larger than his fifty percent estimate. In fact, the expert admitted that his estimated revenue surplus would shrink by $1 million for each percentage point by which the airlines' share of the terminal space was greater than fifty percent. Tr. 203. As a result, if the expert's estimate of aeronautical

space was too low by eight percent, that would eliminate the entire aeronautical revenue surplus, even if his calculation contained no other errors. And the record indicated that the expert's estimate was almost certainly too low. The City stated that the aeronautical share of terminal space was seventy percent, and the Complainants had failed to show that the City's calculation was wrong. R.D. at 25.

The errors in the expert's estimate thus preclude us from ruling that the airport was obtaining surplus aeronautical revenues from sources besides the landing fees. Like the Chief Judge, we accordingly conclude that the Complainants have failed to satisfy their burden of proof on showing that there were excess aeronautical revenues which should have been credited to the landing fee rate base.

Our finding that the Complainants submitted no proof that the airport receives surplus aeronautical revenues by itself supports a finding that the airport had no obligation to use surplus aeronautical revenues from other sources to offset the landing fees. However, we also agree with the Chief Judge's finding that the "cap" requirement does not obligate airports to use surplus aeronautical revenues from other sources to reduce the landing fee rate base when, as here, those revenues are paid under existing agreements with aeronautical users.

The new statute states that nothing in it "shall adversely affect the rights of any party under any existing written agreement between an air carrier and the owner or operator of an airport . . . ." 49 U.S.C. 47129(f)(1). The Complainants' claim that the airport is obtaining surplus aeronautical revenues is largely based on the claim that the rents paid by the airlines for terminal facilities exceed the airport's cost of providing those facilities. Indeed, the Complainants contend that we must presume that the airport is obtaining surplus aeronautical revenues merely because the terminal rentals are based on fair market value. Complainants Brief to DOT at 31. However, if we directed the City to use any such excess revenues as a credit in the landing fee rate base, then the City would lose the economic benefit of its terminal leases with the airlines insofar as the lessees had agreed to pay a higher rental than a rental based on the recoupment of the airport's cost of providing terminal facilities.

The Complainants do not deny that their claim for a credit for the alleged surplus aeronautical revenues would reduce the City's economic benefits from its terminal leases. Instead, the Complainants contend that the airlines had accepted terminal leases requiring fair market rental payments in the belief that the "cap" requirement would give them a credit in the landing fee rate base for the City's surplus terminal revenues. We find this argument unconvincing. The airlines signed the terminal leases at issue without obtaining any clause guaranteeing that the City would maintain the residual fee system or giving the airline tenant the option of reopening the lease if the City changed to a compensatory system. The airlines knew, however, that these leases would remain in effect for many years after the expiration of the existing residual fee agreements between the City and the airlines. Tr. 481-484.

e. The Allocation of the Interest Income Earned by the Airport

In the 1993-1994 fiscal year the airport earned $9.3 million in interest on its funds, none of which was credited against the airfield cost center. The Complainants assert that most of the principal amount of these funds resulted from the landing fees paid by the airlines under the residual fee system and that virtually all of the interest should have been credited against the landing fee rate base. The Complainants, however, state that they would accept a credit of $4.4 million. Complainants Brief to DOT at 35-36. They claim that the lack of a credit causes the landing fee to be overstated by $0.09. Complainants Brief to ALJ at 67.

When the Complainants presented this complaint at the hearing, the City argued that the airlines had not paid their full share of the airfield costs under the residual fee system and that any funds paid during that period were fungible, so there is no basis for saying that the airlines were the source of the funds earning interest. Furthermore, under a compensatory rate system the airlines were not entitled to the benefit of revenues earned by the airport owner.

The Chief Judge held that the airlines were not entitled to any credit for the airport's interest income. In his view, the Complainants had failed to show that the City's interest-earning funds came from fees paid by the airlines. Moreover, as he had found with respect to the Complainants' complaint against the amortization charges, the landing fees paid by the airlines had not covered the cost of operating the airport, so implicitly the airlines could not be deemed the source of the airport's investment funds. Finally, the compensatory fee system itself contemplated that the landing fees paid by the airlines would cover their share of the cost of the airfield and apron; it did not contemplate using unrelated income to offset the airlines' share of airport costs. R.D. at 27.

The Complainants urge us to reverse the Chief Judge's findings. They again argue that the airport funds earning interest were derived from fees paid by the airlines and that the residual system entitled the airlines to any surplus generated under that system. Moreover, they claim that the City's failure to credit the landing fee rate base with a share of the interest income violated the "cap" requirement in the Policy Statement. Finally, they assert that the airfield cost center should be given a credit at least for that portion of the interest earned on bond proceeds, since the airfield cost center is charged with a portion of the airport's bond expense. Complainants Brief to DOT at 36, n. 19.

We agree with the result reached by the Chief Judge (except as to the interest earned on bond proceeds), since the airlines are not entitled under a compensatory fee system to a share of the airport's interest income. Since the City replaced the residual fee system with a compensatory fee system for landing fees, the airlines no longer have the right to share in the airport income unrelated to the airfield and apron cost centers. The airport has the right to charge the airlines landing fees based on their share of the costs chargeable to the airfield and apron. The airport has no obligation to offset the airlines' share of those costs with income earned by the airport from other activities. Just as the airport has no obligation to give the airlines a credit for its revenue from concessions, it has no obligation to give them a share of its interest income.

To avoid that general rule, the Complainants argue that they must be deemed the source of the airport's interest-earning funds. We cannot agree with this assertion. As the Chief Judge concluded, the Complainants have failed to show that their fee payments were the source of the airport's investment funds.

Furthermore, the Complainants' expert admitted that the airlines could not claim a share of the income derived by the City if the City had instead used the funds to invest in concession facilities. Tr. 386-388. If the Complainants concededly would not be entitled to income earned by the airport from other investments, we do not see how they can claim a share of the interest earned on the funds.

Equally unpersuasive is the Complainants' claim that the lack of a credit for the interest income will cause the airport to violate the "cap" requirement in the Policy Statement. The "cap" requirement, however, bars an airport from obtaining aeronautical revenues that exceed its aeronautical expenses. As shown, the Complainants have failed to show that the airport is obtaining surplus aeronautical revenues. The interest income does not constitute aeronautical income. The Complainants' claim to a share of that income in fact is contrary to the principle set forth in Kent County and the Policy Statement that under a compensatory fee system the airlines have no right to share in an airport's non-aeronautical revenue without the consent of the airport operator.

However, part of the airport's interest income comes from the City's bond construction and servicing accounts, and the expense of obtaining those proceeds is included in the landing fees. The interest earned on the bond construction and servicing accounts should be offset against the debt servicing expense, as the Complainants claim. Complainants Brief to DOT at 36, n. 19.

Total interest earned in fiscal year 1993-1994 was $1.8 million on the bond construction account and $0.4 million on the bond service account. Exhibit LAX-5 at 48. The bond construction account contains, among other things, funds raised from bond issues for various capital projects. These funds are held in the bond

proceeds account until disbursed in payment for the designated capital projects. Sound ratemaking principles require that interest earned on the bond proceeds be credited against the debt servicing expense. Similarly, the bond servicing account contains funds awaiting disbursement for payment of principal and interest on airport construction bonds, and interest earned on that account should also be credited against debt servicing expense.

The amount of interest from these accounts that should be credited to the landing fee rate base appears to be de minimis, however. The City claims that only 12.8 percent of the airport's total debt service expense is allocated to the airfield and apron cost centers. The City also claims that there are no unexpended bond proceeds in the bond construction account and that the funds in the bond construction account all stem from sources other than bond proceeds. Los Angeles Brief to ALJ at 66. Thus, even if all of the interest from the bond construction fund were attributable to bond proceeds, the airfield and apron cost centers would receive a credit of less than $0.3 million, which would reduce the landing fee by less than one cent per thousand pounds. If, as the City alleges, none of the interest income from the bond construction account is attributable to bond proceeds, the rate base would be reduced by as little as $45,000. The Complainants' own brief does not separately identify the amount that would be due if an offset were made. We will therefore not require the City to refund that amount.

f. The Lack of any Adjustment of the Fees Based on Actual Expenses

Under the compensatory fee system chosen by the City, the City calculates an interim landing fee set at the beginning of each fiscal year on the basis of its budgeted expenses. That fee is not the final fee for that fiscal year, however, since the City will adjust it to reflect the actual expenses attributable to the airfield rate base. R.D. at 27. The City thus far has not reconciled the fees paid by the airlines for the 1993-1994 fiscal year with the actual expenses for that year, although it has made a preliminary reconciliation which will increase the landing fee to $1.67. Complainants Brief to ALJ at 70-71.

The Complainants claim that the City should have completed the reconciliation long ago and that the City is deliberately stalling so that the final calculation of the 1993-1994 landing fee will be announced after the Department decides this case. The City argues that it is in the process of completing the reconciliation and the airlines in any event have not been hurt because the process is not yet complete.

The Chief Judge concluded that the City had taken too long to complete the reconciliation process but that the airlines had not been harmed by the delay since the City's reconciliation was likely to result in an increase in the fees. R.D. at 27-28.

Notwithstanding the Chief Judge's observation that the City's delay should not have harmed the airlines, the Complainants ask us to affirm the Chief Judge's determination that the City has violated the Policy Statement by delaying its final reconciliation. The Complainants argue, moreover, that they have been harmed by the delay, for they believe that the reconciliation, if properly done, will show that the final fee should be less than $1.56 per thousand pounds. And they assert that the reconciliation made by the City will likely trigger another round of litigation under 49 U.S.C. 47129, since the final fees set by the City will probably be unacceptable. Complainants Brief to DOT at 37-38.

On the ground that the final amount of the LAX landing fees will be greater than $1.56, the City contends that the Chief Judge correctly found that the lack of a final reconciliation for the 1993-1994 fiscal year has not harmed the airlines. The City states that it is clearly entitled to adjust the landing fees in light of the airport's actual expenses, including its expenses for services provided by the City. Los Angeles Reply Brief to DOT at 20.

The Chief Judge and the Complainants read paragraph 2.2 of the Policy Statement as requiring the City to quickly complete its adjustment of the fees to reflect the airport's actual expenses. That paragraph states in

part, "Airport proprietors must employ a reasonable, consistent, and 'transparent' . . . method of establishing the rate base and adjusting the rate base on a timely and predictable schedule." The Policy Statement would not require an airport using a compensatory rate system to create an adjustment process whereby the airlines pay an interim landing fee based on forecast or budgeted expenses during the fiscal year and the airport thereafter adjusts the fees to reflect its actual expenses during the year. An airport could charge compensatory fees based on estimated costs that would not be adjusted retroactively to reflect actual costs. If an airport adopts such a fee system, however, the Policy Statement will require it to adjust the fees charged prospectively rather than maintain the same fees over a substantial number of years.

If, like the City, an airport operator chooses to create a system where landing fees are subject to a retroactive adjustment, however, the Policy Statement's requirement of a "timely and predictable schedule" will require that the adjustment be done promptly.

Thus the City should determine as soon as reasonably possible the final amount of its landing fees for each fiscal year. Here the City has begun the reconciliation process but has still not determined what the final 1993-1994 fees should be, even though the 1993-1994 fiscal year ended one year ago. Since we think that the reconciliation should have been completed earlier, we ask the City to complete it as soon as possible. We will not order the City to complete the process by a specific deadline, since no deadline is established by the City's fee methodology and since the City represents that it has been taking steps to complete the process. Los Angeles Brief to ALJ at 68-69, 72.

As noted, the Complainants have urged us to require a prompt reconciliation since they fear that the City's calculation of the final fee will lead to a new proceeding under 49 U.S.C. 47129. Our goal on all airport rate matters is that the airport operator and the airlines will agree on aeronautical fees without litigation before us. Policy Statement, paragraph 1.1. We hope that the airlines and the City can agree on the final landing fee for the 1993-1994 fiscal year (and future fiscal years). We recognize that the City's imposition of a final fee which is unacceptable to the airlines may lead to another proceeding before us, even though it should be in the interests of all parties to avoid such a result. At this time, however, we see no action which could be taken by us in this proceeding to keep that from happening.

g. The Reimbursement of Direct and Indirect City Services

As explained, the $1.56 fee for the 1993-1994 fiscal year is based on the airport's budgeted expenses, not on its actual expenses. The final fee will be fixed only after the City has determined the airport's actual expenses in that year. The City has not yet made a final determination of the amount that the airport should pay the City for such services as police protection, crash, fire, and rescue services, and general administrative services provided by the City. Some such charges were included in the rate base when the City set the fee at $1.56, but other charges were not included. For example, the rate base apparently includes no expense for services provided by the Los Angeles Police Department, although the City will bill the airport for police protection when it makes the final determination of the charges for City services. The rate base for the $1.56 fee, however, does include the amount of $7.3 million for crash, fire, and rescue services, all of which were allocated to the airfield cost center, and $875,000 for general administrative services, which were allocated to the airport's general administrative indirect cost center and reallocated among the various direct cost centers, including the airfield and apron cost centers. R.D. at 28, 29.

The Complainants have challenged the City's allocation to the airfield of the entire cost of one fire engine company. The Complainants also claim that the City plans to impose excessive charges on the airport for other services provided by the City and to allocate too high a share of those charges to the airfield.

The City argues that its allocation of crash, fire, and rescue costs is reasonable, and it asserts that no final calculation of the charges for City services has been made, so it would be premature for us to consider the reasonableness of the City's possible charges.

The Chief Judge concluded that he could not determine the reasonableness of charges not yet made by the City, but he did rule on some of the charges included in the rate base for the 1993-1994 fees, particularly the City's treatment of the $1.5 million cost of one fire department company, Engine Company 51. The City charged 84 percent of the company's cost to the airport and then allocated all of that charge to the airfield. He found that the record contained no evidence supporting the allocation to the airfield of part of the cost of Engine Companies 5 and 95. He further found that the City's proposed final reconciliation of the landing fees also involved an unjustified allocation of costs to the airfield, primarily an excessive share of the costs of certain police units. R.D. at 28-32.

The Complainants have asked us to affirm the Chief Judge's findings of unreasonableness as to certain City charges. According to them, we should make findings about the City's proposed charges for City services to the extent that we can, since otherwise the City will include unreasonable charges in the final reconciliation for the 1993-1994 fiscal year and thereby trigger another proceeding under 49 U.S.C. 47129.

The City disagrees with the Chief Judge's findings of unreasonableness and asserts that we may not properly consider any claims as to City charges which are not yet final. ACI agrees with the City that we should not rule on preliminary charges for City services. The City and ACI both contend that we should defer to the City's allocation of costs for police and fire, crash, and rescue services, since the airport operator assertedly should not be deterred from spending funds on services for the protection of the public due to a fear that we would disallow the inclusion of such expenses in the landing fee rate base.

Our review of these arguments is governed by the principle that an airport operator's allocation of the cost of such services as police and crash, fire, and rescue services to a landing fee rate base must be justified. The courts have held that an airport's landing fees must be based on its costs. In Kent County the court of appeals held unreasonable the airport's allocation of all of the crash, fire, and rescue costs to the airlines' landing fees, since the court found that general aviation and terminal tenants also used those services. 955 F.2d at 1062-1063. And in an earlier case, we disapproved an airport's proposed fee structure because it unreasonably allocated such costs among aeronautical users. Investigation into Massport's Landing Fees, FAA Docket 13-88-2, at 8. Our Policy Statement also states that any allocation must also be transparent. Policy Statement, paragraphs 2.2, 2.5.1.

Under this principle, the City's allocation of most of the cost of Engine Company 51 to the airfield seems unreasonable. That company backs up Crash 80, which is a fire department unit dedicated entirely to flight line services. While twelve percent of Engine Company 51's incidents in the 1983-1992 period were flight-line incidents, 72 percent of its incidents in that period occurred in public areas like the terminal and the parking lots.

The City claims that the Chief Judge wrongly believed that the share of the cost of Engine Company 51 allocated to the airfield included non-flight-line charges. Assertedly the costs allocated to the airfield include only flight-line costs. According to the City, that company is kept in existence as a backup for the main crash unit and would probably not exist if it were not needed for major airport emergencies. Los Angeles Brief to DOT at 48, 50-52.

The City is mistaken in its assumption that Engine Company 51's status as a backup for the main crash unit justifies allocating the great majority of its cost to the airfield. Since the company in fact is used primarily for incidents off the airfield, the City's allocation of 84 percent of its cost to the airfield is unreasonable. We further note that the City has cited no evidence showing that the costs allocated to the airfield were actually limited to flight-line costs.

According to the record in this proceeding, so far no other charges for City services have been made final for the 1993-1994 fiscal year. While the Complainants have asked us to hold that several of the City's proposed charges would be unreasonable if made final, we will not do so. We should not rule on the reasonableness of a

potential charge when the City has neither stated what the charge will be nor has submitted an explanation of the charge and its allocation among the various airport cost centers. Moreover, the record in this proceeding contains relatively little evidence on such issues.

As shown, any such allocation of expenses to the airfield will have to be justified and transparent. The City must take that rule into account when it makes its final allocation, and the City should bear in mind the Chief Judge's thoughts on such matters as the allocation of the cost of the Police Department's Organized Crime Intelligence Division and Bunco-Forgery Division to the airfield and other airport cost centers. Among other things, the City's charges for services provided the airport must be consistent with its practices on charging other City departments for services. The City should recognize that an unreasonable allocation of such costs will generate airline requests for another proceeding under 49 U.S.C. 47129, which would be burdensome for the City, the airlines, and us.

h. The Police Substation

The City plans to charge the airport with the cost of a police substation located on airport property (the City's original fee methodology did not include the expense of that substation, but its cost will be included in the final reconciliation of the 1993-1994 fees). R.D. at 32-33.

The Complainants had argued that the police working from the substation spent much of their time on non-airport matters so the cost of the substation should not be charged to the airport, especially since the airport has its own police force. The City argued that this issue was premature, since it has not made a decision on what to charge the airport for the cost of the police substation, but it also argues that charging the airport with the substation's cost is reasonable, since the airport's own police do not handle serious crimes, which are the responsibility of the substation, and since the substation's officers spend almost all of their time working at the airport.

The Chief Judge concluded that the City's intention to charge the entire cost of the substation to the airport would be unreasonable since the City's witness admitted that the police stationed there had some responsibilities for protecting the area around the airport. R.D. at 32. On the other hand, the record did not indicate how the substation's cost would be allocated between the different airport cost centers and how the work of the substation's police officers was divided among the different areas of the airport. Moreover, no final reconciliation had been made by the City. The Chief Judge accordingly found that it would be impossible to determine whether the City's allocation of the substation's costs would otherwise be unreasonable. R.D. at 33.

The Complainants ask us to reaffirm the principle that the City may not include costs such as the police substation costs in the landing fee rate base unless it provides a transparent methodology for allocating such costs to the airport and then to the airfield and apron cost centers in a manner which ensures that the rate base is only charged for services related to the airfield and apron cost centers.

The City contends that the substation allocation is premature and should not be addressed by us. The City further complains that the Chief Judge unfairly struck some of the evidence submitted by the City in support of the proposed allocation of the substation's cost to the airport.

Since no final allocation of the substation's costs has been made, and since the record on the issue is sketchy, we will not rule on whether the City may properly allocate the substation's cost to the airport or on how the substation's cost may be allocated among the airport's cost centers. We note in that regard that the Chief Judge did strike some of the evidence submitted by the City in defense of its position.

However, as we have said elsewhere in this order, we remind the City that any allocation of the substation's cost to the airport and between the airport's cost centers must be justifiable and transparent. In past cases we

and the courts have carefully reviewed airport allocations of crash, fire, and rescue costs. Kent County, 955 F.2d at 1062-1063; Investigation into Massport's Landing Fees, FAA Docket 13-88-2. If the City's final allocation of police costs leads to complaints involving a significant dispute under 49 U.S.C. 47129, we will examine whether the City has met its obligations to allocate costs in a justifiable and transparent manner.

7. Conclusion on the Landing Fees' Reasonableness

While we have found most of the Complainants' attacks on the landing fees unsupported, we find that the landing fees are unreasonable to the extent that the City included a fair rental value for the airfield and apron land based on an estimated fair market value. The City should have used historic cost as the basis of the land value in the landing fee rate base. The airlines accordingly may be charged only for the current debt service on the airfield and apron land, and we are ordering the City to refund the portion of the landing fee payments representing the excessive valuation of the land.

We will not require a refund at this point for the City's allocation of an excessive portion of the cost of Engine Company 51 to the airfield, even though that cost is included in the rate base, since the City has not made a final determination of its charges to the airport for police protection and crash, fire, and rescue services. When the City makes that determination, it must allocate the expenses of Engine Company 51 on a justifiable, transparent basis.

8. Refunds

Having determined that the LAX landing fees were unreasonable to the extent that the City included the fair market value of the airfield land in the rate base, the final question in this proceeding is the relief to be given the Complainants and the other airlines participating in this case.

Since we have found that the fees are unreasonable, the City must modify the LAX landing fees to eliminate that portion of the fees found unreasonable and so modify the future fees charged all airlines using the airport.

The more difficult questions in this case concern the scope of our refund authority as it applies to the various groups of carriers that have filed complaints against the LAX landing fees. In addition, the parties dispute the effect of the standstill agreement between the City and most of the airlines serving LAX, since that agreement entitles the airline parties to refunds if we issue a decision finding that the landing fees are unreasonable and if we declare that refunds should be paid. Finally, the parties dispute our ability to order a specific refund amount because they disagree over the adequacy of the record for such a determination.

As explained below, we are ordering the City to refund the portion of the landing fees that is unreasonable because the City improperly valued the airfield land. The City may satisfy its obligation by making refunds in accordance with the terms of the standstill agreement.

While the airlines that filed follow-on complaints (complaints filed after the expiration of the 60-day deadline for filing complaints set by 49 U.S.C. 47129) contend that we have inherent authority to require refunds that is not subject to the limitations of 49 U.S.C. 47129, we are declining to exercise any such authority that we might have. The airlines that are parties to the standstill agreement will be entitled to obtain refunds under that agreement. While several of the airlines filing follow-on complaints are not parties to that agreement, we decline to exercise the refund authority that we might have for the benefit of carriers that neither exercised their right to file a timely complaint under 49 U.S.C. 47129 nor signed the standstill agreement.

We have determined in this order the formula for calculating the refunds due the airlines. We have determined that we cannot calculate the specific amount of the landing fee that must be refunded under that formula, because the record is not sufficiently detailed to make a precise calculation. The Complainants have estimated the amount as approximately $0.25 per thousand pounds of landed weight. The City, on the other

hand, disputes this figure. The Chief Judge made no findings on the amount to be refunded. In these circumstances, we believe it necessary to conduct a supplemental proceeding so that the precise amount of the refund can be calculated. We are therefore issuing a separate order requiring the City to show cause why the refund amount should not be set at $0.25 per thousand pounds landed weight. We will give the Complainants an opportunity to comment on the City's filing. We will then issue an order before the end of the thirty-day deadline set by 49 U.S.C. 47129 for the making of a refund.

a. Positions of the Parties

The Complainants argue that we must calculate the refunds due the airlines and require the City to refund the portion of the landing fees which is unreasonable. The Complainants contend that refunds are mandatory under 49 U.S.C. 47129 and that they are entitled to receive refunds under the terms of the standstill agreement. Complainants Brief to DOT at 48 and Complainants Reply Brief to DOT at 18. The Complainants maintain that the standstill agreement contemplates that we will determine the amount of any refund. Complainants Reply Brief to DOT at 19.

The carriers that filed follow-on complaints assert that we have the authority to award retrospective relief to airlines that paid landing fees found unreasonable by us, whether or not those carriers were eligible for refunds under 49 U.S.C. 47129. Add-on Carriers Brief to DOT at 22-27. However, according to these airlines, they are entitled to an award of refunds under that statute, even though they filed their complaints against the City more than sixty days after the enactment of the Authorization Act. They also argue that we may not discriminate against foreign airlines in ordering a remedy in this case, since any such discrimination would violate the obligations of the United States under its international agreements.

The City, on the other hand, argues that none of the foreign airlines and none of the airlines filing follow-on complaints are eligible for refunds in this proceeding. According to the City, if we determine that part of the landing fees are unreasonable, we may neither calculate the amount of refunds due the carriers nor order the City to make such payments. The City asserts that those issues are governed by the standstill agreement which we have no authority to enforce.

Finally, ACI asserts that we must decline the airlines' invitation to set the rates, since the statute bars us from setting an airport rate or fee. ACI maintains that, in the absence of a standstill agreement, the determination of the refund or credit must be left to the airport, subject to review by the Department. Brief of ACI to DOT at 17 and Reply Brief at 7.

b. Statutory Background

The provisions in the Authorization Act on refunds and credits are part of the subsection requiring airlines to pay new or increased fees under protest pending our determination of the reasonableness of the new or increased fee, 49 U.S.C. 47129(d). While the subsection allows an airport to require airlines to pay a new fee or fee increase on an interim basis, it also prohibits the airport from denying access to an airline that pays the fee under protest, and it ensures that airlines can obtain a refund or credit if the fee is found unreasonable.

Subparagraph 49 U.S.C. 47129(d)(1), the provision governing refunds, reads as follows:

(A) IN GENERAL -- Any fee increase or newly established fee which is the subject of a complaint that is not dismissed by the Secretary shall be paid by the complainant air carrier to the airport under protest.

(B) REFERRAL OR CREDIT -- Any amounts paid under this subsection by a complainant air carrier to the airport under protest shall be subject to refund or credit to the air carrier in accordance with directions in the final order of the Secretary within 30 days of such order.

(C) ASSURANCE OF TIMELY REPAYMENT -- In order to assure the timely repayment, with interest, of

the amounts in dispute determined not to be reasonable by the Secretary, the airport shall obtain a letter of credit, or surety bond, or other suitable credit facility, equal to the amount in dispute that is due during the 120-day period established by this section, plus interest, unless the airport and the complainant air carrier agree otherwise.

(D) DEADLINE -- The letter of credit, or surety bond, or other suitable credit facility shall be provided to the Secretary within 20 days of the filing of the complaint and shall remain in effect for 30 days after the earlier of 120 days or the issuance of a timely final order by the Secretary determining whether such fee is reasonable.

Also relevant, in view of the standstill agreement's provisions on refunds, is the statutory section preserving the parties' rights under existing agreements, 49 U.S.C. 47129(f), which states in part,

Nothing in this section shall adversely affect . . . the rights of any party under any existing written agreement between an air carrier and the owner or operator of an airport. . . .

We discuss below our other possible authority to require refunds of unreasonable airport fees.

c. Refund Authority under 49 U.S.C. 47129

In our view, when we determine under 49 U.S.C. 47129 that a new or increased fee is unreasonable in whole or in part, we have the authority to, and must, order the unreasonable portion of the fee to be refunded or credited to the airlines filing complaints under that statute. First, the language of 49 U.S.C. 47129(d)(1)(B) is mandatory, for it requires that "any amounts paid under protest shall be subject to refund or credit . . . in accordance with directions in the final order of the Secretary." Secondly, the statute imposes a time limit for the making of the refund or credit: within thirty days of our final decision in a proceeding held under the statute. Thirdly, the statute requires the airport to submit financial security in order to assure that refunds can be made. Fourthly, the financial security must remain in place for thirty days after the Secretary's final decision, coinciding with the thirty-day period for refunds described in subsection (d)(1)(B).

Moreover, the current statutory provisions requiring refunds (and a form of financial security from the airport pending completion of our proceeding) were adopted by the conference committee on the Authorization Act as a substitute for provisions in the Senate bill requiring an escrow account into which the disputed fees would be paid pending completion of our proceeding. See Order 95-4-5 at 34-35. Since the escrow account was designed to ensure that the complaining airlines would recover their payments if the fee was held unreasonable, the provision in the final bill giving us the authority to direct that refunds or credits be made, coupled with the financial security requirement, should be read to achieve the same goal, since there is no indication in the legislative history that Congress wished to make refunds discretionary.

Reading the statute as requiring refunds is additionally consistent with the statutory goal of giving the airports access to the funds to be paid under a new fee schedule while ensuring that airlines could recover those funds if the fees are ultimately held unreasonable. Cf. American Airlines v. Puerto Rico Ports Authority, Order 95-3-41 (March 22, 1995) at 3.

(i) Size of the Refund

We also conclude that any refund in a case like this should be limited to the amount of the fee found unreasonable, not the whole amount of the fee increase or new fee. The provision on financial security implies that the refund would be limited to "the amounts . . . determined not to be reasonable."

In this case, the Complainants have presented discrete objections to various components of the new LAX landing fees, and the Chief Judge made separate determinations on each of those objections. As is clear from reading this decision, our determinations on these issues are not interrelated or interdependent. Moreover, the

Complainants are seeking a refund only of the unreasonable portion of the new landing fee rather than a refund of the difference between the new fees and the fees that would have been paid if the residual fee system had been continued. Complainants Brief to DOT at 48-49. Reading the statute as mandating that we require a refund of the entire amount of a new fee (or a fee increase) when only part of the fee has been found invalid would give the complaining airlines a windfall and in practice punish an airport. As a result, we conclude in cases like this that we must calculate the amount of the refund due the complaining airlines based upon our resolution of the discrete issues raised in connection with the fees.

We find unpersuasive ACI's argument that we may not calculate the amount of the refund. Citing the statutory prohibition against our setting airport fees, 49 U.S.C. 47129(a)(3), ACI asserts that any calculation of a refund by us would be unlawful. ACI Brief to DOT at 17. In making this argument ACI has misconstrued the statute, which specifically directs us to order refunds or credits when a fee is determined to be unreasonable and establishes financial security requirements to ensure that refunds are made. The statute also states that the refund or credit is to be made in accordance with the directions of the Secretary, thereby vesting the Secretary with wide latitude in determining how refunds are carried out. We could hardly carry out our broad mandate to order refunds or credits if we could not calculate the amounts due the complainants in a proceeding. We read the prohibition against our setting a fee as giving the airport the discretion to choose which kind of fee structure it wishes to adopt and to calculate the fees according to its chosen methodology; we then have the responsibility upon the filing of a proper complaint to examine whether the resulting fees are reasonable.

(ii) Applicable Refund Period

As to the period of payments for which refunds are due, the parties in this proceeding have taken opposing positions. The City contends that refunds may be ordered only for the 120-day period for which an airport must provide financial security under the statute. Los Angeles Reply Brief to DOT at 30-31. The airline parties, on the other hand, contend that we must order refunds for the entire period during which the new or increased fee was paid under protest. Complainants Reply Brief to DOT at 18-19; Add-on Complainants Reply Brief to DOT at 7-9.

This issue should not affect the refunds paid as a result of this proceeding, since the standstill agreement gives the airline parties the right to obtain refunds for the entire period in which the new landing fees were paid. We find that in the ordinary case, where an airport has increased a fee or established a new fee after the Authorization Act's enactment, the refund would cover the full period during which the fees were paid under protest. This result follows from the express terms of the statute.

The refund provision, 49 U.S.C. 47129(d)(1)(B), states that "[a]ny amounts paid under this subsection by a complainant air carrier to the airport under protest shall be subject to refund or credit . . . ." The statute thus does not limit the refunds to the fees paid during only part of the period in which the new fees were imposed. The 120-day period cited by the City, moreover, applies only to the financial security provision, 49 U.S.C. 47129(d)(1)(C). Limiting the financial security requirement to that period is logical since no security could be required under the statute until an airline files a complaint. Reading the 120-day limitation into the refund paragraph would be illogical, as the follow-on carriers have pointed out, because the statute gives carriers up to sixty days to file a complaint and makes refunds due within thirty days of our final decision. The City's reading of the statute accordingly would allow carriers to obtain refunds for only a 120-day period, when the fee may have been paid under protest for as long as 210 days.

In this case our refund authority under 49 U.S.C. 47129 could not run from the date that the landing fees were imposed, since the Authorization Act was not enacted until a year after the new fees were imposed. Our authority to order refunds under the statute goes back to the date of enactment. Using that date is reasonable, since the City was collecting the higher fees notwithstanding the airlines' claims that the fees were invalid. This interpretation of the statute cannot harm the City, since it had already promised in the standstill

agreement to refund the fees paid from July 1993.

d. The Standstill Agreement

The standstill agreement, signed by the City acting through its Board of Airport Commissioners (DOA), a number of airlines, and two airline trade associations, the Air Transport Association and the International Air Transport Association, Exhibit ATA-45, contains the following section on refunds:

3. In the event a federal agency or court of competent jurisdiction renders a final determination that any portion of the landing fees paid by a Carrier to DOA for the use of LAX was unlawful and directs or declares that a refund of such fees should be paid, DOA shall refund to the Carrier at that time the portion of the landing fees found to be unlawful, with accrued interest at the federal judgment rate, calculated as currently set forth in Title 28 of the United States Code, Section 1961. Interest on the refund shall be calculated from the date of payment by the Carrier to the date of refund by DOA . . . .

The statute, as shown, expressly states that its provisions will not affect the rights of any party under an existing agreement between an airport and airlines. 49 U.S.C. 47129(f). Since the standstill agreement between the City and airlines serving LAX contains detailed provisions on refunds, that agreement's provisions may satisfy the City's refund obligation under the statute. Since we have found the landing fees unreasonable in part and are declaring that refunds should be paid, the City has become obligated to pay the refunds.

We expect the City to carry out the agreement, for it has repeatedly represented that it would do so. For example, in answering the Complainants' initial complaint, the City represented, "[T]he complainant air carriers have entered into a contractual agreement with Los Angeles which would entitle them to a refund to the extent that the landing fees at LAX are found to be unlawful in a proceeding before the Secretary of Transportation." Response to Formal Complaint at 3, n. 2. The City's answer to the amended complaint similarly stated, "By [the standstill] agreement, the City agreed . . . to refund any portion of the landing fees later declared invalid." Respondents' Answer to Amended Complaint at 7.

While the standstill agreement's provisions are related to the City's refund obligation, we believe the City has overstated the agreement's impact on our authority. The City thus argues that we may not calculate the refunds due the airline parties to that agreement since we may not enforce the agreement. The City claims that it will calculate the refunds due the parties after we issue an order on the reasonableness of the landing fees. Los Angeles Brief to DOT at 72-73. The Complainants, on the other hand, contend that we must calculate the refunds due the airlines that signed the standstill agreement. We agree with the Complainants -- the standstill agreement by its terms does not give the City the right to establish the amount of refunds due the airline parties. Instead, the agreement states that the City will refund "the portion of the landing fee found to be unlawful." We must therefore carry out our statutory obligation to determine the amount due.

e. The Department's Other Refund Authority

The Authorization Act expressly gives us the authority to require refunds from an airport when a fee is investigated under the procedures established by 49 U.S.C. 47129 and is found unreasonable. Whether we could require a refund in an investigation of an airport fee conducted under the Anti-Head Tax Act or the Airport and Airway Improvement Act is unclear, for neither statute specifically authorizes us to award refunds when we find that an airport fee is unreasonably high.

In a case involving the Civil Aeronautics Board's regulation of airline fares, the Court of Appeals suggested that the Board might have an equitable power to require restitution when the airlines had charged unlawfully high fares, even though the Board had no express reparations authority. Moss v. CAB, 521 F.2d 298 (D.C. Cir. 1975). The Court did not resolve that issue, since the Board had decided on equitable grounds not to

require refunds even if it had the authority to do so.

On the ground that we have a similar equitable power to require restitution, the follow-on carriers urge us to direct the City to make refunds to all carriers notwithstanding any limitations in 49 U.S.C. 47129. Assuming we have such powers, we decline to exercise them in this proceeding. All of the airlines that signed the standstill agreement have a contractual right to obtain refunds. The Complainants, moreover, are entitled to obtain refunds under 49 U.S.C. 47129, since they filed a timely complaint under that statute. The only airlines in this case that cannot obtain refunds are the follow-on carriers that did not sign the standstill agreement. We see no reason why we should exercise our equitable authority to require restitution, assuming we have such authority, on behalf of carriers that failed to protect their rights by signing the standstill agreement (or by filing a timely complaint under 49 U.S.C. 47129).

f. The Foreign Airlines' Right to Obtain Refunds

The Authorization Act on its face appears to exclude foreign airlines from its remedial provisions, for the statute states that complaints may be filed against an airport fee only as to fees imposed "upon one or more air carriers (as defined in section 40102 of this title)." 49 U.S.C. 47129(a)(1). Section 40102 in turn defines "air carrier" as a citizen of the United States, a definition which would exclude foreign air carriers. As a result, when we adopted the rules of practice for airport rate investigations, we assumed the statute allowed only U.S. carriers to file complaints and obtain refunds under 49 U.S.C. 47129. 60 Fed. Reg. at 6919. However, when we assigned this proceeding to an administrative law judge we noted that our initial interpretation of the statute might be mistaken. Order 95-4-5 at 18, n. 13.

On the basis of our earlier interpretation and its view of the language of the statute, the City argues that no foreign airline may be awarded a refund in this proceeding. Los Angeles Brief to DOT at 67-68. The carriers filing follow-on complaints, however, argue that the statute must be read as allowing foreign airlines to obtain refunds, since otherwise the United States would violate numerous treaties and bilateral air services agreements, in all of which the United States has promised that it will not discriminate against foreign airlines.

After further consideration of this issue, we conclude that the statute does not expressly bar foreign airlines from obtaining retrospective relief and that the United States' obligations under a number of treaties and agreements require us to read the statute as entitling foreign airlines to obtain refunds under its provisions.

The predicate for our reexamination of the statute's meaning is the United States' obligation under numerous treaties and agreements to ensure that foreign airlines are treated the same as U.S. airlines. The United States would breach this obligation if we denied foreign airlines the ability to obtain refunds under 49 U.S.C. 47129 when U.S. airlines can obtain refunds.

The Chicago Convention precludes the Department from discriminating against foreign airlines with respect to user charges at U.S. airports. Article 15 of the Convention states:

Any charges that may be imposed or permitted to be imposed by a contracting State for the use of such airports and air navigation facilities by the aircraft of any other contracting State shall not be higher, . . . as to aircraft engaged in scheduled international air services, than those that would be paid by its national aircraft engaged in similar international air services.

This provision states that the charges imposed upon foreign airlines shall not be higher than those imposed upon domestic airlines. Pursuant to the Chicago Convention foreign airlines are ensured the right that they pay no more to airports than similarly-situated U.S. airlines are required to pay for the same services. Air Transport Ass'n v. City of Los Angeles, 844 F. Supp. 550, 556 (C.D. Calif. 1994); Policy Statement, paragraph 3.3.

In addition, various bilateral air services agreements between the United States and foreign countries also prohibit discriminatory treatment by the United States. Each of these agreements contains a provision regarding airport user fees and prohibiting discrimination with respect to such fees on the basis of nationality. Add-on Complainants Brief to DOT at 5-6. And the Treaties of Friendship, Commerce, and Navigation between the United States and many foreign nations typically provide that business firms from the foreign nation must be treated in this country no less favorably than U.S. firms. Add-on Complainants Brief to DOT at 7.

If we were to deny retrospective relief to the foreign airline parties in this proceeding, we would effectively be requiring those airlines to pay charges that are higher than those paid by U.S. airlines. Such an outcome could result in a violation of our nation's obligations under international law. Even if the foreign airlines could enforce their rights in a court suit, as they perhaps could do in light of the decisions in McKesson Corp., supra, and O'Connell Management, supra, they would still be disadvantaged, since U.S. airlines would be able to obtain refunds more quickly and easily. The City does not try to argue that the denial of refunds to all foreign airlines would be consistent with the obligations of the United States under international agreements.

Against this background, we find that the statute must be read to give foreign airlines the same rights as U.S. airlines to file complaints and obtain restitution under 49 U.S.C. 47129. Nothing in the language or history of the Authorization Act indicates that Congress intended to create procedures for airport rate investigations that would violate the United States' commitments under its international agreements.

The statute nowhere states that only U.S. airlines may file complaints or obtain refunds under its terms. The only reference to the definition of air carrier appears in the paragraph stating when a complaint may be filed, that is, when a new or increased fee is imposed upon an air carrier. The following paragraphs authorizing the filing of complaints do not refer to the section 40102 definition of air carrier. Furthermore, before its recodification the predecessor of section 40102 did not state that its definition of "air carrier" as a U.S. citizen would be binding for all purposes under the Federal Aviation Act. Instead, that section began with the words, "unless the context otherwise requires." Section 101 of the Federal Aviation Act, formerly codified as 49 U.S.C. 1301. We think the context requires reading the term "air carrier" in the Authorization Act as including foreign air carriers, since we cannot assume that Congress meant to breach the United States' treaty obligations without clear evidence of such an intention. In reaching this conclusion we note that the City has cited no legislative history indicating that Congress intended to deny foreign airlines the ability to file a complaint and obtain relief under 49 U.S.C. 47129.

In interpreting the statute we must also follow the principle that statutes should not be read in a way that would violate the United States' treaty obligations unless Congress clearly intended to override those obligations. As the Supreme Court has stated, "There is . . . a firm and obviously sound canon of construction against finding implicit repeal of a treaty in ambiguous congressional action. 'A treaty will not be deemed to have been abrogated or modified by a later statute unless such purpose on the part of Congress has been clearly expressed.'" Trans World Airlines v. Franklin Mint Corp., 466 U.S. 243, 252 (1984); South African Airways v. Dole, 817 F.2d 119, 125-126 (D.C. Cir. 1987) (but there Congress had unambiguously expressed its intent to override an international air services agreement).

Secondly, we note that the courts have construed "air carrier" as including both U.S. and foreign airlines in circumstances where doing so was logical. South African Airways v. Dole, 817 F.2d 119, 127 (D.C. Cir. 1987); Lawal v. British Airways, 812 F. Supp. 713 (S.D. Tex. 1992), citing Morales v. Trans World Airlines, 112 S. Ct. 2031 (1992).

As a result, we find that 49 U.S.C. 47129 must be read as giving foreign airlines the same rights as U.S. airlines to obtain redress when an airport's fees are found to be unreasonable.

g. The Airlines Entitled to Refunds: Airlines That Disputed the Fees

As we explained when we assigned this case to an administrative law judge, the new procedures of 49 U.S.C. 47129 apply to fees that were created or increased after the statute's enactment and to new or increased fees that were "in dispute" on the date of enactment. We concluded that the LAX landing fees were in dispute on the date of enactment because a number of airlines had filed suits challenging the validity of the fees or had signed the standstill agreement preserving their right to challenge the fees. Order 95-4-5 at 17.

The City contends that at most only those carriers who themselves disputed the fees on the date of enactment are entitled to any relief under 49 U.S.C. 47129. According to the City, those carriers that neither signed the standstill agreement nor participated in the district court litigation are ineligible for any retrospective relief in this proceeding, since those carriers were not disputing the reasonableness of the LAX landing fees. Los Angeles Brief to DOT at 65. The City contends, however, that those carriers that did not join in filing a brief to the Ninth Circuit Court of Appeals on appeal from the district court's dismissal of the airlines' suit also are not entitled to obtain retrospective relief in this proceeding. Los Angeles Brief to DOT at 68.

The follow-on carriers disagree with the City's objections. They argue that all of the carriers filing complaints in this proceeding had disputed the legality of the LAX landing fees.

The Chief Judge ruled that the landing fees were "in dispute" if only one airline had challenged them. Since a number of airlines had filed suit to block the fees, he concluded that any carrier otherwise able to file a complaint could seek a refund in this proceeding. R.D. at 37-38. He did not consider whether the follow-on carriers' late filing of their complaints disqualified those carriers from obtaining refunds under 49 U.S.C. 47129.

In our view, any carrier that signed the standstill agreement should receive a refund, since the City agreed to make refunds to those airlines if we declared that a refund should be paid. In addition, since the airline parties to the agreement specifically reserved their right to challenge the fees, we believe that the fees were "in dispute" as to those parties. As a result, it appears to us to be irrelevant whether an airline party to that agreement also joined in the appeal from the district court's dismissal of the airlines' suit seeking a declaration that the landing fees were unlawful. However, although the City has shown that no foreign airlines joined in the brief filed with the Ninth Circuit, the foreign airlines that joined in the notice of appeal never formally withdrew from the case. Moreover, the follow-on carriers represent that many of the foreign airlines joined in a second case in the Ninth Circuit, the appeal from the district court's refusal to enjoin the City from implementing the new landing fee structure. Add-on Complainants Reply Brief to DOT at 5-6.

However, the statute clearly states that we may order the payment of refunds only to "a complainant air carrier", 49 U.S.C. 47129(d)(1)(B), and the statute imposes a sixty-day filing deadline on complaints, a condition not met by the follow-on carriers, as we discuss next.

h. The Airlines That Did Not File a Timely Complaint

When we determined that the Complainants were entitled to a hearing on their complaint under 49 U.S.C. 47129, we also decided as a matter of discretion to allow a number of other carriers to participate as complainants in this proceeding even though they had not filed a complaint within 60 days of the Authorization Act's enactment. Order 95-4-5 at 19 and 36, n. 25. Since the follow-on carriers argue that their complaints were timely, even though they were not filed within sixty days of the Authorization Act's enactment, we will address this matter again. As we will explain, these carriers are not entitled to relief under 49 U.S.C. 47129. However, many of them can obtain refunds since they are parties to the standstill agreement.

The carriers filing follow-on complaints that signed the standstill agreement are the following: Aerolineas Argentines, Aerovias de Mexico, Air France, Alitalia, All Nippon, British Airways, Cathay Pacific, El Al, Evergreen, Japan Air Lines, Korean, Lauda, Lufthansa, Malaysia, Philippine Airlines, Singapore Airlines,

Swissair, and Virgin Atlantic. The carriers filing follow-on complaints that did not sign the standstill agreement are the following: Aero California, American International, AOM Minerve, Cargolux, Carnival, Corse-Air, EVA, Iberia, LAN Chile, Martinair, Qantas, Reno, Rich International, Target Airways d/b/a Great American Airways, Tower Air, Viking International, and World. Those carriers that did not sign the standstill agreement also did not participate in the district court litigation challenging the City's imposition of the new landing fees.

Each group includes both U.S. and foreign airlines: of the follow-on complainants, one U.S. airline and seventeen foreign airlines signed the standstill agreement, and eight U.S. airlines and nine foreign airlines did not sign the standstill agreement.

The statute expressly requires that complaints be filed within sixty days of the date that a carrier receives notice that the airport is increasing a fee or imposing a new fee. 49 U.S.C. 47129(a)(1)(B). However, as shown, Congress clearly intended the statute to apply to the on-going dispute about the reasonableness of the LAX landing fees, even though those fees had been imposed well before the statute's enactment. Order 95-4-5 at 13-14. To reconcile Congress' intent to allow the airlines to challenge the LAX fees under 49 U.S.C. 47129 and the express requirement of a 60-day filing deadline for complaints, we construed the statute as requiring the filing of a complaint about the LAX fees within sixty days of the statute's enactment. Order 95-4-5 at 14.

None of the follow-on carriers attempted to file a complaint under 49 U.S.C. 47129 until after the Complainants had filed an amended complaint and we issued a notice giving the procedural dates. Among the procedural dates given in the notice was the deadline set by our rules of practice for the filing of follow-on complaints after the filing of an initial complaint. The follow-on carriers in this proceeding relied on that procedure and filed complaints within seven days of the Complainants' filing of their amended complaint.

The City objected to the filing of the follow-on complaints on the ground that they were not filed within the deadline set by the statute. We agreed that the complaints were untimely under 49 U.S.C. 47129 but determined to allow those carriers to remain as a parties under our authority to investigate the reasonableness of airport fees. Order 95-4-5 at 19-20.

The follow-on carriers do not claim that they complied with the statutory filing deadline. Instead, they argue that their complaints should not be deemed untimely under 49 U.S.C. 47129, primarily because our failure until February 3, 1995, to adopt procedural rules for cases under that statute meant that a timely filing of a complaint would be useless. We recognize that we would not have begun a hearing on a complaint filed within sixty days of the statute's enactment because we did not adopt procedural rules until later. However, the lack of procedural rules cannot excuse carriers from complying with the statute's requirement that complaints be filed within sixty days. Moreover, as we have done in other cases, we must strictly apply the statutory deadlines. See Lehigh-Northampton Airport Authority, supra, Order 95-5-8 at 13-14.

The follow-on carriers have also argued that the sixty-day deadline may not be fairly applied to foreign airlines since they could not know until the publication of the rules of practice that they would be allowed to file complaints seeking an expedited investigation of new or increased airport fees. We find this argument unpersuasive. First, since five of the Complainants are foreign airlines, at least some foreign carriers assumed that they could obtain relief under the statute. More importantly, 49 U.S.C. 47129 only entitles a foreign airline to obtain a refund if the carrier complies with its terms, one of which is the sixty-day filing deadline for complaints. We recognize that the statute may be ambiguous, but a private party wishing to obtain relief under 49 U.S.C. 47129 should have protected its interests by filing a protective complaint with us within the statutory deadline.

We note, moreover, that our application of the sixty-day filing requirement will not violate any obligations of the United States under its international agreements. As pointed out by the follow-on carriers (and by the

Note delivered by the Embassy of the Netherlands), those agreements prohibit the United States from discriminating against foreign airlines. Our enforcement of the statutory deadline is nondiscriminatory, because we are enforcing the deadline against U.S. and foreign airlines (and ordering the payment of refunds to the foreign airlines that filed a timely complaint).

The follow-on carriers that signed the standstill agreement should obtain refunds under the terms of that agreement, as promised by the City. The potential inability of the other follow-on carriers to obtain refunds follows from their apparent failure to take steps to protect their interests. They did not file a timely complaint under 49 U.S.C. 47129, did not join in the district court litigation against the City, and did not sign the standstill agreement. Those carriers, moreover, have submitted no evidence justifying their actions.

i. Calculation of the Refund Amount

In accordance with 49 U.S.C. 47129(c)(1), this order constitutes our final determination on the reasonableness of the LAX landing fees. As shown, we have found the fees unreasonable to the extent that the City used the airfield land's estimated fair market value in the rate base. We are directing the City to refund a portion of the fees represented by the excessive land valuation in the rate base. However, the record in this case does not appear to provide enough information to enable us to order a precise refund amount on this issue.

In order to carry out Congress' direction to direct the payment of refunds or credits when a fee is found unreasonable, we have concluded that we should determine the amount of the fee that must be refunded to the airlines entitled to refunds. We believe our decision to calculate the specific amount due is consistent with the statutory deadlines, since we have issued a final decision on the reasonableness of the LAX landing fees within the 120-day period prescribed by 49 U.S.C. 47129. That decision, moreover, includes a declaration that the City must refund the portion of the fees represented by the excessive charge for the value of the airfield land. We intend to issue an order establishing the exact amount due before the end of the thirty-day period set by Congress for the payment of refunds or credits.

Our intention to hold a supplemental proceeding in this case is also reasonable since this is the first case to be fully litigated under the new statute. Cf. Permian Basin Area Rate Cases, 390 U.S. 747, 792 (1968). Congress did not prescribe specific procedures for the determination of the refund amount, and the parties in this proceeding on their own did not submit the data needed for the calculation of the precise amount of refund due the airlines. Given Congress' clear directions to us to order refunds when we find a new or increased fee unreasonable in whole or in part, holding a supplemental proceeding within the thirty-day period for making refunds is reasonable when the record is insufficient to carry out that mandate.

The Complainants have calculated that portion of the fee to be approximately $0.25 per thousand pounds of landed weight. However, the record does not provide enough data to determine with certainty that $0.25 is the proper amount of the landing fee that must be refunded. Also, there is a question of what portion, if any, of the current debt service relates to the acquisition of the airfield and apron land. Rather than declare that the proper refund amount is the figure provided by the Complainants, we wish to give the City an opportunity to submit more detailed data on this question.

Therefore, in order to fulfill our statutory mandate to the greatest degree possible, we are issuing a separate order directing the City by July 7 to show cause why we should not establish $0.25 per thousand pounds as the amount of the refund. The City should submit information in support of its position that the amount of the refund should be less than $0.25, if that is the City's position. The Complainants may then respond to the City's submission, and the City may file a reply. The parties should not file any argument concerning our ultimate findings in this order. Their submissions should be limited strictly to a discussion and data concerning the appropriateness of a refund of $0.25 per thousand pounds of landed weight. We will issue our decision on the refund amount within the thirty-day period set by the statute for the making of the refund or credit.

We will not, however, attempt to determine the specific amount due each airline. Since the new landing fees are still being paid by the airlines and the record in this proceeding does not contain current data, we cannot know how much each airline has paid in fees. We also see no need to calculate the amount due each airline, since the City and each carrier entitled to refunds should easily be able to do that on the basis of our final calculation of the portion of the fee that was unreasonable. Since we are not determining the amount due each individual airline, we need not address the parties' dispute over whether the evidence in the record on that issue is sufficient and was properly accepted by the Chief Judge.

ACCORDINGLY:

1. We find that the landing fees charged the airlines by the respondents, the City of Los Angeles, the City of Los Angeles Department of Airports, and the Los Angeles Board of Airport Commissioners, for Los Angeles International Airport are unreasonable and therefore unlawful under 49 U.S.C. 40116, 49 U.S.C. 47107, and 49 U.S.C. 47129, insofar as the respondents (1) include in the rate base for such fees a fair market rental based on an estimated fair market value for the land underlying the airport's airfield and apron and (2) include in the rate base an unreasonable and unjustified allocation of the costs of Engine Company 51 to the airfield;

2. We find that the complainants Air Transport Association et al. have otherwise failed to show the landing fees established in 1993 for the use of Los Angeles International Airport are unreasonable;

3. When the City of Los Angeles, the City of Los Angeles Department of Airports, and the Los Angeles Board of Airport Commissioners, establish the final landing fees for Los Angeles International Airport for the fiscal years 1993-1994 and 1994-1995, they must be able to justify (1) all charges imposed on the airport for services provided by the City of Los Angeles and (2) the allocation of such charges between the airfield and apron cost centers and the other direct and indirect cost centers at the airport, and they must explain the basis for such charges and allocations to the airlines serving the airport;

4. We order the respondents, the City of Los Angeles, the City of Los Angeles Department of Airports, and the Los Angeles Board of Airport Commissioners, to refund with interest the fees paid for the period from August 23, 1994, to the extent that such fees are unreasonable due to the inclusion in the rate base for such fees of a fair market rental based on an estimated fair market value for the land underlying the airport's airfield and apron, to the following airlines: Air Canada, Air New Zealand, Alaska Airlines, American Airlines, American Trans Air, America West Airlines, Continental Airlines, Delta Air Lines, KLM Royal Dutch Airlines, Mexicana Airlines, Southwest Airlines, Trans World Airlines, United Airlines, United Parcel Service, USAir, and Varig Brazilian Airlines;

5. We will establish the refund amount due under ordering paragraph 4 in a supplemental proceeding;

6. The respondents, the City of Los Angeles, the City of Los Angeles Department of Airports, and the Los Angeles Board of Airport Commissioners, may satisfy their obligation to make refunds under this order by paying refunds in accordance with the December 1, 1993, agreement between the City of Los Angeles, acting by order of and through its Board of Airport Commissioners, the Air Transport Association, the International Air Transport Association, and the Air Carriers listed on Appendix A to that agreement;

7. We declare that the respondents, the City of Los Angeles, the City of Los Angeles Department of Airports, and the Los Angeles Board of Airport Commissioners, should refund the landing fees paid for the period from July 1, 1993, to the extent that such fees are unreasonable due to the inclusion in the rate base for such fees of a fair market rental based on an estimated fair market value for the land underlying the airport's airfield and apron, to each of the airline parties to the December 1, 1993, agreement between the City of Los Angeles, acting by order of and through its Board of Airport

Commissioners, the Air Transport Association, the International Air Transport Association, and the Air Carriers listed on Appendix A to that agreement;

8. We order the respondents, the City of Los Angeles, the City of Los Angeles Department of Airports, and the Los Angeles Board of Airport Commissioners, to give a credit to the airlines serving the airport to the extent that the landing fees are unreasonable due to the inclusion in the rate base of an unjustifiable allocation of costs for Engine Company 51, when the respondents establish the final landing fees for Los Angeles International Airport for the fiscal years 1993-1994 and 1994-1995;

9. We adopt the findings made by Chief Administrative Law Judge John J. Mathias in his recommended decision in this proceeding except to the extent that his findings are inconsistent with the analysis and findings set forth in this order;

10. We grant the motion for leave to file an unauthorized motion filed by the respondents, the City of Los Angeles, the City of Los Angeles Department of Airports, and the Los Angeles Board of Airport Commissioners, on June 6, 1995, and deny the Respondents' Motion to Strike Attachment 1 to the Joint Reply Brief of the Add-On Complainants; and

11. We deny all other pending motions not addressed in this order.

By:

PATRICK V. MURPHY
Acting Assistant Secretary for Aviation
and International Affairs

(SEAL)