Order 2005-6-11

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

Served: June 14, 2005

Issued by the Department of Transportation
on the 14th day of June 2005

BRENDAN AIRWAYS, LLC, et al.,	:	
v.	:	
THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY	:	Docket OST-05-20407

FINAL DECISION

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FINAL DECISION

Summary

The Department of Transportation, pursuant to 49 U.S.C. § 47129(c)(2), determined that a February 14, 2005, complaint filed by thirteen airlines[1] (collectively the "complainants", "carriers", or "airlines") against the Port Authority of New York and New Jersey ("Port Authority" or "respondent") challenging increased fees charged at Newark Liberty International Airport ("Newark"), presented a significant dispute over the reasonableness of two increased airport fees.[2] The two fees are the General Terminal Charge ("GTC") and Federal Inspection Facilities Space Charge ("FIS") imposed by the Port Authority on all domestic and foreign air carriers that use the Terminal B FIS/B-2/B-3 ("International Terminal B") at Newark.[3]

The Complaint and Instituting Order: The complaint charged that the Port Authority, which is responsible for establishing the fees in dispute at Newark, violated the DOT Policy Regarding Airport Rates and Charges, 61 Fed. Reg. 31994, June 21, 1996 ("DOT Policy Statement"), because: (1) the Port Authority did not engage in meaningful consultations; (2) the supporting data for the fee increases were insufficient; (3) several expense and revenue component allocations were improper or unreasonable; and (4) the fee increases violated various bilateral aviation agreements because they were unjustly discriminatory against foreign flag carriers. In an Instituting Order issued on March 16, 2005, pursuant to the requirements of section 47129, the Department concluded that the facts alleged met the criteria for a significant dispute, e.g., size of the airport (one of the nation's largest and busiest), amount in dispute (up to $22M for CY '05), relative size of the increased fees (up to sixty-three percent), questions regarding fee methodology (alleged lack of financial information to justify increase), the number of carriers complaining about the increased fees, and the concern raised by the European Commission in its Note Verbale, filed with the record.

ALJ Recommended Decision: Because the complaint presented a significant dispute, the Department directed that a hearing be held before an administrative law judge ("ALJ"). The ALJ assigned to this case, Richard C. Goodwin, convened a hearing on April 4 and 6, 2005, and issued a Recommended Decision on May 9, 2005. The ALJ determined that: (1) complainants, except in the noted instances, failed to carry their burden of proof that the Port Authority's increased fees are unreasonable; (2) the increased fees are not

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[1] The airlines that joined in the complaint were Brendan Airways, LLC, d/b/a USA 3000 Airlines, British Airways PLC, Scandinavian Airlines System, Societe Air France, Swiss International Airlines, Virgin Atlantic Airways Limited, Deutsche Lufthansa AG, TAP Air Portugal, Alitalia-Linee Aeree Italiane-S.p.A., El Al Israel Airlines Limited, Air Jamaica Limited, KLM Royal Dutch Airlines, and Singapore Airlines Ltd. Brendan Airways is a U.S. carrier; the remaining 12 complainants are foreign carriers.

[2] The Airports Council International – North America ("ACI-NA") filed a timely petition to intervene in this proceeding as allowed by Department rules. 14 C.F.R. § 302.20.

[3] The GTC fee applies to all passengers (domestic and international) arriving into and departing from International Terminal B. The FIS fee applies to all international passengers arriving into International Terminal B. See Respondents' Brief in Opposition to the Airlines' Joint Complaint and Brief at 1 nn.1–2.

unreasonably discriminatory; (3) the Port Authority's application of its fee methodology mistakenly or unreasonably attributed to complainants certain expenses in the areas of concessions, rent, and expense reclassification; and (4) complainants are due a refund, plus interest, in an amount consistent with his findings and conclusions. Recommended Decision at 1.

Department's Final Decision: On review of his Recommended Decision, the Department has determined that the fees are reasonable except to the extent they are based on: (1) two expense reclassification costs in the amount of $2.13M per year and the associated indirect cost allocation yet to be determined; (2) an unreasonable methodology used for allocating city rent; (3) an incorrect calculation of one component of concession revenue in the amount of $0.9M per year; and (4) the Port Authority's net income (also referred to as an annualized surplus). A supplemental proceeding within the next thirty (30) days will be used to determine the appropriate amount of refunds due to the complainants. The Department has determined that the complainants failed to meet their burden of proof to show that the Port Authority's fees are unreasonable with respect to all other issues raised. The Department has further determined that the new fees are not unjustly discriminatory against foreign flag carriers and that the complainants are due a refund and interest for certain amounts set forth more fully below.

A. STATUTORY AND REGULATORY BACKGROUND

In determining whether the increased GTC and FIS fees are reasonable and not unjustly discriminatory, the Department relies on various guidance, including: statutes, Department policy statements, bilateral agreements, case law, and rules of practice.

Statutory Guidance: In the 1994 Federal Aviation Administration Authorization Act ("1994 Authorization Act"), Congress gave airlines and airport operators the ability to obtain prompt resolution of significant disputes over the reasonableness of new or increased airport fees. 49 U.S.C. § 47129. This section—the basis for this proceeding—requires the Secretary to determine the reasonableness of a challenged fee or fee increase within 120 days after the complaint is filed.[4]

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

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

In addition to the 1994 Authorization Act, the Anti-Head Tax Act, 49 U.S.C. § 40116, provides guidance in our decision making. The Anti-Head Tax Act allows the local airport authority to collect only reasonable rental charges, landing fees, and other service charges from aircraft operators for the use of airport facilities. See Northwest Airlines v. County of Kent, 114 S.Ct. 855 (1994); see also Second Los Angeles International Airport Rates Proceeding, Order 97-12-31 (December 23, 1997); Miami International Airport Rates Proceeding, Order 97-3-26 (March 19, 1997).

DOT Policy Statement: In response to the 1994 Authorization Act's mandate that we publish guidelines for determining whether a fee is reasonable, 49 U.S.C. § 47129(b), we issued the DOT Policy Statement.[5] The DOT Policy Statement sets forth Departmental guidelines for assessing the reasonableness of airport fees. Then, as we noted in the March 16 Instituting Order at 3–5, when an airport sponsor accepts federal grant money for an airport improvement, it must give certain assurances, including the assurance that the airport will be available for public use on fair and reasonable terms and without unjust discrimination. 49 U.S.C. § 47107. The sponsor of the airport, here the Port Authority, is obligated to the Transportation Secretary and the FAA Administrator to assure compliance with its federal airport grant obligations. 49 U.S.C. § 47107(g).

In examining fee increases within this statute, the Department may determine whether the new fee is reasonable, but may not prescribe a fee. 49 U.S.C. § 47129(a)(3). When determining whether airport fees are reasonable, the guidelines established in the DOT Policy Statement shall be used. No party has disputed that the DOT Policy Statement should be applied in deciding this case.[6] As we noted in the Second Los Angeles International Airport Rates Proceeding, Order 15-12-33 at 16, the DOT Policy Statement expressly reaffirms an airport's right to choose a fee methodology (compensatory, residual, or hybrid), and gives each airport substantial discretion in calculating the fees related to costs.

Bilateral Agreements: The United States' air service agreements with many foreign countries also require U.S. airport fees to be reasonable and non-discriminatory. Department policy likewise endorses reasonableness and non-discrimination in airport fees. Consistent with bilateral obligations, the DOT Policy Statement ¶ 3.3 expressly provides that:

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[5] The 1994 Authorization Act required the Department to issue standards or guidelines for determining whether airport fees are reasonable. The Department thus issued its Policy Regarding Airport Rates and Charges, 60 Fed. Reg. 6909, on February 3, 1995. The Department subsequently issued a revised Policy Statement. 61 Fed. Reg. 31994 (June 21, 1996). The DOT Policy Statement was vacated in parts not relevant to this proceeding, by the U.S. Court of Appeals for the D.C. Circuit. Air Transport Ass'n v. Department of Transportation, 119 F.3d 38 (D.C. Cir. 1997).

[6] We note that the Port Authority's concern that the DOT Policy Statement definition of a "rate base" addresses airfield fees only. Respondent's Opening Brief to the Secretary on Exceptions to the Recommended Decision ("Respondent's Opening Brief") at 6 n.13. Although the Policy Statement only addresses "rate base" in context of airfield fees, we agree with respondent that it provides guidance on what is reasonable for a rate base for non-airfield fees.

> [C]harges imposed on foreign airlines must not be unjustly discriminatory, must not be higher than those imposed on domestic airlines engaged in similar international air services and must be equitably apportioned.... Charges to foreign air carriers for aeronautical use that are inconsistent with these principles will be considered unjustly discriminatory or unfair and unreasonable.

Case Law: Our past cases have also established some guidelines for our analysis of airport fees challenged by airlines. See, e.g., Second Los Angeles International Airport Rates Proceeding, Order 97-12-31 (December 23, 1997); Miami International Airport Rates Proceeding, Order 97-3-26 (March 19, 1997).

Rules of Practice: Pursuant to the requirements of the 1994 Authorization Act, we also adopted Rules of Practice for Proceedings Concerning Airport Fees, Subpart F, 14 C.F.R. Part 302. 60 Fed. Reg. 6919 (February 3, 1995). Those rules, as well as Subpart A of the Department's Rules of Practice, have governed the conduct of this proceeding. Under our rules, and in order to satisfy the burden of proof, airline complainants must set forth their case in their complaint and the accompanying briefs and evidence submissions: "Carriers filing complaints ... will generally be expected to submit documentation that contains the filing party's entire position and supporting evidence." 60 Fed. Reg. 6923; 14 C.F.R. § 302.603(a). However, airport owners or operators may not undermine the air carriers' ability to meet such burdens by withholding financial information or data that support a new or increased fee. If they do so, they run the risk that the new fee will be found to be unreasonable. 61 Fed. Reg. 32018, ¶ 1.1.1 (June 21, 1996).

B. ORIGINS OF THIS CASE

The Airport: The Port Authority operates Newark along with LaGuardia, JFK, and Teterboro airports as well as the Port of Newark, a maritime terminal. Newark has three terminals, designated A, B, and C, each of which have sub-terminals, designated A-1, A-2, A-3, B-1, B-2, etc. Airports are entitled to create different cost centers at an airport. Here the Port Authority is treating Terminals A, B, and C as separate cost centers.

While neither complainants nor the Port Authority have submitted for the record in this case any of the agreements and other documents governing the contractual relationships between the Port Authority and any of the airlines using Newark, the parties have represented to the Department the following facts about the use of the various terminals. The airlines using Terminal A have lease agreements that specify the rents or fees that must be paid by those airlines. The complainants in this case use International Terminal B, but are not lessees or signatories to any lease agreements. Continental Airlines, a former occupant of International Terminal B with the complainants, built and operates Terminal C under a lease agreement with the Port Authority. Therefore, as a practical matter, the Port Authority's fee methodology, including its cost allocations, will affect only the fees paid by complainants and other Terminal B airlines. The occupants of Terminals A and C compensate the Port Authority for comparable costs through their lease agreements.

The Basis for Increased GTC and FIS Fees: The Port Authority based the fee increases on its cost estimates for the current year, which generally reflect its cost experience in recent years. The Port Authority included a 2–15 percent increase to account for anticipated cost increases or contingencies. PA-35 (reflecting 2005 estimated cost increases varying from 2 to 15 percent, averaging 3 percent across all cost components). See Complainants' Post-Hearing Brief at 14. The Port Authority has made a commitment to discuss the fees with the airlines at the end of the year but has not made a commitment to refund any excess amount or to use excess amounts as credits for the next year.

1. The 2005 Fee Increases

Fee Increases Announced: On October 28, 2004, the Port Authority hosted a meeting for representatives of carriers serving Terminal B. At the meeting, the Port Authority advised the carriers that it was planning to implement on January 1, 2005, proposed increases of the GTC fee from $5.50 to $8.00 per passenger, and the FIS fee from $13.50 to $22.00 per passenger.[7] The Port Authority alleged that it had been incurring significant losses at International Terminal B and that it needed to raise fees to cover the losses. The Port Authority stated that it had not adjusted the fees for seven years and could not continue to incur losses. Respondents' Brief in Opposition to the Airlines' Joint Complaint and Brief at 6–7 ("Answer Brief"). The Port Authority provided some financial data at this meeting to support the fee increases. The carriers characterized this material as "rudimentary" and alleged that it "fell far short of that specified by Appendix 1" of the DOT Policy Statement. Complaint at 4.

Consultations: Following the meeting, the Port Authority sent a letter to all carriers, dated November 12, 2004, which included a rate card that provided the carriers with the Port Authority's proposed rate increase noting its effective date of January 1, 2005; a compact disc that included a copy of the presentation given at the October 28, 2004, meeting; and a copy of the financial statement that was distributed at the meeting, which included historic and current economic information on revenues, expenses, and passenger volumes, as well as information on the proposed fee increases, their effective date, and the revenue forecasts based upon the increased fees. Complaint at Exhibit B.

Between November 24 and 29, 2004, most of the affected carriers in Terminal B wrote to the Port Authority in response to the materials provided on November 12, expressed concern about the size of the fee increases and the Port Authority's supporting documentation, and asked the Port Authority to produce additional financial information as described by Appendix 1 to the DOT Policy Statement.

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[7] This proceeding is the second case involving increased GTC and FIS fees at Newark conducted under 49 U.S.C. § 47129, and involves at least eight of the same complainants. The earlier case, British Airways PLC, et al. v. Port Authority of New York and New Jersey et al., dismissed by Order 2000-5-23 (May 24, 2000), grew out of the Port Authority's decision to increase the same fees at Terminal B in March 2000 after providing the affected carriers less than two weeks' notice of the increase. The case was dismissed before reaching a hearing on the merits after the Port Authority rescinded the disputed fee increase and issued credits to all affected carriers. See Order 2000-5-23 (May 24, 2000).

The Port Authority responded on December 16, 2004, with a letter and additional materials to support the fee increases. Complaint at Exhibit A. The letter contained a document titled "Basis for 2005 Increase In Newark Liberty International Airport Terminal B FIS/B-2/B-3 Fees". This ten-page enclosure provided more information about the historic and current finances of International Terminal B than was initially provided on October 28, 2004. The enclosure also included the Port Authority's fee methodology, future factors to affect facility fees, another copy of the financial statement for Terminal B, and a Glossary explaining various terms, particularly those related to expense categories. The Port Authority noted that the implementation date of the increased fees would be moved to February 1, and concluded by offering the opportunity to meet with the carriers to discuss the fee increases.

On January 5, 2005, the carriers requested a meeting with the Port Authority to discuss the fee increases. The Port Authority says that it tried unsuccessfully to get the airlines to meet before January 25 because the fee increases were set to take effect on February 1. Answer Brief at 13–14. On January 26, the Port Authority provided the carriers with a revised financial statement but did not provide any supporting schedules or financial information on Terminal C, which the carriers had previously sought. The airlines informed the Port Authority on January 28 that they had already decided to file a complaint under section 47129. Answer Brief at 17–18. The carriers and the Port Authority met one last time on January 31, without any agreement on the fee increases. Answer Brief at 18.

Fee Increases Implemented: On February 1, the Port Authority implemented the increased fees at International Terminal B. The carriers have paid the increased fees under protest while initiating this administrative dispute process.

2. The Complaint and Port Authority Response

The Complaint: In their complaint, filed on February 14, the complainants asserted that the new fees at Newark Terminal B are unreasonable and thus violate the DOT Policy Statement and U.S. bilateral obligations.[8] Complaint at 10–15. First, the complainants alleged the fees are unreasonable because of the magnitude of the increase. Specifically, the GTC fee has been increased 45.5 percent ($5.50 per passenger to $8.00 per passenger), and the FIS fee was increased 63 percent ($13.50 per passenger to $22.00 per passenger).

Next, the complainants charged that the fees were unreasonable because the Port Authority's procedures for adopting the new fees violated the DOT Policy Statement, which requires disclosure of sufficient documentation to justify the fees, and because the documentation provided did not comply with the DOT Policy Statement Appendix 1 requirements. The complainants also claimed that the Port Authority violated U.S.

[8] The complaint included some correspondence with the Port Authority about the fee increases, some tables on International Terminal B's costs and revenues, but no declarations or affidavits. The complaint also did not include any copies of the carriers' leases or other agreements with the Port Authority governing the terms of their use of International Terminal B.

international obligations by implementing the fee increases without "meaningful consultation" and thus imposed discriminatory fee increases in violation of various bilateral agreements. Finally, the complainants claimed that the fee increases violated the DOT Policy Statement on accumulated surpluses because the Port Authority accumulated significant surpluses from Terminal B operations in 2000 and 2001 and should have used those surpluses to offset the need for fee increases in 2005 and future years.

The Answer and Motions: On March 1, the Port Authority filed its answer to the complaint and several motions. The Port Authority first contended that it engaged in meaningful consultations with the complainants and claimed that section 47129 does not authorize the Department to find that fees are unreasonable based on a lack of consultation. The Port Authority then argued that the complaint did not raise a significant dispute because complainants failed to establish a prima facie case. The Port Authority concluded that the fee increases are reasonable.

In addition to its answer and opposition brief, the Port Authority filed four motions which expanded upon the points made in the Port Authority's answer and opposition brief.[9] The complainants opposed the Port Authority's motions.

The Reply: On March 3, the complainants filed a reply and disputed the Port Authority's contentions, especially regarding whether meaningful consultations took place and supported this argument with reply declarations of James Brennan and R. Bruce Reiser, attendees of the meetings referenced in the complaint. The complainants further argued that the Port Authority failed to provide sufficient data and attached the reply declaration of Daniel P. Kaplan on this point.

Motion to Strike Reply Declarations: On March 4, the Port Authority moved to strike the complainants' three reply declarations and claimed that they introduced new matters not raised in the complaint, and thus, violated Department Rule 605(b), which states that "[t]he reply shall be limited to new matters raised in the answer." (emphasis added) 14 C.F.R. § 302.605(b). Respondents further argued that the declarations addressed documents, statements, data and events known to the complainants when they filed the complaint, rather than new matters. The complainants responded by opposition brief that the reply declarations rebutted declarations made in the Port Authority's answer and also contained new matters raised in the answer.

3. The Instituting Order

Finding of Significant Dispute: As previously noted, we determined that the dispute over the increased FIS and GTC fees must be sent to an ALJ for a hearing under the statutory

[9] The motions were: (1) Motion to Dismiss for Failure to Comply with the Department's Rules Concerning the Contents of Complaints Filed Under § 47129; (2) Motion to Dismiss Foreign Air Carriers as Improper § 47129 Complainants; (3) Motion to Dismiss Newark Liberty International Airport as an Improper Respondent; and (4) Motion to Strike Exhibit D and Exhibit H to the Complaint. Subsequently, on March 4, the respondent filed an additional motion, i.e., Respondents' Motion to Dismiss for Failure to Comply with the Department's Rules Concerning the Contents of Complaints Filed Under Section 47129, and Motion to Strike Reply Declarations.

procedures because the complaint was within our jurisdiction under 49 U.S.C. § 47129 and presented a significant dispute. Order 2005-3-21 at 20 (March 16, 2005). We earlier required the Port Authority to provide the financial security required by the statute. Restated Scheduling Notice, Docket No. OST-2005-20407-6 (February 18, 2005). On March 4, the Port Authority filed a letter of credit in the amount of $5,902,693.58, which we acknowledged by Notice on Security Requirement, Docket No. OST-2005-20407-35 (March 10, 2005).

Rulings on Motions: We also addressed various motions made by the Port Authority. Of particular relevance for this proceeding was Respondents' Motion to Dismiss for Failure to Comply with the Department's Rules Concerning the Contents of Complaints Filed Under Section 47129, and Motion to Strike Reply Declarations. We denied the motion to dismiss and deferred the motion to strike so the ALJ could consider the adequacy of the evidence in reaching his Recommended Decision. Instituting Order at 28–29. Although we found a significant dispute to exist within the statute, we acknowledged the unusual evidentiary issues presented and noted that the complainants' "ability to present their case may be circumscribed by the limitations of their own pleadings . . . because [they] did not file any testimony with their complaint, which the rules require." Id. at 2.

Ruling on Document Production: In addition, complainants requested the Department to compel the Port Authority to produce additional documents relevant to the fee increases. We granted complainants' request, in part, and attached a list of the evidentiary material, "Attachment 1", to be provided by the Port Authority. In addition to the documents requested by complainants, the Department included additional information requests, which we considered relevant to the issues in this case.

Issues to Investigate: We directed the ALJ to investigate the following issues set forth in the complaint:

> (1) whether the Port Authority has improperly or unreasonably allocated the following expense cost pools to Terminal B: Operating & Maintenance Expenses, Airport Services, Phase 1A, CH & RP, Fixed Charges, and City Rent, per its financial statement;
>
> (2) whether the Port Authority has improperly or unreasonably allocated other expense sub-categories to the expense categories listed at item (1) supra, per its financial statement;
>
> (3) whether the Port Authority has improperly or unreasonably failed to include all appropriate revenues in the "Rentals & Other" category, per its financial statement;
>
> (4) whether the Port Authority has improperly or unreasonably projected passenger traffic in 2005, for its rate-setting methodology; and

(5) whether the fees are unreasonably discriminatory as between airlines using Terminal B, and those using Terminals A and C.

We directed the ALJ to make findings on whether the Port Authority's fee methodology and calculation on these specific issues were reasonable. We also asked the ALJ to make findings on the amount that should be refunded if we ultimately held the fees to be unreasonable.

Issues Not to Investigate: We directed the ALJ not to investigate the issue raised in the complaint about concession fee revenue because there was no evidence in the complaint governing the parties' fee obligations or entitlement to the concession revenues. We also directed the ALJ not to consider the carriers' claims about accumulated surpluses in prior years and whether they should have been applied to current deficits in lieu of increasing fees because there was no evidence in the complaint of unlawfully diverted revenue or of complainants' right to share in past surpluses. We also directed the ALJ not to consider whether the fees at Newark are higher or lower than those charged by other airports. Finally, we found that, because the statutory fee reasonableness requirement being enforced by the Department is consistent with the provisions of the bilateral agreements on fees, these proceedings comply with our bilateral obligations. Instituting Order at 23.

4. The ALJ's Decision

In his Recommended Decision, Judge Goodwin held that the airlines failed, in some instances, to show that the increased fees were unreasonable or unjustly discriminatory and, in other instances, did show where the fee methodology mistakenly or unreasonably allocated certain expenses to complainants for concessions, rent and expense reclassification.

The ALJ also found that: (1) the Port Authority produced sufficient information for complainants to assess the fees' reasonableness; (2) it responded in a timely manner to all reasonable requests for information; and (3) it complied with ¶ 1.1.1 of the DOT Policy Statement and Attachment 1 of the Instituting Order. In addition, the ALJ found that the Port Authority did not discriminate among the airlines using International Terminal B and those using Terminals A and C, based on different methodologies and the resulting fees. The ALJ found that the air carriers using Terminals A, B-1, and C are in fundamentally different situations from the complainants because they are parties to lease agreements while the complainants are not. The statute, 49 U.S.C. § 47107(a)(2)(B), and the DOT Policy Statement recognize the ability of an "airport proprietor [to make] reasonable distinctions among aeronautical users (such as signatory and non-signatory carriers) and assess[] higher fees on certain categories of aeronautical users based on those distinctions." DOT Policy Statement ¶ 3.1.1.

The ALJ found that the Port Authority's forecast surplus "is not so relatively large as to suggest that the Port Authority has attempted to create a revenue surplus in violation of Policy Statement provisions" and thus ruled that the Port Authority's projected surplus in

2005 was neither improper nor unreasonable, as an airport is permitted to account for uncertainties in predicting revenue and expenses. Recommended Decision at 13.

The ALJ also found that complainants failed to show that the following elements of the Port Authority's methodology were unreasonable: (1) the charges in the direct expense category of Structural Maintenance; (2) the amount and allocation of the Port Authority's metropolitan area-wide indirect costs; (3) the Port Authority's methodology for calculating International Terminal B's indirect costs; and (4) the allocation of Airport Services, Phase 1A, CH&RP (central heating and refrigeration plant), and Fixed Charges. In addition, complainants failed to show: (1) the "Rentals & Other" category did not include all appropriate revenues; and (2) the Port Authority improperly or unreasonably projected passenger traffic for 2005.

The ALJ was not convinced by complainants' arguments that there were alternative methods of calculating costs. Merely showing that there is another reasonable way to calculate costs is insufficient. Instead, the ALJ noted, complainants were required to show that the Port Authority's methods were unreasonable, which they did not do in the case of certain indirect costs, such as police services, which complainants urged should be allocated on a passenger count basis.

The ALJ did, however, find that the Port Authority's methodology for determining the fee increases was unreasonable in certain instances due to the Port Authority's: (1) improper calculation of direct expenses by including expense reclassifications for signage and two abandoned projects; (2) improper and unreasonable allocation of city rent that was not cost-based; and (3) misallocation of the concession revenues from display advertising by crediting International Terminal B users with only fifty percent of revenues from display advertising instead of eighty percent. The ALJ estimated that the Port Authority improperly calculated the annual amount generated by its fee increases by more than $5M: $2.13M in direct expenses, $2.2M in city rent, and $0.9M for uncredited concession revenues.

C. THE DEPARTMENT'S DECISION

The Department has determined to adopt the results of the ALJ's Recommended Decision on all of the issues except surplus/net income. In view of the Department's decision that the fees paid by the airlines are reasonable, except for those specific elements deemed unreasonable, the Port Authority must refund complainants the portion of the fees paid during the pendency of this proceeding that is unreasonable. In addition, the Port Authority must adjust its fees in accordance with this order.

We set forth below the Department's detailed analysis of the issues, beginning with a discussion of the evidentiary motions and the burden of proof, followed by a discussion of the disputed elements of the rate methodology and the Port Authority's refund obligation.

As an initial matter, we note that the applicable statute and DOT Policy Statement expressly recognize that an airport has the right to establish a compensatory fee system if it wishes. See 49 U.S.C. § 47129(a)(2); DOT Policy Statement ¶¶ 2.1 passim; see also Kent County, supra, 114 S.Ct. 855. If an airport chooses a compensatory methodology to set fees, those fees must be based on an airport's costs. In the current case, the Port Authority has characterized their methodology as compensatory; however, we note that in the distribution of concession revenue, the methodology incorporates aspects of a residual methodology.[10] Furthermore, when analyzing the appropriateness of a compensatory non-airfield fee methodology based on cost, the Department finds that it is reasonable to use as guidance the DOT Policy Statement provisions on airfield fees. The Department's view on this point is explained and applied below in our specific analysis of the surplus issue, but applies equally to the other cost issues presented here.

1. Evidentiary Motions and Related Matters

The complainants are disputing several evidentiary rulings made by the ALJ. The ALJ denied the complainants' motions for further discovery and to submit additional testimony, and he struck part of the briefs submitted by complainants to him. Because the ALJ's rulings on these motions may have affected the complainants' ability to introduce evidence on some issues, we begin our analysis with a discussion of the evidentiary motions raised. The Department reviews the ALJ's rulings de novo. After reviewing the motions, briefs and the ALJ's decision, the Department has decided to affirm the ALJ's rulings.

Motion to Modify Attachment 1 to the Instituting Order and for Deposition: The complainants filed a Motion to Modify Attachment 1 to the Instituting Order and for Deposition ("Discovery Motion") on March 22, requesting: (1) that the ALJ modify Attachment 1 as necessary to include a variety of documents and other information; and (2) that the ALJ permit the deposition of David Kagan or other Port Authority document custodian. The complainants argued that the Instituting Order had authorized such modification "for good cause shown ... if the ALJ believes the circumstances so warrant."[11]

The Department's Rules of Practice require airline complainants to file all of their testimony with their complaint or to say specifically what additional information they have been unable to obtain from the airport. 14 C.F.R. § 302.603. The Department adopted these rules to enable all parties to meet their statutory deadlines. The complainants did not request in their complaint that the Department require the Port Authority to turn over the information detailed in their Discovery Motion. Furthermore,

[10] Residual agreements generally provide for the sharing of nonaeronautical revenues with aeronautical users by the airport proprietor, in exchange for the aeronautical users assuming part or all of the liability for nonaeronautical costs. In compensatory agreements, the airport proprietor generally assumes all liability for airport costs and retains all airport revenues. DOT Policy Statement ¶¶ 2.1.1–2.1.2.

[11] Brief in Support of Joint Complainants' Motion to Modify Attachment 1 to the Instituting Order and for Deposition (March 22, 2005) at 4 (quoting Instituting Order at 28).

Attachment 1 of the Instituting Order required the Port Authority to turn over more material than the complainants had requested in their complaint and reply.

The ALJ was empowered to modify Attachment 1 for good cause shown, which could result from complainants' inability to obtain the information earlier from the opposing party; however, complainants had the initial responsibility to attempt to obtain the documents and materials. The ALJ did not have the authority to require the Port Authority to submit information that the airlines could have but did not request previously.

The Discovery Motion was filed prior to the Port Authority's submission in response to Attachment 1. The complainants acknowledged that "the Port Authority's responses may well contain all of the information needed to resolve the issues in this proceeding." Complainants' Brief for Discovery Motion at 3. As noted by the ALJ, after receiving the additional information from the Port Authority, complainants "did not allege that the Port Authority failed to provide [the information listed in Attachment 1] and did not file any motions to compel." Recommended Decision at 10. The complainants have neither shown that they requested from the Port Authority the documents and information outlined in the Discovery Motion nor given an explanation for their failure to request the material earlier. The ALJ properly denied the Discovery Motion after receipt of the new information from the Port Authority.[12]

The complainants also contest the ALJ's denial of their request to depose David Kagan. The ALJ may issue an order authorizing a deposition for good cause shown, but the matter is left to the ALJ's discretion.[13] The ALJ determined that complainants had not shown good cause. We agree with the ALJ's conclusion. In particular, we note that complainants admitted that Kagan was available at the hearing and that they were able to obtain the same testimony that they would have sought via deposition. Complainants' Brief to the Department Decisionmaker ("Complainants' Brief") at 19. Therefore, complainants did not meet the requirements of the Rules of Practice for taking a deposition of a witness. 14 C.F.R. § 302.26(a).

Motion to Introduce Testimony Pursuant to Instituting Order: The complainants argue that the ALJ should have granted their Motion to Introduce Testimony Pursuant to Instituting Order ("Motion for Testimony"). The Instituting Order stated that complainants were not permitted "to submit new evidence at the hearing without a showing of good cause" but that they may submit testimony at the hearing based on the information provided by the Port Authority in response to Attachment 1 of the Instituting Order. Instituting Order at 3. The complainants gave only vague descriptions of the

[12] The additional information in response to Attachment 1 was submitted by the Port Authority on March 23, 2005.

[13] The rules of general applicability in these proceedings (14 C.F.R. Part 302, Subpart A) provide for depositions in certain circumstances. "Ordinarily an order to take the deposition of a witness will be entered only if: (1) The person whose deposition is to be taken would be unavailable at the hearing; (2) The deposition is deemed necessary to perpetuate the testimony of the witness; or (3) The taking of the deposition is necessary to prevent undue and excessive expense to a party and will not result in an undue burden to other parties or in undue delay." 14 C.F.R. § 302.26(a).

testimony to be offered and did not meet their burden to show good cause. Because complainants did not establish that the testimony they wished to submit was based on new information from the Port Authority, the ALJ was correct to deny the complainants' Motion for Testimony. The Department agrees with the ALJ that complainants failed to show good cause for the introduction of the proposed additional testimony.

Request for Reconsideration/Interlocutory Appeal of Denial of Presentation of Evidence: The complainants argue that the ALJ prevented them from meeting their burden through his denial of their Motion for Testimony. They filed a Request for Reconsideration or Interlocutory Appeal of the denial of their Motion for Testimony. An interlocutory appeal is granted only in extraordinary circumstances. 14 C.F.R. § 302.11(h). In view of the fact that the complainants offered no new arguments, there was no need for the ALJ to reconsider his previous ruling. There were no extraordinary circumstances warranting an interlocutory appeal, particularly considering the time constraints of the proceeding. The Department agrees and affirms the ruling of the ALJ.

Respondent's Motion to Strike Attachments 1 and 2 to Complainants' Reply to Respondent's and Intervenor's Post-Hearing Briefs and Portions of Complainants' Reply Brief that Reference Attachments 1 and 2 ("Motion to Strike"): The complainants argue that the ALJ erred in granting Respondent's Motion to Strike portions of the direct testimony of James P. Brennan, R. Bruce Rieser and Daniel P. Kaplan. The ALJ stated in his April 7, 2005, Post-Hearing Order that the complainants' reply brief was limited to twenty pages. The complainants' reply brief contained five pages of attachments, created by complainants, further explaining the calculations performed by complainants. The complainants cannot circumvent the ALJ's page limit by couching additional argument in the form of charts and "Notes", particularly when those charts and notes consist of materials authored by complainants that could have been included within the page limitation.

In addition to being in excess of the page limit, the five additional pages contained information that had previously been deemed inadmissible by the ALJ. The ALJ had already determined that the complainants had failed to show good cause to admit the additional testimony. The complainants cannot circumvent the ALJ's evidentiary rulings by submitting the evidence as part of a brief. Therefore, we affirm the ALJ's decisions regarding the Motion to Strike.

Note Verbale from the Council of the European Union: On June 3, 2005, the Council of the European Union delivered a Note Verbale to the U.S. Department of State addressing the ALJ's Recommended Decision. The State Department receives such correspondence from foreign governments and forwards it to the appropriate government officials for their consideration. The Department, on June 7, 2005 included the Note Verbale in the docket of this proceeding because it was properly forwarded to the Department.[14]

[14] Respondent's counsel, by correspondence dated June 8, 2005, objected to the inclusion of the Note Verbale in the record after the close of the evidence as a violation of the Administrative Procedure Act, 5 U.S.C. § 556(e) and as fundamentally unfair. Counsel further requested that we include a copy of his letter of objection in the record of these proceedings, which we did on June 14, 2005.

Because the European Union is not a formal party to the proceeding, the Department may not treat a pleading or other document from it as a part of the record. Therefore, the Department cannot give consideration to the contents of the letter in rendering a Final Decision. The Note Verbale is, however, included in the docket of this proceeding for completeness.

Respondent's Motion to Strike the International Air Transport Association's June 2, 2005 Letter to the Secretary: On June 2, 2005, the Regional Vice President of the International Air Transport Association ("IATA") sent a letter to the Secretary of Transportation, the Deputy Assistant Secretary for Aviation and International Affairs, and the Deputy Assistant Secretary of State for Transportation Affairs. The letter discussed this proceeding and urged the Department to take certain actions in connection with rendering this Final Decision. The letter was not filed in the Docket, but was served on the Port Authority's counsel. The Port Authority responded on June 7, 2005, with a motion to strike[15] the letter on the basis that IATA was not a party to the proceeding and had not properly followed the Department's procedural rules for submitting evidence during the hearing or for intervening, and that IATA had not complied with the briefing procedures established in this case.

The Department agrees that the IATA letter should not be considered a part of the record or considered by the Department in connection with this Final Decision. IATA did not follow Departmental rules of procedure or our briefing procedures in this case. IATA is also not a proper party to this proceeding. 14 C.F.R. 302.20. Accordingly, in rendering this Final Decision, the Department will not consider the IATA letter.

2. The Burden of Proof

When an airline seeks a determination as to the reasonableness of a fee imposed on the airline by an airport, the airline bears the burden of proof. The airline complainants must submit evidence sufficient to show that the challenged fees are unreasonable. Los Angeles International Airport Rates Proceeding, Order 95-6-36 at 17–18 (citing Administrative Procedure Act, 5 U.S.C. § 556(d) ("the proponent of a rule or order has the burden of proof") and Director, OWCP v. Greenwich Collieries, 114 S.Ct. 2251 (1994)); see also Air Canada v. U.S. Dep't. of Transportation, 148 F.3d 1142, 1155–56 (D.C. Cir. 1998). However, if the complainants present a prima facie case that a fee is unreasonable, the burden shifts to the airport. The airport must then submit sufficient evidence to show that the fee is, in fact, reasonable. Absent evidence presented at the hearing that a fee may be unreasonable, the airport is under no obligation to justify its rate-setting methodology.

Strict compliance with these procedures is necessary in order for all parties to be able to meet the statutory deadlines. Many of the complainants are familiar with the process. Indeed, eight of the current complainants initiated another rates proceeding under section 47129 only five years before—in the same forum, against the same airport, and involving

[15] The Respondent's included with the Motion to Strike a Motion for Leave to File an Unauthorized Document, which we hereby grant.

the same fees. The complainants have an affirmative obligation to provide sufficient evidence with their complaint to support their allegations.

The complainants have argued repeatedly before, during, and after the hearing that any failure to meet their burden of proof was the result of the Port Authority's refusal to provide sufficient documentary detail to assess the reasonableness of the fee increases. The complainants made this argument with issues such as the costs associated with Structural and Electrical Maintenance, Airport Services, Phase 1A, CH&RP (central heating and refrigeration plant), and Fixed Charges.

The DOT Policy Statement provides suggestions of the types of information that may be useful in determining the reasonableness of fee increases, but the general reference by the complainants to the DOT Policy Statement does not relieve complainants of the need to outline the specific information that they believe is necessary in their evaluation of the fee increases. It is not sufficient merely to refer generally to Appendix 1 of the DOT Policy Statement and request responsive documents from an airport. The Department and the parties are constrained by the 120-day statutory period established by Congress to resolve the dispute. Unfortunately, neither the parties nor the Department have the luxury of the more generous discovery periods customary in traditional district court litigation. The strict time limitation obligates the airlines to react more quickly to notice of a possible fee increase in order to obtain information to prove its case of unreasonableness. As we have noted, at least eight of these carriers were aware of the section 47129 procedures and requirements because they filed an almost identical complaint five years ago.

3. The Challenged Elements of the Port Authority's Rate Methodology

As noted in the Instituting Order at 22, Department rules governing this proceeding require that the complainants set forth their case in their complaint and the accompanying briefs and evidence submissions. The issues to be investigated and addressed by the ALJ were limited to the issues set forth in the Instituting Order based upon the evidentiary filings made by complainants. Accordingly, the scope of the Department's review and decision is limited to the issues raised by complainants.[16]

a. Expense Cost Pools for Terminal B

The first issue addressed by the ALJ involved the expense cost pools for Terminal B. We directed the ALJ to look at the six items raised in the complaint: (1) Operating and Maintenance Expenses; (2) Airport Services; (3) Phase 1A; (4) CH&RP (central heating and refrigeration plant); (5) Fixed Charges; and (6) City Rent. The ALJ found in favor of

[16] While we directed the ALJ to investigate only those specific issues raised by the complaint and supporting evidentiary submissions, we provided some latitude to the ALJ to consider evidence submitted as a result of Attachment 1, or order of the ALJ for good cause shown, when investigating the specific issues raised by complainants. Thus, although we directed the ALJ not to consider concession revenues due to a lack of supporting information provided by the complainants, the ALJ decided to address the concession issue as a result of evidence presented at the hearing and documents produced by the Port Authority. We agree with the ALJ's determination to consider the limited concession revenue issue raised.

the complainants on two of the specific items raised, but against the complainants in the remaining four items. We adopt the ALJ's recommended decision on the two items found in favor of the complainants, as explained below.

1. Operating and Maintenance Expenses

The ALJ undertook a detailed analysis of the Port Authority's 2005 estimated Operating and Maintenance Expenses totaling $33.7M. Recommended Decision at 13–17. Direct operating and maintenance expenses include costs for janitorial services, elevator, escalator and baggage belt maintenance, customer service representatives, labor, materials, and service costs. Indirect costs include the International Terminal B portion of agency administrative, public safety and engineering costs. Id. at 13. The Port Authority's Profit and Loss statement breaks the operating and maintenance costs into four categories.[17] Within the category of Direct International Facility Expenses, one subcategory known as "Expense Reclassifications", in the amount of $2.13M, drew particular scrutiny from the complainants and the ALJ.

"Expense Reclassifications" for 2004 consisted of two elements: signage that was mistakenly coded initially as a capital cost, and expenses associated with planning for two capital projects that were ultimately abandoned. Recommended Decision at 14. According to the Port Authority, planning expenses are usually treated as capital expenses. But, when the airport cancels a capital project, the planning expenses are usually treated as an operating expense in the year in which the cancellation occurred. See PA-47 ¶ 59.

The ALJ determined that the expense reclassification costs for signage and abandoned projects, in the amount of $2.13M, was unreasonable because the two items were not shown to be "ordinary and recurring" expenses. The ALJ then determined that the indirect expenses attributable to these two direct expense items should be recalculated using the same methodology and refunded to complainants. Recommended Decision at 23.

The Department agrees with the ALJ that the complainants have met their burden of proof to show that the expense reclassification costs of $2.13M were not reasonable. While we agree generally with the principle cited by the Port Authority that it is entitled to recover its costs incurred, we disagree that the Port Authority is entitled to use $2.13M in one time costs to establish its cost basis for fee increases. Were evidence presented by the Port Authority to show, in response to the complainants' prima facie showing of unreasonableness, that the Port Authority has incurred expense reclassification costs in the range of their 2005 estimate of $2M for each of the last several years, then we could find that the Port Authority could reasonably base an estimate of $2M going forward into 2005 and beyond. Alternatively, the Port Authority showed no specific evidence that it

[17] (1) Direct International Facility Expenses (direct expenses); (2) Newark Airport Allocated Expenses (indirect expenses); (3) Port Authority General Airports, Police, Maintenance, and Engineering Allocated Expenses (indirect expenses); and (4) Port Authority Central Administrative and Development Allocated Expenses (indirect expenses). See also PA-30-002, -003.

expected reclassification costs in the range of $2M in 2005. See Tr. 397:1–11. Because the Port Authority did not present such evidence, we determine that the Expense Reclassifications portion of the fee is unreasonable.

The fact that the Port Authority's own expert classified the items as a one-time charge supports the ALJ's and the Department's determinations here. For example, the Port Authority's expert witness explained that "the cost that had been incurred in performing this work was written off in a one-time charge." PA-47 ¶ 59. He further explained on cross-examination that in 2002 the Port Authority incurred no charges for expense reclassification; in 2003, the charge was only $279,797; but, in 2004, the year before the present rate increase was to take effect, the expense reclassification category skyrocketed nearly nine-fold to $2,131,482. See CA-8; CA-9.

The Department also agrees with complainants' position that the expense reclassification costs are unreasonable because the Port Authority has already covered for unexpected costs through cost increases of 2–15 percent. See PA-35. Furthermore, while the costs for signage—unlike the costs for abandoned projects—may indeed be a charge that was simply miscoded in 2004, the testimony and other evidence in the record do not support the Port Authority's arguments. See, e.g., Tr. 396:22–397:7.

The Department does not find persuasive the Port Authority's justification that the reclassified expenses are reasonable because the total direct costs—of which reclassified expenses are one component—are in line with past years' direct expenses.[18] Given the other evidence discussed above, the Department believes that the complainants' position has merit: the Port Authority has not provided sufficient evidence to rebut the complainants' case on this point, and thus, the expense reclassification costs are not reasonable.[19]

The Port Authority further argues that it is entitled to recover all costs incurred, not just ordinary and recurring ones and cites the DOT Policy Statement ¶ 2.3 to support its position. While it is true that the Port Authority is entitled to recover all costs incurred, contingent costs can be recovered from reserves set aside for such contingent expenses that vary over time. See DOT Policy Statement ¶ 2.4.4 (An airport may include in a rate base "amounts needed ... to fund reasonable cash reserves to protect against other contingencies.").

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[18] Total direct expenses for 2002–2005 are as follows: 2002 – $18.7M, 2003 – $19.9M, 2004 – $18.3M, and 2005 – $18.7M (est.) PA-35.

[19] In addition to the Expense Reclassifications charge, the ALJ found that the other 2004 direct expense categories, including Terminal B International ($2.84M), Structural Maintenance ($7.9M), and Electrical Maintenance ($2.1M) are not unreasonable. The ALJ found that the Port Authority justified its direct expenses for Structural Maintenance because it explained that $7M of the costs were for a cleaning contract and contracts for maintenance of baggage belts and loading bridges. As to Terminal B International and Electrical Maintenance, the ALJ found the costs not unreasonable because complainants did not meet their burden to prove that the expenses were not justified. After a review of the record and transcript evidence, the Department concurs with and adopts the ALJ's conclusions on these expense items.

2. Indirect Expenses

In addition to the direct operating and maintenance costs discussed above, the Port Authority's expense calculations for International Terminal B include indirect cost components. These indirect expenses consist of costs for services provided at the airport that benefit various cost centers, including International Terminal B, but are not directly attributable to specific cost centers. See PA-30-003; PA-47 ¶ 65. The Port Authority allocates its overall aviation-related indirect costs among the four Port Authority airports under a formula that causes twenty-eight percent to be allocated to Newark. PA-30-003. The Port Authority then allocates Newark's indirect costs among the different terminal cost centers at that airport according to the amount of direct costs paid by the Port Authority for each cost center. In making this calculation, the Port Authority does not include the direct expenses paid by the airline tenants at the other terminals. Because the International Terminal B facilities used by the complainants were responsible for 12.86 percent of the direct expenses paid by the Port Authority at Newark, the Port Authority allocated 12.86 percent of the indirect expenses to those facilities. See PA-30-003 (note f); PA-47 ¶ 66; Tr. 339:14–17. Thus, the Port Authority's 2005 allocation for indirect costs to International Terminal B is $14.9M.[20]

a. Allocation of Costs to Newark

As noted above, the Port Authority allocated to Newark twenty-eight percent of the total amount of indirect costs incurred by the Port Authority at the four airports it operates. The complainants did not contest the total indirect costs incurred by the Port Authority, but instead disputed the reasonableness of the twenty-eight percent allocation to Newark.

The ALJ found that there was insufficient information in the record about the Port Authority's total costs for all of the airports it operates to determine whether the Port Authority correctly applied its allocation formula. The ALJ found that the complainants provided no evidence to suggest that the twenty-eight percent allocation was unreasonable, and thus concluded that the Port Authority's chosen allocation was reasonable. Recommended Decision at 16–17.

The Department concurs with the ALJ's determination on this issue because the complainants have submitted no evidence that the Port Authority's method for allocating indirect costs among Newark and its other airports is unreasonable. The Port Authority's alleged failure to justify the allocation is not relevant. The complainants could have, but did not, include this issue in their complaint. Nor did the complainants ask the Department in their complaint to require the Port Authority to turn over relevant information. Because the complainants did not do that, they cannot now complain that the allocation is not supported or not reasonable.

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[20] The Port Authority established this amount to cover the following three subcategories of indirect operating and maintenance expenses: (1) Newark Airport Allocated Expenses ($8.4M); (2) Port Authority General Airports, Police, Maintenance, and Engineering Allocated Expenses ($3.4M); and (3) Port Authority Central Administrative and Development Allocated Expenses ($3.1M). See PA-35; Recommended Decision at 15.

The Department is also not persuaded to find the allocation unreasonable based on the complainants' argument that the Port Authority could have used an alternative method, e.g., passenger counts, to allocate costs. The existence of a reasonable alternative method to allocate costs does not render the method used by the Port Authority unreasonable. We note as well that the Port Authority addressed this methodology argument and stated that Newark would bear a much larger share of the costs for this category if the Port Authority allocated it on a per passenger basis. Respondent's Post Hearing Brief at 28–29.

b. Allocation of Costs to International Terminal B

In addition to challenging the metropolitan area-wide allocation of indirect costs to Newark, the complainants also challenged the Port Authority's re-allocation of that twenty-eight percent among Newark's cost centers. The ALJ noted that the "Port Authority determined that International Terminal B's indirect costs should be derived from the ratio of International Terminal B's direct costs to the Airport's direct costs" with a resultant percentage of 12.86 in 2004. Recommended Decision at 16; CA-10-002. The ALJ held that the Port Authority's allocation of Newark's indirect costs among Newark's cost centers was not unreasonable.

The complainants argue that the Port Authority's methodology is unreasonable, particularly because the Port Authority includes only International Terminal B's direct expenses in the calculation. The Port Authority does not include the direct expenses paid by Continental at Terminal C and by the airlines using Terminals A and B-1. The complainants argue as a result that the allocation formula unreasonably causes them to bear the burden of a larger share of the airport's indirect costs.

The Department agrees with the ALJ's determination on this issue. As noted by the ALJ, the Port Authority allocates indirect expenses in proportion to each terminal's (or cost center's) share of the airport's direct expenses. The Port Authority's expert witness supported the reasonableness of the chosen methodology by explaining that "indirect costs very much relate to the intensity of the operations and the management effort needed to supervise those operations. Because the Port Authority has no substantial operations to speak of in other terminals at Newark, one would not expect there to be much indirect cost associated with those other terminals." See PA-47 ¶ 117; see also Respondent's Reply Brief to the Secretary on Exceptions to the Recommended Decision ("Respondent's Reply Brief") at 14. The complainants' expert witness testimony provided no documentary basis to indicate that the Port Authority's exclusion of the direct costs paid by other airport tenants was unreasonable or otherwise discriminatory. The Department therefore agrees with the ALJ's conclusion that the complainants failed to show that indirect costs cannot be allocated on the basis of each cost center's direct costs incurred by the Port Authority for each cost center.

Furthermore, the complainants' contention that allocating indirect costs on the basis of passenger counts is a more reasonable method does not show that the Port Authority's

formula is unreasonable. In fact, the Port Authority presented evidence at the hearing that the complainants' passenger count methodology was itself unreasonable and would result in higher costs being allocated to complainants' rate base. Respondent's Reply Brief at 14 n.24.

3. Airport Services, Phase 1A, CH&RP, and Fixed Charges

The Port Authority's expert witness described four categories of Newark's indirect costs: Airport Services, Phase 1A, CH&RP, and Fixed Charges. See PA-47 ¶¶ 76–83; PA-30-004. Airport Services includes the Terminal B allocation of certain utility and other expenses. Phase 1A costs relate to roadway access work that was allocated based on land area. CH&RP includes costs for terminal heating and air conditioning. Fixed Charges include Terminal B's portion of the cost recovery for investment in facilities.

The ALJ concluded that the Port Authority's allocations to Airport Services, Phase 1A, CH&RP, and Fixed Charges were not unreasonable. Recommended Decision at 18. The ALJ based that determination on the finding that the complainants presented no evidence relating to these specific items.

We agree with the ALJ that the complainants failed to meet their burden on these items. They submitted no evidence suggesting that the Port Authority's calculation of these costs is unreasonable. As the Department noted in the Instituting Order, the complainants' "ability to present their case may be circumscribed by the limitations of their own pleadings." Instituting Order at 2.

4. City Rent

The Port Authority does not own the land underlying the airport. As lessee of the land that Newark airport occupies, the Port Authority pays a fixed rent to the City of Newark or a rate based on a percentage of gross revenues, whichever is greater. This rent contains four components: the "Base Newark Rent Payment"; a supplemental rent payment; rent payable to the City of Elizabeth, NJ; and an amortization payment. Recommended Decision at 18. The largest component is the Base Newark Rent Payment, which "totals $60M per year, or 8 [percent] of gross revenues combined with Port Newark, whichever is greater." Id.

Of the total city rent, the Port Authority determines Terminal B's portion by "calculating the proportion of its annual gross revenue to Newark Airport's total gross revenue and applying the resulting percentage to the city rent. (PA-30-004, note (m); Tr. 253:14–254:5; Tr. 386:13–19)." Id. For 2004, the Port Authority allocated approximately $5.0M, or 7.7 percent of the airport's gross revenues, for city rent at International Terminal B. For 2005, the Port Authority estimates that the city rent allocation should be $7.2M. According to the Port Authority, the increase of $2.2M, or a forty-four percent increase from the 2004 amount, is largely the result of the increased revenue estimated to

be generated by the higher FIS and GTC fees for International Terminal B, and thus a larger overall percentage of total airport revenues. Id.; see also PA-47 ¶ 86.

All parties agree that the rent paid this year by the Port Authority to the City of Newark will be the "flat" amount of $60M, not an amount based on gross revenues. Further, the rent paid by the Port Authority will be the same amount this year as it was last year.

Based upon the evidence presented, the ALJ determined that the Port Authority's methodology for establishing the city rent allocation for International Terminal B was unreasonable. In reaching this decision, the ALJ agreed with the complainants' argument that the city rent payment is not based on costs and noted that the DOT Policy Statement requires the allocation to be based "on the principle of cost causation." Recommended Decision at 19 (citing DOT Policy Statement ¶ 2.4.5). The ALJ concluded that the Port Authority here improperly imposed costs on the basis of revenues, while the DOT Policy Statement and prior Department decision making have established that revenues must follow costs. Recommended Decision at 18-19.

The Department agrees that, in this case, the Port Authority's chosen allocation methodology is inconsistent with the principles of the DOT Policy Statement to the extent that it is not based on costs. Further, we agree with the ALJ's conclusion that the Port Authority cannot allocate the rental payment among terminals on the basis of each terminal's share of revenues when the rent currently being paid by the Port Authority is not based on the airport's total revenues. Because the question is not before us, we are not addressing whether an allocation of rental expenses based on each cost center's gross revenue will necessarily be unlawful in every instance when the rental expense is based on the airport's total gross revenue.

The Department disagrees, however, with the ALJ's determination that the "increase" in city rent, in and of itself, is unreasonable. Because the levels of the fees in effect before February 1, 2005, were established several years ago, and not in 2004, and because the base city rent has remained at $60M per year, the allocation of city rent made by the Port Authority for 2004 is not relevant—it had no effect on the prior fee levels and, thus, no impact on the airlines. In other words, the fees paid in 2004 were not based upon that city rent allocation. Any "increase" in the city rent could only be established by comparing the proposed 2005 city rent allocation with the one made seven years ago and there has been no completed challenge to the methodology used at that time. See note 7, supra. There is no evidence in the record as to the city rent allocation seven years ago. Assuming the same methodology was being employed at the time, it is theoretically possible that the city rent allocation seven years ago could have been higher than $7.2M, particularly if Continental was still using the terminal and total terminal revenues were higher. However, because there is no evidence in the record to make a determination on this point, it cannot properly be said how much, if at all, the city rent allocation increased.[21]

[21] Generally, the Department disallows unreasonable amounts, and a supplemental proceeding is occasionally warranted to determine the exact amount to be disallowed. In those cases, both parties have had the opportunity to analyze and counter the proposed methodology. Here, it is the underlying

The Port Authority argues that if the Department finds its current methodology to be unreasonable because it is not based on costs, then the Department should reject the ALJ's conclusion that the $2.2M should be refunded to complainants. Instead, the Port Authority argues that the Department should order the Port Authority to recalculate the 2005 city rent allocation to International Terminal B using a new methodology. In its brief, the Port Authority suggested calculating the city rent "as an indirect cost" and applying the 12.86 percent Terminal B allocation to the total airport city rent. Respondent's Opening Brief at 15–16. The Port Authority states that by using this alternative methodology, the 2005 city rent allocation would be $8.3M. In this case, we cannot refer the allocation of city rent back to the Port Authority for determination in a supplemental proceeding given the statutory time limitations. The Department cannot rule at this time on the reasonableness of the alternate methodology proposed by the Port Authority because it is not before us in this proceeding. To permit the Port Authority to determine a new methodology at the post-hearing stage of this proceeding would deprive the complainants of their opportunity to challenge the reasonableness of the new methodology and would effectively result in the Department's endorsement of unilateral fee-setting.

Although the Department cannot permit the Port Authority to select a new allocation methodology within the context of these proceedings, it would be inequitable to disallow the entire city rent allocation because it is a legitimate base-rate element. In addition, the record indicates that the complainants fully expected to pay some amount for city rent. Because complainants only contested the increase in their complaint, they have, in effect, accepted the $5M amount of rental charge that the Port Authority allocated for the previous year. Accordingly, the Department only disallows $2.2M in city rent, as requested by the complainants in their original complaint.. The Department emphasizes, however, that it views the allocation methodology used by the Port Authority as unreasonable and finds that the Port Authority should develop a new or revised methodology, preferably in consultation with the complainants for future fee-setting.[22]

b. "Rentals & Other" Revenues; Projected Passenger Traffic in 2005

The Port Authority's expert witness explained that the "Rentals & Other" category includes nine separate revenue items on the Port Authority's Profit and Loss Statement.[23] The "Projected Passenger Traffic in 2005" category refers to the estimates used by the Port Authority to estimate air passenger numbers for its 2005 budgeting estimates.

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methodology found unreasonable, and the complainants did not have the opportunity to contest the Port Authority's proposed alternative methodology.

[22] We note that the Port Authority has already agreed to meet with the airlines annually. Therefore, the parties should be able to determine a reasonable allocation methodology for city rent at that time, if not sooner.

[23] See PA-47 ¶¶ 47–50. The nine revenue categories are: (1) Aircraft Services – Fixed; (2) Ground Handling – Fixed; (3) Aircraft Parking & Storage; (4) Fuel Fees; (5) Scheduled Airlines – Percentage of Fees; (6) Other Supplemental Fees; (7) Other Itinerant Fees; (8) Aircraft Service Agencies; and (9) Scheduled Airlines – Terminals. PA-47 ¶ 48.

We directed the ALJ to investigate whether the Port Authority's financial statement has improperly or unreasonably failed to include all appropriate revenues in the "Rentals & Other" category and whether the Port Authority has improperly or unreasonably projected passenger traffic in 2005 for its rate-setting methodology. The ALJ stated that the complainants provided no evidence concerning these issues and did not consider them further. We agree that the record does not contain evidence on these issues and, therefore, the complainants failed to show that the Port Authority's calculations and projections for each were unreasonable for its rate-setting methodology.

c. Whether Fees Are Unjustly Discriminatory

The complainants allege that Continental Airlines, which uses Terminal C, pays lower fees than the complainants. Continental Airlines previously operated out of Terminal B. It subsequently built and now operates exclusively out of Terminal C. By contrast, the airlines in Terminal B do not have leases with the Port Authority and do not operate the terminal. The record in this case includes no evidence on the terms of the arrangements between the Port Authority and Continental or between the Port Authority and the complainants.

The ALJ found that the increased fees are not unjustly discriminatory. The ALJ noted that the bilateral agreements and federal law prohibit unjust discrimination, but permit reasonable distinctions such that airlines not similarly situated can be treated differently if there is a "rational basis for disparate treatment". Recommended Decision at 21. 49 U.S.C. § 47107(a)(1); DOT Policy Statement ¶ 3 passim. The ALJ also found that on this issue, the complainants failed to meet their burden of proof because all International Terminal B carriers are treated the same, whether domestic or international. Recommended Decision at 21–22 and n.29. Further, the ALJ reasoned that Terminal A, B-1, and C airlines are not similarly situated because compensation to the Port Authority is incorporated into leases and is, thus, irrelevant to fee setting for carriers using International Terminal B. Tr. 282:6–15, 283:7–10. The ALJ also noted that the distinction between lessee/non-lessee is explicitly permitted by statute. 49 U.S.C. § 47107(a)(2)(B)(i); Recommended Decision at 22.

The Department agrees with and adopts the conclusions of the ALJ. As noted by the ALJ, the controlling statute allows airports to treat signatory and non-signatory carriers (and carriers with leases and those without) differently. 49 U.S.C. § 47107(a)(2)(B)(i); Recommended Decision at 22. The DOT Policy Statement also expressly permits differences in treatment of differently situated airlines, and makes clear that tenant/non-tenant and signatory/non-signatory airlines are not similarly situated. DOT Policy Statement ¶ 3.1.1.

In this case, the record shows that Continental is a signatory airline. The Port Authority says that Continental operates Terminal C, and by doing so, agreed to bear much of the expense of that terminal on its own. The record does not show the nature of the

contractual relationship between Continental and the Port Authority, so the Department is without any basis for saying that the fees are unjustly discriminatory.

The Department does not agree with complainants' arguments that the ALJ's reasoning is wrong because the DOT Policy Statement and the bilateral agreements require that "airlines operating similar international service at the same airport" must have similar rates. Complainants' Opening Brief at 25 n.91 and accompanying text. The Department notes that such a reading ignores the key distinction allowed in rates by the DOT Policy Statement where tenant/non-tenants or signatory/non-signatory carriers are concerned.

The Department recognizes that the complainants argue that the fees are discriminatory because they are "captives" in that Terminal C has the only other international arrivals facilities at Newark and the complainants cannot practicably move to Terminal C. As discussed, the Department has found that the challenged fees are reasonable for the most part. In addition, the Port Authority's expert witness testified that the Port Authority considers a variety of factors when setting fees including the fact that complainants are not signatory carriers and can leave the airport at any time. See PA-47; see also Tr. 309:2–3; Tr. 306:20–307:19. Accordingly, the Department finds that the Port Authority has not unjustly discriminated between airlines using International Terminal B and those using other terminals at the airport.

4. Other Issues

a. Surplus

The Port Authority's calculation of the challenged fees included an estimated annualized surplus of $5.1M. PA-35. In his Recommended Decision the ALJ found that the creation of the estimated surplus was reasonable. As explained below, we have determined that the inclusion of an estimated surplus was unreasonable. The Department further concludes that, if increased fees will result in an unreasonable or inappropriate surplus, then the Port Authority must be obligated to refund that surplus. Before discussing our reasoning, we turn to the ALJ's analysis of the issue.

The ALJ reasoned that the generation of an estimated annualized surplus of $5.1M was reasonable for three reasons. Recommended Decision at 12–13. First, he reasoned that revenue and expense projections are tentative and uncertain, and that the projected net income is "not so relatively large as to suggest that the Port Authority has attempted to create a revenue surplus in violation of the DOT Policy Statement provisions [at ¶ 4.2]." Second, the ALJ also stated that the Port Authority is "permitted in its calculations to reflect ... the inherent risk of uncertainty in such predictions." Last, the ALJ was swayed by the Port Authority's pledge to sit down with the affected carriers at least annually to review its costs and revenues. See PA-17-011. We disagree.

The DOT Policy Statement provides guidance in the analysis of whether the surplus is reasonable. Specifically, ¶ 4.2 of the DOT Policy Statement cautions airports regarding the establishment and use of surplus revenues. "In establishing new fees, and generating

revenues from all sources, airport owners and operators should not seek to create revenue surpluses that exceed the amounts to be used for airport system purposes and for other purposes ... including reasonable reserves and other funds to facilitate financing and to cover contingencies." DOT Policy Statement ¶ 4.2.

DOT Policy Statement ¶ 2.4.5 outlines specific rules regarding the assessment of airfield fees. Airfield fees must be based on costs. DOT Policy Statement ¶ 2.4.5. They can include an imputed cost of capital and funds for reserves, but cannot be calculated to generate a profit for the airport. Here, the Port Authority has not claimed that the surplus represents a return on capital or funds for reserves.[24] As discussed below, we acknowledge that the dispute is over terminal fees and not airfield fees. Nonetheless, we believe that the DOT Policy Statement provides useful guidance to us and affected parties on the surplus issue.

We note that the Port Authority has argued that the portions of the DOT Policy Statement relating to airfield fees are not directly applicable in this case because the fees at issue here are non-airfield fees. In this case, the Port Authority's principal method of establishing the fees for International Terminal B, a non-airfield asset, is through the use of a compensatory fee methodology. Such a methodology, permitted and expected under the DOT Policy Statement, is cost-based. The Port Authority admits that such costs are, in turn, factored into the rate base calculated by the Port Authority and then applied to determine the fees charged for each carrier. This is a perfectly reasonable approach, and under the circumstances, it is both logical and reasonable for the Department to apply as guidance for its decision the DOT Policy Statement provisions on such rate base calculations to non-airfield terminal facilities.

Moreover, the Department finds that it is a reasonable interpretation of the DOT Policy Statement and the statutory authority to look at all provisions—both airfield and non-airfield—when analyzing fee issues and the reasonableness of fees for terminals. We note, as well, that the Port Authority also avails itself of the guidance set forth in the airfield portions of the DOT Policy Statement and concedes that there is no reason that the definition of a rate base applicable to review of non-airfield fees should differ from the definition of a rate base applicable to review of airfield fees. See, e.g., Respondent's Opening Brief at 6 n.13 (expense reclassifications). Therefore, it is reasonable to use the DOT Policy Statement guidance on "rate base" methodologies to guide us.

Furthermore, the Port Authority's claim that forecasting its future expenses is difficult cannot justify what is clearly a surplus. It is the Port Authority's obligation under a compensatory methodology to calculate a fee that will ultimately generate no surplus. In

[24] The ACI-NA supports the Port Authority's right to factor in surpluses and reserves to maintain the health of airports. The ACI-NA noted in particular that recent airline bankruptcies, as well as the abrupt exit of airlines from individual airports, mean that airports risk losing "substantial revenues from departed airlines and non-aeronautical revenues due to reduced passenger traffic." ACI-NA Reply Brief at 9. Accordingly, they urge the Department to recognize the prudence of allowing airports to provide a cushion "to allow for the vicissitudes of airline and passenger traffic." Id. The Department agrees that an airport has a right to establish reserves when justifiable; however, the Port Authority has provided no evidence that the surplus derived from the fee increases is intended to be a reserve of the kind allowed by the DOT Policy Statement.

the present case, the Port Authority has already used a "default" rate of a three percent per year rise in operating costs in calculating the fee increases. The ALJ found this to be reasonable. Recommended Decision at 12. The Department agrees that the Port Authority may impute a "default" rate of a three percent rise per year in operating costs, so long as that rate is consistent with annual operating cost increases. The Department disagrees, however, that the Port Authority can additionally calculate the fees in a manner that will create a surplus that is not justified by known or reasonably expected airport costs.[25]

The ALJ also erred in finding that the estimated surplus would be small. After adjusting for the other changes we are ordering, the estimated surplus may exceed total terminal costs by over fifteen percent. The Department considers this amount to be unacceptably large, particularly after the Port Authority already factored in a three percent increase in costs and represented during consultations with the air carriers that it "want[ed] to breakeven, not make money on this increase."[26] PA-06-007.

The Department further disagrees with the ALJ's reasoning that the existence of the surplus is excused by the Port Authority's commitment to discuss the fees with the airlines at the end of the year. The Department is aware that many other airports routinely collect more revenue than costs but then credit that surplus back to the users in the rate base for the following year. However, the Port Authority has made no commitment to refund fee payments to the extent that the increased fees generate a surplus and has not promised to give the airlines in International Terminal B a credit on 2006 fees for any surplus created by the 2005 fees. Thus, requiring a refund of the annualized surplus already paid and a recalculation of the fee going forward is entirely appropriate.

b. Concession Revenues

The record describes concessions to include food and beverage, advertising, retail, duty free, and other revenues. See CA-5-008. As operator of Terminal B, the Port Authority undertakes the establishment of concessions through its own contractual arrangements with the concessionaires. Historically in Terminal B, the Port Authority applied a portion of the concession revenues toward Terminal B costs.

The airlines' complaint argued that the fees were unreasonable, in part, because the Port Authority did not credit them with all of the Terminal B concession revenues. Complaint at 11. In the Instituting Order we directed the ALJ not to address the issue of concession revenue because there was no evidence presented in the complaint to show that the complainants were entitled to share the concession revenues. Accordingly, we stated,

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[25] The Port Authority stated during the consultations with the carriers that the proposed fee increases were intended "to offset the deficit" and not to cover capital improvements. For that, the Port Authority "would come to [the carriers] in the future to increase rates for development." PA-06-007.

[26] This representation was made when the Port Authority's estimated surplus was only $2.2M. PA-05-001. It is therefore unclear from the record of the Port Authority's representations what amount it believes is necessary to "breakeven."

"the ALJ is directed not to investigate the issue raised in the complaint about concession fee revenue." Instituting Order at 23.

As a result of the document production by the Port Authority required by Attachment 1 to the Instituting Order, new information regarding concession revenue was produced. The Port Authority produced various revised profit and loss statements, which they claimed included credit for eighty percent of concession revenues for display advertising.[27] At the hearing, complainants cross-examined the Port Authority's expert witness on this information. The Port Authority's witness admitted in a supplemental declaration that the Port Authority erred in its initial calculation of the concession revenues due the airline in 2005. PA-47 ¶53.

The ALJ concluded that the concession issue presented to him at the hearing was thus a separate issue from the concession issue that the Department directed him not to consider. Recommended Decision at 22. This is because the issue raised in the complaint involved whether the complainants were entitled to a credit for all concession revenues derived in Terminal B. By contrast, the issue raised in the hearing involved whether the complainants were entitled to eighty or fifty percent of display advertising concession revenue.

Based upon the evidence submitted at the hearing, the ALJ recommended that an adjustment be made for approximately $900K in annualized revenues for improperly calculated advertising revenue. According to the ALJ, the evidence showed that the Port Authority had made a calculation error and acknowledged that in its 2004 financials it had credited the airlines with only fifty percent of concession revenue for display advertising instead of the historic allocation of eighty percent. The figures were thus corrected from $4.8M to $5.7M as the proper allocation for International Terminal B users. According to the ALJ, the parties then agreed that the figure for 2005 would be $5.9M.

The Department concludes that it was appropriate for the ALJ to render his decision. The Instituting Order directed the ALJ not to investigate the concession issue presented in the complaint, that is, the allegation that the airlines were entitled to all of the concession revenues generated in International Terminal B. During the hearing, however, and then in subsequent briefing, the Port Authority acknowledged that "it had inadvertently credited the airlines with less than the intended percentage of concession revenues." Respondent's Reply Brief at 15. See also PA-35; Tr. 379:12–380:4.

With regard to the Port Authority's vehement contention that it is not obligated now or in the future to credit the airlines with eighty percent of the display concession revenue, we

[27]There were multiple iterative allocation errors in the 2004 Profit and Loss Statement including, first twenty percent, then fifty percent of display concession revenue, instead of the historical allocation of eighty percent. The Port Authority's expert acknowledged the error. Furthermore, when the 4.2 percent projected increase for 2005 was factored in, the total display concession revenues should be $5.9M, according to complainants. Complainants' Opening Brief at 34. The Port Authority's expert witness agreed with the math, but not with the obligation.

agree that there was no contract, lease, agreement or other evidence presented to demonstrate that the Port Authority has a continuing obligation to credit the same eighty percent historic rate to the airlines in future years. However, the overwhelming majority of the evidence in the record is that the Port Authority intended to give the airlines eighty percent of the display concession revenue. We note that the Port Authority is required to consult with air carriers prior to instituting fee increases. Given the Port Authority's admission of its previous errors and subsequent corrections, the Department concurs in the ALJ's recommendation that the full eighty percent of the display concession revenue should be credited to the complainants.

5. Conclusions on the Reasonableness of the GTC and FIS Fee Increases

The Department concludes that the complainants' have failed to meet their burden of proof regarding most aspects of the fee increases. However, the Department finds that the Port Authority's methodology for calculating the GTC and FIS fees is unreasonable as to its inclusion of reclassified expenses and associated indirect costs, allocation of city rent, and allocation of concession revenues. In addition, the Department finds that the inclusion of a surplus—or net income—in its fee methodology is unreasonable and violates the DOT Policy Statement because there was no evidence presented that any surplus funds would be used "to meet debt-service coverage requirements; to fund cash reserves to protect against the risk of cash-flow fluctuations associated with normal airfield operations; [or] to fund reasonable cash reserves to protect against other contingencies." DOT Policy Statement ¶ 2.4.4.

6. Calculation of the Refund Amount

In accordance with 49 U.S.C. § 47129(c)(1), this order constitutes our final determination on the reasonableness of the increased GTC and FIS fees at Newark. As indicated, we have found these fees to be reasonable except to the extent that they were based on: (1) two expense reclassification costs in the amount of $2.13M per year and the associated indirect cost allocation yet to be determined; (2) an unreasonable methodology for allocating city rent; (3) an incorrect calculation of concession revenue in the amount of $0.9M per year; and (4) a surplus/net income. We are directing the Port Authority to refund the portion of the fee increases deemed unreasonable that have already been paid by the complainants since the fee increases were implemented on February 1, 2005. However, the record in this case does not appear to provide enough information to enable us to order a precise refund amount on the annualized indirect cost allocation attributable to the direct costs for reclassified expenses of $2.13M per year, which we deemed unreasonable.

In order to carry out Congress' direction to direct the payment of refunds or credits when a fee is found unreasonable, we have concluded that we should determine the amount of the fee that must be refunded to the complainants in a supplemental proceeding. We believe our decision to calculate the specific amount due is consistent with the statutory deadlines, because we have issued a Final Decision on the reasonableness of the GTC and FIS fee increases within the 120-day period prescribed by 49 U.S.C. § 47129. That

decision, moreover, includes a declaration that the Port Authority must refund the portion of the fees represented by the excessive charges for the reclassified expenses and associated indirect costs, city rent, net income, and concession revenue. We intend to issue an order establishing the exact amount due before the end of the 30-day period set by Congress for the payment of refunds or credits.

Our intention to hold a supplemental proceeding in this case is also reasonable because the Department has previously employed this procedure in a similar case, which we use to guide us now. See First Los Angeles International Airport Rates Proceeding at 60–62, Order 95-6-36 (June 30, 1995). We noted then that Congress did not prescribe specific procedures for the determination of the refund amount, and the parties in that case on their own did not submit the data needed for the calculation of the precise amount of refund due the airlines. Given Congress' clear directions to us to order refunds when we find a new or increased fee unreasonable in whole or in part, holding a supplemental proceeding within the 30-day time period for making refunds is reasonable when the record is insufficient to carry out that mandate. Also, we wish to provide the parties an opportunity to submit their calculations of the appropriate refund amount with supporting data.

Therefore, in order to fulfill our statutory mandate to the greatest degree possible, we are ordering the Port Authority to provide its calculation of the refund due consistent with this Final Decision by Tuesday, June 21. The Port Authority should submit information in support of its position. The complainants may then respond to the Port Authority's position by Monday, June 27, and the Port Authority may file a reply by Thursday, June 30. The parties should not file any argument concerning our ultimate findings in this order. Their submissions should be limited strictly to a discussion and data concerning the amount of the refund. We will issue our decision on the refund amount within the 30-day period set by the statute for the making of a refund or credit.

We will not, however, attempt to determine the specific amount due each airline. Because the new GTC and FIS fees are still being paid by the airlines and the record in this proceeding does not contain current data, we cannot know how much each airline has paid in fees. We also do not need to calculate the amount due each airline, because the Port Authority and each carrier entitled to refunds should easily be able to do that on the basis of our final calculation of the portion of the fee that was unreasonable. Because we are not determining the amount due each individual airline, we need not address the parties' dispute over whether the evidence in the record on that issue is sufficient and was properly accepted by the ALJ.

ACCORDINGLY:

1. We find that the General Terminal Charge and Federal Inspection Facilities Space Charge charged the airlines by the respondent, Port Authority of New York and New Jersey, for Newark Liberty International Airport are reasonable so long as the adjustments and refunds discussed in this decision are made by the Port Authority;
2. We find that the complainants, Brendan Airways et. al., have otherwise failed to show the increased GTC and FIS fees established on February 1, 2005, for the use of International Terminal B at Newark Liberty International Airport are unreasonable;
3. We order the respondent, Port Authority of New York and New Jersey, to refund with interest the fees paid for the period from February 1, 2005, to the date of the refund payment to the extent that such fees have been found unreasonable by this order and to pay such refunds to each of the thirteen carriers that joined in the complaint filed in this docket on February 14, 2005;
4. We will establish the refund amount due under ordering paragraph 3 in a supplemental proceeding as follows: The Port Authority must provide its calculation of the refund due consistent with this Final Decision by Tuesday, June 21. The complainants may then respond to the Port Authority's position by Monday, June 27, and the Port Authority may file a reply by Thursday, June 30.
5. We order the Port Authority to modify the fees to eliminate the portions of the fees found unreasonable and to so adjust the fees charged all airlines subject to the fees at issue in this proceeding;
6. We adopt the findings made by the Administrative Law Judge Richard C. Goodwin in his recommended decision in this proceeding except to the extent that his findings are inconsistent with the analysis and findings set forth in this order; and
7. We deny all other pending motions not addressed in this order.

By:

MICHAEL W. REYNOLDS
Deputy Assistant Secretary for Aviation
and International Affairs

June 14, 2005

(SEAL)

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