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Order 97-3-26

Served: March 19, 1997

UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY
WASHINGTON, D.C.

Issued by the Department of Transportation
on the 19th day of March, 1997

MIAMI INTERNATIONAL AIRPORT RATES PROCEEDING	:	Docket OST-96-1965 -- 138

ORDER

The Department of Transportation, under 49 U.S.C. 47129, has determined that the landing fees and terminal fees charged at Miami International Airport (MIA) are reasonable insofar as the airport will be allocating most of the cost of new terminal facilities which American Airlines will use in the same manner that it allocates the cost of new or expanded terminal facilities being built for use by other airlines. As a result of this allocation, all of the airlines using the airport's terminal facilities will share in paying the cost of the airport's on-going project for expanding and modernizing all of its terminal facilities. The airport is allocating those costs under its established equalization methodology, whose reasonableness was not challenged by any party.

Introduction

On November 19, 1996, Dade County filed a request with the Department of Transportation asking for a determination of the reasonableness of the fees charged by Dade County at MIA. The County asked us to make that determination under 49 U.S.C. 47129, enacted as section 113 of the Federal Aviation Administration Authorization Act of 1994, P.L. 103-305 (August 23, 1994) (the 1994 Authorization Act), and under the expedited procedures established by our regulations, 14 C.F.R. Part 302, Subpart F, adopted at 60 Fed. Reg. 6919 (February 3, 1995).

American Airlines filed an answer supporting the County's request.

Six airlines (the Joint Carriers) -- Air Canada, Delta, Lufthansa, TWA, United, and USAir -- filed an answer arguing that MIA's fees are unreasonable and that the dispute over the airport's fees should be resolved by the Federal Aviation

38 pp

Administration (FAA) under its procedures set forth in 14 C.F.R. Part 13, not by this Department under 49 U.S.C. 47129.[1]

We determined that Dade County's request met the jurisdictional requirements set by statute for proceedings under 49 U.S.C. 47129 and that a hearing should be held on the fee dispute between the airport and the Joint Carriers. We therefore referred the County's request to an administrative law judge (ALJ) for hearing. Order 96-12-23 (December 19, 1996). We determined that we would review the judge's decision.

The ALJ assigned to the case, Ronnie A. Yoder, issued a recommended decision on February 17, 1997, that concluded that the airport's fees were unreasonable. He concluded that American should pay a much larger share of the cost of the terminal facilities that American will use.

Dade County and American contend that we should reverse the ALJ's decision, while the Joint Carriers generally support it but assert that the ALJ should have required American to bear an even larger share of the A/D Concourse's cost. The Airports Council International--North America (ACI), an airport trade association that intervened in this case, urges us to overturn the ALJ's findings on certain issues.

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. We have determined to reverse the ALJ's decision, since we find that the airport has shown that its cost allocation plans are reasonable.

A. BACKGROUND

1. Statutory and Regulatory Background

Federal law imposes limitations on an airport's operations and fees. 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. This requirement was contained in section 511 of the Airports and Airways 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

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[1] USAir recently changed its name to US Airways, but this order will refer to the airline by its earlier name, since that was the name used in all of the pleadings and in the documents submitted in evidence in this case.

use of airport facilities. See Northwest Airlines v. County of Kent, 114 S. Ct. 855 (1994).

Section 113 of the 1994 Authorization Act includes specific provisions for the resolution of airport-airline disputes over airport fees. Before the enactment of section 113, an airline could seek an investigation into the lawfulness of any airport fee under the enforcement procedures adopted by the FAA, but the FAA rules did not ensure that the airline would obtain a hearing or prompt decision on such a complaint.

To give airlines and airport operators an opportunity to obtain a prompt decision on significant disputes about the lawfulness of new fees and increased fees, Congress enacted Section 113 of the 1994 Authorization Act. That section requires the Secretary to determine the reasonableness of a challenged fee within 120 days after the complaint is filed.[2]

In examining fee increases under the new expedited procedures, we may determine whether the new fee is reasonable, but we may not prescribe a fee. 49 U.S.C. 47129(a)(3). The section 113 administrative dispute resolution procedure does not apply to fees imposed by a written agreement between the airport and the airlines or to fees imposed pursuant to a financing agreement or covenant entered into before the enactment of 49 U.S.C. 47129. 49 U.S.C. 47129 (e), (f).

Although the 1994 Authorization Act created new procedures for examining the reasonableness of new or increased airport fees, it did not change the airports' obligation to charge airlines only reasonable fees. Los Angeles International Airport Rates Proceeding, Order 95-4-5 (April 3, 1995) at 3. The statute also did not eliminate our preexisting authority to investigate whether airport fees were unreasonable or otherwise unlawful under federal law. See, e.g., Order 95-4-5 at 15-16, 19-20.

Pursuant to the requirements of section 113 of the 1994 Authorization Act, the Department 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, govern proceedings conducted under 49 U.S.C. 47129.

In addition to creating procedures allowing the expedited resolution of significant airline complaints about the reasonableness of a new or increased airport fee, the statute also gives an airport the right to obtain a determination by the Department on the reasonableness of a fee. 49 U.S.C. 47129(a)(1)(A).

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[2] The Secretary has delegated his authority under 49 U.S.C. 47129 to the Assistant Secretary for Aviation and International Affairs. 49 C.F.R. 1.56a, as amended by 60 Fed. Reg. 11046 (March 1, 1995).

Dade County's request for a determination of the reasonableness of its fees is the first request by an airport for such a determination under 49 U.S.C. 47129.

When we adopted the Rules of Practice for proceedings held under 49 U.S.C. 47129, we chose to make the procedures substantially the same for all cases, whether begun by an airport's request for a determination or an airline complaint. 60 Fed. Reg. at 6925 (February 3, 1995). Thus, while the statutory deadlines apply only to proceedings begun by airline complaints, our rules of practice apply the same deadlines to proceedings begun by an airport's request for a determination on the reasonableness of its fees. 14 C.F.R. 302.613(a), 302.615, and 302.619(a). On the other hand, the statutory refund and financial security procedures apply only when airlines file a complaint. 49 U.S.C. 47129(d).

The 1994 Authorization Act also required the Department to issue standards or guidelines that shall be used to determine whether airport fees are reasonable. In response to this statutory mandate, the Department issued its Policy Regarding Airport Rates and Charges, 61 Fed. Reg. 31994, on June 21, 1996 (the Policy Statement). The Policy Statement replaced the policy statement initially adopted under the 1994 Authorization Act, 60 Fed. Reg. 6906 (February 3, 1995).[3]

We have issued final decisions after a formal hearing under 49 U.S.C. 47129 in two cases, the Los Angeles International Airport Rates Proceeding, Order 95-6-36 (June 30, 1995), affirmed in part and remanded in part, City of Los Angeles Department of Airports v. Dept. of Transportation, 103 F.3d 1027 (D.C. Cir. 1997), and the Second Los Angeles International Airport Rates Proceeding, Order 95-12-33 (December 22, 1995), which has been remanded by the Court of Appeals at our request (these cases are sometimes referred to as the first and second LAX cases).[4]

2. Factual Background

Dade County's plans to expand and rebuild MIA led to this proceeding. As we discuss in more detail below in our decisional section, the airport has adopted a Capital Improvement Program (Capital Program) whereunder the County will reconstruct much of the airport. Included in that plan will be the development of a terminal facility (referred to as the A/D Concourse) that will be used by

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[3] The Air Transport Association, the major U.S. airline trade association, and the City of Los Angeles have filed petitions for review of the Policy Statement. Air Transport Ass'n v. United States Department of Transportation et al., D.C. Cir. No. 96-1253 (filed July 19, 1996). The issues being raised by those parties do not involve the issues raised in this case.

[4] The challenges made by Los Angeles and the airline parties in the judicial review proceedings on the LAX cases do not involve issues relevant to the airlines' dispute with Dade County.

American Airlines. That facility is designed to enable American to efficiently operate a hub at MIA. The airport will also renovate and expand the facilities used by most of the other airlines using the MIA terminal. The Capital Program's total cost is estimated at $4.6 billion. R.D. at 27.

The airport calculates its terminal fees under the equalization methodology, which is also used by a number of other major airports. Under that methodology, each airline pays the same rate whether its facilities are newer or older or have a better or worse location than the facilities used by other airlines. The terminal fees paid by each airline reflect its proportionate share of the airport's total cost of providing terminal facilities and services. The airport is including all of the cost of the Capital Program, including the cost of the A/D Concourse (with certain exceptions), in the terminal costs charged to all airlines using the terminal and will allocate those costs under the equalization methodology.

The Joint Carriers do not oppose the airport's equalization methodology, but they contend that American will be obtaining a terminal facility that will be better and costlier than the facilities available to other airlines and that American should therefore bear the cost of the A/D Concourse project (or at least the cost of the features that distinguish it from the airport's other terminal facilities), in addition to the costs which American has already agreed to bear.

The total cost of the A/D Concourse will be $974 million. American has agreed to invest approximately $150 million in the concourse, about $60 million for an enhanced baggage system and $90 million for computer equipment, furniture, and finishes to its VIP lounge. R.D. at 26. Under the airport's equalization fee methodology, American will also share the burden of paying the rest of the cost of the A/D Concourse as well as the cost of the improvements being made to the facilities used by other airlines at MIA.

3. The Litigation over MIA's Fees

The airport's plans to include the cost of the A/D Concourse in calculating the fees and terminal rents paid by all of the airlines using the airport caused Air Canada, Delta, TWA, United, and USAir to file a suit seeking a declaratory judgment that the fees would be unlawful. Air Canada et al. v. Dade County et al., S.D. Fla. No. 95-2037-Civ-Lenard.[5] They argued that the airport's proposed fees would violate the Anti-Head Tax Act, 49 U.S.C. 40116; the United States' international agreements; various provisions in Florida's constitution and statutes; and the airlines' lease agreements with MIA.

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[5] The five plaintiffs in the district court case included all of the Joint Carriers except Lufthansa.

Dade County both denied the airlines' arguments that the fees would be unlawful and moved to dismiss the case on the ground that the court did not have jurisdiction to decide the legal issues presented by the plaintiff airlines. In November 1996 the court largely granted Dade County's motion. Air Canada et al. v. Dade County et al., Order of November 7, 1996. The court ruled that the reasonableness of the fees should be resolved by the Department, not by the courts. The court held that the FAA should resolve the fee dispute between the airport and the airlines under 49 U.S.C. 47129. The court directed the parties to take appropriate action with regard to the fee dispute under that statute. See Order 96-12-23 at 9.

After the airlines stated that they would not file a complaint against the fees under 49 U.S.C. 47129, Dade County filed a request for a determination of the reasonableness of its fees under that statute. Its filing initiated this proceeding.

4. The Fees in Dispute

On September 20, 1996, the airport mailed to all of the airlines serving MIA a notice stating that the landing fees at MIA for the year beginning October 1, 1996, would be $1.34 for each 1,000 pounds of nominal maximum certified gross landing weight of aircraft. The landing fee in the previous year had been $1.15 per thousand pounds. Dade County Request at 4-5. On September 24 the airport sent the airlines a notice stating that the terminal rents would also be increased on October 1. Dade County Request at 5.

Although the current fiscal year's landing and terminal fees are higher than they would otherwise be due to the A-D Concourse project, the major impact of that project on the airlines' terminal and landing fees will occur in future years, as the airport has only begun the work of building that facility.

B. EARLIER PROCEEDINGS IN THIS CASE

1. Dade County's Request and the Airline Responses

Dade County's request, filed on November 19, 1996, asserted that the airport's increased fees were reasonable and lawful. Dade County contended that its equalization methodology was fair and comparable to the methodology used by a number of other U.S. airports, such as San Francisco International, San Diego International, and Pittsburgh International. The airport further alleged that requiring the other airlines to bear a share of the A/D Concourse in their fees was fair, since American has helped pay for the cost of the renovated facilities now being used by other airlines at MIA, even though the airport has not yet renovated American's facilities, and will share in the cost of facilities that will be built in the future for other airlines. Dade County Brief at 12-17, 46-50.

The airport additionally argued that the cost of the A/D Concourse challenged by the Joint Carriers represents less than half of the Terminal Building improvements costs included in the Capital Program and that American operates a majority of the airport's flights, so that the improvements benefiting American will make up a smaller proportion of the total Terminal Building costs than American's flights make up of the airport's operations. In addition, since the airport allocates most of the terminal costs on the basis of an airline's activity, not the amount of the Terminal Building space used by an airline, American's status as the hub airline at MIA will cause it to bear a relatively large share of the total cost of the Capital Program. Dade County Brief at 3.

Furthermore, Dade County alleged that a consultant, The John F. Brown Company, estimated what the airport's rates and charges would be if the Capital Program included the A/D Concourse and what they would be if it did not. That firm concluded that the airlines' MIA fees would increase from $10 per enplaned passenger in 1995 to $24 per enplaned passenger in 2005 without the A/D Concourse and would only increase to $25 per enplaned passenger in 2005 with the A/D Concourse, a difference of only $1. Dade County Brief at 28.

Dade County contended that its request met the jurisdictional requirements prescribed by the statute and our rules for a proceedings under 49 U.S.C. 47129.

Dade County urged us to resolve the dispute promptly, since it could not afford to invest hundreds of millions of dollars in the A/D Concourse if we have not determined whether the Joint Carriers' objections are valid. Dade County Request at 6-7.

American filed an answer supporting Dade County's position that we should determine whether the MIA fees are reasonable under 49 U.S.C. 47129 and that the airport's fees are reasonable.

Three days after Dade County filed its request for a determination, the Joint Carriers filed a complaint with the FAA under Part 13 of the FAA's rules, 14 C.F.R. Part 13. They asked the FAA to investigate the airport's plans to include most of the cost of American's facilities in the costs used for calculating all of the airlines' fees. Complaint of Air Canada et al. v. Dade County, FAA Docket No. 13-96-20 (Exhibit 20 to the Joint Carriers' Answer is a copy of this complaint, without its exhibits). The Joint Carriers asserted that the airport's fee proposals violated the Anti-Head Tax Act, section 511 of the Airport and Airway Improvement Act, and our Policy Statement on airport rates and charges.

The Joint Carriers also filed an answer to Dade County's request. They did not object in principle to the airport's equalization methodology or to the airport's decision to expand its facilities. Joint Carriers Answer at 9-10. They argued instead that the airport's planned allocation of the cost of the A/D Concourse is unreasonable, that the FAA should determine the reasonableness of the fees, and

that the County's request for a determination must be dismissed since it had not satisfied the jurisdictional requirements of 49 U.S.C. 47129. Among other things, the Joint Carriers argued that Dade County was really seeking an advisory opinion, since the A/D Concourse project had not yet affected the airlines' terminal rents and had had only a slight effect on the airlines' landing fees. Joint Carriers Answer at 24-28.

On the merits the Joint Carriers contended that MIA's plan to allocate the costs of the A/D Concourse among all of the airlines using MIA was unfair and unreasonable. According to them, the Capital Program would provide few benefits for any airline other than American, since the airport needed to construct new facilities for other airlines largely because the A/D Concourse project required the destruction of facilities currently being used by airlines other than American. The Joint Carriers additionally claimed that there was no assurance that the airport will actually build new facilities for any other airlines. Joint Carriers Answer at 41-43, 49-53. The Joint Carriers also asserted that American will receive much better facilities than will the other airlines using the airport. For example, only the A/D Concourse will have a train for the movement of passengers within the terminal. Joint Carriers Answer at 11-12.[6]

Dade County's plans to make the other airlines share in paying the cost of the A/D Concourse are particularly unfair, according to the Joint Carriers, since Dade County is effectively giving American a long-term lease on that facility, whereas the other airlines are unable to obtain any kind of long-term assurance that they can continue using their facilities. Joint Carriers Answer at 38-41.

The Airports Council International -- North America (ACI) moved to intervene in the proceeding.

2. The Instituting Order

We concluded that Dade County's request satisfied the jurisdictional requirements for proceedings under 49 U.S.C. 47129 and that a formal hearing should be held. We determined that Dade County's filing met the sixty-day deadline prescribed by our rules and that the A/D Concourse work has led to an increase in the terminal and landing fees charged during the current fiscal year. Order 96-12-23 at 17-22.

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[6] In their pleadings before we set this case for hearing, the Joint Carriers consistently argued that the airport should charge American with the entire cost of the A/D Concourse, even though American would also continue paying a share of the costs of the remainder of the Capital Program under the equalization methodology. Joint Carriers Answer at 55-57. Only on the eve of the prehearing conference did the Joint Carriers present a list of items that should be charged to American that included many but not all of the elements of the A/D Concourse plan.

We also set forth guidelines on the scope of the issues and evidence that are relevant to our final decision in this case.

We noted that our rules require an airport requesting a determination of the reasonableness of its fees and the airlines answering the request to set forth their entire case in, respectively, its request and their answers and in the accompanying briefs and evidence submissions. 14 C.F.R. 302.605(a) and 302.607(b). We therefore stated that the hearing in this proceeding must be confined to the specific issues raised by Dade County's request and the Joint Carriers' answer and be supported by the evidentiary filings already submitted, unless a party could show good cause for the submission of additional evidence. Order 96-12-23 at 23.

We defined the specific issue to be investigated at the hearing as whether Dade County may include the costs of the A/D Concourse and related facilities in calculating the landing fees and terminal rents paid by all airlines using MIA during the current fiscal year. Order 96-12-23 at 23. We suggested that the ALJ's decision on that issue would require findings on, among other things, the following sub-issues:

> (1) whether the airport's use of the equalization methodology in allocating the cost of the A/D Concourse and other terminal improvements is reasonable;
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> (2) whether the facilities in the A/D Concourse will be substantially better and more costly than the facilities that will be provided for the Joint Carriers;
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> (3) whether the Capital Program will cause the Joint Carriers to obtain facilities comparable to the A/D Concourse, and whether the Capital Program will substantially improve the airport facilities used by the public and by airlines other than American;
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> (4) whether the airport's planned allocation of the costs of the A/D Concourse is consistent with the practices of other airports, and, if not, whether the airport's allocation of those costs is nonetheless reasonable;
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> (5) whether American's likely role as a hubbing carrier and the effect of that role on American's own fee liability will, in light of the airport's methodology for calculating the fees paid by individual airlines (for example, the airport's use of airline activity as a major factor in calculating fees) offset any disparate treatment that might otherwise result from the airport's allocation of the costs of the A/D Concourse;
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> (6) whether American is obtaining a leasehold interest in the A/D Concourse that is substantially different from the rights of other airlines to

use facilities at MIA, and, if so, whether that affects the reasonableness of the airport's allocation of the cost of the A/D Concourse; and

(7) whether an unreasonably large proportion of the cost of the Capital Program will be incurred as a result of the airport's decision to construct the A/D Concourse and other facilities that will be used by American.

We stated, however, that we did not intend this list of sub-issues to be exclusive or mandatory, although we believed that findings on each of these subissues would be necessary for making a finding on the issue of whether the allocation of the cost of the A/D Concourse was reasonable. As discussed below, the ALJ determined not to consider the fourth subissue listed above, the practices of other airports.

We also asked the ALJ to make findings on the amounts by which the landing fees and terminal rents would be unreasonably high if the Department held that the fees are unreasonable as to the various A/D Concourse charges challenged by the Joint Carriers. Since the future scope and costs of the Capital Program were likely to be unknown, we directed the ALJ to indicate the extent to which his findings are based on assumptions on these issues or, if true, whether he could make no findings because of insufficient knowledge. Order 96-12-23 at 24.

We stated that the ALJ was to focus on the reasonableness of the fees currently being paid by the airlines, since proceedings under 49 U.S.C. 47129 involve the reasonableness of fees already imposed by an airport, not on proposed fees. We recognized, however, that a decision on the reasonableness of the current fees necessarily involves an examination of Dade County's plans to continue in future years to include the costs of the A/D Concourse in calculating the fees paid by all airlines using MIA. Order 96-12-23 at 24.

Finally, we directed the ALJ to limit the hearing to the cost allocation issue. We specifically stated that he was not to determine whether the equalization method is inherently reasonable, since the Joint Carriers had not challenged it, or investigate whether the A/D Concourse is desirable or necessary. We have stated that we will not use rates and charges proceedings to second-guess airport decisions on building capital investment projects. We did state, however, that he could consider whether American's needs could have been met through a less expensive alternative. Order 96-12-23 at 24-25.

3. The ALJ's Decision

The ALJ concluded that that airport's fees were unreasonable and that the airport would be allocating approximately $390 million of the cost of the A/D Concourse (and related construction elsewhere at the airport) to all airlines which should be paid entirely by American. R.D. at 20-23.

The ALJ began by finding that the airport, not the Joint Carriers, has the burden of proof and that the airport must therefore show that its fees were reasonable. R.D. at 33-39.

On the major issue in the case, the reasonableness of the airport's allocation of the costs of the A/D Concourse among all airlines using the terminal, the ALJ found that the airport's fees were unfair. In his view, the A/D Concourse would give American better facilities than those available on Concourse G, which meant that the fees were unreasonable. R.D. at 65. In addition, Concourse A/D would include special features required by American that would not be included in the airport's other terminal facilities. On the basis of the so-called betterments list prepared for an airport staffer, as supplemented by late-filed exhibits submitted by the Joint Carriers, he found that many of the features should be charged to American, as reflected in that list. R.D. at 66-73.

As an additional basis for his conclusion that the fees were unreasonable, the ALJ cited the agreement between the airport and American that will give American the exclusive use of the A/D Concourse as long as it operates 250 jet flights a day. He noted that no other airline had a contractual right to continue using specified gates at MIA. R.D. at 77-79.

The ALJ dismissed the airport's argument that other airlines would receive new facilities as well under the Capital Program. The ALJ considered that argument had no weight since there was no guarantee that the airport would build new facilities for any other airline. R.D. at 80.

Despite our direction on the need to consider whether MIA's cost allocation would be consistent with the practices of other airports, the ALJ's recommended decision stated that that issue should not be examined in this case. R.D. at 73.

He concluded the airport had failed to show that its calculation of its fees was accurate, which meant that the fees were unreasonable regardless of the fairness of the allocation of the cost of the A/D Concourse. In making this conclusion, he cited the admission of one airport staffer that she had miscalculated the allocation of Capital Program costs between the landing fees and the terminal fees. R.D. at 82-86.

C. SUMMARY OF THE DEPARTMENT'S DECISION

After reviewing the ALJ's decision, the parties' briefs and evidence, and the hearing transcript, we have determined that the airport's fees are reasonable, with one exception, given the airport's plans to renovate and expand the facilities used by most of the airlines at MIA. We conclude that the airport's allocation of the costs of the A/D Concourse is reasonable, but we are affirming the ALJ's determination that the landing fees improperly include costs for an airfield facility that is not yet in operation.

MIA must be expanded and rebuilt in order to accommodate the growing volume of traffic at the airport. To achieve that goal Dade County adopted the

Capital Program, including the A/D Concourse. The record demonstrates both that the A/D Concourse will be comparable to the facilities being built for other airlines at the airport and that there is a substantial likelihood that the airport will complete the other terminal projects included within the Capital Program. There is no evidence, moreover, that the Joint Carriers' current and planned facilities are inadequate or prevent any of those airlines from operating efficiently.

We find that the ALJ made several legal and factual errors in his decision. Among other things, he wrongly held that the airport had the burden of proof. We think that the Joint Carriers, whose filing of the district court suit led to this proceeding, have the burden. More importantly, we find that the ALJ's decision is based in large part on a rationale that would invalidate the equalization methodology. We further find that the ALJ erred in concluding that the A/D Concourse and the terminal facilities used by other airlines will not be comparable.[7] Since the A/D Concourse is comparable to the facilities used by other airlines, the Policy Statement allows the airport to include the concourse's cost within the cost pool used to calculate the fees charged all airlines using the terminal, as long as the airport's methodology is reasonable and consistently applied. In determining that the facilities are comparable and that the airport's fees are otherwise reasonable, we are relying on the specific facts in the record before us and addressing only the arguments made by the parties on review of the ALJ's decision.

We have considered in this case the practices of other airports that use an equalized methodology for allocating the costs of facilities requested by a hub airline, but we are not approving or disapproving those practices in this case. This proceeding is not a proper forum for reviewing the manner in which airports generally allocate the costs of the facilities used by their largest airline tenants. We are examining the fees of only one airport, and our finding that the fees are reasonable is based in large part on that airport's representation that it will be improving the facilities used by most airlines, not just American. Because our decision is limited to the record in this case, we cannot agree with the Joint Carriers' claim that our decision here will assertedly tell airports whether they may subsidize facilities built for a hub airline. Joint Carriers Brief to DOT at 7.[8]

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[7] The Joint Carriers suggest that our ability to overturn the ALJ's findings is limited. Joint Carrier Reply Brief to DOT at 6. We disagree. See, e.g., Republic Airlines v. CAB, 756 F.2d 1304, 1318 (8th Cir. 1985). In this case, moreover, the ALJ's findings are not based on his credibility findings, and our disagreement with his conclusion largely results from our different policy views, our conclusions on the burden of proof, and our analysis of the airport's fee structure and Capital Program.

[8] We note, however, that this claim by the Joint Carriers ignores the record evidence on the practices of two airports where two of the Joint Carriers -- United and USAir -- have hubs. At those airports, Chicago's O'Hare International and Pittsburgh International, the hub airline apparently obtained new facilities whose cost was charged, at least in part, to all airlines using the airport.

We would be concerned, however, if an airport built facilities demanded and used by a hub airline and charged much of their cost to other airlines in circumstances where the latter airlines would not have comparable facilities needed to replace outmoded facilities.

Before addressing the basic issue of the A/D Concourse's comparability, we will discuss our jurisdiction to determine the reasonableness of the MIA fees, the applicable reasonableness standard, and the burden of proof issue.[9]

D. DECISIONAL STANDARDS AND JURISDICTIONAL AND PROCEDURAL ISSUES

1. The Applicable Reasonableness Standard

As we stated in the order setting this case for hearing, the applicable reasonableness standards are those established by the Policy Statement, 61 Fed. Reg. 31994 (June 21, 1996). Order 96-12-23 at 25.

Three provisions of the Policy Statement are relevant. Paragraph 2.1 of the Policy Statement, the provision applicable to landing fees, requires the airport to apply its methodology "consistently to similarly situated aeronautical users." Paragraph 2.6, which covers non-airfield fees, states, "[T]he airport proprietor may use any reasonable method to determine fees, so long as the methodology is justified and applied on a consistent basis to comparable facilities . . . ." And paragraph 3.1 states, "The airport proprietor must apply a consistent methodology in establishing fees for comparable aeronautical users of the airport."

All of the parties agree that the Policy Statement establishes standards which must be used in determining whether the MIA fees are reasonable. The ALJ, however, believed that an airport's fees must also pass muster under the reasonableness standard used by the Supreme Court in Northwest Airlines v. County of Kent, 510 U.S. 355, 368-369 (1994), a standard derived by the Court from the test used for determining whether a state or local fee or tax violated the Commerce Clause. R.D. at 59-61. In that case the Court examined whether the airport fees at issue were based on some fair approximation of use of the facilities and were not excessive in relation to the benefits conferred on the airlines paying the fees. In part as a result of the ALJ's belief that the Kent County standard was

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[9] We see no need to address the allegations by Dade County and American that the ALJ was not impartial. We also will not take action on the Joint Carriers' complaint that American and the County did not comply with the page limits for briefs, Joint Carriers Reply Brief to DOT at 17, n. 17, since they did not file a motion to strike. A party that violates our procedural rules runs the risk of having its pleadings stricken from the record if the violation warrants such action.

applicable, he concluded that an airport must conduct a cost-benefit analysis to justify its fees. R.D. at 32, 40.

The ALJ misconstrued the law in concluding that airport fees are subject to the Policy Statement guidelines and the Kent County standard. As the Supreme Court stated in Kent County, it used the Commerce Clause standard only because the Anti-Head Tax Act contained no definition of reasonableness and, more importantly, because we had not adopted guidelines for determining reasonableness. 510 U.S. at 366-367. Since we later adopted the Policy Statement, we have now adopted reasonableness guidelines which have replaced the more general standards contained in the Commerce Clause test. As a result, we no longer use the Kent County test in determining whether an airport's fees are reasonable. The Court specifically contemplated in Kent County that the Secretary might choose to adopt different and more stringent standards than those used by the Court. 510 U.S. at 369, n. 14.

The ALJ in any event misinterpreted the Kent County test, which is a relatively general standard for assessing the Constitutionality of state and local government fees. The courts have never held that that test imposed a cost-benefit test on each separate facility whose costs are included in a fee.

2. Jurisdiction

The County contends that we may not determine whether the fees paid by four of the Joint Carriers -- Air Canada, Lufthansa, TWA, and United -- are unreasonable, since they signed lease agreements committing them to pay the fees set by the airport. Dade County relies on the statutory provision barring us from invalidating a fee set by agreement between an airport and an airline. 49 U.S.C. 47129(e). Dade County Brief to DOT at 26-29.

When the County made this argument to the ALJ, he found it without merit. R.D. at 49. We agree with the ALJ. First, as the County recognizes, not all of the Joint Carriers have signed the agreements requiring acceptance of the fees. Secondly, as the Joint Carriers aptly point out, "[The County] is arguing that the Department has no jurisdiction under section 47129 to hear the County's Request regarding the fees." Joint Carriers Reply Brief to DOT at 30. Since the County did not raise this jurisdictional argument when we were considering whether to set its request for hearing, we believe it has waived it. In addition, we are reluctant to hold that an airline's acceptance of a standard agreement requiring the payment of fees set by the airport must be deemed to constitute the kind of agreement barring an airline from obtaining any relief under 49 U.S.C. 47129, as the County contends. Cf. Order 95-4-5 at 15, n. 11.

For different reasons the Joint Carriers believe that we may not determine the reasonableness of the airport's fees under 49 U.S.C. 47129. In response to the County's request for a determination, the Joint Carriers argued on several

grounds that the County's request did not come within our jurisdiction under 49 U.S.C. 47129. They do not ask us to reexamine that issue but reaffirm their position that the County's request does not meet the jurisdictional requirements set by the statute. Joint Carriers Brief to DOT at 4, n. 6.

While we will not repeat our discussion of the jurisdictional issues in our instituting order, Order 96-12-23 at 17-22, we note that the Joint Carriers, as stated in that order, have neither explained why the FAA should resolve the dispute over the M IA fees nor alleged that our examination of the dispute under 49 U.S.C. 47129 has prejudiced their ability to present their case. Order 96-12-23 at 17, n. 11. In addition, the Joint Carriers' jurisdictional claims are moot as a practical matter, since we have the jurisdiction to examine the reasonableness of the airport's fees under our pre-existing authority to investigate airport fees. See Order 95-4-5 at 15-16, 19-20. In contrast to the first LAX case, no party here seeks relief which is arguably available only in cases heard under 49 U.S.C. 47129.

3. Burden of Proof

The Administrative Procedure Act determines which party has the burden of proof in cases heard under 49 U.S.C. 47129, as we stated in the first LAX case. Order 95-6-36 at 17. The statute states, "The proponent of a rule or order has the burden of proof." 5 U.S.C. 556(d). In the first LAX case we held that an airline filing a complaint against an airport's fees has the burden of proof.

Unlike the LAX cases, which were begun by the filing of complaints by airline groups, this proceeding resulted from an airport's request for a determination of reasonableness. It is the first such proceeding, so we have not addressed the question of whether the airport or the airlines have the burden of proof in a case initiated by an airport request.

The ALJ believed that the airport is the proponent of the order in this proceeding because it filed the request for a determination and so must be deemed the party requesting relief from us. R.D. at 33. He also read the Policy Statement and our Rules of Practice for Proceedings Concerning Airport Fees, 14 C.F.R. Part 302, as indicating that an airport would have the burden of proof when it files a request for a determination. R.D. at 36-37.[10] The Joint Carriers support the ALJ's conclusion.

Dade County and American, however, argue that the ALJ erred, for they contend that the Joint Carriers have the burden of proof. Among other things, they cite judicial decisions holding that a party's filing of a suit for declaratory judgment does not change the burden of proof, e.g., Seattle Audubon Society v. Lyons, 871 F. Supp. 1291, 1308 (W.D. Wash. 1994), aff'd on other grounds, 80 F.3d 1401 (9th Cir. 1996).

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[10] Despite his conclusion that the airport had the burden of proof, the ALJ declined to charge American for the cost of some elements of the A/D Concourse because the Joint Carriers had failed to show that those elements should not be charged to all airlines using the terminal. R.D. at 99.

The parties have cited no relevant judicial decisions applying the Administrative Procedure Act's burden of proof provisions in a case analogous to this case, and we did not address the issue in our earlier rulemakings on airport rates and charges or in cases implementing our authority under 49 U.S.C. 47129.

We have determined, however, that the Joint Carriers should have the burden of proof in this case due to the origins of this proceeding and the fundamental nature of this dispute. This proceeding is the direct result of the Joint Carriers' decision to file a district court suit against Dade County in which they challenged the legality of the airport's fees under federal and state law. If the court had resolved the Joint Carriers' claims, as they wanted, the Joint Carriers would have had the burden of proof. We are hearing this case because the court granted Dade County's motion to dismiss the Joint Carriers' federal claims on the ground that this agency, not the courts, was responsible for determining whether an airport's fees were reasonable under federal law. The Joint Carriers had opposed that motion. The court did not dismiss the Joint Carriers' claims that the fees are unreasonable under state law but instead stayed that part of the case pending our decision on the federal reasonableness issue.

Although Dade County filed the request for a determination, it did so in response to the court's order that the parties should take action to present the fee issue to us under 49 U.S.C. 47129. The County, moreover, took that step only after the Joint Carriers had announced that they would not file a complaint under 49 U.S.C. 47129. This proceeding is the direct outgrowth of the Joint Carriers' decision to file suit against the County. We believe in these circumstances that those carriers should have the burden of proof in this proceeding, just as they would have had the burden of proof had the court adjudicated their claims that the fees violate federal law.

The ALJ assumed that the filing of the request for a determination automatically made Dade County the proponent of an order for purposes of the Administrative Procedure Act's provision on burden of proof. R.D., at 33. That assumption is incorrect. In some situations the courts, for example, have held that a defendant, not the plaintiff, has the burden of proof. See, e.g., Seattle Audubon Society, supra; United States v. Springer, 491 F.2d 239, 242 (9th Cir. 1974).

We disagree with the Joint Carriers' contention that Dade County should bear the burden of proof since it decided on its own to file a request for determination with us rather than have the matter resolved by the FAA on the basis of the Joint Carriers' complaint filed with that agency. We see no reason why the airport's compliance with the district court's order for the parties to take action under 49 U.S.C. 47129 should transfer the burden of proof to the airport. In addition, the Joint Carriers' position seems illogical -- the airport must bear the burden of proof if it files a request with us, but the Joint Carriers bear the burden of proof if they present the same dispute to the FAA by filing a complaint with the FAA.

An important factor in our decision on the burden of proof is that our ruling will cause no unfairness for the Joint Carriers. They began the litigation over the airport's fees, they were able to conduct discovery in the district court proceeding, and they have known since the district court issued its order in November 1996 that the fee issue would be litigated in an administrative forum. The Joint Carriers accordingly have had ample opportunity to prepare their case in response to the airport's request for a determination. This is not a case where the airlines had neither notice that there would be litigation over the reasonableness of an airport's fees nor an opportunity to investigate the airport's documentation for the fees in dispute.

As we have explained, this case is unusual because of the circumstances giving rise to the filing of Dade County's request. In our view, if an airport imposes a new or increased fee and then files a request with us for a determination under 49 U.S.C. 47129 that the fee is reasonable, the airport would generally bear the burden of proof in support of its request. Absent the filing of a request or a complaint by affected airlines, the validity of the fee would require no further action by us. When an airport seeks an affirmative determination by us as to a fee's reasonableness and validity, and no airline complaint is simultaneously filed, we see no unfairness in placing the burden of proof on the airport. Moreover, we would expect the airport to be prepared in such a case to demonstrate the fee's reasonableness, including the underlying calculations supporting the fee.

E. THE AIRPORT'S POLICIES ON FEES AND OPERATIONS AND ITS PLANS FOR REBUILDING AND EXPANSION

The key issue in this case is whether the A/D Concourse is comparable to the facilities provided the Joint Carriers. Only if the A/D Concourse is comparable may the airport include the costs of that terminal facility in calculating the fees charged all airlines using the terminal. Para. 2.6 of the Policy Statement. The ALJ, as shown, held that the A/D Concourse was not comparable. As the basis for our analysis of that issue, which causes us to disagree with his findings, we will first describe the airport's equalization fee methodology, the airport's policies on leasing terminal facilities, and the airport's Capital Program. After we discuss the comparability issue, we will address the ALJ's finding that the fees are unreasonable due to the airport's alleged failure to show that the fees were correctly calculated.

1. The Airport's Fee Methodology

Determining whether the airport's allocation of the cost of the A/D Concourse is reasonable requires an understanding of the airport's equalization rate methodology for terminal fees. As explained below in our discussion of comparability, the ALJ's decision held the airport's fees invalid in part because he misapplied the equalization methodology in concluding that the A/D Concourse was not comparable to other facilities.

While the airport uses a cost-based methodology to calculate its terminal fees, it uses the residual method to calculate its landing fees. In calculating the landing fees, the airport complies with its 1954 Trust Agreement, whose terms govern the airport's existing and planned bond issues. Under that agreement the sum of MIA's landing fee revenues and the airport's gross revenues from other sources must equal the sum of the airport's current expenses, reserve fund requirements, and 120 percent of its debt service. Dade County Brief at 11-12.[11] Because the airport obtains substantial revenues from other sources, the landing fees make up a relatively small part of its total revenues. Van Wezel Declaration at 6. However, the airport's terminal fees do not cover all of its terminal costs, so the landing fee reflects some terminal costs as well as the costs of the runways and taxiways.[12]

As noted, the airport's application of the residual fee methodology for landing fees does not affect our analysis of the issues (or the analysis done by the ALJ and the parties). The airport's application of the equalization methodology for terminal fees, in contrast, is important to any analysis of the issues.[13]

The cost-based equalization methodology used by MIA for terminal fees does not base charges for an individual facility or service on the cost of providing that facility or service, even though terminal facilities at MIA are not fungible now and will not be fungible after the completion of the Capital Program. Instead, MIA charges every airline the same rate for each category of terminal space. R.D.

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[11] Under a residual fee methodology, the airlines' landing fees provide the revenue needed by the airport to offset the difference between the airport's total expenses and the revenues collected by the airport from other sources, such as concessions. Compensatory fees, in contrast, are based on the cost of providing a service or facility. 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. See, e.g., Los Angeles International Airport Rates Proceeding, Order 95-6-36 at 5.

[12] The cost of incomplete terminal facilities, however, is not included in the calculation of the terminal rates. Those costs are instead included in the landing fee calculation as a result of the airport's use of a residual fee methodology and its obligations under the 1954 bond agreement. Dade County Request at 10. However, Dade County states that part of the costs of the A/D Concourse have already been included in the terminal rent rate base. Dade County Reply at 17, n. 6.

[13] The parties introduced much evidence on the airport's development of the equalization methodology, as discussed by the ALJ. R.D. at 46-51. Dade County adopted the equalization methodology only after discussions with major airlines using the airport, but the County adopted the fees by ordinance, not by agreement with the airlines. R.D. at 46.

at 40-44.[14] As described by Gary Dellapa, the Director of the Dade County Aviation Department, "All rental rates for the same class of space are equalized, i.e., each airline is charged the same rental rate for the same class of space regardless of age, location, condition or any other factor." Dellapa Declaration at 5.

The Joint Carriers' economics expert, Dr. Daniel Kaplan, similarly described the methodology, Kaplan Declaration at 4-5:

> At most airports, but especially at airports undergoing continual renovations, facilities are not homogeneous. Structures have been built at different times, have different fits and finishes, and consequently have different historic costs. Under a policy of rate equalization, carriers pay the same rates and charges even though the facilities one carrier uses may differ in some respects from the facilities used by another. Under such circumstances, it may not be unreasonable for an airport providing carriers comparable facilities with comparable operational capabilities, but with disparate historic costs, to price those facilities the same.

The airport argues that its rate equalization methodology benefits the airport, since it thereby avoids the significant administrative costs imposed when an airport bases each tenant's rental charges on the costs of the particular space used by that tenant. Kasper Declaration at 4-5. The airport alleges that other major airports use an equalization methodology, for example, San Francisco International, San Diego International, Pittsburgh International, Memphis International, McCarran International (Las Vegas), Reno/Tahoe International, Albuquerque International, Robert Moeller Municipal (Austin), Eppley Airfield (Omaha), and Theodore Francis Green (Providence). Kasper Declaration at 6-8.

More importantly, Dade County asserts that the methodology is fair for the airlines using the terminal, since the airport is undergoing continual renovation and thus each airline will at some time have the advantage of operating from the newest and most modern facilities in the terminal. Kasper Declaration at 5; Tr. 1302-1303. For example, when Dade County began planning several years ago to spend $45 million to expand and refurbish Concourse H, the facility used by USAir, USAir's regional director of properties was quite pleased, since the airline "would benefit from the most modern and efficient concourse at Miami International Airport." He noted as well, "USAir has supported any type of

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[14] As discussed in more detail below, any airline using MIA must pay for the cost of certain special facilities, like the laser baggage sortation system that will be included in the A/D Concourse for American. The County and American state that American will pay the cost of its enhanced baggage system.

improvement program on Concourse H, especially since all the airlines share in the costs." DC Exhibit 6.[15]

The airport's fee structure is also important for our decision, since most of the terminal fees paid by the airlines are not based on the amount of space used by each airline. The fees instead are largely based on each airline's activity, for example, the number of seats flown by each airline. Eighty percent of the airport's revenues from airline terminal fees come from fees based on activity, not on space. Tr. 1305-1306, 1315. As a result, if American's ability to use the A/D Concourse leads to an increase in American's operations at MIA, American's terminal fees will increase. Since American expects the increased efficiencies of the A/D Concourse to enable it to substantially increase its operations at MIA, the County's building of that facility will lead to the Joint carriers paying a smaller share of the total terminal fees. See, e.g., Second Erickson Declaration at 7-8. Even now American is paying almost half of the airport's total airline fees, due to the airport's reliance on airline activity in allocating fee obligations.

2. The Airport's Policy on Leasing Terminal Facilities and Gates

Another MIA policy is relevant to this case. Unlike many other airports, MIA refuses to lease gates and terminal space to airlines under long-term leases. Instead, MIA leases terminal space under thirty-day leases and refuses to lease gates. MIA states that it adopted its policy of refusing to enter into long-term leases with airlines as a result of its experience when two of the major airlines using MIA -- Eastern and Pan American -- went bankrupt. Because those airlines had long-term leases, the airport was unable quickly to make available for other airlines the space that had been used by Eastern and Pan American. R.D. at 26, n. 22. Because Dade County refuses to give any airline a longterm lease on its terminal facilities, the airport can quickly reassign terminal facilities if an airline stops serving MIA.

During the initial discussions between Dade County and American on the original design of the A/D Concourse project, American offered to help finance the project with $200 million to $400 million in special facility bonds in exchange for a long-term lease. The County, however, refused to depart from its longstanding refusal to grant long-term leases for terminal facilities. R.D. at 26.

The Joint Carriers now suggest that Dade County could have avoided this dispute by giving American a long-term lease for the A/D Concourse facilities, in which event the airport could have financed the cost of developing that facility by issuing special revenue bonds. Joint Carriers Brief to DOT at 56. We disagree

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15 The Concourse H project will cost $75 million and should be completed by October 1997. Carreras Supp. Declaration at 4.

with the Joint Carriers' suggestion that we should tell the County to change its policy on terminal leases. We do not view our authority to determine the reasonableness of airport fees as a basis for directing an airport to change fundamental operating principles when, as here, the airport adopted those principles for seemingly valid reasons.

3. MIA's Capital Improvement Project

The fee dispute between Dade County and the Joint Carriers is the result of the Capital Program and the airport's plans to allocate the cost of the A/D Concourse work included within the Capital Program. We are basing our decision to uphold the reasonableness of the fees in large part on the airport's intent to build new facilities for many of the airlines using MIA, not just American, under the Capital Program, and on the airport's undisputed need to renovate and expand its facilities. Our analysis of the airport's expansion and renovation plans differs substantially from the ALJ's analysis, and our findings have helped cause us to reverse his decision.

The record shows that Dade County must build newer and larger terminal facilities. In the brief accompanying its request for a determination, Dade County alleged that MIA "has an urgent need to update and expand its facilities, particularly international gates and [Federal Inspection Services] facilities." It contends that MIA is one of the smallest major U.S. airports in terms of square footage of terminal space per passenger; that, while MIA handles ninety percent as many international travellers as JFK, it has only half as many U.S. customs and immigration inspectors; that MIA has more aircraft operations per runway than any other U.S. airport; and that MIA is severely hampered by having too little space for concessions. Dade County Brief at 20. According to Dade County, the airport's consultants "have concluded that the airfield is at or near its capacity; the Terminal Building is already at capacity; and the [Federal Inspection Services] facilities are deficient to meet even current demand." Dade County Brief at 20. See also Dellapa Declaration at 6-7; DC Exhibit 16.

To expand the airport's facilities, Dade County in 1995 adopted the Capital Program after conducting a four-year study of the airport's needs and expansion possibilities. Completing the Capital Program will take ten years and cost $4.6 billion. Most of that cost will be incurred by rebuilding parts of the Terminal Building and increasing its size from 4.1 million square feet to 8.8 million square feet. About $1 billion of the cost represents the cost of various other infrastructure projects, including the building of a new runway. R.D. at 27; Ballard Declaration at 2-3.

The airport cannot expand its boundaries, so it had to develop an expansion plan that reflects the limits created by its existing layout and location. Haury Declaration at 4.

One phase of the Capital Program will be the creation of the A/D Concourse by reconfiguring and reconstructing its existing concourses A, B, C, and D Concourses. The improvements to the other areas of the Terminal Building are expected to cost $1.8 billion, according to the airport. Dade County Brief at 21-22. Those projects include $63 million in improvements for Concourse F, $346 million to complete a wrap for Concourses D, E, and F, and $341 million for a new Concourse J and improvements to Concourse H. R.D. at 27. See also Carreras Declaration at 2-3; Exhibit DC-47.

The ALJ found that the Capital Program will increase the number of gates at MIA from about 106 to about 121. R.D. at 79. In addition, many of the Capital Program's projects are designed to increase the efficiency of the airport's facilities, for example, by adding dual taxiways where possible.

Several elements of the Capital Program are scheduled to be completed before the completion of the A/D Concourse. For example, the improvements to Concourse F will be substantially completed by May 1998. United uses those facilities. Similarly, the Concourse H improvements, which primarily benefit USAir and Delta, will be done within the next seven months. Dellapa Declaration at 11; Carreras Supp. Declaration at 4. The A/D Concourse, in contrast, will not be completed until 2003. See Sequence 11, plate 17, of the airport's terminal expansion plan. The airport is further along in the new Concourse J project than it is on the A/D Concourse project. Tr. 1528-1530.

The A/D Concourse project will cost $975 million and involves reconfiguring Concourses A through D into a linear design that will enable American to operate its hub more efficiently.

The ALJ dismissed the airport's plans to rebuild the facilities used by most of the Joint Carriers on the ground that there is no guarantee that the airport will actually complete the Capital Program. While the airport has given American a contractual right to the completion of the A/D Concourse, the other airlines have no contracts assuring them that they will receive new facilities. R.D. at 78-81.

The record suggests that the ALJ unreasonably discounted the likelihood that the airport will complete the rest of the Capital Improvement Project. Although there is no guarantee that the airport will finish the rest of the Capital Program, it seems unlikely that it will not do so. Two concourses are due to be completed within the next fourteen months, and substantial construction will be done on another, Concourse E, within that period. The airport, after all, must be expanded, since it has too few gates to accommodate its expected traffic needs. The most likely place for adding those gates is Concourse J. Tr. 1534-1537. See also Second McIntyre Declaration at 2-3. The airport's ultimate goal, after all, is to have 160 gates. Tr. 408. Neither the Joint Carriers nor the

ALJ cited evidence indicating that the airport would not complete the Capital Program.[16]

Although other airlines do not have a contractual right to obtain new facilities, the airport states that it is committed to upgrading all of the airport. And American's control of the A/D Concourse's construction should benefit the airport and be consistent with past practice. Tr. 1263.

F. THE A/D CONCOURSE'S COMPARABILITY WITH OTHER TERMINAL FACILITIES

1. Analytical Principles

As indicated, the airport will use its equalization methodology in adjusting the terminal rents to reflect the cost of the Terminal Building improvements included in the Capital Program. Under that methodology, all of those costs (except the cost of American's baggage sorting system) will be included in the calculation of the terminal rents payable by all of the airline tenants. The airport will similarly include the costs of the other terminal improvements in calculating the terminal rents paid by American, even though American will not directly benefit from those improvements. The Joint Carriers assert, however, that the A/D Concourse is sufficiently different in scope and cost from the facilities available to other airlines that American must pay a large share of the concourse's cost, if not its entire cost. Thus, under our Policy Statement, we need to determine whether the A/D Concourse will be comparable to other terminal facilities.

As explained below, we find that the A/D Concourse will be comparable to other terminal facilities. In making that finding we have been unwilling to engage in a detailed examination of the airport's planning decisions.

When an airport or airline seeks a ruling on the reasonableness of an airport's fees under 49 U.S.C. 47129, we have an obligation to adjudicate the reasonableness of the fees when the jurisdictional requirements for such a proceeding are met. That obligation may force us to consider whether an airport's facility plans are reasonable and fair, insofar as they affect airline fees, but we will be reluctant to engage in any micromanagement of airport planning decisions. See also 60 Fed. Reg. 6906, 6908 (February 3, 1995) (the interim policy statement on airport rates and charges). We have a limited ability in a proceeding heard under 49 U.S.C. 47129 to determine what facilities should be built. Determining whether a particular facility is necessary or appropriate and

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[16] Although the ALJ suggested that various statements by County Commissioners indicated that the County was uninterested in the concerns of other airlines, R.D. at 25, the quoted statements were taken out of context. See Dade County Brief to DOT at 5, n. 5. In addition, the statements were contained in exhibits which were not in the record, as the ALJ noted. R.D. at 25, n. 20.

whether the facility represents a wise use of the funds generated by airport fees can be a difficult judgment for airport planners and airline facility experts, especially when, as here, any new construction must occur within the confines of an operating airport whose existing facilities make practicable some options and not others. The record indicates, for example, that the airport's layout makes it difficult, if not impossible, to reconstruct Concourse G in a manner which would give its airline tenants the same facilities to be enjoyed by the airlines using other concourses. Tr. 484. That such physical limitations make it impossible for all concourses to be exactly the same should not result in a finding that none of the concourses are comparable facilities.

In addition, making fine judgments on comparability is also difficult when an airport like MIA is continually upgrading various facilities without simultaneously upgrading all facilities, a task that would be impossible given the airport's need to remain in service. As a result, terminal facilities will inevitably be of different age, quality, and value. USAir's representative thus admitted that USAir's facilities on Concourse H will be better than Concourses C, D, and G, although comparable to Concourse F. Tr. 1583.

2. The Finish and Dimensions of the A/D Concourse Facilities

The A/D Concourse will be essentially comparable with the other new concourses in terms of size, scope, finish, and furnishings and will be built according to Dade County Aviation Department design guidelines. Carreras Supp. Declaration at 1, 5; Tr. 571-574. See also Haury Declaration at 12-13.

The ALJ nonetheless concluded that the A/D Concourse would be better and more expensive in several respects than the facilities available for other airlines and that American should have to pay for the cost of the better quality of the concourse. He found that it would have bigger holdrooms and gates that could accommodate both international and domestic flights and larger aircraft than the other concourses. He further concluded that these features of the A/D Concourse resulted from demands made by American, not by the airport. R.D. at 66-67.

The record shows that the other rebuilt concourses will be very similar to the A/D Concourse and that the design of the concourse was chosen by the airport. The airport wishes to have as many gates as possible that could be used for both international and domestic flights. Tr. 514-517. The airport also determined the size of the new gates, based on its judgment on potential airline needs, not on the basis of American's current fleet. Tr. 553. The testimony shows, for example, that the gates contained in all of the new or renovated concourses will be of the same size as much as possible. Tr. 551-552, 1577-1578.

The ALJ additionally erred in complaining that the concourse will have gates larger than needed for accommodating American's current fleet of aircraft. R.D. at 67. As noted above, the airport wants to have more international gates. The airport also points out that it needs to build gates that can handle its future needs, including the likelihood

that airlines will be operating bigger aircraft than those currently in use. As a consulting engineer explained, Second Haury Declaration at 6:

> [Dade County] has chosen to build this terminal for operation well into the twenty-first century. By building the gates to accommodate aircraft at least the size of a Boeing 757 aircraft, [the County] will insure that these gates will not become obsolete with the evolution of bigger aircraft and increased air traffic.

3. The ALJ's Misapplication of the Equalization Methodology

Although the A/D Concourse in general will be comparable to the other new terminal facilities, the ALJ mistakenly believed that it must be compared with Concourse G, a facility which will not be rebuilt under the Capital Program. Concourse G is used by TWA and Air Canada, two of the Joint Carriers. Since the A/D Concourse will be better than Concourse G, he concluded that the airport's allocation of the cost of the A/D Concourse was unreasonable on that ground alone. R.D. at 65. As he put it, "The fact that Concourse G, which is occupied by two of the Joint Carriers, is not even 'similar', let alone comparable to Super A, is fatal to Dade County's case." R.D. at 66.

The ALJ erred in thinking that American must pay for more of the cost of the A/D Concourse if that facility will be better than Concourse G. By making this comparison, the ALJ essentially concluded that the equalization methodology is unreasonable, a conclusion never requested by the Joint Carriers and a determination on an issue that we directed him not to address. Order 96-12-23 at 24-25.

Relying on this comparison of the A/D and G Concourses in effect invalidates the equalization methodology. As shown, the equalization methodology generally requires airlines to pay the same rate even though some airlines have terminal facilities that are significantly older or poorer than the facilities used by other airlines. Some airlines at MIA currently have better facilities than other airlines. The ALJ himself quoted statements that three of the Joint Carriers -- Delta, United, and USAir -- now have better facilities than the airlines using Concourse G. R.D. at 65. USAir's representative similarly conceded that its facilities on Concourse H will be better than those available on three other concourses (C, D, and G). Tr. 1583.

The assumption underlying the methodology is that every airline will eventually obtain new facilities, since airports are continuously being modernized, but that at any point in time some airlines will be using older facilities than other airlines. The ALJ thus should not have compared the A/D Concourse with the G Concourse. After all, other airlines already have better space than TWA and Air Canada, yet no one has objected to the airport's use of the equalization methodology to charge TWA and Air Canada the same rate as the airlines with the better space. Notably, neither Air Canada nor TWA has challenged the airport's use of the methodology for space which is not as good as the space used by other airlines.

The ALJ also improperly considered the A/D Concourse in isolation, without giving adequate weight to the other airlines' receipt of new facilities under the Capital Program and the use by some airlines of new facilities whose cost was paid by all airlines using the airport, not just the airlines using the new facility. Because of his erroneous view of the issues, he required the airport to show that the other airlines would receive benefits from the construction of the A/D Concourse that were equivalent to the expense imposed on them. R.D. at 52.

The ALJ could not treat the A/D Concourse as a stand-alone facility for purposes of his cost-benefit analysis. Indeed, one of the subissues specified in our instituting order as requiring examination was whether the Capital Program would substantially improve the airport facilities used by the public and by airlines other than American. Order 96-12-23 at 23. Although the other airlines will not use the A/D Concourse as long as American operates a large hub at Miami, most of them will be obtaining new facilities as well, and American will share in paying the cost of their facilities. The equalization methodology requires every airline to pay the same rate even if other airlines will be obtaining newer facilities. By insisting instead that the A/D Concourse had to be considered in isolation, the ALJ in effect ruled that the equalization methodology was unreasonable. Under his logic, for example, the airport could charge only USAir for the cost of USAir's new facilities unless it determined that other airlines received benefits from that project equalling its cost. But Dade County has never allocated costs on that basis, and it could not do so without scrapping the equalization methodology.

4. The A/D Concourse's Inclusion of Special Features

The ALJ concluded that the A/D Concourse will contain special features -- or require otherwise unnecessary demolition and new construction -- whose costs should be paid by American, not by the other airlines using the terminal. American has agreed to pay $150 million for improvements within the A/D Concourse, but was unwilling to agree to pay for other features in the facility. R.D. at 62. The ALJ concluded that American should bear the cost of other work required for the A/D Concourse, including changes required in other areas of the airport, which will total at least $390 million. R.D. at 101.

Before explaining why we disagree with the ALJ's conclusions, we will address the one element of the A/D Concourse whose cost American agreed to bear, the enhanced baggage system. Under the County resolution establishing the airport's fee methodologies, an airline obtaining an enhanced baggage system must pay the additional cost of the system, since the airport will pay only the cost of a standard baggage system. DC Exhibit 5 at 9. Although American has agreed to pay the additional cost of its enhanced system, according to Dade County and American, they had taken the position in the district court litigation and at the start of this proceeding that American's liability was capped at $60 million. Only at the hearing did the County state that American's liability was not limited. R.D. at 57-59. We are quite troubled, as was the ALJ, by their change in position on the interpretation of their contract. Unlike the ALJ, however, we will not hold the fees unreasonable on that basis. To ensure that the airport and American comply with their current representation that there is no cap

on American's liability for the additional cost of its laser baggage system, we are conditioning our determination of reasonableness on the finding that American will pay the entire additional cost of the baggage system.

While American should clearly pay the cost of the laser baggage system, the record does not show that other elements of the A/D Concourse are so special or unusual that they should be charged entirely to American. In concluding the contrary, the ALJ essentially relied on the so-called "betterments list" included in American's exhibits, American Exhibit 30, and on the Joint Carriers' response to the ALJ's December 23, 1996, order, in which the Joint Carriers expand the list of items to be charged American. R.D. at 70-73. The betterments list names a number of features in the A/D Concourse and projects required by that concourse's construction whose cost arguably should be charged to American. The list was prepared by a consulting firm working for the airport and was requested by an airport staffer, Spencer Ballard, who wished to have a list of A/D Concourse features that were arguably special or unusual for use in bargaining with American.

We think that the ALJ should not have relied on the betterments list as a basis to invalidate the airport's allocation of the cost of the A/D Concourse. Ballard testified at the hearing that he had not considered the list an accurate statement of items that should be charged to American, especially in light of its commitment to operate 250 flights a day. Tr. 1275-1276, 1279.[17] He also testified that he had the list drawn up for purposes of negotiating with American. Tr. 1230-1232. And he testified that, at least as to some items, he did not know what facilities were available to other airlines at MIA. Tr. 1248. In addition, neither the County government nor the airport's executive officials ever approved the list as a statement of policy on the proper allocation of charges.[18]

Furthermore, the Joint Carriers did not provide any significant evidence supporting the ALJ's conclusion that the betterments list was an accurate list of items that could not be charged to other airlines. As noted earlier, the Joint Carriers' response to the County's request for a determination took the position that the entire cost of the A/D Concourse should be borne by American and did not name which elements of that concourse allegedly must be charged to American. Joint Carriers Answer at 55-58. The Joint Carriers submitted a list of the items which should be charged to American only just before the prehearing conference. The Joint Carriers admitted this at the prehearing conference and also conceded that this represented a change in their position. PHC Tr. at 167, 318-320. The ALJ allowed them to introduce those exhibits over the objections of the County and American, which claimed that the late submission of these exhibits prejudiced them, since they had not had a chance to respond to this evidence. Tr. 25-26.

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[17] The ALJ refused to allow him to state whether he now thinks that the list accurately states which items should be charged to American. Tr. 1274, 1277.

[18] We recognize that another airport staff member stated that he thought that American should pay additional costs for the A/D Concourse, Tr. 823-825, but he did not specify which costs should be paid by American. More importantly, the County did not adopt that position.

See also Dade County Brief to DOT at 7-8. We believe that this complaint of procedural unfairness has substantial merit, but in any event the Joint Carriers have failed to show that any of these elements should be excluded.

We have considered specific items included in the list and determined that the airport's allocation of their cost is reasonable. Since we find, as indicated, that the Joint Carriers have failed to submit evidence showing that the items listed on the betterments list should be charged to American, we will discuss only the major items in detail rather than all of the items included in the list (for a list of the items, see R.D. at 88-99).

The principal disputed feature in the A/D Concourse is the automated people mover, or train, included in that concourse. Including the train in the concourse required the concourse to have four stories rather than three, and the fourth story requires the construction of a new FAA tower since the building's increased height will block the vision of the controllers working in the existing tower. R.D. at 88-89.

The airport will build the train due to the concourse's great length, which makes the train necessary for travellers using the concourse. Without the train, a significant number of passengers could not make connections within 65 minutes, the standard established by the Dade County Aviation Department (and a minimum connect time standard greater than the minimum connect time at other airports, including USAir's hub, Pittsburgh). The train will also substantially reduce the distance that passengers must walk. Second Haury Declaration at 3; Tr. 1255, 1368.

Equally importantly, the A/D Concourse will not be the only concourse with a train. Concourse E already has a train, which will be replaced by a better one as part of the Capital Program. Carreras Declaration at 6; Tr. 445.[19]

We cannot agree with the Joint Carriers' claim that the train is needed only to shorten American's minimum connecting time by a small amount. As shown by the testimony at the hearing, the length of the concourse would make it difficult for travellers to reach the more distant gates without the train. Given the existence of another train in one of the airport's concourse, we could not find unreasonable the airport's planned allocation of the cost of the train in the A/D Concourse.

The betterments list includes several demolition projects for facilities that could be used for a significant period beyond their proposed demolition date, for example, Concourses B and C. On the ground that the airport would presumably continue using these facilities until the end of their useful life but for the A/D Concourse project, the ALJ found that such demolition costs must be paid by American. R.D. at 89, 90.

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[19] Although American is currently using Concourse E, it will stop using that facility and therefore not benefit from the train's improvement.

We are unwilling to charge the demolition costs to American. Although building the A/D Concourse will involve the demolition of structures that otherwise could remain in service, the airport's expansion and renovation plans necessarily involve the demolition of existing structures in order to create a larger and more efficient terminal building and other airport facilities. Tr. 408. As Richard Haury, an airport planner, stated in his second declaration, at page 5:

> In my experience as an airport planner, in almost all instances where renovation of terminal facilities occurs at an operating airport to upgrade and increase the size and capacity of the airport, facilities are demolished which could continue to be used in some fashion. Airport planners, however, must take a broader view when determining the future course of airport facilities. Existing facilities built to address the needs of the past must not be allowed to dictate the design of the airport for the future. Concourses B and C were designed and built when traffic at MIA was substantially different. Growth at MIA cannot be deterred by a minority of airlines who would require the continued use of facilities which do not meet the present or future needs of [the Dade County Aviation Department] or the user airlines.

Furthermore, there is no evidence that the airport in the past has required the airline benefiting from a renovation that involved the demolition of existing facilities to pay the cost of the demolition work or the construction needed to replace the demolished facilities. In recent years the airport has demolished several existing structures in order to build new facilities. Van Wezel Declaration at 25.

The ALJ further concluded that American should pay for the cost of the replacement gates allegedly needed because of the gates lost due to the construction of the A/D Concourse. R.D. at 92-94. We disagree. If we assume that the A/D Concourse will result in the destruction of some gates, a finding disputed by Dade County, Dade County Brief to DOT at 37-38, the result will be the construction of new gates, which will benefit the airlines using them at least as much as American. In addition, as with the demolition work, it is unreasonable to expect an airport to preserve existing structures, including gates, when the airport has developed a plan for improving the overall efficiency and capacity of the airport by reconfiguring its facilities. The airport also stated that its need for additional gates (and the loss of gates due to expanded concession space) were the principal reasons for its decision to build Concourse J and other facilities on the airport's south side. Carreras Supp. Declaration at 2; McIntyre Supp. Declaration at 2-3.

The ALJ concluded that the A/D Concourse was unique because it would have dual taxiways, while some other concourses would not have dual taxiways. R.D. at 69. The ALJ himself noted that some of the gates on Concourses E, F, H, and J will have access to dual taxiways. Ibid. See also Tr. 483-486. The airport is unable, however, to provide dual taxiways for all gates due to the existing layout

of the airport, for example, the location of Concourse G, which makes doing that impossible. Tr. 484. Furthermore, on this issue as on others, the Joint Carriers have not shown that the lack of dual taxiways for all of the gates used by them will significantly hamper the efficiency of their operations at MIA.

5. American's Needs as a Hub Carrier as the Cause of the A/D Concourse's Design

Since American operates a hub at MIA, it has operating needs that are different from those of the other airlines serving MIA. American's need to operate its hub efficiently played a large part in the planning of the A/D Concourse, particularly its design as a linear concourse rather than a finger pier concourse. Haury Declaration at 4-5.

Although all of the concourses used by the Joint Carriers will be finger pier concourses, that difference between their facilities and the A/D Concourse does not appear critical to us. Since no other airline operates a hub at MIA, no other airline needs the type of linear design chosen by American for the A/D Concourse. Thus we disagree with the ALJ's assumption that American's ability to use a linear concourse represents a distinction that should require American to pay the cost of the concourse. R.D. at 69.

Significantly, none of the Joint Carriers has alleged that its facilities are inadequate or prevent it from operating efficiently. The airport's current layout, on the other hand, has reduced the efficiency of American's hub operations. Among other things, American must operate out of three concourses, not one, and its aircraft are subject to delays in arriving and leaving gates in those concourses. Holloway Declaration at 2-4. Most, if not all, of the Joint Carriers, in contrast, have their gates in a linear formation, since each uses only one concourse.

The efficiencies of the linear concourse are critical for American, since it plans to operate 5.3 flights per day per gate, a greater number than the other airlines at MIA, who operate on average only 3.2 flights per day per gate. Second Erickson Declaration at 8.

Before the ALJ the Joint Carriers had argued that American could have satisfied its legitimate needs as a hub airline if the airport had chosen to build an alternative terminal facility, the so-called D/E terminal proposal, which would have much less costly than the A/D Concourse plan. American rejected the D/E terminal alternative because it would not adequately meet American's needs and instead insisted on the A/D Concourse design. R.D. at 27. The ALJ did not consider the Joint Carriers' claims that the airport's cost allocation was unreasonable because American's needs could have been met with the less expensive D/E terminal project. He reasoned that Dade County's decision against adopting the D/E terminal proposal was outside the scope of the issues as set by our instituting order. R.D. at 27. While the ALJ's reading of the instituting order may not be correct, we need not review that issue since the Joint Carriers have not asked us to do so.

American and Dade County have also pointed out that American's ability to operate more efficiently -- and thereby operate more flights -- will benefit the other airlines,

since most terminal fees are allocated on the basis of the number of seats flown by each airline. If American operates more flights and thus more seats, it will pay a larger portion of the airport's total terminal fees. While the additional amount of fees paid by American may well not offset the total cost of the A/D Concourse, those additional fee revenues for the airport should provide a substantial benefit for other airlines.

The ALJ believed that the allegations by the airport and American that the A/D Concourse would lead to an increase in American's operations and thereby increase American's share of the airlines' total terminal fee payments were entitled to no weight, since there was no guarantee that American would operate 250 flights a day at MIA. The ALJ's conclusion appears unrealistic to us. While there is no guarantee that American will increase its flights at MIA, there seems to be little likelihood that American will not increase its service. American, after all, is investing $150 million in the concourse and already operates a substantial number of flights at MIA as the hub airline. American will also be paying about half of the cost of the Capital Program, including the A/D Concourse costs, as long as it operates a hub at MIA. This investment should deter American from reducing service at MIA and indeed should encourage it to maximize its use of the new concourse. We doubt for other reasons that American will choose to downgrade its presence, especially since Miami has become the major U.S. gateway for Latin America, a growing market for U.S. airlines. But if American did, for some reason, reduce operations at MIA, the airport could reassign A/D Concourse facilities to other airlines, since the airport designed the concourse so that it could be used by other airlines if necessary.

Finally, while we have discussed the A/D Concourse in terms of American's operations, we note that, as Dade County points out, the travellers using the airport will also benefit from the airport's planning decisions. By enabling American to operate more efficiently, the A/D Concourse will improve the quality of service received by its passengers. For example, the concourse's linear design will make it easier for American's customers to make flight connections and to navigate within the terminal, Tr. 425-426, as will the train.

6. The Effect of American's Long-Term Right to Use the A/D Concourse

Although the airport has had a well-established policy of refusing to grant longterm leases to any airline for terminal facilities, Dade County agreed with American that American would have the exclusive right to use the A/D Concourse as long as American operates a hub with at least 250 flights each day. If American operates fewer than 250 flights, it loses the right to exclusive use of the A/D Concourse (the ALJ quotes the agreement at R.D. 26).

The ALJ concluded that American's assured right to exclusive use of the A/D Concourse supported his conclusion that the airport's fees are unreasonable. American, unlike every other airline using the airport, has an assurance that it can continue using the same facilities on a longterm basis. R.D. at 77-79.

American's long-term use agreement is troubling, since no other airline has similar rights to the terminal facilities it uses, but the agreement does not affect the airport's costs. Since the issue in this case is the cost allocation issue, the airport's agreement with American does not appear to provide a basis for invalidating the airport's allocation of the cost of the A/D Concourse. In addition, American's ability to use the A/D Concourse depends on its fulfillment of a commitment made by no other airline at MIA, American's commitment to operate a specified level of service. Airlines with different leasehold rights for terminal facilities may arguably be charged the same rate for those facilities. Tr. 709-710.[20]

Furthermore, we agree with the airport and American that the agreement seems to have little practical effect. If American operates 250 flights, the airport would have to find American an equivalent number of gates to use anyway. Moreover, in practice the Joint Carriers have used the same facilities for long periods of time, even though they do not have an agreement with the airport assuring them of that right. Delta, for example, has used the same gates on Concourse H for over twenty years. Dellapa Declaration at 3. See also Van Wezel Declaration at 22. As stated by an airport official, "[T]he County would not assign these air carriers to gate positions on other concourses, except in emergencies or unless their interior Terminal Building leased ticket counter or assigned bag areas changed." Van Wezel Declaration at 23.

7. Consistency with Airport's Established Methodology

The Policy Statement requires an airport fee methodology to be applied consistently. The ALJ found that the airport's allocation of the cost of the A/D Concourse was not consistent with its usual methodology, because the airport did not appear to be charging American for the cost of certain features ordinarily charged to an airline. R.D. at 54-56. He made this finding even though one County witness stated that the fees for American's facility would be consistent with the County's usual methodology. R.D. at 55.

The ALJ seemingly erred in concluding at this time that the airport does not intend to follow its established methodology in allocating A/D Concourse costs. American will pay for the cost of the laser baggage system. As for the other features which are ordinarily charged to individual airlines, the County represents that no one knows which of them will be included in the A/D Concourse, since it has not yet been

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[20] The airport offered at the hearing to stipulate that it would give the Joint Carriers comparable contractual rights to continue using specified terminal facilities if those carriers agreed to operate as many flights per gate as American will. R.D. at 17. The ALJ dismissed the stipulation, because he viewed it as an untimely effort to change the record. We doubt that we would reject the stipulation proposal on the ground used by the ALJ, but we agree that the stipulation proposal is entitled to little, if any, weight. Since the other airlines do not operate hubs at MIA, they are unlikely to operate as many flights as American does, which makes the airport's offer impracticable for them.

designed, and that the County intends to charge American for the cost of such features if they are included. Dade County Brief to DOT at 31.

Since the County has states that it will follow its established fee policies in charging for the A/D Concourse, Dade County Brief to DOT at 31, and since the Policy Statement requires an airport's fee methodology to be applied consistently, we will condition our decision on the County's compliance with those policies.

8. The Practices of Other Airports

Our instituting order listed as one of the subissues whether the County's allocation of the cost of the A/D Concourse was consistent with the practices of other airports. Order 96-12-33 at 23. The ALJ nonetheless decided at the pre-hearing conference that he did not regard the issue as relevant. PHC Tr. 178-179, 253. His recommended decision similarly declares that the practices of other airports are irrelevant. R.D. at 73.

The ALJ's decision to essentially ignore the practices of other airports was improper. We stated in the second LAX case that we consider the fee practices of other airports in determining whether a challenged fee is reasonable, Order 95-12-33 at 14, 45, and our decision in the first LAX case considered the practices of other airports, Order 95-6-36 at 20, 21, 31. Our instituting order specifically listed the practices of other airports as an issue requiring examination. While we stated that our list of subissues was not binding on the ALJ, we did not expect him to dismiss one of those issues, as he did here, on the ground that he considered the practices of other airports irrelevant. While an ALJ could in appropriate circumstances reasonably decline to investigate a subissue, the ALJ erred in declining to investigate the issue. He decided on policy grounds that it was irrelevant, notwithstanding our own established position that the issue was relevant.[21]

Although the ALJ was not interested in examining this issue, the parties had already submitted evidence on it and conducted cross-examination on the issue. We find the evidence offered by the airport and American on this issue more persuasive than the Joint Carriers' evidence.[22] The evidence offered by the airport and American indicates that at least two airports -- Chicago's O'Hare International and Pittsburgh -- have built newer or better facilities desired by the hubbing airline and charged all airlines using

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[21] Although the ALJ announced at the prehearing conference that he considered the issue irrelevant, PHC Tr. at 253, his decision inaccurately states that the parties agreed that the issue was irrelevant. R.D. at 14. The County's counsel pointed out at the prehearing conference that our decision in the second LAX case had stated that the practices of other airports were relevant in determining whether an airport's fees were reasonable and that our instituting order stated that the practices of other airports should be considered. PHC Tr. at 252-253.

[22] We are giving less weight to the testimony of the Joint Carriers' witness on the practices of other airports since she appeared to be less knowledgeable on the subject. See, e.g., Tr. 1466-1472, 1480.

the airport for costs of the facility, even if the other airlines thought that the airport's existing facilities were satisfactory.

According to the record in this case, at O'Hare only United's terminal has moving sidewalks, yet the operating and maintenance cost of those is included in the rate base for the equalized rents paid by all airlines. The United terminal has a relatively large amount of glass, which increases the airport's operating and maintenance costs. The other airlines also pay a share of the debt service costs of United's new facility. And the United terminal was built on the site of the international terminal, which was demolished, and the airlines using that terminal moved to a new terminal with much higher costs. Second Erickson Declaration at 3-4.

At Pittsburgh USAir, the hub airline, insisted that the airport build a new terminal, demolish the old terminal, which had a remaining useful life, and force all other airlines to move to the new terminal. The new terminal includes features required only because USAir operates a large hub. And the net effect for American of the airport's replacement of the old terminal with the new one was a tripling of its costs per square foot at Pittsburgh. Second Erickson Declaration at 4-5.

MIA's allocation of the cost of the A/D Concourse is consistent with the testimony on the cost allocation practices of O'Hare and Pittsburgh. Here, in apparent contrast to the situations at those two airports, MIA's terminal facilities, including the facilities used by airlines other than American, clearly need to be expanded and rebuilt. The airport has adopted the Capital Program, including the A/D Concourse, to satisfy those needs. And most of the airlines serving MIA will obtain better facilities as a result of the Capital Program. The record suggests that at O'Hare and Pittsburgh new facilities may have been built for the benefit of the hubbing airline without providing significant benefits for other airlines.

Although the ALJ considered the practices of other airports irrelevant, he inconsistently considered relevant American's objection fourteen years ago to Salt Lake City's plan to build a new terminal for Western Airlines, the hub airline, and charge the cost of that facility to all airlines serving Salt Lake. R.D. at 70. American's position on Salt Lake City's plans, however, has no bearing on this case. American's brief, for example, suggests that Salt Lake City was building a new terminal only for Western and that no other airline would benefit from the project. Exhibit JC-2 at 14-18. That alone distinguishes that case from this one. In addition, the ALJ's position is inconsistent. While he relies on American's position on Salt Lake City's cost allocation plans, he simultaneously refuses to consider the cost allocation practices at two hub airports used by Joint Carriers, O'Hare and Pittsburgh.

However, despite our consideration of the practices of other airports, we wish to caution that we are not endorsing any airport practice whereby non-hub airlines are charged for the costs of facilities built for the benefit of a hub airline. In addition, the practices of other airports are not necessarily decisive for reasonableness detrminations. Our decision here is based on the specific facts of this case, particularly the airport's

need to improve and expand all of its facilities and its plans to build new facilities for most of the airlines at MIA. In this case we are not establishing general policy guidelines on the allocation of costs associated with the construction of new facilities needed by a hub airline. And if the only MIA terminal facility being improved by Dade County were the A/D Concourse, we might find the airport's cost allocation unreasonable.

G. OTHER REASONABLENESS ISSUES

The ALJ also found the fees unreasonable on two other grounds, the airport's alleged failure to establish that the fees were properly calculated and the airport's inclusion of a charge for facilities not yet in operation. We disagree with the ALJ's conclusion that the airport needed to show that its fees were correctly calculated, but we will affirm his decision that the airport has improperly charged airlines costs associated with facilities not yet in use.

1. The Airport's Calculation of the Fee

The ALJ concluded that we had asked him to determine whether the airport had properly calculated the fees. He required the airport to show that its calculation of the fee was correct and, when it failed to do so, held that the fees were unreasonable on that ground, among others. In making this finding the ALJ primarily relied on the admission by an airport witness that her declaration, which was included in the County's request for determination, incorrectly allocated the cost of the A/D Concourse between the current fiscal year's landing fee and terminal fees and that her declaration was therefore inaccurate. R.D. at 82-86.

In choosing to examine the accuracy of the airport's calculation of the fees, the ALJ misconstrued our order and the procedures applicable to proceedings covered by 49 U.S.C. 47129. As we explained in the order setting this case for hearing, the issues in these cases must be limited to those presented in the parties' pleadings filed before our determination on whether a hearing should be held under 49 U.S.C. 47129. The airport and the Joint Carrier pleadings focused on the cost allocation issue -- whether the airport had properly allocated the cost of the A/D Concourse and other airport improvements to all airlines under the equalization methodology -- not on whether the airport had correctly calculated the fees on the basis of that allocation. The Joint Carriers had not challenged the airport's calculation, although they had argued that the current landing and terminal fees were either unaffected or barely affected by the costs of the A/D Concourse project. The Joint Carriers thus did not claim that the airport's charges for costs associated with the A/D Concourse were too large.

We accordingly ruled that the primary issue in this case was whether the County may include the costs of the A/D Concourse and related facilities in calculating the landing fees and terminal rents paid by all airlines using MIA during the current fiscal year. Order 96-12-23 at 23. Whether the airport's witness incorrectly allocated the current

costs of the A/D Concourse between the landing fee and the terminal fee is irrelevant to that issue.

While our instituting order stated that the ALJ should determine whether the airport's "fee methodology and calculation are valid," Order 96-12-23 at 23, the context of this direction and the nature of the dispute between the airport and the Joint Carriers indicate that the calculation of the fee was not at issue. As is obvious from our discussion in that order, the key issue was whether or not the airport's allocation of the cost of the A/D Concourse to all airlines under the equalization methodology was reasonable.[23]

The witness' error, moreover, has no impact on the cost allocation issue, since it neither affects the amount of the fees being paid by the airlines nor the County's basis for its allocation of the cost of the A/D Concourse.[24] The Joint Carriers, moreover, have failed to show any prejudice from the County's error. As noted, they challenged the airport's allocation of the A/D Concourse costs, not the airport's calculation implementing that allocation. Indeed at the hearing they waived their right to cross-examine the witness, Tr. 1043, who volunteered during the ALJ's questioning that she had made the error. The error means only that the County's original evidence incorrectly attributed too large a share of the A/D Concourse costs to the landing fee and too small a share to the terminal fees.

Finally, we cannot agree with the Joint Carriers' summary claim that they have been prejudiced by the error. Joint Carriers Brief to DOT at 17. They have always based their objections to the airport's allocation of the costs of the A/D Concourse on principle, that is, on the contention that they should not be charged for the cost of a facility designed to meet American's needs, not on a contention that the airport inaccurately calculated the costs of the project or the manner in which those costs would be divided between the landing fees and the terminal fees.[25]

2. The Airport's Charge for Facilities Not Yet in Use

The final reasonableness issue in this case involves the ALJ's disallowance of the airport's inclusion in the landing fee of a charge for the cost of a new FAA control tower, which has not been built and so is not yet in use. R.D. at 86-87. He disallowed the

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[23] In contrast, in the Puerto Rico Ports Authority Rates Proceeding, the airport's calculations were at issue. See Order 95-4-6 (April 3, 1995) at 5-6, 17-19.

[24] We give no weight to the Joint Carriers' speculation on the reason for the witness' change in position, which is unsupported by record evidence. Joint Carriers Brief to DOT at 20, n. 16, and 67.

[25] We also will not find the fees unreasonable on the basis of another alleged error in the calculation identified by the ALJ. R.D. at 86. The Joint Carriers should pursue that issue directly with the airport. The airport claims that the calculations are correct. Dade County Brief to DOT at 25, n. 18.

charge on the ground that paragraph 2.4 of the Policy Statement allows airports to charge users for the cost of planning future airfield facilities but does not otherwise allow charges for the cost of constructing facilities which are not yet in use. The airport's charge includes costs for preliminary design and engineering for the tower.[26]

The airport's briefs do not address the ALJ's determination or ask us to reverse it. We will therefore affirm it.

H. DISMISSAL OF FAA PROCEEDING

As noted, the Joint Carriers filed a complaint with the FAA asking that agency to determine that the airport's fees were unreasonable due to the allocation of the cost of the A/D Concourse. Complaint of Air Canada et al. v. Dade County, FAA Docket No. 13-96-20. The FAA has stayed further proceedings on that complaint pending the completion of this proceeding.

Since we determined after a formal hearing that the airport's fees are reasonable, there is no reason why the FAA should conduct any investigation on the basis of the Joint Carriers' complaint. We are therefore asking the FAA to dismiss that complaint.

ACCORDINGLY:

1. We find that the landing and terminal fees charged the airlines by Dade County for Miami 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 fees include charge for the costs of building a new FAA control tower other than planning costs;

2. We find that the terminal and landing fees at Miami International Airport are otherwise reasonable insofar as those fees are affected by the costs of the Capital Improvement Program and the A/D Concourse;

3. Our determination that the terminal and landing fees are reasonable is subject to the following conditions: the obligation of American Airlines to pay the additional cost of the enhanced baggage system to be included in the A/D Concourse shall not be limited, and Dade County shall comply with its existing resolution governing airport fees by charging American Airlines the cost of items designated therein as the responsibility of the airline using terminal facilities;

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[26] The ALJ, on the other hand, concluded that the airport could include charges for building terminal facilities, since the Policy Statement states that the limits on charges for building facilities are effectively limited to airfield facilities. R.D. at 86, n. 120, citing 61 Fed. Reg. 32002.

4. We adopt the findings made by Administrative Law Judge Ronnie A. Yoder 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;

5. We request the Federal Aviation Administration to dismiss Complaint of Air Canada et al. v. Dade County, FAA Docket No. 13-96-20; and

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

By:

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

(SEAL)

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