UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC

Northwest Airlines, Inc., Delta Airlines, Inc.
AirTran Airways Inc., Continental Airlines, Inc.,
Southwest Airlines, Inc.

Complainants

v.

Indianapolis Airport Authority, Indianapolis
International Airport, BAA-Indianapolis

Respondents.

FAA Docket 16-07-04

DIRECTOR'S DETERMINATION

I. INTRODUCTION

This matter is before the Federal Aviation Administration (FAA) based on the Complaint filed under 14 Code of Federal Regulations (14 CFR) Part 16, by Northwest Airlines, Inc., Delta Air Lines, Inc., AirTran Airways Inc., Continental Airlines, Inc., and Southwest Airlines, Inc. (Airlines/Complainants). The Complaint was filed against the following Respondents, Indianapolis Airport Authority, Indianapolis International Airport, BAA-Indianapolis (Authority).

In this Part 16, Complainants allege that the Authority is violating 49 U.S.C. § 47101 *et seq.*, and Grant Assurances 22, 23, 24, and 25 as well as the FAA's *Policy Regarding Airport Rates and Charges* and the FAA's *Policy and Procedures on the Use of Airport Revenue*. Complainants argue that the violations stem from an already executed amendment to an agreement between the Authority and Federal Express Corporation ("FedEx"), involving the development and financing of a new aircraft parking apron at Indianapolis International Airport (IND) for FedEx's exclusive use. The amendment in question is known as *Amendment No. 3 to the Airport-FedEx Land Lease Agreement* (Amendment No. 3), dated April 14, 2006.

As part of this Complaint, Complainants request that the FAA (i) find Amendment No. 3 to be unlawful in so far as it affords FedEx Landing Fee Rent Credits that result in a funding shortfall compared to the total cost of the FedEx Cargo Apron, (ii) prohibit the Authority from adding any funding shortfall related to the FedEx Cargo Apron to the airfield cost center or otherwise include the cost of the FedEx Cargo Apron in the computation of landing fees at the Airport, and (iii) award such further relief and take

such further action as the FAA deems necessary or appropriate, including, but not limited to, seeking civil penalties.[1]

The Authority denies all allegations that it violated its Federal obligations and asks the FAA to dismiss the Complaint.[2] Specifically, and as affirmative defenses, the Authority answers that (1) "as a result of the settlement offer made by the Authority, the Complaining Airlines are not directly and substantially affected as a result of Amendment No. 3" (2) "the Authority did not unjustly discriminate against the Complaining Airlines," (3) "the Authority did not grant an exclusive right to FedEx," (4) the "the Authority did not violate the Rates and Charges Policy," (5) "the Authority did not violate the Revenue Use Policy," and (6) "the Authority did not violate its self-sustainability obligations."[3]

The FAA's decision in this matter is based on the applicable Federal law and FAA policy, and review of the pleadings and supporting documentation submitted by all the parties, which comprise the administrative record reflected in the attached FAA Exhibit 1.

II. THE COMPLAINANTS

The Complainants, Northwest Airlines, Inc., Delta Air Lines, Inc., AirTran Airways Inc., Continental Airlines, Inc., and Southwest Airlines, Inc., in this case are referred to as "Airlines" or "Complainants." Northwest is a U.S. certificated air carrier providing scheduled passenger air service to airports throughout the United States, including IND, and the world. AirTran is a U.S. certificated air carrier providing scheduled passenger air service to airports throughout the United States, including IND, and the Bahamas. Delta is a U.S. certificated air carrier providing scheduled passenger air service to airports throughout the United States, including IND, and the world. Continental is a US certificated air carrier providing scheduled passenger air service to airports throughout the United States, including IND, and the world.[4] Southwest is a US certificated air carrier providing scheduled passenger air service to airports throughout the United States, including IND.[5]

Each of the Complaining Airlines is a signatory to the *Agreement and Lease of Premises at Indianapolis International Airport* (Lease Agreement), which sets landing fee rates at the Airport on a residual basis until the Lease Agreement expires by its own terms at the end of December 2010.[6]

---

[1] FAA Exhibit 1, Item 1, Page 2
[2] FAA Exhibit 1, Item 10, Page 48
[3] See FAA Exhibit 1, Item 10, Page 12
[4] FAA Exhibit 1, Item 2, Page 2
[5] FAA Exhibit 1, Item 6, Page 2
[6] FAA Exhibit 1, Item 10, Page 2 The Airport admits that each of the Complaining Airlines is a signatory to the Airport Lease Agreement; see FAA Exhibit 1, Item 10, page 9

III. THE AIRPORT AND ITS FEDERAL OBLIGATIONS

The Indianapolis Airport Authority (Authority) owns and operates the Indianapolis International Airport (IND) in Indianapolis, Indiana.[7] IND is a commercial service airport that holds a 14 CFR Part 139 Operating Certificate. The Airport occupies approximately 7,700 acres, about 12 square miles of land in Wayne and Decatur Townships of Marion County, all within the city of Indianapolis, Indiana.[8] IND is the base for more than 74 based aircraft and serves a wide spectrum of aeronautical activities totaling over 213,000 annual operations, over 96,000 of which are air carrier operations.[9]

The airport is the largest in Indiana and a major hub for FedEx. The 1.9 million square foot FedEx hub at IND is FedEx's second largest facility.[10] FedEx is also a signatory to the Lease Agreement.[11] The Airport is completely managed by a private firm through a management contract with the airport operator, Respondent BAA.[12]

FAA records indicate that the planning and development of IND has been financed, in part, with funds provided by the FAA under the Airport Improvement Program (AIP) and, between 1982 and 2007, the Airport received more than $355 million in federal airport development assistance in AIP grants.[13] In addition, part of IND was conveyed by the War Assets Administration (WAA) to the City of Indianapolis as surplus property. As a result, the Airport incurred obligations in the form of restrictive deed covenants arising from conveyances of land under the powers and authority contained in the provisions of the Surplus Property Act (SPA) of 1944 as amended, 49 U.S.C. § 47151-153.[14]

IV. ISSUES UNDER INVESTIGATION

The issues under investigation before the FAA are whether the *Amendment No. 3 to the IAA-FedEx Land Lease Agreement* (Amendment No. 3), dated April 14, 2006[15] is consistent with

- Grant Assurance 22 *Economic Nondiscrimination*, 49 U.S.C. § 47107 (a)(1) through (6), which requires the airport sponsor to make the Airport available to all types, kinds, and classes of aeronautical activity on reasonable terms, and without unjust discrimination.

---

[7] The Director notes that the airport sponsor in this case is the Airport Authority. It is that entity that is responsible for compliance with the applicable Federal obligations. However, the term Airport is also used to describe the Respondents and therefore, in these proceedings Authority and Airport refer to the airport sponsor. See FAA Exhibit 1, Item 10, Pages 12-13
[8] http://www.indyindiana.com/indianapolis_airport.htm
[9] FAA Exhibit 1, Item 16
[10] http://imaps.indygov.org/ed_portal/template.asp?page=trans_air
[11] FAA Exhibit 1, Item 10, Page 2
[12] http://www.indyindiana.com/indianapolis_airport.htm
[13] FAA Exhibit 1, Item 18
[14] FAA Exhibit 1, Item 16
[15] FAA Exhibit 1, Item 1, Pages 1-2

- Grant Assurance 23 *Exclusive Rights*, 49 U.S.C. § 47107(a) (4), which prohibits the granting of an exclusive right for the use of the airport.

- Grant Assurance 24, *Fee and Rental Structure*, 49 U.S.C. § 47107(a)(13) which requires, in pertinent part, that the owner or sponsor to maintain a fee and rental structure for the facilities and services being provided to airport users which will make the airport as self-sustaining as possible under the circumstances existing at the airport.[16]

- Grant Assurance 25 *Airport Revenues*, 49 U.S.C. §§ 47107(b) and 47133, which requires the airport sponsor to ensure that all revenues generated by the airport will be expended by it for the capital or operating costs of the airport; the local airport system; or other local facilities which are owned or operated by the owner or operator of the airport and directly and substantially related to the actual air transportation of passengers or property; or for noise mitigation purposes on or off the airport.[17]

V. BACKGROUND

Since 1993, FedEx and the Authority have had an operating lease agreement. The 1993 *Amended and Restated Land Lease Agreement* is one of two leases currently in effect between FedEx and the Authority and has been amended three times. It was first amended as Amendment No.1 in October 21, 1994, a second time as Amendment No. 2 on June 16, 2000, and finally, by Amendment No. 3 on April 14, 2006. Amendment No. 3 is at issue here.[18]

In the spring 2006, the Authority informed the designated carrier-representative for the Signatory Airlines (Northwest Airlines)[19] that the Authority had been discussing with FedEx the expansion of its domestic cargo facilities and operations at the Airport.[20] On April 5, 2006, the Authority provided Northwest Airlines a summary of the terms of an agreement, and provided the other airlines with written information about the FedEx agreement. The Authority indicated that Amendment No. 3 would be signed by FedEx within two weeks, on April 14, 2006. As planned, on April 14, 2006, the Authority and FedEx executed Amendment No. 3 for the financing and development of new cargo facilities and an adjacent apron at IND for FedEx's exclusive use.

---

[16] Includes claims related to the *Policy Regarding Airport Rates and Charges*, 61 Fed. Reg. 31944 (June 21, 1996)

[17] Includes claims related to the *Policy and Procedures Concerning the Use of Airport Revenue*, 64 Fed. Reg. 7696 (February 16, 1999)

[18] FAA Exhibit 1, Item 10, Page 2

[19] An airline that enters into an agreement that is substantially similar to the Airport Use Agreement is considered to be a "Signatory Airline." See FAA Exhibit 1, Item 10, Page 2

[20] However, it is noted that the Authority denies that representatives of the Signatory Airlines were not informed until the Spring of 2006 that there were ongoing discussions with FedEx regarding the expansion of the cargo facilities and that the Authority introduced the cargo expansion project to the Signatory Airlines as early as the Summer of 2005 during the Airport's capital budget review process. See FAA Exhibit 1, Item 10, p. 11. The Director notes that the Authority failed to include in the record the reference to validate this claim despite a note in its Answer, but whether the Complainants were notified in the Spring of 2006 or a few months earlier in the Summer 2005 is not critical, the issue is left as represented here.

Specifically, Amendment No. 3 facilitates a major expansion of FedEx's operations at the Airport, including the financing and construction of a 400,000 square foot expansion of its existing sort building, a new 175,000 square foot secondary sort building, a 40,000 square foot aircraft maintenance building, and an 8,000 square foot facility for ground support equipment, all of which will belong to the Authority upon completion of construction. The Authority expects FedEx to invest approximately $162 million in expanding those facilities.[21] The Complainants allege that under Amendment No. 3, the Authority will build the FedEx Cargo Apron at a cost to the Authority of approximately $49 million.[22]

On May 3, 2006, the Authority sent an email to the members of the IND Airline-Authority Affairs Committee Members (Airlines/Complainants) announcing that the negotiations for the FedEx expansion at IND had been successfully completed. The Authority notified the Airlines that the agreement would be presented to the Airport's Board for approval on May 5, 2006. On May 5, the Airlines sent the Authority a letter objecting to the Special Facility Rent Credit, also called the Landing Fee Credit or the Rent Credit ("Credit" or "Rent Credit"), which is part of Amendment No. 3. That same day, the Airport Board approved Amendment No. 3.[23]

Throughout 2006 and 2007, Complainants and the Authority attempted unsuccessfully to resolve the dispute and in February 2007, the Authority provided Complainants with an actual copy of Amendment No. 3.[24] On April 13, 2007, Complainants filed a 14 CFR Part 16 Complaint with the FAA. It was docketed as FAA Docket No. 16-07-04. [25] On April 20, 2007, Continental Airlines, Inc. submitted a motion to join the Complaint as a Joint Complainant.[26] An Answer to this motion was filed on May 1, 2007.[27] On May 1, 2007, the Authority submitted a Motion Requesting Extension of Time.[28] An Answer by Complainants to this motion was filed on May 2, 2007.[29]

On May 4, 2007, FAA issued an Order extending the due date for the Answer until June 4, 2007.[30] Also on that day, Southwest Airlines Co., filed a motion to join the Complaint as a Joint Complainant[31] to which on May 9, 2007, the Authority filed an Answer. [32] On June 4, 2007, an Answer and Motion to Dismiss was filed by the Authority.[33] This was followed on June 8, 2007, by an Unopposed Motion for Extension of Time.[34] On June 22, 2007, Complainants filed a Reply and Answer to the Authority's

[21] FAA Exhibit 1, Item 10, Pages 2-3
[22] FAA Exhibit 1, Item 1, Page 2
[23] FAA Exhibit 1, Item 1, Pages 18-19
[24] FAA Exhibit 1, Item 1, Page 19
[25] FAA Exhibit 1, Item 1
[26] FAA Exhibit 1, Item 2
[27] FAA Exhibit 1, Item 3
[28] FAA Exhibit 1, Item 4
[29] FAA Exhibit 1, Item 5
[30] FAA Exhibit 1, Item 7
[31] FAA Exhibit 1, Item 6
[32] FAA Exhibit 1, Item 8
[33] FAA Exhibit 1, Item 10
[34] FAA Exhibit 1, Item 11

Motion to Dismiss.[35] This was followed by the Authority's Rebuttal on July 16, 2007.[36] On July 30, 2007, Complainants filed a Motion for Leave to File and Response[37] which was followed on August 9, 2007 by the Respondent's Answer to Complaining Airlines' Motion for Leave to File and Response.[38] On December 5, 2007, the FAA issued a Notice of Extension of Time.[39]

On March 28, 2008, the FAA issued a request for additional information with six (6) questions from the Respondent (FAA Questions). The FAA requested the following information:

(1) Provide a layout of the FedEx facilities located on the Airport; (2) Is the FedEx Apron subject to the Credit located within the Airport Cost Center known as the "Airfield Area" under the Agreement and Premises Lease; (3) Were the provisions of sections 8.01 and 8.03 applied to the FedEx Apron subject to the Credit; (4) How are the funds representing the Credit applied to the Special Facilities Debt of the FedEx Apron; (5) Does the Agreement and Lease of Premises explicitly provide for increasing the Airfield Area requirement to account for the Credit under the FedEx Amendment No 3; (6) What other types of credits have been claimed by Signatory Airlines under the provisions of the Agreement and Premises Lease.[40]

On May 12, 2008, the FAA received the response to the FAA Questions from the Authority.[41]

On June 11th, 2008, the FAA received the response to the Authority's response to the FAA Questions from the Complainants.[42]

VI. APPLICABLE LAW AND POLICY

The federal role in civil aviation has been augmented by various legislative actions that authorize programs for providing federal funds and other assistance to local communities for the development of Airport facilities. In each such program, the Airport sponsor assumes certain obligations, either by contract or by restrictive covenants in property deeds and conveyance instruments, to maintain and operate its Airport facilities safely and efficiently and in accordance with specified conditions. Commitments assumed by Airport sponsors in property conveyance or grant agreements are important factors in maintaining a high degree of safety and efficiency in airport design, construction, operation and maintenance, as well as ensuring the public fair and reasonable access to the Airport.

[35] FAA Exhibit 1, Item 12
[36] FAA Exhibit 1, Item 13
[37] FAA Exhibit 1, Item 14
[38] FAA Exhibit 1, Item 15
[39] FAA Exhibit 1, Item 17
[40] FAA Exhibit 1, Item 22
[41] FAA Exhibit 1, Item 20
[42] FAA Exhibit 1, Item 21

Title 49 U.S.C. § 47101, *et seq*., provides for federal airport financial assistance for the development of public-use airports under the Airport Improvement Program (AIP) established by the Airport and Airway Improvement Act of 1982, as amended. Title 49 U.S.C. § 47107, *et seq*., sets forth assurances to which an airport sponsor agrees as a condition of receiving federal financial assistance. Upon acceptance of an AIP grant, the assurances become a binding contractual obligation between the airport sponsor and the federal government. The assurances made by airport sponsors in AIP grant agreements are important factors in maintaining a viable national airport system.

Airport Sponsor Assurances

As a condition precedent to providing airport development assistance under the Airport Improvement Program, 49 U.S.C. § 47107, *et seq*., the Secretary of Transportation and, by extension, the FAA must receive certain assurances from the airport sponsor. Title 49 U.S.C. § 47107(a) sets forth the statutory sponsorship requirements to which an airport sponsor receiving federal financial assistance must agree.

The FAA has a statutory mandate to ensure that airport owners comply with these sponsor assurances.[43] FAA Order 5190.6A, *Airport Compliance Requirements* (FAA Order 5190.6A), issued on October 2, 1989, provides the policies and procedures to be followed by the FAA in carrying out its legislatively mandated functions related to federally obligated airport owners' compliance with their sponsor assurances. The FAA considers it inappropriate to provide federal assistance for improvements to airports where the benefits of such improvements will not be fully realized due to inherent restrictions on aeronautical activities. The grant assurances relevant to the issues raised in the Complaint are the following:

Grant Assurance 22, Economic Nondiscrimination

The owner of any airport developed with federal grant assistance is required to operate the airport for the use and benefit of the public. Federal grant assurance 22, *Economic Nondiscrimination*, (Assurance 22) deals with both the reasonableness of airport access and the prohibition of adopting unjustly discriminatory conditions as a potential for limiting access. Assurance 22 of the prescribed sponsor assurances implements the provisions of 49 U.S.C. § 47107(a)(1) through (6), and requires, in pertinent part:

> [The airport owner or sponsor] will make the airport available as an airport for public use on reasonable terms and without unjust discrimination to all types, kinds and classes of aeronautical activities, including commercial aeronautical activities offering services to the public at the airport. [Assurance 22(a).]

[43] *See, e.g.*, the Federal Aviation Act of 1958, as amended and recodified, Title 49 U.S.C. §§ 40101, 40113, 40114, 46101, 46104, 46105, 46106, 46110; and the Airport and Airway Improvement Act of 1982, as amended and recodified, Title 49 U.S.C. §§ 47105(d), 47106(d), 47107(k), 47107(l), 47111(d), 47122

> Each fixed-base operator at the airport shall be subject to the same rates, fees, rentals, and other charges as are uniformly applicable to all other fixed-base operators making the same or similar uses of such airport and utilizing the same or similar facilities. [Assurance 22(c).]
>
> [The airport owner or sponsor] will not exercise or grant any right or privilege which operates to prevent any person, firm, or corporation operating aircraft on the airport from performing any services on its own aircraft with its own employees (including but not limited to maintenance, repair, and fueling) that it may choose to perform. [Assurance 22(f).]
>
> The sponsor may establish such reasonable, and not unjustly discriminatory, conditions to be met by all users of the airport as may be necessary for the safe and efficient operation of the airport. [Assurance 22 (h).]
>
> The sponsor may prohibit or limit any given type, kind or class of aeronautical use of the airport if such action is necessary for the safe operation of the airport or necessary to serve the civil aviation needs of the public. [Assurance 22(i).]

Subsection (h) qualifies subsection (a), and subsection (i) represents an exception to subsection (a) to permit the sponsor to exercise control of the airport sufficient to preclude unsafe and inefficient conditions that would be detrimental to the civil aviation needs of the public.

In all cases involving restrictions on airport use imposed by airport owners for safety and efficiency reasons, the FAA will make the final determination on the reasonableness of such restrictions when those restrictions deny or limit access to, or use of, the airport. [FAA Order 5190.6A, Section 4-8.]

Assurance 23, Exclusive Rights

Federal grant assurance 23, *Exclusive Rights*, (Assurance 23) implements the provisions of 49 U.S.C. §§ 40103(e) and 47107(a)(4), and requires, in pertinent part, that the owner or sponsor of a federally obligated airport:

> "…will permit no exclusive right for the use of the airport by any persons providing, or intending to provide, aeronautical services to the public."
>
> "…will not, either directly or indirectly, grant or permit any person, firm, or corporation, the exclusive right at the airport to conduct any aeronautical activities…"
>
> "…will terminate any exclusive right to conduct an aeronautical activity now existing at such an airport before the grant of any assistance under Title 49 United States Code."

In FAA Order 5190.6A, the FAA discusses its exclusive rights policy and broadly identifies aeronautical activities as subject to the statutory prohibition against exclusive rights. While public-use airports may impose qualifications and minimum standards upon those who engage in aeronautical activities, FAA has taken the position that the application of any unreasonable requirement or any standard that is applied in an unjustly discriminatory manner may constitute the constructive grant of an exclusive right. Courts have found the grant of an exclusive right where a significant burden has been placed on one competitor that is not placed on another. [*See* e.g. Pompano Beach v FAA, 774 F2d 1529 (11th Cir, 1985).] An owner or sponsor is under no obligation, however, to permit aircraft owners to introduce onto the airport equipment, personnel, or practices which would be unsafe, unsightly, detrimental to the public welfare, or which would affect the efficient use of airport facilities. [*See* FAA Order 5190.6A, Section 3-9 (e).]

Leasing all available airport land and improvements planned for aeronautical activities to one enterprise will be construed as evidence of intent to exclude others unless it can be demonstrated that the entire leased area is presently required and will be immediately used to conduct the activities contemplated by the lease. [*See* FAA Order 5190.6A, Section 3-9(c).]

FAA Order 5190.6A provides additional guidance on the application of the statutory prohibition against exclusive rights and FAA policy regarding exclusive rights at public-use airports. [*See* FAA Order 5190.6A, Chapter 3.]

Assurance 24, Fee and Rental Structure

Grant Assurance 24, "Fee and Rental Structure," of the prescribed sponsor assurances satisfies the requirements of 49 U.S.C. § 47107(a)(13). It provides, in pertinent part, that the airport sponsor:

> "will maintain a fee and rental structure for the facilities and services at the airport which will make the airport as self-sustaining as possible under the circumstances existing at the particular airport, taking into account such factors as the volume of traffic and economy of collection. No part of the Federal share of an airport development, airport planning or noise compatibility project for which a grant is made under Title 49, United State Code, the Airport and Airway Improvement Act of 1982, the Federal Airport Act or the Airport and Airway Development Act of 1970 shall be included in the rate basis in establishing fees, rates, and charges for users of that airport."

FAA's *Policy and Procedures Concerning the Use of Airport Revenues* (Revenue Use Policy)[44] provides, among other things, the FAA's policy on the maintenance of a self-sustaining rate structure by federally-assisted airports. It provides, in relevant part, that:

[44] See 64 FR 7696, February 16, 1999.

> "Airport proprietors must maintain a fee and rental structure that in the circumstances of the airport makes the airport as financially self-sustaining as possible. [Section VII(B)(1)]
>
> If market conditions or demand for air service does not permit the airport to be financially self-sustaining, the airport proprietor should establish long term goals and targets to make the airport as financially self-sustaining as possible. [Section VII(B)(2)]
>
> …the FAA does not consider the self-sustaining requirement to require airport sponsors to charge fair market rates to aeronautical users. Rather, for charges to aeronautical users, the FAA considers the self-sustaining assurance to be satisfied by airport charges that reflect the cost to sponsors of providing aeronautical services and facilities to users. [Section VII(B)(5).]
>
> …the FAA interprets the self-sustaining assurance to require that the airport receive fair market value for the provision of nonaeronautical facilities and services, to the extent practicable considering the circumstances at the airport. [Section VII(C).]"

Most of the principles of the FAA's *Policy Regarding Airport Rates and Charges* (Rates and Charges Policy)[45], including the prohibition on unjust economic discrimination and the requirement to be financially self-sustaining, are based on the statutory grant assurances found at 49 U.S.C. § 47107, et seq., in existence since before 1982. In addition to the unjust discrimination prohibition[46] and the self-sustainability requirement,[47] rates, fees, rentals, landing fees, and other service charges imposed on aeronautical users for aeronautical use of airport facilities must be reasonable.[48] In accordance with relevant Federal statutory provisions governing the use of airport revenue, airport proprietors may expend revenue generated by the airport only for statutorily allowable purposes.[49]

Under the terms of grant agreements administered by the FAA, all aeronautical users are entitled to airport access on fair and reasonable terms without unjust discrimination. Therefore, the FAA considers that the principles and guidance set forth in the Rates and Charges Policy apply to all aeronautical uses of the airport. The FAA recognizes, however, that airport proprietors may use different mechanisms and methodologies to establish fees for different facilities, e.g., the airfield. The FAA takes these differences into account when called upon to resolve a dispute over aeronautical fees or otherwise

---

[45] See 61 FR 31994, Sections of the policy, not applied herein, were vacated in Air Transport Association v DOT, 119 F 3d. 38 (DC Cir. 1997), amended 129 F.3d 625.
[46] See Paragraph 3 of the Rates and Charges Policy, Page 32021; see also 49 U.S.C. § 47107(a)(1)
[47] See Paragraph 4 of the Rates and Charges Policy, Page 32021; see also 49 U.S.C. § 47107(a)(13)(A)
[48] See Paragraph 2 of the Rates and Charges Policy, Page 32019; see also 49 U.S.C. § 47107(a)(1)
[49] See 49 U.S.C. § 47107(b)

consider whether an airport sponsor is in compliance with its obligation to provide access on reasonable terms without unjust discrimination.[50]

A Federally obligated airport owner's obligation to make the airport available for public use does not preclude the owner from recovering the cost of providing facilities and services at the airport through the imposition of reasonable fees, rents, and other user charges designed to make the airport as self-sustaining as possible under the airport-specific circumstances.[51] Neither Federal law nor FAA policy requires a single approach to airport rate-setting. Airport fees, rents, and other charges may be set according to a methodology, e.g., residual or compensatory, or a combination thereof, at the discretion of the airport sponsor, as long as the methodology and cost-allocation formula selected is transparent, reasonable, and not unjustly discriminatory.[52]

Airport proprietors must employ a reasonable, consistent, and transparent (i.e., clear and fully justified) method of establishing the airport fees and adjusting the fees on a timely and predictable schedule. Airport proprietors are advised to establish fees with due regard for economy and efficiency.[53] The airport proprietor must apply a consistent methodology in establishing fees for comparable aeronautical users of the airport (similarly situated). The prohibition on unjust discrimination does not prevent an airport proprietor from making reasonable distinctions among aeronautical users (e.g., signatory and non-signatory carriers, tenants and non-tenants, commercial and non-commercial users) and assessing higher fees on certain categories of aeronautical users based on those distinctions (e.g., higher fees for non-signatory carriers, as compared to signatory carriers).[54]

Assurance 25, Airport Revenues

Grant Assurance 25, "Airport Revenues," of the prescribed sponsor assurances implements provisions of 49 U.S.C. § 47107(b), et seq., and requires, in pertinent part, that:

> "a. All revenues generated by the airport and any local taxes on aviation fuel established after December 20, 1987, will be expended by it for the capital or operating costs of the airport; the local airport system; or other local facilities which are owned or operated by the owner or operator of the airport and which are directly and substantially related to the actual air transportation of passengers or property; or for noise mitigation purposes on or off the airport. Provided, however, that if covenants or assurances in debt obligations issued before September 3, 1982, by the owner or operator of the airport, or provisions enacted before September 3, 1982, in

[50] See Section A of the Rates and Charges Policy, Page 32017
[51] *See* Order, Sec. 4-14(a)
[52] *See* 49 U.S.C. § 47129(a)(2) and paragraph 2 of the Rates and Charges Policy, Page 32019
[53] See Paragraph 2.4.3 of the Rates and Charges Policy, Page 32020
[54] See Paragraph 3.1 of the Rates and Charges Policy, Page 32021

governing statutes controlling the owner or operator's financing, provide for the use of the revenues from any of the airport owner or operator's facilities, including the airport, to support not only the airport owner or operator's general debt obligations or other facilities, then this limitation on the use of all revenues generated by the airport (and, in the case of a public airport, local taxes on aviation fuel) shall not apply.

b. As part of the annual audit required under the Single Audit Act of 1984, the sponsor will direct that the audit will review, and the resulting audit report will provide an opinion concerning, the use of airport revenue and taxes in paragraph (a), and indicating whether funds paid or transferred to the owner or operator are paid or transferred in a manner consistent with Title 49, United States Code and any other applicable provision of law including any regulation promulgated by the Secretary or Administrator.

c. Any civil penalties or other sanctions will be imposed for violation of this assurance in accordance with the provisions of Section 47107 of Title 49, United States Code.

The Revenue Use Policy provides, among other things, the FAA's policy on the use of airport revenue. It provides, in relevant part, that:

> "Unlawful revenue diversion is the use of airport revenue for purposes other than the capital and operating costs of the airport, the local airport system, or other local facilities owned and operated by the airport owner or operator and directly and substantially related to the air transportation of passengers or property. [Section II(C).]
>
> Prohibited uses of airport revenue include but are not limited to: (1) Direct or indirect payments that exceed the fair and reasonable value of services provided to the airport. The FAA generally considers the cost of providing the services or facilities to the airport as a reliable indicator of value. (12) Direct subsidy of air carrier operations. Direct subsidies are considered to be payments of airport funds to carriers for air service. Prohibited direct subsidies do not include waivers of fees or discounted landing or other fees during a promotional period. [Section VI(B)(1) and (12).]"

The FAA Airport Compliance Program

The FAA discharges its responsibilities for ensuring airport owners' compliance with their federal obligations through its Airport Compliance Program. The FAA's airport compliance efforts are based on the contractual obligations an airport owner accepts when receiving federal grant funds or the transfer of federal property for airport purposes. These obligations are incorporated in grant agreements and instruments of conveyance in

order to protect the public's interest in civil aviation and to ensure compliance with federal laws.

The FAA Airport Compliance Program is designed to ensure the availability of a national system of safe and properly maintained public-use airports operated in a manner consistent with the airport owners' federal obligations and the public's investment in civil aviation.

The Airport Compliance Program does not control or direct the operation of airports. Rather, it monitors the administration of the valuable rights pledged by airport sponsors to the people of the United States in exchange for monetary grants and donations of federal property to ensure that the public interest is being served. FAA Order 5190.6A sets forth policies and procedures for the FAA Airport Compliance Program. The Order is not regulatory and is not controlling with regard to airport sponsor conduct. Rather, it establishes the policies and procedures to be followed by FAA personnel in carrying out the FAA's responsibilities for ensuring airport compliance. It provides basic guidance for FAA personnel in interpreting and administering the various continuing commitments made to the United States by airport owners as a condition of receiving a grant of federal funds or the conveyance of federal property for airport purposes. The Order analyzes the various obligations set forth in the standard airport sponsor assurances, addresses the nature of those assurances, addresses the application of those assurances in the operation of public-use airports, and facilitates interpretation of the assurances by FAA personnel.

The FAA Compliance Program is designed to achieve voluntary compliance with federal obligations accepted by owners and/or operators of public-use airports developed with FAA-administered assistance. Therefore, in addressing allegations of noncompliance, the FAA will make a determination as to whether an airport sponsor is *currently* in compliance with the applicable federal obligations. Consequently, the FAA will consider the successful action by the airport to cure any alleged or potential past violation of applicable federal obligation to be grounds for dismissal of such allegations. [*See* e.g. Wilson Air Center v. Memphis and Shelby County Airport Authority, FAA Docket No. 16-99-10, (August 30, 2001) (Final Decision and Order)]

Enforcement of Airport Sponsor Assurances

FAA Order 5190.6A, *Airport Compliance Requirements*, dated October 2, 1989, covers all aspects of the airport compliance program except enforcement procedures.

Enforcement procedures regarding airport compliance matters may be found at *FAA Rules of Practice for Federally Assisted Airport Enforcement Proceedings* (14 CFR Part 16). These enforcement procedures were published in the Federal Register (61 FR 53998, October 16, 1996) and became effective on December 16, 1996.

The Complaint and Appeal Process

Pursuant to 14 CFR, Part 16, § 16.23, a person directly and substantially affected by any alleged noncompliance may file a complaint with the FAA. The Complainant shall

provide a concise but complete statement of the facts relied upon to substantiate each allegation. The complaint shall also describe how the Complainant was directly and substantially affected by the things done or omitted by the Respondents. [14 CFR, Part 16, § 16.23(b)(3,4).]

If, based on the pleadings, there appears to be a reasonable basis for further investigation, the FAA will investigate the subject matter of the complaint. In rendering its initial determination, the FAA may rely entirely on the complaint and the responsive pleadings provided. Each party shall file documents that it considers sufficient to present all relevant facts and arguments necessary for the FAA to determine whether the sponsor is in compliance. [14 CFR, Part 16, § 16.29.]

The proponent of a motion, request, or order has the burden of proof. A party who has asserted an affirmative defense has the burden of proving the affirmative defense. This standard burden of proof is consistent with the Administrative Procedure Act (APA) and federal case law. The APA provision states, "[e]xcept as otherwise provided by statute, the proponent of a rule or order has the burden of proof." 5 U.S.C. § 556(d). [*See* also, Director, Office of Worker's Compensation Programs, Department of Labor v. Greenwich Collieries, 512 US 267, 272 (1994); Air Canada et al. v. Department of Transportation, 148 F3d 1142, 1155 (DC Cir, 1998).] Title 14 CFR § 16.229(b) is consistent with 14 CFR §16.23, which requires the complainant to submit all documents then available to support his or her complaint. Similarly, 14 CFR § 16.29 states that "[e]ach party shall file documents that it considers sufficient to present all relevant facts and argument necessary for the FAA to determine whether the sponsor is in compliance."

VII. ANALYSIS AND DISCUSSION

The Complainants filed this Part 16 Complaint to argue against a Special Facility Rental Credit (Credit) to FedEx on its apron rent.[55] The Complainants asked the FAA to ensure the airlines will not bear the cost of the Authority's $49 million expenditure[56] to expand the FedEx cargo-apron.[57] The Complainants seek relief to (i) the extent the Credit causes funding shortfalls compared to the total cost of the FedEx Cargo Apron, (ii) keep any funding shortfalls out of the airfield cost center, and (iii) award further relief, including civil penalties.[58]

[55] FAA Exhibit 1, Item 1, Exhibit 1, Page 18
[56] FAA Exhibit 1, states the expansion will cost $49 million, while the Answer states the expansion will occur in 3 phases and cost $46.5 million ($14.4+$20.5+$12.0) such a difference has no impact on the analysis or the FAA Determination
[57] FAA Exhibit 1, Item 10, Exhibit L, Page 1
[58] FAA Exhibit 1, Item 1

In their Answer and Motion to Dismiss,[59] the Authority argues that "The Complaining Airlines object to the landing fee rate effects of one aspect of a major ground lease amendment entered into by the Authority and [FedEx]. However, the Complaining Airlines nonetheless seek to retain all of the benefits resulting from that amendment. By seeking to have their landing fee rates based upon the additional rental revenue and additional landed weights resulting from FedEx's expansion, but not upon the rent credit that was necessary to obtain them, the Complaining Airlines wrongly claim an entitlement to the benefits of an agreement more advantageous than the one that the Authority actually was able to negotiate with FedEx."[60]

In their Reply to the Answer, the Complainants further request the FAA to: (i) deny the Respondents' Motion to Dismiss, (ii) find the Credits of the Amendment No. 3 to be unlawful because they will burden other airlines with the costs of FedEx's exclusive Cargo Apron, (iii) prohibit the Respondents from adding any funding shortfall related to the FedEx Cargo Apron to the airfield cost center or otherwise including the cost of the FedEx Cargo Apron in the computation of landing fees at IND throughout the duration of Amendment No. 3, and (iii) award such further relief and take such further action as the FAA deems necessary or appropriate, including, but not limited to, imposing civil penalties upon the Respondents.[61] Specifically, the Complainants stress that "If the Landing Fee Rent Credits work the way FedEx and the Respondents intend for them to work, the Joint Complainants will pay higher landing fees than they would pay absent the Landing Fee Rent Credits. Burdening the other carriers at IND with tens of millions of dollars in costs for an exclusive facility to be built by the Airport for the exclusive use by another carrier is unreasonable, unjustly discriminatory, and unlawful for the reasons set forth in the Joint Complaint."[62]

The Authority asserts that, "…the rent credit arrangements and landing-fee rate calculations have been implemented in such a way that the shifting of responsibility for cost recovery to FedEx occur earlier in time than any increase in the Airport System requirement resulting from the credit. Thus, the other Signatory Airlines obtain a time-value benefit from the reduced landing-fee rates before any offsetting increase in the Airport System requirement would occur. Also, because of an impending switch to fixed landing-fee rates for the balance of the term of the current Signatory Agreement (which expires December 31, 2010), the credit-related increase in the Airport System requirement may never occur."[63]

---

[59] The Authority requested the FAA dismiss the complaint because the Joint Complainants misnamed the responsible party. FAA Exhibit 1, Item 10, pages 12-13. The Complainants listed the Authority, the Airport and BAA-Indianapolis, the airport operator as parties to the complaint. The FAA agrees its enforcement authorities under Part 16.1 are generally limited to actions taken by the sponsor, especially with regard to the Grant assurances, but the FAA will not dismiss the Complaint based on this assertion by the Authority. Under Part 16, the Authority is generally responsible for the actions taken by the Airport and BAA-Indianapolis, and FAA will hold the Authority responsible for actions taken by the Airport and/or BAA-Indianapolis

[60] FAA Exhibit 1, Item 10, Page 2

[61] FAA Exhibit 1, Item 12, Pages 5 - 6.

[62] FAA Exhibit 1, Item 12, page 3

[63] FAA Exhibit 1, Item 20, Page 7-8

The docket reflects that the Authority and FedEx entered into Amendment No. 3 under which FedEx would spend $162 million to expand its sort and maintenance facilities.[64] The parties dispute whether the apron is Special Purpose Facility.[65]

The Authority argues in their answer that the Complainants have not met the burden of proof standard required in a Part 16 proceeding. The Authority claims the economic discrimination standard is "persuasive evidence that a similarly situated user … received preferential treatment vis-à-vis the Complainant." They continue, it is "incumbent upon the Complainant to prove its allegations of unjust discrimination by providing evidence that similar terms and conditions were requested and were subsequently denied, without adequate justification.[66]

In their Reply, the Complainants argue that, "Although Respondents have taken great pains to point out the burden of proof on the Joint Complainants (which has been fully met), Respondents have failed to acknowledge, much less satisfy, their own burden. It is well established that the 'proponent of a motion…has the burden of proof. A party who has asserted an affirmative defense has the burden of proving the affirmative defense." [Martyn, FAA Docket 16-02-03, DD at 44]. [67]

As stated in the Applicable Law and Policy Section, the proponent of a motion, request, or order has the burden of proof. A party who has asserted an affirmative defense has the burden of proving the affirmative defense. This standard burden of proof is consistent with the Administrative Procedure Act (APA) and Federal case law. The APA provision states, "[e]xcept as otherwise provided by statute, the proponent of a rule or order has the burden of proof." 5 U.S.C. §556(d). *See* also, *Director, Office of Worker's Compensation Programs, Department of Labor v. Greenwich Collieries*, 512 US 267, 272 (1994); *Air Canada et al. v. Department of Transportation*, 148 F3d 1142, 1155 (DC Cir, 1998). Title 14 CFR §16.229(b) is consistent with 14 CFR §16.23, which requires that the complainant must submit all documents then available to support his or her complaint. Similarly, 14 CFR §16.29 states that "[e]ach party shall file documents that it considers sufficient to present all relevant facts and argument necessary for the FAA to determine whether the sponsor is in compliance."

The FAA does not concur with the Authority that the Complainants have failed to meet the burden of proof standard. The FAA notes the Complainants base their arguments on known facts contained in Amendment No. 3 and the Lease Agreement; these are

[64] FAA Exhibit 1, Item 10, Exhibit L, Page 1
[65] FAA Exhibit 1, Item 10, Lease Agreement, page 11. The Lease Agreement defines a Special Purpose Facility as "any specific improvement undertaken by AUTHORITY for the benefit of one or more airlines or any other Airport System tenant pursuant to the terms of a separate agreement that provides for, among other things, (1) the payment of rentals or fees for the use or occupancy thereof in sufficient amounts to permit the financing of such improvement and payment of all costs thereof solely from such rentals or fees, and (2) the payment of the maintenance and operating cost of such improvement by the tenant or tenants thereof."
[66] FAA Exhibit 1, Item 10, page 16
[67] FAA Exhibit 1, Item 12, Page 14

documents that will determine if the Authority violated its grant assurances. There is a sufficient record to proceed with the Part 16 proceeding.

Therefore, the analysis and discussion below is set up to address allegations by the Complainants that the Respondents violated Grant Assurance Nos. 22, Economic Nondiscrimination, 23, Exclusive Rights, 24, Fee and Rental Structure and 25, Revenue Use.

1. Whether the *Amendment No. 3 to the IAA-FedEx Land Lease Agreement* (Amendment No. 3), dated April 14, 2006 is consistent with Grant Assurance 22 *Economic Nondiscrimination*, 49 U.S.C. § 47107 (a)(1) through (6), which requires the airport sponsor to make the Airport available to all types, kinds, and classes of aeronautical activity on reasonable terms, and without unjust discrimination.

The Complainants present several allegations of unjust economic discrimination by the Respondents. These allegations are addressed in the following subtopics: Amendment No. 3, the Agreement and Lease of Premises, Rent Credit, Adverse Impact and Similarly Situated.

Amendment No. 3

The Complainants assert "Amendment No. 3 begins by appearing to require FedEx to pay a rental, called the Additional Special Facilities Rent, calculated to reimburse for 100% of the project cost over twenty years (including financing costs and capitalized interest)."[68] The Complainants state the Special Facilities Credit cause other airlines to bear a very substantial part of the FedEx Cargo Apron.[69] "But FedEx will not actually pay that full amount in rent. In fact, FedEx may not pay anything for the apron project. This is because for the next 20 years or so, through 2028, Amendment No. 3 gives FedEx credits, essentially rent reductions, of up to 100% of the Additional Special Facilities Rent." [70]

According to the Complainants, the Authority is attempting through Amendment No. 3 to do indirectly what it cannot do directly, stating, "Obviously, the IAA is free to build a facility for FedEx's exclusive use as long as it or FedEx pays the cost and no portion of the costs are borne by other airlines".[71]

In its Answer, the Authority states that Amendment No. 3 allows FedEx to expand its sort and maintenance facilities at its own cost, and the Authority agrees to finance expansion of the FedEx apron as a Special Purpose Facility. FedEx will then rent the expanded apron from the Authority and will pay the Authority rent (Additional Special Facilities

[68] FAA Exhibit 1, Item 1, Page 8
[69] FAA Exhibit 1, Item 1, Page 8
[70] FAA Exhibit 1, Item 1, Pages 8-9
[71] FAA Exhibit 1, Item 1, Page 9

Rental). If FedEx achieves certain landed weight incentives, the Authority will grant it a Credit on a portion of the Additional Special Facilities Rental for the expanded apron.[72]

The Authority notes that the Credit shall be equal to a maximum 75% of the incremental landing fee revenue of FedEx (above a 5 billion pound annual base, increased by 3% annually beginning in 2011), and the annual Credit will remain at 75% as long as all three phases of the apron expansion are completed within the five year expansion term provided by Amendment 3. Otherwise, the Credit shall be 70% if Phases 1 and 2 are completed or 65% if only Phase 1 is completed.[73]

The Authority will calculate the incremental additional landed weight as follows:

- Create an (annual) adjusted base (5 billion pounds) and increase it 3 percent annually beginning in 2011.

- Compute the incremental landed weight by deducting the actual landed weight from the adjusted base.

- Compute the incremental landing revenue by multiplying the incremental landed weight by the landing fee (not to fall below $1.62 per 1,000 pounds of landed weight for Credit calculation purposes).

- Divide the incremental landing fee revenue between the airport system and the Credit amount, with 25 percent to the Airport System and 75 percent to the Credit, but ***limiting*** the Credit to 75 percent of the Additional Special Facilities Rental.[74]

The Complainants claim that "[a]nnual funding deficiencies for the construction of FedEx's Cargo Apron are forecast to range from $1,387,000 per year to $2,688,000 per year, starting in 2010. The projected funding deficiency due to the Landing Fee Rent Credits totals over *$37,000,000* for the years between 2008 and 2026, all of which would be borne as additional cost by the airlines doing business at IND in the form of increased landing fees."[75]

The Complainants maintain that "under Article V.B(2) of Amendment No. 3, FedEx's Additional Special Facilities Rental will be reduced by the amount of an Additional Special Facilities Rental Credit. That section provides that:

> "Beginning January 1, 2007, the Lessee shall earn a Credit against the Additional Special Facilities Rentals otherwise

[72] FAA Exhibit 1, Item 10
[73] FAA Exhibit 1, Item 1, Page 9
[74] FAA Exhibit 1, Item 10, page 23 – (reference to footnote 35 – which refers to Article II or Amendment No. 3) [FAA Exhibit 1, Item 1, Exhibit 1]
[75] FAA Exhibit 1, Item 1, Page 9

> due pursuant to Subsection (1) above, calculated in the manner described in this paragraph (2).
>
> The Additional Special Facilities Rental Credit shall equal the difference in Actual Revenues and Base Revenues, multiplied by the applicable Percentage Credit; provided however, if Actual Revenues are less than Base Revenues, no Credit shall apply." [76]

The Authority states that, "The Complaining Airlines object to the rent credit notwithstanding that Amendment No. 3, taken as a whole, will benefit them financially by lowering their landing fees. Amendment No. 3's beneficial impact exists by design, as the magnitude of the rent credit given to FedEx will always be smaller, by definition, than the additional landing fees to be paid by FedEx above the negotiated threshold amounts. In addition, so long as the Airport's landing fees are set on a residual basis, the Complaining Airlines further benefit from the additional rental revenues produced by Amendment No. 3. Amendment No. 3's net benefits presumably explain why the Complaining Airlines are at such pains to stress that they are not seeking to "unwind" the FedEx transaction."[77]

The Complainants and the Authority use different durations to represent the impacts of Amendment No. 3. The Authority stops its analysis at 2028, when Amendment No. 3 ends, while the Complainants use 2036, the year the financing of the apron is complete. The Complainants state the difference is significant because the Authority does not consider the full impact of the financing costs. It stops its calculations at 2028, while the actual financing costs continue through 2036. [78]

On March 28, 2008, the Director issued the FAA Questions to assist in clarifying some details and allegations raised in the pleadings. The Complainants in their response to the FAA Questions responded that the "Rent Credit increases the Airport System Requirement paid for by the Complainants and other airlines at IND in the form of increased landing fees. This is precisely what the Joint Complaint is about ... "[79] The Complainants insist, "(i) Any carrier growing at the Airport has to pay the landing fees on all of its incremental landed weight and (ii) the carriers' landing fees would be lower if there were no FedEx Landing Fee Rent Credit factored into the Airport System Requirement. Consequently, as IAA concedes, the amount of Airport System Operating Revenue will be less on a dollar-for-dollar basis, and therefore the Airport System Requirement on which the airline's landing fees are based will be higher on a dollar-for-dollar basis than what those fees would be in the absence of the Rent Credit. Simply put, the incremental landing fees paid by FedEx cannot validate an arrangement that burdens other airlines for many years with the substantial cost of a Rent Credit granted to one carrier on its exclusive facility."[80]

---

[76] FAA Exhibit 1, Item 10, Page 21-22
[77] FAA Exhibit 1, Item 10, page 4
[78] FAA Exhibit 1, Item 12, Page 24
[79] FAA Exhibit 1, Item 21, Page 6
[80] FAA Exhibit 1, Item 21, Pages 7-8

While, the Authority presents a contrary view in their response to the FAA Questions, "to the extent that FedEx lands sufficient weight to generate incremental landing fee revenue and to produce a rent credit, there are two offsetting rate effects. One is that the Airport System requirement will be increased. The other is that FedEx will pay a greater percentage of that Airport System requirement. The rent credit is designed in such a way that the second effect will outweigh the first, thus holding other Signatory Airlines harmless against any rate impacts of FedEx rent credit and, in fact, reducing the other Signatory Airlines' landing fees". The Authority goes on to argue that, "The bottom line is that…any increase of the Airport System requirement caused by the rent credit is more than offset by an increase in FedEx's landing fees. Ultimately, once the Additional Special Facilities Rental Credit is applied, the debt associated with the cargo apron expansion is serviced by a combination of Additional Special Facilities Rent and FedEx's incremental landing fees, and not, as the Complaining Airlines claim, from the landing fees paid by them. Amendment No. 3 has no negative financial impact on the other Signatory Airlines."[81]

The Director developed Table 1 below to note by way of illustration, the Credit for 2012 would be taken in 2013 by crediting the $1,416,247 against the Additional Special Facilities Rental. This in turn lowers Airport System Operating Revenue under the separate Lease Agreement, resulting in a higher Airport System Requirement of $1,416,247 and a higher landing fee.

Table 1
Calculation of Rent Credit
For 2012

Actual Landed Weight			6,182,793
Year	Rate Adjustment	Adjusted Base	
2010		5,000,000	
2011	3	5,150,000	
2012	3	5,304,500	
Less Adjusted Landed Weight Base			5,304,500
Equal: Additional Landed Weight Attributable to Expansion			878,293
Landing Fee Rate			$ 2.15
Incremental Landing Fee Revenue			$1,888,330
Less 25% Retained for Airport System			$ 472,082
Equals 75% of Incremental Landing Fee Available for Credit			$1,416,247

The Director in the FAA Questions specifically asked the parties to "describe the flow of funds from the Airfield Area Cost Center once the Credit is claimed by FedEx."[82] The Authority advised that it "has offered and the Signatory Airlines have indicated unanimously that they wish to accept, a negotiated fixed landing fee rate for the balance of the term of the Signatory Agreement based on 2008 levels." [83] The gravaman of the

[81] FAA Exhibit 1, Item 20, page 7-8
[82] FAA Exhibit 1, Item 22
[83] FAA Exhibit 1, Item 20

Complaint is that the Complainants allege that the rent Credit to FedEx will result in increased landing fees in the future, after the end of the current contract, while the Authority argues that there is no negative impact to the Complainants under their current contract. The Authority stress that the airlines will have their landing-fee rates frozen at the 2008 levels through December 31, 2010.

While the Complainants counter that they have not signed any agreement to reflect this proposal, the Respondents represent that the Airlines will have their landing-fee rates frozen at the 2008 levels through December 31, 2010.[84]

The Lease Agreement is a separate stand- alone agreement between the Authority and the Signatory Airlines, including the Complainants and FedEx, and that Amendment No. 3 is a stand- alone agreement between the Authority and FedEx. The Director notes that the Lease Agreement, could not and did not specifically reference Amendment No. 3, he nonetheless recognized that the terms of Amendment No. 3 can influence the landing fee calculation of the Lease Agreement.

If FedEx claims the Credit against its Additional Special Facilities Rental and the Airport System Operating Revenue under the Lease Agreement decreases by the amount of the Credit, it could cause the Airport System Requirement to rise, resulting in a higher landing fee than would otherwise be the case without the Credit. Under the existing Lease Agreement, the FedEx Credit cannot be imposed unilaterally on the Complainants. This is true even if the Airlines benefit from additional FedEx operations because airfield costs are spread over more operations and the Complainants actually pay less as a result.

Agreement and Lease of Premises.

The Complainants stated that the Authority did not obtain Majority-In-Interest (MII) approval for the apron expansion, as the Agreement and Lease of Premises (Lease Agreement) requires. In accordance with the Lease Agreement, the Authority must consult with the Signatory Airlines and receive two-thirds approval prior to committing to certain capital improvements. This requirement is in Article 8, Capital Improvements:

- Section 8.01, Capital Improvements,

> A. "[O]n or before August 1st each year, AUTHORITY shall notify Signatory Airlines of the purchase price/construction cost of Capital Improvements and the amortization schedule to be added to the rate base, pursuant to Article 6, for Capital Improvements for which amortization is to be included in the next appropriate rental period…
>
> B. Within a reasonable time, but no sooner than 30 days after distribution of the report, AUTHORITY shall convene a meeting of the Signatory Airlines to discuss and <u>obtain</u>

[84] FAA Exhibit 1, Item 21

concurrence of the Signatory Airlines to any proposed Capital Improvement requiring such concurrence… [*emphasis added*]

C. If concurrence on a Capital Improvement is specifically withheld following the first meeting, AUTHORITY shall have the option to convene a second meeting of the Signatory Airlines. The second meeting shall be held within 30 days after the receipt of notice of nonconcurrence from the Signatory Airlines, upon notice by AUTHORITY. At the second meeting AUTHORITY shall respond to questions raised during the first meeting and shall ask for reconsideration of the Capital Improvement or consideration of the amended Capital Improvement. Upon reconsideration, of the Original Capital Improvement or consideration to the amended Capital Improvement, the proposed Capital Improvement shall be deemed concurred in unless, within 30 days after such second meeting, concurrence is specifically withheld in writing, by two thirds (2/3) of the Signatory Airlines. If concurrence is withheld, the Capital Improvement will be deferred until the next Fiscal Year…

D. After providing notice to the Signatory Airlines, AUTHORITY may, without complying with the provisions of subsection (B) hereof, proceed with any of the following Capital Improvements [*emphasis added*] and include the cost of such Capital Improvement in that Fiscal Year's calculation for the Landing Fee and rentals of the Signatory Airlines, if such Capital Improvement is necessary or prudent to: (1) Assure or facilitate compliance with a rule, regulation, or order of any federal, State, or other governmental agency (excluding AUTHORITY) that has jurisdiction over the operation of the Airport. (2) Maintain, operate, or create Airport System functional capability and capacity at a level that is required (a) by public health, safety, access, security or welfare or (b) by the trustee for the security of the Bonds. (3) Satisfy judgments or fines against AUTHORITY imposed by an agency of federal or state government rendered by a court of competent jurisdiction. (4) Repair casualty damage net of insurance proceeds to Airport System property. (5) Develop a Special Purpose Facility. [*emphasis added*] (6) Acquire land to preserve, protect, or enhance the Airport system. (7) Expenditures for architectural, engineering, or economic studies or other professional services of planned Airport System facilities."[85]

[85] FAA Exhibit 1, Item 10, Exhibit B, Pages 50-53

The Complainants argued the expansion of the apron is not a Special Purpose Facility because other airlines will pay its financing costs. The Complainants charge "[T]he execution of the Lease Agreement (i.e. Amendment No. 3) without approval violates the MII provisions of each of the carrier's respective leases. The Respondents incorrectly claim that the contemplated expansion of FedEx's Cargo Apron at IND was a Special Purpose Facility Transaction not requiring MII approval from the Signatory Carriers. IAA is wrong. A Special Purpose Facility is one which provides for 'the payment of rentals or fees for the use or occupancy thereof in sufficient amounts to permit the financing of such improvement and payment of all costs thereof solely from such rentals or fees...' As explained above, Amendment No. 3—with its Landing Fee Rent Credits to FedEx—shifts millions of dollars of costs to other carriers at IND, so this capital project cannot possibly meet the definition of a Special Purpose Facility."[86]

The Complainants confirm their position in their response to the FAA Questions that the cargo apron project required MII approval because it was not a Special Purpose Facility. "[T]he FedEx Cargo Apron is exclusively for FedEx's use, but as a result of the Rent Credit, its construction and maintenance are not paid for 'solely from [FedEx] rentals' as required by the Airline Lease. By virtue of the Rent Credit, a substantial portion of the cost burden is to be imposed on other carriers through higher landing fees. Thus, the FedEx Cargo Apron is not a Special Purpose Facility."[87]

The Authority disagrees and states in its response to the FAA Questions:

> The Authority complied with the provisions of Section 8.01 and 8.03 with regard to the FedEx apron subject to the Credit. Specifically, on June 30, 2005, by letter from IAA's Marsha Stone, Finance Director, to the Airline Technical Committee, Airline Properties Representatives, and Airline Station Managers, the Authority transmitted a summary of the 2006 Capital Improvement Program, in which the cargo apron expansion was expressly noted as being exempt from MII approval. *See* Response Exhibit C; *see also* Response Exhibit D (individual responses from Signatory Airlines). Thereafter, on May 3, 2006, Patrick Dooley, the Airport Director, sent a letter to Erin Heitkamp, the designated representative for the Signatory Airlines, in which he described the scope of the proposed project, including sources of funds, and included a rent credit. Answer Exhibit L. In that letter, Patrick Dooley reiterated that the "Federal Express' expansion is a Special Purpose Facility as defined in the… Signatory Agreement and is therefore not subject to a Majority In Interest vote of the Signatory Airlines. [88]
>
> The cargo apron expansion is a Special Purpose Facility because it was 'undertaken by the Authority for the benefit of one or more

[86] FAA Exhibit 1, Item 1, Pages 17-18
[87] FAA Exhibit 1, Item 21, Page 11
[88] FAA Exhibit 1, Item 20, Page 3-4

> airlines…pursuant to the terms of a separate agreement," Amendment No. 3, 'that provides for, among other things (1) the payment of rentals or fees for the use or occupancy thereof in sufficient amounts to permit the financing of such improvement and payment of all costs thereof solely from such rentals or fees, and (2) the payment of the maintenance and operating cost of such improvement by the tenant or tenants thereof.' Amendment No. 3 ensures that FedEx will pay the full debt service associated with the cargo apron expansion through the rents and fees it pays to the IAA. Moreover, pursuant to the terms of Amendment No. 3, FedEx is responsible for maintenance and operation of the entire cargo apron." [89]
>
> "The Authority provided notice to the Signatory Airlines regarding (a) the anticipated costs of the FedEx apron expansion and (b) the Authority's determination that the apron expansion was a Special Purpose Facility not requiring an MII vote, Response Exhibit C, Answer Exhibit L, and the Signatory Airlines raised no objections to that determination. Response, Exhibit D. In other cases, when the Signatory Airlines have disagreed with the Authority's determination that a project should be treated as Special Purpose Facility, they have expressly objected to that determination in writing. *See, e.g.*, Response Exhibit E (2003 letters transmitting MII ballots from Northwest, Delta, Continental, Southwest, and other Signatory Airlines)."[90]

The Complainants state "IAA's Response contains letters from certain carriers to support the erroneous claim that the Complainants had agreed that the FedEx Cargo Apron project was a Special Purpose Facility not requiring MII approval…however, those letters provide no such evidence."[91]

> "First, none of the letters expressly concedes that the FedEx Cargo Apron was a Special Purpose Facility outside the MII approval requirement."[92]
>
> "Second, at the time those airline letters were written in mid-2005, Respondent IAA had merely informed the airlines at IND about the general outlines of a potential project to expand the FedEx Cargo Apron facility, not the illegal plan to pay for the project on the backs of other carriers at IND. ... Thus, to the extent one stretches to read those letters as somehow indicating some form of acquiescence with respect to a FedEx Cargo Apron project, it was - at most - with respect to the general concept of the project, not how the project was going to be funded as provided for in Lease Amendment No. 3. Indeed, it was not until the following year (Spring 2006) that the Joint Complainants were for the first time presented with the funding details of

[89] FAA Exhibit 1, Item 20, Page 4-5
[90] FAA Exhibit 1, Item 20, Pages 5
[91] FAA Exhibit 1, Item 21, Page 11
[92] FAA Exhibit 1, Item 21, Page 12

> Amendment No. 3, including the Rent Credit, and then only at the last moment as a fait accompli."[93]
>
> "Third, even back in 2005, Northwest Airlines clearly indicated its position that the proposed FedEx Cargo Apron must be subject to a cost recovery agreement with FedEx. Northwest's comment stated: "Project #36 Cargo Apron Construction - Contingent Approval Subject to cost recovery agreement with FedEx.' Northwest's position was clear. The Cargo Apron project could be a Special Purpose Facility only if all of its costs were recovered by FedEx. Since FedEx does not fully pay for the Apron project, it is not a Special Purpose Facility and MII approval was required."[94]
>
> "Fourth, upon learning in mid-2006 of the details for the funding of the Cargo Apron with a FedEx Landing Fee Rent Credit, the Joint Complainants further made clear - immediately and in writing - that the Project was not a Special Purpose Facility exempt from MII approval."[95]

The Complainants summarized that, “Amendment No. 3 - with its Landing Fee Rent Credit for FedEx - shifts tens of millions of dollars of costs onto other carriers at IND, so this capital project cannot possibly meet the definition of a Special Purpose Facility."[96]

The Complainants assert that the Lease Agreement does not explicitly provide for the Rent Credit because the Lease Agreement predated by many years FedEx Amendment No. 3. Therefore, it could not have "explicitly" referred to the FedEx Landing Fee Rent Credit.[97]

The Complainants state, "[T]here is no dispute that the Airport System Expense includes the FedEx Cargo Apron project and its corresponding debt service. As IAA's Response states, the FedEx Cargo Apron project has 'been financed, thus far, from the proceeds of Series 2006 [General Airport Revenue Bonds] GARBs,' and the 'debt service for those GARBs is included as an Airport System Expense for purposes of calculating the Airport System Requirement.' ... There is also no dispute that the Airport System Operating Revenue includes all of the rental fees paid by FedEx (reduced by the Landing Fee Rent Credit). ... "[98]

Consequently, according to the Complainants, "the FedEx Cargo Apron project increases the Airport System Requirement and the resulting cost burden of landing fees for other carriers at IND on both the expense and revenue side of the equation-by increasing the Airport System Expense to account for apron costs and debt service and by reducing the Airport System Operating Revenue as a result of the Rent Credit. This arrangement -

---

[93] FAA Exhibit 1, Item 21, Page 12
[94] FAA Exhibit 1, Item 21, Page 13
[95] FAA Exhibit 1, Item 21, Page 12 -13
[96] FAA Exhibit 1, Item 21, Page 13
[97] FAA Exhibit 1, Item 21, Page 2
[98] FAA Exhibit 1, Item 21, Page 3

whereby the burden of the Rent Credit for FedEx's exclusive Cargo Apron will be borne by the other airlines at IND over many years - is unlawful…."[99]

The Authority holds that the FedEx apron expansion does not require MII approval under the terms of the Lease Agreement because it is a Special Purpose Facility. Article 8 of the Lease Agreement provides for the development of a Special Purpose Facility[100] without MII approval. The Complainants disagree. They state the Authority has not followed the terms of the Lease Agreement because the FedEx apron project is not a Special Purpose Facility, as defined by Article 8 of the Lease Agreement. The Complainants hold that the definition in the Lease Agreement of a Special Purpose Facility requires the tenant, as in this case FedEx, to pay for all of the financing and costs of the Special Purpose Facility. In the Complainants view, the use of the Credit transfers some of these costs (and possibly all the costs) to the Complainants in their landing fee. Therefore, the Complainant asserts that the FedEx project cannot be considered a Special Purpose Facility and MII approval is required before the FedEx project could be developed.

The Authority on the other hand states it did notify the Complainants through letters to the Airline Technical Committee, Airline Properties Representatives, and Airline Station Managers of the apron expansion project, and it stated the letters explained the projected rents and the use of the Credit. The Complainants state they were not aware of the use of the Credit until just before approval of the FedEx project by the Authority. Once they learned of the intent to use the Credit, they have protested the project since that time.

The Director notes that the Lease Agreement provides the processes the Authority and the Signatory Airlines have agreed to for the development of capital improvements on IND. The Director agrees that if the apron is a Special Purpose Facility as defined in the Lease Agreement, the payment for its use or occupancy, maintenance and operating costs would be solely from payments by FedEx. Accordingly, under the existing agreement which is set to expire on December 30, 2010, no fee resulting from the construction of the Special Purpose Facility would be able to be imposed on the Complainants, even if the other carriers benefit from FedEx additional operations because airfield costs are spread over more operations and the Complainants actually pay less as a result. There is presently no compliance problem here since the Respondents have committed to freeze the Complainants' landing-fee rates at the 2008 levels through the 2010 expiration date.

Adverse Impact

The Authority argues the Complainants will not be adversely affected at all by the FedEx apron expansion during the term of their existing leases, "IAA made an offer to remove from the rates and charges calculation, the principal and interest payments on the airports capital investment in the apron expansion and the lease payments for that facility through

[99] FAA Exhibit 1, Item 21, Page 3-4
[100] FAA Exhibit 1, Item 10, Exhibit B, Page 53

December 31, 2010."[101] The Authority goes on to state that, "IAA has offered to exclude from the Complaining Airlines' landing fee rates both the cost and facility rents associated with the cargo apron expansion (while continuing to give them the benefit of FedEx's incremental landed weight), and because there is no demonstrated basis for assuming that there will be any rate impact at all after the current Airport Use Agreement expires in 2010, the Complaint should be dismissed for failure to satisfy the requirements of 14 C.F.R. § 16.23(a)." [102]

In their Reply, the Complainants stated the offer to hold harmless "protects the Joint Complainants from nothing, because it ends before the cost impacts are expected to begin…IAA's 'offer' to hold the Carrier's harmless from the effects of the Landing Fee Rent Credit was a "cynical and illusory gesture because it was limited to a period before the adverse impacts of the Landing Fee Rent Credits will be incurred." Therefore, the Complainants state the FAA should reject the "Respondents' absurd contention that the Complainants have no "standing" … under Part 16.1."[103]

The Complainants stated that "insofar as they use the runways/taxiways at IND and pay landing fees, the Landing Fee Rent Credits for FedEx and the increased FedEx operations at IND envisioned by Lease Amendment No. 3 will directly and substantially affect each of them,"[104] which establishes their standing to pursue the Complaint. The Complaints cited Bombardier Aerospace Com. v. City of Santa Monica, FAA 16-03-11, DD (Jan. 3, 2005), where two large aircraft operators had standing to contest landing fees where both "have operated and continue to operate at SMO in addition to having paid landing fees on several occasions."[105]

The Complainants also claim standing "in light of their well-substantiated claim of revenue diversion. For such claims there is a presumption of standing… regardless of whether there is a substantive showing of detrimental effect. Jim Martyn v. Port of Anacortes, FAA Docket 16-02-03, DD (April 14, 2003) ("a complainant presently engaged in a business arrangement with the airport in question would be assumed to

[101] FAA Exhibit 1, Item 10, Item 1, Pages 13, 19 and 20. The full text of paragraph 44 is, "[T]he IAA and BAA-IND have refused to remedy, in any substantive manner, the concerns outlined by the Joint Complainants, and, at this point, there is no reasonable prospect for timely resolution of the dispute. Although IAA made an offer to remove from the rates and charges calculation the principal and interest payments on the airport's capital investment in the apron expansion and the lease payments for that facility through December 31, 2010, that offer utterly fails to resolve this dispute because it ignores the burden on the other airlines of the Landing Fee Rent Credits which extend well beyond 2010 and which total tens of millions of dollars."

[102] FAA Exhibit 1, Item 10, Page 14

[103] FAA Exhibit 1, Item 12, Page 6

[104] FAA Exhibit 1, Item 12, Page 7

[105] FAA Exhibit 1, Item 12, Page 7. In the Response of the IAA to FAA's Request for Additional Information, it states, "However, the Authority has offered, and the Signatory Airlines have indicated unanimously that they wish to accept, a negotiated fixed landing fee rate for the balance of the term of the Signatory Agreement based on 2008 levels. [See Response Exhibit 1, and Response Exhibit J] As a result, the Signatory Airlines will have 'frozen' in place the advantages stemming from the timing of the landing fee calculations for 2008." FAA Exhibit 1, Item 20, page 9

suffer from a direct and substantial effect when revenue diversion is alleged without having to demonstrate that effect…that presumption fully applies here.")"[106]

The Complainants also argue the Authority's argument must be rejected because "…it would severely undermine the Part 16 process. Allowing a respondent to defeat a complainant's standing under Part 16 merely by proffering a meaningless settlement offer." The Complainants cited, Miami International Airport Rates Proceeding, DOT Order 97-3-26, that "reject[ed the] airport's reliance on an 'impracticable' settlement offer would create a giant loophole and allow respondents to become the 'gatekeepers; of Part 16 claims…Such a result would be contrary to the public interest because it would reduce the ability of complainants to pursue relief and the FAA's ability to remedy noncompliance."[107]

The Complainants additionally hold that the FedEx apron expansion is not a Special Purpose Facility as defined by the Lease Agreement because it is not solely paid for by FedEx but its cost is shared by the Complainants because of the application of the Credit and the impact on the landing fee. The Complainants believe the FedEx apron expansion requires MII approval under Article 8 of the Lease Agreement. The Authority holds that the FedEx apron expansion is a Special Purpose Facility and therefore does not require MII approval of the Signatory Airlines under the Lease Agreement. As discussed earlier, the interaction of two separate agreements, the Lease Agreement and Amendment No. 3, has yet to adversely affect the Complainants and is therefore a contract dispute and will not be adjudicated under Part 16.

The Authority further states, "FAA should not allow the Complaining Airlines opportunistically to reap the incremental rent and landing fee benefits of FedEx's expansion without accepting the limited rent credit that was necessary to facilitate the expansion."[108] The pertinent issue here is if the Authority's premise that it is contractually able to apply the Credit to the calculations of the landing fees in the Lease Agreement is not sustained, then it is left with attempts to unilaterally impose, through the Credit mechanism, a higher landing fee on the Complainants that would otherwise be the case without their express approval.

The FAA notes that Martyn and the Complainant significantly differ. In Martyn, the complainant was in fact being denied access to the airport. In this Complaint, the Complainants are on the airport but arguing against a potential future event, which is uncertain considering the differing analyses submitted by the Complainants and the Authority.
The Director agrees with the Authority that Amendment No. 3 has yet to adversely affect the Complainants, however, the Director disagrees that the Complainants do not have standing under Part 16.23(a). The Complainants do have standing under Part 16, but the issue is not yet ripe for review since the rent Credit has not been applied and the Complainants have not been harmed. The Authority has agreed not to apply the Credit

[106] FAA Exhibit 1, Item 12, Page 9
[107] FAA Exhibit 1, Item 12, Pages 9-10
[108] FAA Exhibit 1, Item 10, Page 33

during the term of the Lease Agreement which expires on December 31, 2010. The Director will not speculate regarding the future rate making methodology that the Complainants and the Authority may negotiate for the replacement of the Lease Agreement.

Moreover, the Director concludes that the claim regarding adverse impact involves a contract dispute between the Authority and the Complainants and that Part 16 is not the proper venue to adjudicate contract disputes when no action has yet to be taken to implement the contract terms that are in a manner contrary to the grant assurances.

It is paramount that the Complainants and the Respondents understand that the FAA does not arbitrate or mediate negotiations through a formal Part 16 complaint process. Nor does the FAA enforce lease terms between parties to an agreement. Rather, the FAA enforces contracts between an airport sponsor and the federal government. [See AmAv v. Maryland Aviation Administration, FAA Docket No. 16-05-12. (March 20, 2006) (Director's Determination).] Whether or not an airport tenant has breached the terms of its lease agreement with the airport sponsor is a matter to be resolved in state court. The FAA is not a party to litigation proceedings between complainants and respondents involving contract disputes; nor does the FAA have jurisdiction over matters of contract law between airport tenants and sponsors. [See Rick Aviation, Inc., v. Peninsula Airport Commission, FAA Docket No. 16-05-18, (November 6, 2007) (Final Decision and Order.)]

There is presently no grant assurance violation since there is no adverse impact to the Airlines without the FedEx Credit.

Rent Credit

The Complainants argue that the Rent Credit provisions, if applied, would be unreasonable and constitute unjust economic discrimination against the carriers. [109] According to the Complainants, "[T]he critical point at the heart of the Joint Complaint is simple: that the Landing Fee Rent Credit provided to FedEx for its exclusive facility will require the Joint Complainants and other airlines at IND to pay higher landing fees over many years then they otherwise would pay in the absence of the Rent Credit." [110]

The Complainants argue that the Authority is shifting FedEx costs to the Complainants, which is unjust economic discrimination. They state, "[a]ssuming … that FedEx exceeds the baseline levels and enjoys the benefit of the Landing Fee Rent Credit, FedEx's rental payments will not fully cover the cost of the Apron facility, and those costs not covered by rent will be borne by other airlines on a dollar-for-dollar basis in higher landing fees than they would otherwise pay...."[111]

[109] FAA Exhibit 1, Item 12, Page 16
[110] FAA Exhibit 1, Item 21, Page 4
[111] FAA Exhibit 1, Item 12, Page 16

To further their argument, the Complainants cited several cases they believe support their allegation of unjust economic discrimination including:

- Miami International Airport Rates Proceeding, DOT Order 97-3-26
- LAWA-2007, DOT Order 2007-6-8
- Bombardier Aerospace, FAA Docket 16-03-11
- Wilson Air Ctr., LLC v. FAA, 372 F.3d 807 (6th Cir. 2004)
- Penobscot Air Services. Ltd. v. FAA. 164 F.3d 713 (1st Cir. 1999)
- Rick Aviation Inc. v. Peninsula Airport Commissioners, FAA Docket 16-05-18

From the Miami International Airport Rates Proceeding, DOT Order 97-3-26, the Complainant cites the following, "The Department also raised warning flags about arrangements similar to this one in the Miami International Airports Rates Proceeding. In that proceeding, the Department emphasized that it 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…That concern is front and center here."[112]

In their Answer, the Authority stated the Rent Credit does not harm the Complainants and argued they did not treat FedEx more advantageously than it treated the Complainants, so there is no unjust discrimination. Additionally, the Authority states, "Although the Complaining Airlines style their Complaint as one alleging unjust discrimination…the relief they seek is not typical of such claims…instead they ask for rate relief, but the rate adjustment they seek goes beyond asking to be held "harmless" from the FedEx transaction."[113]

The Authority disputed the conclusions reached by the Complainants in the above cited cases. Specifically, the Authority cited the Miami International Airport Rates Proceeding, in support of their position; stating, "Both DOT and the D.C. Circuit rejected exactly the *per se* rule advocated by the Complaining Airlines here: that 'fees cannot be reasonable when one airline subsidizes renovations to benefit another'…They rejected the claim even though the amounts at issue in Miami were far greater than the amount of FedEx' s Rent Credit at IND and even though, unlike here, the MIA complainants were in direct competition with the beneficiary of the alleged discrimination. Because the Authority's actions here are squarely within the circumstances under which it is permissible to charge airlines the same fees (be they non-discriminatory landing fees, as at IND, or equalized rents as at MIA), FAA should dismiss the complaint." [114]

[112] FAA Exhibit 1, Item 12, Page 17
[113] FAA Exhibit 1, Item 10, Pages 4-5
[114] FAA Exhibit 1, Item 13, Pages 28-29

In addition, the Authority states the Complainants should not have ignored ground rent when computing potential adverse impacts.[115] The Complainants state that every airline pays ground rent and all must pay the fixed rate, therefore they properly excluded ground rent when computing the adverse impact of the Credit. [116] The Authority states the Complainants used outdated landed weights, which dramatically increased the amount of the Credit. [117] The Complainants disagreed with the new data stating that it was for only a 4- month period, however using the Authority's projections the landed weights would continue to support their calculation of their revised adverse impact. [118]

The Authority charges that "the Complaining Airlines' premise is false because FedEx's additional rent and landing fees exceed the amount of any rent forgone because of the credit, and because the Complaining Airlines are benefited, not harmed, by Amendment No. 3 as a whole."[119] The Authority asserts that, "Because FedEx and the Complaining Airlines pay the same landing fee rate, the Complaining Airlines are forced to claim that it is unjustly discriminatory to charge the *same* landing fee rate when that rate includes the costs of facilities that only FedEx uses. However, that claim has neither factual nor legal support. First, the Complaining Airlines are mistaken when they argue that the combination of the FedEx rent credit and the residual landing fee rate methodology means that they, rather than FedEx, will be paying the cost of FedEx's apron...the credit was designed from the outset to ensure that FedEx will pay the full cost of the facilities. Second, even if there were a net cost included in the landing fee calculation, that would not be unjustly discriminatory…there is no per se rule prohibiting residual landing fee rates that include the cost of facilities that benefit some airport users and not others." [120]

The Authority further asserts that, "The Complaining Airlines do not challenge the Authority's residual rate methodology. On the contrary, they indicate that "any such change [from the residual method] to a compensatory methodology would likely be strongly resisted by the Carriers." But residually-calculated rates almost always include some costs for facilities that are not used by all of the airport users paying the residual rates. That is true regardless of whether the formula is a cost-center residual, an airport residual, or an airport-system residual. In a cost-center residual, landing fee rates for the airfield cost center may well include net costs of general aviation facilities that passenger airlines do not use. … These arrangements are reasonable because any one airport user's chances of 'subsidizing' the cost of another user's facilities is balanced by its chances of being subsidized by other users' revenues."[121]

In summary, the Authority states that it carefully negotiated Amendment No. 3 so that the FedEx Rent Credit would not negatively impact other Airlines. The Authority notes that, "By insisting that the maximum amount of Additional Special Facility Rental Credit

[115] FAA Exhibit 1, Item 10, Page 27
[116] FAA Exhibit 1, Item 12, Page 19-20
[117] FAA Exhibit 1, Item 10, Page 27-28
[118] FAA Exhibit 1, Item 12, Page 21
[119] FAA Exhibit 1, Item 10, Page 33
[120] FAA Exhibit 1, Item 13, Page 15
[121] FAA Exhibit 1, Item 13, Page 22

earnable in any one year be limited to no more than 75% of the incremental landing fees paid by FedEx that year (up to the level of Additional Special Facilities Rent that year), the Authority ensured that: (1) FedEx will only qualify for a rent credit in those years in which it generates sufficient incremental landing fee revenues to cover the credit, (2) the Complaining Airlines will always share in the benefits resulting from FedEx' s incremental landed weight and landing fees, and (3) the Complaining Airlines' benefits will continue to increase in each of the out-years after the Additional Special Facility Rental Credit reaches its negotiated cap. In other words, by its own terms, Amendment No. 3 will protect the Complaining Airlines if FedEx fails to generate additional landing fee revenues for the Authority, and will benefit the Complaining Airlines once the threshold is surpassed."[122]

The Complainants and the Authority argue over the impact of the Credit on the airlines doing business at IND. The Complainants first claimed the carriers would pay approximately $37 million through increased landing fees. [123] The Authority argues the Credit would not adversely impact the carriers, in fact, the Authority states the Credit will have a net benefit of $10 million from increased revenues that FedEx will generate for the airport from its increased number of landings and additional facilities rental.[124] After considering new information from the Authority, the Complainants later reduced the cumulative negative impact on the air carriers to $23 million through 2028.[125]

The Director finds that in this case, it is clear that under the terms of Amendment No. 3, FedEx will not be solely responsible for *"the payment of the rentals or fees for the use or occupancy thereof in sufficient amounts to permit the financing of such improvement and payment of all costs thereof solely from such rentals or fees."* [126] Credits given back to FedEx in return for landed weight will serve to dilute the costs of the improvements to FedEx and will spread them out, through the residual agreement, to all Signatory Airlines at the Airport. It is not reasonable to impose one carrier's special facility costs on other carriers where there will not be a reciprocal benefit, as in the blended rates in the Miami terminal, where all the carriers would eventually have their facilities upgraded. Furthermore, it is contrary to the express terms of the Lease Agreement.

The FAA finds the Complainants' argument that they will incur additional costs as a result of Amendment No. 3 could be valid if the Authority imposes this arrangement on the Airlines without their concurrence. For the present, as noted, the FAA views the Credit arrangement as a contract dispute for which Part 16 is not the proper venue to resolve. If the Airlines and the Authority do not come to terms in a subsequent agreement, and the Authority unilaterally imposes the Credit, the matter may then be appropriate for FAA review. Absent a written agreement, the taking of "common use"

[122] FAA Exhibit 1, Item 13, Page 19
[123] FAA Exhibit 1, Item 1, Page 9
[124] FAA Exhibit 1, Item 10, Page 32
[125] FAA Exhibit 1, Item 12, Page 18
[126] FAA Exhibit 1, Item 10, Exhibit C, definitions

revenue and using it for an "exclusive use" FedEx apron could amount to a violation of Grant Assurance #22.

The responsibility for resolving the dispute over a Credit that has yet to be applied rests first with the Authority and the Complainants, not the FAA.

- If the Complainants agree to include the Credit in a future methodology, it would not violate the FAA grant assurances or the Rates and Charges Policy.

- If the Authority imposes landing fees on the carriers, those fees will be subject to the reasonableness principle of the Rates and Charges Policy.

- If the Complainants agree to extend the Lease Agreement and not amend it to recognize the Credit, This matter would continue to be a contract dispute and Part 16 would not be the appropriate venue.

The Director agrees there is significant variation and uncertainty with the projections presented by both parties in their pleadings as well as in their respective responses to the FAA Questions. However, the issue that is the basis of this complaint is not the presence of a surplus or shortfall resulting from the Credit, or what components of the rents should be or not be considered. The principal issue in this complaint is whether the application of the Credit results in the unilateral imposition of extra costs added to the Airport System Requirement requiring a higher landing fee than would otherwise be the case in order to compensate for the Credit.

Since the FAA does not know the form of the future agreement, or whether there will even be an agreement, it is not appropriate at this time to rule on the Authority's possible future application of the Credit for the FedEx apron. The Director finds that if the Complainants and the Authority do not come to terms in a replacement agreement and the Authority unilaterally imposes the Credit on the Complainants (and all airlines) such an action would be subject to the Rates and Charges Policy. The Policy would not permit the Authority to unilaterally impose the costs of one carrier on all other carriers by adding such costs to its common rate base unless approved by those carriers.[127]

Similarly Situated

The parties to this instant complaint disagree on whether the passenger carriers and the cargo carrier, FedEx, are similarly situated although the Complainants did not raise this issue in their Complaint. The Authority argues that the Complainants are not similarly situated with FedEx, so there could be no unjust discrimination. The Authority noted several points of difference that make FedEx and the other airlines dissimilar:

- "FedEx, unlike the passenger carriers, has invested hundreds of millions of dollars in tenant-financed improvements at IND that belong to IAA or will revert to IAA

[127] Policy Regarding Airport Rates and Charges, F.R. Vol. 61, No. 121, Section C.

ownership. These investments include …FedEx's current $162 million expansion of its sorting facilities at IND."[128]

- "FedEx is the only airport tenant in position to lease and use that much space in that location. Accordingly, leasing that land to FedEx benefits the Authority and the Signatory Airlines… without substantial opportunity cost to the Airport or other Airport users." [129]

- "[T] he only *similarity* between FedEx and the complainants is that they are all airlines doing business at IND. Virtually everything else is different. FedEx and the Complaining Airlines provide different services using different business models, different facilities (the FedEx-built sorting facility versus the Airport-constructed Terminal) and leased premises *(e.g.*, ground and apron) located in substantially different parts of the Airport." [130]

The Complainant's argue that, "Respondents seek to avoid the prohibitions on unjust discrimination…by arguing that FedEx and the Joint Complainants are not similarly situated. According to Respondents, these differences include the time and circumstances when the leases were negotiated, the lease durations, the amount of tenant investment at issue, the size/location of the relevant facilities….This argument is without merit." The Complainant's state that they recognize that the prohibition on unjust discrimination does not prevent an airport proprietor from "making reasonable distinctions among aeronautical users...." However, they note that, "that prohibition bars airport proprietors from charging air carriers making similar use of the airport's facilities fees which are not substantially comparable…as Respondents seek to do." [131]

The Complainant also argue that, "The Joint Complainants and FedEx are all large airlines providing air transportation services with large aircraft at IND and making comparable use of the runways, taxiways, and the other airside facilities that are essential components of the airfield cost center. Accordingly, the Joint Complainants are similarly situated to FedEx regarding landing fees and leases."[132]

FAA policy provides that if an airport sponsor can justify that different rates are nondiscriminatory and if the rates are substantially comparable, it may charge airport tenants different rates for similar airport users. For example, the rental rates for similar tenants may vary because of differences in debt and physical layout of rental and public space.[133]

In this case, the FAA finds that FedEx and all of the Signatory Airlines are similarly situated under the terms of the Lease Agreement, which they all signed. It is the

[128] FAA Exhibit 1, Item 10, Page 37
[129] FAA Exhibit 1, Item 10, Page 37
[130] FAA Exhibit 1, Item 10, Page 38
[131] FAA Exhibit 1, Item 12, Pages 24-25
[132] FAA Exhibit 1, Item 12, Page 25
[133] FAA Order 5190.6A, Section 4, 4-14 (c) and (d)

interpretation of the terms of the Lease Agreement that is the basis for the Complaint at issue. While the different Signatory Airlines may occupy different leased premises under different agreements with the Authority, may serve different types of markets, or may make different investments on the Airport, they are all tied together under this Complaint by the terms of the Lease Agreement herein and thus similarly situated for purposes of reviewing grant compliance. Accordingly, since the Complainants and FedEx are similarly situated, if the Authority were to implement Amendment No. 3 at this time contrary to the terms of the Lease Agreement, it could amount to a violation of Grant Assurance 22, Economic Nondiscrimination. However, as stated the Respondent has frozen the Complainants' landing-fee rates at the 2008 levels through December 31, 2010, and there is no current noncompliance.

In closing, the Director emphasizes that the FAA's role in a Part 16 Complaint is to determine whether the Respondent is in current compliance with its federal obligations. [*See* Section VI, "Applicable Law and Policy," *FAA Airport Compliance Program.*] The FAA Airport Compliance Program is designed to achieve voluntary compliance with federal obligations accepted by owners and/or operators of public-use airports developed with federal financial assistance. Therefore, in addressing allegations of noncompliance, the FAA will make a determination as to whether an airport sponsor is *currently* in compliance with the applicable federal obligations. As stated above, there is no current noncompliance.

2. Whether the *Amendment No. 3 to the IAA-FedEx Land Lease Agreement* (Amendment No. 3), dated April 14, 2006 is consistent with Grant Assurance 23 *Exclusive Rights*, 49 U.S.C. § 47107(a) (4), which prohibits the granting of an exclusive right for the use of the airport.

The Complainants allege the Rent Credit is a violation of Grant Assurance 23, Exclusive Rights.[134] The Complainants allege that the Authority, "by granting FedEx an exclusive right ... is discriminating against the other carriers by providing more favorable terms and conditions to FedEx and by shifting the cost of the exclusive facility to other airlines." [135] The Complainants also argue that the grant assurances prohibit airports from granting exclusive rights and, "FAA has made clear that the application of any unreasonable requirement or standard that is applied in an unjustly discriminatory manner would constitute a constructive grant of a prohibited exclusive right."[136]

In their Reply, the Authority disagrees with the Complainants' position and states that, "The constructive exclusive right claim is merely a derivative of their economic discrimination claim and fails for the same reasons. It also fails for the obvious reason that none of the Complaining Airlines has been excluded from the Airport. Each is

[134] FAA Exhibit 1, Item 1, Page 12
[135] FAA Exhibit 1, Item 1, Page 13
[136] The FAA has since recognized that providing dual analysis of unjust economic discrimination and a constructive granting of an exclusive right is redundant. [See Skydive Paris v. Henry County, TN, FAA Docket No. 16-05-06, Director's Determination, p. 19.]

providing scheduled passenger transportation service to IND, and none has identified any service it has been prevented from providing."[137]

The Complainants content that, "…Lease Amendment No. 3… grants an actual exclusive right because the Cargo Apron expansion is being undertaken for FedEx's sole use as part of the expansion of its IND hub. Respondents protest that this does not constitute an exclusive right because the Carriers have not "been delayed from gaining access to the Airport, or prevented from operating at the Airport or…in actual competition with FedEx. However, Respondent's crimped view of an exclusive right is misplaced." [138]

In its Rebuttal, the Authority states there was no conferring of an exclusive right because, "…constructive and actual exclusive rights both require that there be some degree of exclusion – some showing of an aeronautical activity that the complainant was constructively or actually prevented from providing." [139] Rather, the Authority states that, "The Complaining Airlines, however, point to no provision of Amendment No. 3, or the underlying 1993 Amended and Restated Land Lease Agreement, that grants FedEx exclusive use of the cargo apron…As a practical matter, the Complaining Airlines and other passenger airlines are unlikely to use the FedEx cargo apron, but that is not the result of FedEx's right to exclude others. Rather, it is a function of the airport layout, the location of the respective facilities, and the ample availability of apron space adjacent to the passenger terminal building and elsewhere at the Airport…in years past, the existing cargo apron has been used by other aeronautical users to park aircraft at no charge to those aeronautical users…."[140]

Additionally, the Authority argues that, "it is well established that in order to show the constructive grant of an exclusive right, a claimant must show that it actually has been barred from conducting a 'particular aeronautical activity' at the airport, *City of Pompano* v. *FAA*, 774 F.2d 1529, 1541 (11th Cir. 1985), through the imposition of unreasonable standards. Here, the Complaining Airlines do not claim that they have been denied the right to self-service aircraft or any other opportunities to provide aeronautical services at the Airport."[141]

The Director reminds the parties that FAA considers it inappropriate to provide federal funds for improvements to airports where the benefits of such improvements will not be fully realized due to the inherent restrictions of an exclusive monopoly on aeronautical activities. Under FAA Order 5190.6A, the existence of an exclusive right to conduct any aeronautical activity at an airport limits the usefulness of the airport and deprives the public of the benefits of competitive enterprise.

However, this is not the case here. Even if Amendment No. 3 grants FedEx the exclusive use of the Apron, the Director finds the Authority is within its rights to make such a

[137] FAA Exhibit 1, Item 10, Page 6
[138] FAA Exhibit 1, Item 12, Page 29
[139] FAA Exhibit 1, Item 13, Page 29
[140] FAA Exhibit 1, Item 13, Pages 30-31
[141] FAA Exhibit 1, Item 13, Page 29

grant, provided it does not deny other airlines the opportunity for similar treatment under a similar situation.[142] It is in denying others a similar right that creates a violation of Grant Assurance 23; here the Complainants have not shown the Authority has denied them a similar right in using the Airport.

As noted above, Amendment No. 3 has yet to be implemented or adversely affect the Complainants and is not ripe for review under Part 16. If the parties have a dispute regarding their Lease Agreement, Part 16 is not the proper venue for resolving a pure contract dispute.

3. Whether the *Amendment No. 3 to the IAA-FedEx Land Lease Agreement* (Amendment No. 3), dated April 14, 2006 is consistent with Grant Assurance 24, *Fee and Rental Structure,* 49 U.S.C. § 47107(a)(13) of 49 U.S.C. which requires, in pertinent part, that the owner or sponsor to maintain a fee and rental structure for the facilities and services being provided to airport users which will make the airport as self-sustaining as possible under the circumstances existing at the airport.

The Complainants reference the "self-sustaining" requirement [143] and state, "the long duration of the Landing Fee Rent Credit also violates Assurance 24 requiring the Airport to be as self-sustaining as possible."[144]

The Authority rebuts this in its response stating the Complainants', "introduce[d] no evidence to show that the Airport will not be as self-sustaining as possible as a result of entering into Amendment No. 3."[145] The Authority went on to state, "the Additional Special Facilities Rental Credit does not violate the Airport's self-sustainability obligations. First, the rent credits were negotiated at arms length with FedEx, and reflect the state of market conditions at the time. Second, although an important part of the fee structure negotiated with FedEx, the rent credits are part of the broader contractual commitments made by FedEx. In fact, Amendment No. 3 was carefully structured so that the rent credits would accrue only under circumstances specifically designed to prevent revenue shortfall to the Airport."[146]

It appears that the Authority negotiated an agreement with FedEx that contributes to its ability to be self-sustaining. The Director acknowledges that the Complainants do not wish to 'unwind' the agreement with FedEx, but want assurances that the Complainants based at IND will not directly or indirectly bear the cost of the improvements to FedEx's

[142] In Jim Martyn v. Port of Anacortes, FAA Docket No. 16-02-03, (April 14, 2003) (Director's Determination), the FAA found the Complainant had requested to lease space for the same purpose and under similar conditions as another similarly situated aeronautical tenant, but was denied. The Director found the airport sponsor in noncompliance. In the current case, Complainants have not demonstrated they requested to lease space for the same purpose and under similar conditions as another similarly situated aeronautical tenant.

[143] FAA Exhibit 1, Item 1, Page 13
[144] FAA Exhibit 1, Item 1, Page 16 Footnote 11
[145] FAA Exhibit 1, Item 10, Page 46
[146] FAA Exhibit 1, Item 10, Page 47

leasehold.[147] The Director agrees that it is not necessary to undo the agreement especially in light of the fact that the Credit does not violate the requirement to be self-sustaining. The record supports the Respondent's assertion that the Credit was integral to the FedEx expansion of upwards of $420 million in leasehold improvements, all of which will revert to Authority ownership.[148]

Grant Assurance 24 requires the airport sponsor to establish a fee and rental structure that will make the airport as self-sustaining as possible under the circumstances existing at the particular airport. The intent of the assurance is for the airport operator to charge fees that are sufficient to cover as much of the airport's costs as is feasible. There has been no showing that the Respondent is not meeting this Grant Assurance requirement.

4. Whether the *Amendment No. 3 to the IAA-FedEx Land Lease Agreement* (Amendment No. 3), dated April 14, 2006 is consistent with Grant Assurance 25 *Airport Revenues,* 49 U.S.C. §§ 47107(b) and 47133, which requires the airport sponsor to ensure that all revenues generated by the airport will be expended by it for the capital or operating costs of the airport; the local airport system; or other local facilities which are owned or operated by the owner or operator of the airport and directly and substantially related to the actual air transportation of passengers or property; or for noise mitigation purposes on or off the airport.

The Complainants alleged violations of Grant Assurance No. 25 and the Revenue Use Policy by the Respondents. These allegations are addressed in the following subtopics: Subsidy and Landing Fees.

Subsidy

The Complainants allege that the Credit violates the Revenue Use Policy because the Credit in effect subsidizes FedEx, which the Revenue Use Policy prohibits. The Complainants recognize that an exception in the Revenue Use Policy does permit the use of airport revenue for short promotional periods, sometimes for up to 2 years, but the Authority allows the Credit for 20 years, which according to the Complainants is really a subsidy for FedEx. [149] The Complainants state the Credit is a subsidy because the apron will be for the exclusive use of FedEx and FedEx will pay for only a portion (if any) of the cost of constructing the Apron.[150]

The Authority avers the Credit is not a prohibited subsidy, but rather is a carefully constructed business transaction tied to FedEx's $420 million in leasehold improvements, which will eventually revert to the Airport.[151] In addition, the Authority asserts it has given incentives to other carriers, so the Credit offered to FedEx is not unique.[152] The

[147] FAA Exhibit 1, Item 1, Page 20
[148] FAA Exhibit 1, Item 10, Page 46
[149] FAA Exhibit 1, Item 1, Page 16
[150] FAA Exhibit 1, Item 1, Page 17
[151] FAA Exhibit 1, Item 10, Page 46
[152] FAA Exhibit 1, Item 10, Page 46

Authority states that Chautauqua Airlines and Northwest Airlines have also received Credits. Northwest has received two Credits for $226,114 and $133,285; Respondent did not provide the amount of Credit for Chautauqua Airlines.[153]

The Complainants state the Credits offered to Northwest Airlines are readily distinguishable from Credits offered to FedEx because they are smaller amounts and were for durations of just one year.[154]

The Complainants claim, "Respondents contend that the rent Credits in Lease Amendment No. 3 do not contravene the FAA's Airport Revenue Diversion Policy for three reasons: the rent credits are not direct subsidies and therefore the Revenue Diversion Policy does not apply; they are not part of a promotional "incentive" but rather are an economic "concession;" and the Airport has given rent credits to other airlines for tenant improvements. None of these contentions withstands scrutiny."[155]

The Complainants allege "the rent credits are clearly offsets to the costs of FedEx's Cargo Apron expansion, regardless of whether the subsidy is 'direct' or not…" the rent credits are part of a broad incentive program to induce FedEx to expand its hub and increase its flight operations at IND," and "The IAA's incentive scheme fails the FAA's Revenue Diversion requirement for promotional incentive programs."[156]

The Respondents maintain in their Rebuttal that, "The Complaining Airlines misunderstand Federal law and FAA policy in this area, and mischaracterize the Respondent's arguments. Respondents did not assert that the Revenue Use Policy 'does not apply' but rather, that since no airport funds will be transferred to FedEx, 'the revenue use sections of the Revenue Division Policy are not implicated." The Respondents additionally argued that, "…because there is no evidence to establish that as a result of the Additional Special facilities [sic] Rental Credit the Airport would not be as self-sustaining as possible under the circumstances, the Revenue Diversion Policy was not violated."[157]

Respondents contend "that the Additional Special Facilities Rental Credit is not a direct subsidy to FedEx, and thus the revenue use sections of the Revenue Diversion Policy are not implicated....The rent credits in this case are not subsidies; they are credits that, if and when they are earned, would have the effect of reducing one of the components of the rent that FedEx is required to pay...."[158]

The Director notes that the Revenue Use Policy does prohibit direct subsidy of air carrier operations, as stated in the Applicable Law and Policy Section. Direct subsidies are considered to be payments of airport funds to carriers for air service. Prohibited direct

[153] FAA Exhibit 1, Item 20, Page 11
[154] FAA Exhibit 1, Item 21, Pages 14-15
[155] FAA Exhibit 1, Item 12, Page 30
[156] FAA Exhibit 1, Item 12, Page 32
[157] FAA Exhibit 1, Item 13, Page 31
[158] FAA Exhibit 1, Item 10, Page 43

subsidies do not include waivers of fees or discounted landing or other fees during a promotional period.[159]

The Director agrees with the Authority that technically the Credit is not a subsidy within the meaning of the Revenue Use Policy because the Authority is not directly paying airport funds to FedEx to operate. Nonetheless, the Authority cannot impose the cost of FedEx's rent Credit on other carriers even if the other carriers benefit from the additional operations by FedEx, as a result of having the airfield costs spread over more operations, and even if the other carriers actually pay less as a result of the overall deal. Moreover, the FAA has made clear it is not reasonable for the costs of even a one- or two-year promotional fee waiver to be borne by other carriers. Thus it would clearly be unreasonable to impose the much longer-term facility rent Credit for FedEx at IND on other carriers.[160]

The record reflects that FedEx is spending $162 million to add "a 400,000 square foot expansion to its existing sort building, a 175,000 square foot secondary sort building, a 40,000 square foot aircraft maintenance building, and an 8,000 square foot building for ground support equipment."[161] As discussed in Table 1 [*see* page 20], the Credit for 2012 would be taken in 2013 by crediting the $1,416,247 against the Additional Special Facilities Rental. This in turn lowers Airport System Operating Revenue under the separate Lease Agreement, resulting in a higher Airport System Requirement of $1,416,247 and a higher landing fee.

Accordingly, based on these facts, the Director finds the Credit is not a subsidy because it is a part of a committed financial agreement, Amendment No. 3, for the development and lease of airport facilities, with the proviso that the costs of the Credit cannot be imposed on other aeronautical users in contravention of the Revenue Use Policy.

Landing Fees

In addition, the Complainants allege the rent Credit causes them to pay for the FedEx apron through higher landing fees. The carriers claim, "IAA's arrangement with FedEx will burden the other airlines at IND with paying for all or a very substantial part of the cost of building a cargo facility for FedEx's exclusive use, because costs left unreimbursed due to the rent credits will be added to the airfield cost center requirement, and hence will require the other airlines to pay higher landing fees than would be the case in the absence of the rent credit arrangement. The amount of this unlawful cost burden will equal, the difference between (1) the sum of the Additional Special Facilities Rent and IAA's financing profit and (2) the Landing Fee Rent Credits."[162]

---

[159] Revenue Use Policy, Section VI (B)(12)

[160] The FAA evaluates promotional fee waiver programs to ensure the programs are not unjustly discriminatory and that the costs of a fee waiver are not in any way passed on to other operators. See 69 F.R. 61544-04, October 19, 2004

[161] FAA Exhibit 1, Item 10, Page 2

[162] FAA Exhibit 1, Item 1, Page 15

The Complainants allege that this is a violation the Rates and Charges Policy. They state, "[a] fundamental statutory principle underlying FAA's Rates/Charges Policy is that airlines cannot be required to pay for facilities used exclusively by others." [163]

The Complainants cite, "Jet 1 Center; Inc. v Naples Airport Authority, FAA Docket No. 16-04-03, "If… the Authority is making up that lost revenue by spreading the associated cost among the remaining tenants, it could be in violation of the FAA's Policy Regarding Airport Rates and Charges, which states: Common costs (costs not directly attributable to a specific user group or cost center) must be allocated according to a reasonable, transparent and not unjustly discriminatory cost allocation methodology that is applied consistently, and does not require any aeronautical user or user group to pay costs properly allocable to other users or user groups."[164]

The Authority in its Answer states the Complainants will not be burdened by Amendment No. 3, and that therefore, it did not violate the Rates and Charges Policy. "On the contrary, the self-correcting mechanisms built into Amendment No. 3 were expressly intended to ensure that all of the Signatory Airlines, including the Complaining Airlines, would be protected from any downside and would benefit from the upside of the FedEx agreement No. 3." [165]

The Authority contends this case is different from *Jet 1*. In *Jet 1,* according to the Authority, the argument centered around the Naples Airport Authority's failure to enforce contract terms. The Authority counters that the "lost revenue" in *Jet* 1 *Center* constituted fuel-flowage fees that the sponsor had a *contractual right* to update each year, which it failed to exercise."[166]

The Authority claims that an "airport sponsor's failure to exercise existing contract rights and its spreading of resulting losses among other airport tenants is a far cry from what the Complaining Airlines object to here: the Authority's failure to negotiate an even better agreement with FedEx than the one it actually was able to negotiate." [167]

The Complainants in their Reply state they will not benefit from the terms of Amendment No. 3. The Airlines maintain that "The Landing Fee Rent Credit scheme will impose substantial additional burdens on the Carriers, with a cumulative net cost reaching nearly $38,000,000, to subsidize the expansion of the Cargo Apron for FedEx's exclusive use"[168] In addition, according to the Complainants, "[i]t is irrelevant because whether or not FedEx's increased operations reduce the percentage of landing fees paid by other airlines or the landing fee rate declines, other airlines will be paying costs associated with building FedEx's exclusive use facility through higher landing fees than in the absence of the Rent Credits, and under FAA policy they cannot be forced to do so."[169]

---

[163] FAA Exhibit 1, Item 1, Page 14
[164] FAA Exhibit 1, Item 1, Page 14
[165] FAA Exhibit 1, Item 10, Page 39
[166] FAA Exhibit 1, Item 10, Page 39
[167] FAA Exhibit 1, Item 10, Page 39
[168] FAA Exhibit 1, Item 12, Pages 34
[169] FAA Exhibit 1, Item 12, Page 34

The Authority rebuts this and states the Complainants are unrealistic in their projected increases in landing fees.[170] Since landing fees reflect airfield costs, it is unlikely landing fees would increase sevenfold during the 20-year term of Amendment No. 3.

The Complainants state their projection is conservative because the increased FedEx activity would accelerate airfield expenditures.[171] The Complainants state the additional landing fees that FedEx would pay is not the point. It is the Credit they object to not the additional fees that FedEx would pay. They state that any carrier with a growing operation would pay additional landing fees from their additional flights, and FedEx should not have their additional fees reduced by the Credit.[172] The Authority states the Complainants did not consider the benefits to the other airlines from the additional landing fees FedEx would pay from its additional flights to IND.[173]

The Complainants cited from earlier FAA decisions to support their allegation that Amendment No. 3 violates the Rates and Charges Policy. The Complainants cited Naples and Bombardier for propositions that,

- "airlines cannot be required to pay for facilities used exclusively by others; [174]
- "aeronautical fees may not exceed the costs allocated to that user or user group"
- "the airport cannot require any user to pay costs properly allocable to another user." [175]

The Complainants conclude that, "[h]ere, the beneficiary is FedEx, which effectively gets to use and enjoy an exclusive facility, while the other airlines at IND will pay for a very substantial part of the cost of that facility, because each dollar of Landing Fee Rent Credit will be added to the airfield cost center requirement, and hence paid by the other airlines through higher landing fees than would be the case in the absence of the Landing Fee Rent Credits. In sum, that scheme violates the FAA's Rates/Charges Policy, and Respondents' ineffective rebuttal on this point does not alter that conclusion." [176]

The Authority in its Rebuttal restated its contention that Amendment No. 3 will benefit, not harm the Complainants by reducing the landing fee rate they will be required to pay. It stated, "… the Complaining Airlines will not be burdened with paying for FedEx' s facilities because FedEx will pay for its own facilities." [177]

The Authority further explained that the Complainants, so far, have benefited from the Amendment No. 3 financial arrangements, "the 2008 landing fee rate calculations were performed in July of 2007, in such a way that they gave the Signatory Airlines the benefit

[170] FAA Exhibit 1, Item 10, Page 30
[171] FAA Exhibit 1, Item 12, Page 21
[172] FAA Exhibit 1, Item 12, Page 23
[173] FAA Exhibit 1, Item 10, Page 30-31
[174] FAA Exhibit 1, Item 12, Page 34
[175] FAA Exhibit 1, Item 12, Page 34
[176] FAA Exhibit 1, Item 12, Page 36
[177] FAA Exhibit 1, Item 13, Page 33

of *increased* FedEx landed weight but did not include in 2008 landing fee rates any FedEx rent *reduction* resulting from the rent credit. Specifically, when the Authority staff budgeted the landing fee rates for 2008, staff conservatively assumed that FedEx would not qualify for the credit and, thus, would pay the full amount of the Additional Special Facilities Rent in 2008. In other words, the 2008 Airport System requirement was not increased to account for rent credit reductions to FedEx's rent. On the other hand, the landed weight projections used by the Authority staff (for purposes of estimating 2008 landing fee rates) were based on, among other things, FedEx's increased landed weight (the very same incremental landed weight that resulted in FedEx's qualifying for the credit in the first place)."[178]

The Respondents maintain that "The net result is that, in 2008, the Signatory Airlines, including the Complaining Airlines, are receiving the benefit—through lower landing fee rates—of an estimated Airport System requirement (numerator) that does not reflect FedEx' s reduced Additional Special Facilities Rent caused by the rent credit, but does reflect FedEx's increased landed weight in the total landed weight (denominator). The reconciliation to the actual Airport System requirement, as adjusted by the effect of FedEx's rent credit, would normally be included in the landing fee rate estimates for 2009. However, the Authority has offered, and the Signatory Airlines have indicated unanimously that they wish to accept, a negotiated fixed landing fee rate for the balance of the term of the Signatory Agreement based on 2008 levels...As a result, the Signatory Airlines will have "frozen" in place the advantages stemming from the timing of the landing fee rate calculations for 2008."[179]

The Director concludes that the benefits of FedEx's landing fees for the new operations do not cancel out the issue of charging FedEx's facility costs to the other carriers. FedEx's additional operations will impose costs on the airfield proportionate to the additional fees it is paying in the form of pavement wear and airport operations cost.

The Rates and Charges Policy recognizes that the FAA will apply the policy guidance in all cases in which the agency is called upon to determine if an airport sponsor is carrying out its obligation to make the airport available on reasonable terms. The FAA's role in matters in which such a dispute is processed under Part 16 is to determine whether the airport proprietor is in compliance with its grant obligations and statutory obligations relating to airport fees. The FAA proceeding is not intended to provide a mechanism for adjudicating the respective rights of the parties to a fee dispute.[180] Nor is it the forum for review of contractual disputes. Such issues are matters of state contract law and are not reviewable in a Part 16 proceeding. This is consistent with the position the FAA has taken on prior cases raising state contract claims. *See* Consolidated Services v. City of Palm Springs, FAA Docket No. 16-03-05 (June 10, 2004). Boca Airport, Inc. v. Boca Raton Airport Authority, FAA Docket No. 16-00-10 (April 26, 2001), and Morris Waller and M&M Transportation v. Wichita Airport Authority, FAA Docket No. 16-98-13 (March 12, 1999).

[178] FAA Exhibit 1, Item 20, Pages 8-9
[179] FAA Exhibit 1, Item 20, Page 9
[180] Rates and Charges Policy, Section C

Once the Lease Agreement expires and assuming it is not renegotiated, if the Authority were to unilaterally impose the cost of the Credit on the Airlines serving the Airport, those Airlines could then seek relief under the Rates and Charges Policy because their rates and charges would no longer be set by a written agreement, and the Credit would then be subject to the Policy. The Rates and Charges Policy offers the airlines two significant protections: an airport may not without written agreement include exclusive use facilities in its rate base,[181] and limits costs that can be included in its common use rate base.[182] In addition, the Complainants may have recourse in other venues to adjudicate disputes arising out of the Lease Agreement.

Summary

The dispute in this Complaint is whether the Authority was required to obtain the approval of the Signatory Airlines prior to entering into Amendment No. 3. The Complainants state they did not give their approval, which the Authority disputes. Under the master Lease Agreement, approval is not required for a Special Use Facility where the sole cost is at the expense of the aeronautical tenant that will use the facility. If costs are to be passed on, then it does not appear that the requirements for a Special Use Facility are met and the Airlines must agree to any additional costs.

The Director concludes that the Authority has yet to impose a financial requirement to cover the cost of the FedEx Credit on the Complainants. The Director finds the Airlines do not need Part 16 to determine the Respondents' grant compliance as the Authority has yet to unilaterally impose the provisions of Amendment No. 3 on the terms of the Lease Agreement. Moreover, section 8.01(D) and 8.03 of the Lease Agreement provide the Complainants with substantial protection in a civil proceeding as well as under section 17.04, which stipulates the laws of the State of Indiana and Federal law govern the Lease Agreement.

As discussed extensively herein, the evidence does not support a finding of a violation of Grant Assurance Nos. 22, 23, 24, and 25. In this case, the costs for the Credit will not be imposed, it at all, until at least the expiration of the Lease Agreement in December 2010 so there is no controversy ripe for review by FAA. If the parties have a dispute regarding their signatory Lease Agreement, Part 16 is not the proper venue for resolving these types of contract disputes; other civil remedies are available to the Complainants to address disputes related to the Lease Agreement and the FedEx Credit.

VIII. FINDINGS AND CONCLUSIONS

The Director finds the Authority did not violate:

- Grant Assurance 22 Economic Nondiscrimination, because (i) the Authority has yet to impose the cost of the Credit in calculating the landing fee rate under the

[181] Rates and Charges Policy, Section D.
[182] Rates and Charges Policy, Sections C & D and subsection 2

Lease Agreement and has offered not to impose such a cost during the term of the Lease Agreement.

- Grant Assurance 23 Exclusive Rights, as the Credit does not exclude Complainants from any permitted aeronautical activity, and the Authority has not denied the Complainants similar opportunities to earn rental Credits.

- Grant Assurance 24, Fee and Rental Structure, because the Complainants are not currently paying the costs for a facility which will be exclusively used by FedEx.

- Grant Assurance 25 Airport Revenues, because the Credit is not a subsidy; no showing of unlawful revenue diversion has been established since all Airport System Operating Revenues remain on the Airport regardless of the imposition of the Credit, which has yet to occur.

ORDER

ACCORDINGLY, it is ordered that:

1. The Complaint is dismissed.
2. All motions not specifically granted herein are denied.

RIGHT TO APPEAL

This Director's Determination is an initial agency determination and does not constitute final agency action subject to judicial review under 49 U.S.C. § 46110.[183] A party to this proceeding adversely affected by the Director's Determination may appeal this initial determination to the FAA Associate Administrator for Airports pursuant to 14 CFR § 16.33(b) within thirty (30) days after service of the Director's Determination.

August 18, 2008
Date

Randall S. Fiertz
Director
Airport Compliance & Field Operations

[183] See also 14 CFR § 16.247