DEPARTMENT OF TRANSPORTATION

Office of the Secretary

14 CFR Part 302

[Docket No. 49830]

RIN 2105–AC18

Rules of Practice for Proceedings Concerning Airport Fees

AGENCY: Office of the Secretary, DOT.

ACTION: Final rule.

SUMMARY: This final rule establishes specific procedural rules under which the Department of Transportation will handle complaints by air carriers and foreign air carriers for a determination of the reasonableness of a fee increase or newly established fee imposed upon the carrier by the owner or operator of an airport. It also establishes rules that would apply to requests by the owner or operator of an airport for such a determination. The final rule responds to the mandate in the recently enacted Federal Aviation Administration Authorization Act of 1994 requiring the Department to issue regulations establishing procedures for acting upon such complaints by air carriers and requests by airport owners and operators.

EFFECTIVE DATE: This rule is effective on February 3, 1995.

FOR FURTHER INFORMATION CONTACT: Robert Klothe, Office of Regulation and Enforcement, Office of the General Counsel, United States Department of Transportation, 400 Seventh Street, SW, Washington, DC 20590, telephone (202) 366–9307.

SUPPLEMENTARY INFORMATION:

Background

This rulemaking had its origins in two related notices on the subject of Federal policy on airport rates and charges issued by the Office of the Secretary of Transportation (OST) and the Federal Aviation Administration on June 9, 1994. A jointly-issued notice entitled ''Proposed Policy Regarding Airport Rates and Charges'' (Proposed Policy) listed and explained the proposed Federal policy on the rates and charges that an airport proprietor can charge to aeronautical users of the airport. (59 FR 29874); a supplemental notice concerning the proposed policy was issued on October 12, 1994 (59 FR 51836). The FAA also issued a notice of proposed rulemaking entitled ''Rules of Practice for Federally Assisted Airports'' setting forth procedures for the filing, investigation, and adjudication of complaints against airports for alleged violation of Federal requirements under the Airport and Airway Improvement Act of 1982, as amended, and the Anti-Head Tax Act provisions of the Federal Aviation Act (59 FR 29880); subpart J of the proposed rule provided special procedures for the expedited review of complaints by airlines involving the fees charged by an airport proprietor.

Subsequently, Congress passed the FAA Authorization Act of 1994, which was signed into law on August 23, 1994. Section 113 of the FAA Authorization Act included specific provisions for the resolution of airport-air carrier disputes concerning airport fees. The procedures contemplated by the FAA Authorization Act were substantially different from those proposed by the FAA. Accordingly, the FAA withdrew its NPRM on September 16, 1994, insofar as it applied to the resolution of the reasonableness of airport fees charged to air carriers. (59 FR 47568). However, the remaining procedures proposed in the FAA NPRM, which would apply to the various other kinds of complaints filed against airports relating to Federal requirements, are not affected by the FAA Authorization Act, and the comment period on the remaining proposals closed on December 1, 1994.

In lieu of the procedures proposed by the FAA for handling air carrier complaints about airport rates and charges, the Office of the Secretary issued a new NPRM on October 24, 1994. As contemplated by the FAA Authorization Act, the October 24 NPRM stated that the procedures contained in 14 CFR Part 302 would generally govern air carrier complaints as well as requests by airport owners or operators for a determination of the reasonableness of airports fees and charges.

Discussion of Comments

The Department received twelve comments on the NPRM. They were submitted by the Air Transport Association (ATA), the Aircraft Owners and Pilots Association (AOPA), the Airports Council International—North America (ACI–NA), the American Association of Airport Executives (AAAE), the General Aviation Manufacturers Association (GAMA), the International Air Transport Association (IATA), Japan Airlines Company (JAL), the Los Angeles Department of Airports, the Maryland Aviation Administration, the Massachusetts Port Authority (Massport), the Metropolitan Washington Airports Authority, and the National Business Aircraft Association, Inc. (NBAA).

Although there were numerous requests for changes to particular provisions, the comments generally expressed support for the overall concept of the proposed rule. The proposed regulatory approach, *i.e.*, consolidating all complaints as soon as the first carrier files a complaint under the new subpart, received several supporting comments and no opposition. Accordingly, the final rule follows this approach with only minor modifications. We turn now to a discussion of the issues most widely addressed in the comments. Other comments are addressed in the section-by-section analysis.

Party Status

A number of commenters addressed issues involving who should be able to make use of the expedited procedures contained in the new subpart. JAL expressed specific support for our proposal to allow foreign air carriers to use the expedited procedures along with U.S. air carriers. AAAE stated that it considers this proposal acceptable, and ACI–NA also indicated that it did not object, although ACI–NA added that ''a foreign air carrier, like any other carrier, which initiates or joins a case should not be allowed to pursue remedies in other forums, in order to avoid duplicative proceedings which could lead to inconsistent or conflicting results.'' Only the Los Angeles Department of Airports opposed including foreign air carriers. It claims that ''Congress intentionally provided the expedited procedures only to U.S. carriers,'' and suggests that making this forum available to foreign carriers forfeits a bargaining position for the United States and contravenes the principle of international reciprocity.

The final rule adopts the proposal to allow foreign air carriers to file complaints under subpart F. As we noted in the NPRM, we anticipate that both domestic and foreign carriers will dispute airport fees they believe to be unreasonable. Since the economic and other issues involved in determining the reasonableness of a fee are essentially the same whether the complainant carrier is U.S. or foreign, it will be simpler for the carriers, the airport and the Department to make that determination in a single proceeding. Therefore, while the FAA Authorization Act was only directed at complaints by U.S. carriers, we will include foreign carriers on our own initiative.

With respect to the comment that foreign carriers filing claims under subpart F should be barred from seeking remedies in other forums, we note that the various bilateral agreements on air service between the United States and

other countries govern the rights of foreign air carriers in this regard.

GAMA, AOPA, and NBAA all argue that we should further expand the applicability of this subpart to cover complaints by general aviation operators. In their view, the arguments for including foreign air carriers apply with equal force to general aviation users. While we recognize that there may be cases in which an airport imposes essentially similar fees on both general aviation and air carrier operations, we cannot grant the request to expand the expedited procedures to general aviation operators. The FAA Authorization Act requires the Secretary to determine the reasonableness of a challenged fee within 120 days after a complaint is filed and indicates a preference for oral evidentiary procedures, to the extent that such procedures are consistent with the 120-day timeframe. Our procedures must carry out the Congressional intent. If general aviation operators are permitted to make use of this subpart, however, the scope of the hearing would be dramatically expanded. It is possible that there would be dozens, conceivably even hundreds, of additional parties, possibly with divergent interests. If this happened, it would so overwhelm the Department's resources that it could become impossible for the Department to meet the statutory deadline.

The Metropolitan Washington Airports Authority argues that there is an integral relationship between the fees paid by ''signatory'' and ''non-signatory'' carriers. (Signatory carriers are airlines that have entered into a use or operating agreement with the airport operator.) Therefore, ''it is important for the procedures to specify that the airport can join as indispensable parties the signatory airlines when the airports rates and charges are challenged by a non signatory airline.'' The final rule does not incorporate this suggestion. If a carrier (signatory or otherwise) would be affected by the outcome of a complaint filed by another carrier at the same airport, it may well choose to participate in the proceeding, such as by filing an answer to the complaint. The NPRM's proposal to require service of any complaint on other carriers (discussed more fully below) was made partly to facilitate such participation. But there is no reason to require the participation of carriers with no complaint of their own and no interest in the fee being challenged.

Evidence To Be Submitted With Complaints, Requests and Answers

A number of commenters addressed the proposal in the NPRM that carrier complaints should contain all supporting evidence and testimony, and that answers should similarly be complete with all evidence and testimony on which the party intends to rely.

IATA commented that a carrier might not have access to much of the information necessary to its complaint unless the airport had agreed to furnish it. IATA requested that the final rule make clear that information within the custody of the airport could be used by the carrier if it was able to obtain the information only after the complaint was filed. ATA raised the same issue, but suggested that we provide for a formal discovery process within the 30-day period following the complaint.

The Department's Policy Regarding Airport Rates and Charges, published in today's **Federal Register**, states that airports should consult with carriers in advance of changing fees, and should provide adequate information to permit carriers to evaluate the justification for the change and the reasonableness of the new or increased fee. We expect that airports will comply with this policy.

The Department finds the IATA and ATA concerns valid. However, we believe that the conduct of discovery in the 30-day period following the complaint would be a burden to the airport owner or operator and to the government. Moreover, any discovery conducted would be unnecessary, and therefore excessive, if the complaint is subsequently dismissed because the Secretary determines that there is no significant dispute. Accordingly, the Department will provide, where necessary, special procedures for the exchange or disclosure of information by the parties.

Airport parties had equivalent objections with respect to the proposed requirements for the timing and completeness of answers. ACI–NA, AAAE, the Los Angeles Department of Airports, and Massport all argued that airports should not have to submit their entire response with the answer. They believe that answering parties should only have to submit a brief in response to a complaint, and should be able to supplement their submission with exhibits and testimony at a later point in the proceeding.

In addition, they claim that it is unfair that complainants will have up to 60 days to gather evidence and prepare exhibits and testimony, while, under the proposal, respondents would be required to submit their complete response seven calendar days after the complaint is filed. AAAE and ACI–NA suggested that we allow answers to be filed 21 days after the initial complaint. The Los Angeles Department of Airports agreed, and also suggested the recommended 21-day period should not start until the last day that complaints could be filed (*i.e.*, on the 60th day after notice of the fee or the seventh day after the first complaint is filed). This would give parties a total of up to 28 days to file answers. Massport asked for a 14 calendar-day answer period, and the Metropolitan Washington Airports Authority recommended 14 days for the initial complaint and seven days for any additional complaints. The Maryland Aviation Administration requested seven business days instead of seven calendar days.

We will retain the requirement that answers contain all testimony and exhibits on which the answering party intends to rely. The carriers pointed out that airport owners and operators possess much of the information that they might need to introduce in challenging a fee. However, there is no fee information in the hands of the carriers that an airport would need to support the reasonableness of the fee. In view of the extremely short decisional deadlines imposed by the FAA Authorization Act, it is important that we have the most information possible at the beginning of a proceeding. While it is true, as commenters noted, that complaining carriers have up to 60 days to file complaints, we do not agree that this gives complainants an unfair advantage. We expect airports to have all the economic evidence they need in support of a new or increased fee before the fee is increased rather than after a complaint is filed. While an answer must, of course, respond to the specific matters raised in a complaint, an airport should not have to generate significant new data.

On the other hand, we believe that it is reasonable to allow some additional time to prepare and submit answers. In the case of complaints, it will be easier for both the answering party and the Department if answers are consolidated to address both the initial complaint and any follow-on complaints. Accordingly, the final rule provides that answers will be due 14 calendar days after the initial complaint is filed. Thus, if there are follow-on complaints, the answering parties will still have a minimum of seven days to address them. We will also allow 14 days for answers to requests for determination.

Determination of ''Significant Dispute''

Within 30 days after a carrier files a complaint, the FAA Authorization Act requires the Department to determine whether there is a ''significant dispute;'' if not, the statute requires the Secretary

to dismiss the complaint. Accordingly, a number of commenters addressed issues associated with the Secretary's determination.

IATA pointed out that the language in proposed § 302.611 stated that the Secretary would issue an order within 30 days determining whether a carrier complaint presented a significant dispute, but there was no corresponding language on requests for determination submitted by an airport owner or operator. As the preamble in the NPRM indicated, it has been our intention to issue such orders within 30 days. However, as provided in § 302.619(c), when both a complaint and a request for determination have been filed with respect to the same airport fee, the statutorily-imposed 120-day schedule for resolving *complaints* controls the course of the proceeding. That is, as required by the FAA Authorization Act, the Secretary will determine whether there is a significant dispute within 30 days of the date the first complaint is filed. In such cases, the determination may come more than 30 days after the date of the airport request. In light of IATA's comment, we have revised the language of § 302.613 to clarify this point.

The comments of both IATA and ATA ask that any order dismissing a complaint for lack of a significant dispute should be clearly stated to be final and appealable. IATA goes on to argue the proposed rule would leave an airport owner or operator in a better position following dismissal of a request for determination than a carrier would be following dismissal of a complaint. We disagree, and we find that no change is necessary in the final rule. If the Secretary dismisses a complaint after finding that there is no significant dispute within the meaning of the FAA Authorization Act, the order of dismissal is subject to the same judicial review as any other order of the Secretary. (If the Secretary instead finds that the complaint fails to meet the procedural requirements of this subpart, the order will set forth the conditions under which a revised complaint may be filed.)

IATA asks that § 302.611 ''provide some reasonably accurate guidelines and standards of review'' under which the Secretary will review complaints to determine whether they present a significant dispute. ATA suggests that we employ the standards of Federal Rule of Civil Procedure 12(b)(6), accepting any complaint as constituting a significant dispute as long as it ''states a claim for relief under Section 47129.'' In the alternative, it suggests we employ the standards for grant of summary judgment under Federal Rule of Civil Procedure 56. Under this approach, as ATA states, ''a 'significant dispute' would exist whenever there was a genuine issue of material fact or law.''

Accepting either of ATA's recommendations would mean that the Department would set for hearing virtually all complaints brought, no matter how trivial. We believe that this is inconsistent with the statutory intent. If Congress had meant for the Department to hear every complaint in which a claim is made, it surely would not have mandated in § 47129(c)(2) that ''the Secretary *shall dismiss* any complaint if no significant dispute exists.'' (Emphasis added.) Congress established the extraordinary dispute resolution program in § 47129 to ensure that carriers and airports can obtain a prompt decision when there is an important fee dispute. It plainly understood that the Department has limited resources; if the expedited procedures are employed any time a complainant can state a claim or establish that there is a fact in dispute, the Department could be unable to respond adequately when there are truly significant fee disputes. Moreover, while we are sympathetic to IATA's request for clear guidelines and standards for review, we believe that the circumstances at each airport and the facts behind each fee dispute vary too widely for us to be able to set out specific standards in the final rule. As we proposed, however, § 302.611 states that we will set forth our reasoning in any order dismissing a complaint on the grounds that the alleged dispute is not significant.

AAAE objected to the statement in the preamble that one piece of evidence that a dispute is significant would be that the complaining carrier had attempted to resolve the dispute with the airport but had been unsuccessful. AAAE points out, ''Airports and their tenant air carriers can have legitimate, and even vehement disagreements about issues that are, objectively, minor.'' We agree with AAAE that the intensity of the discussions between airports and carriers does not by itself mean that there is a significant dispute within the meaning of § 47129. Nevertheless, as the preamble to the NPRM stated, the failure of direct negotiations ''would be some indication, although not necessarily proof, that there is a significant dispute.''

ACI–NA and IATA disagree sharply on our authority to dismiss airport requests for determination when there is no significant dispute. ACI–NA stated that the Department was correct in determining that the FAA Authorization Act makes no provision for dismissal on that basis (in contrast with its specific requirement to dismiss carrier complaints that do not present a significant dispute). IATA, on the other hand, claimed that our failure to provide for dismissal of an airport owner or operator's request ''is clearly arbitrary and capricious.'' As IATA's comments note, however, the statutory language on dismissals, in § 47129(c)(2), ''*on its face* appears to be applicable *only* to complaints and air carriers.'' (Emphasis in original.) While IATA suggests that this ''may be the result of legislative oversight,'' we believe this language is plain, and we will adopt the NPRM's proposal to proceed to a final order on the merits when an airport properly submits a request for determination.

Service of Documents

In order to ensure compliance with the extremely short time frames provided by the FAA Authorization Act for action on fee disputes, the NPRM proposed special service requirements. The proposal contained three main elements: (1) Complaints and requests for determination would have to be served on all carriers providing service to the airport; (2) For most filings, service would have to be made by hand, by electronic transmission, or by overnight express delivery; and (3) Parties would actually have to receive the documents no later than the day they are filed.

The NPRM stated that the Department realized that these service requirements could pose a burden in some situations, but it also expressed our belief that they are necessary to permit a consolidated hearing for all complaints. Nevertheless, we specifically invited comment on the service proposals, and particularly on an additional proposal to substitute service of complaints or requests for determination on members of any airline negotiating committee at the airport rather than on all carriers serving the airport. A number of commenters responded to this invitation.

To begin with, AAAE and ACI–NA supported the proposal to allow service of documents on airline committee members at those airports having such committees. The Metropolitan Washington Airports Authority claimed that it should be adequate to serve the committee itself, without serving the individual carrier members. ATA, however, strongly argued that service on the airline committee members would not provide adequate notice to other carriers serving the airport; it advocated requiring service on all carriers serving the airport, preferably at their

headquarters' offices. Complaints by carriers drive the schedule for determining the reasonableness of airport fees. It is essential that carriers have adequate notice when a document is filed, particularly an initiating complaint, which starts the seven-day period for follow-on complaints. In light of ATA's comments, therefore, the final rule does not provide for serving the members of the airport's carrier committee.[1] Nevertheless, we continue to be concerned about the potential burden of a literal application of a requirement to serve ''all carriers.'' As the comments of the Metropolitan Washington Airports Authority pointed out, ''the requirement to serve 'all' carriers could become an unnecessary procedural hurdle that prevents the expeditious resolution of a fee dispute,'' because it could be read to require service on even the most infrequent users of the airport. The Metropolitan Washington Airports Authority recommended that service be limited to carriers that operated at the airport within the 30 days prior to the filing, while AAAE and ACI–NA suggested using the Air Carrier Activity Information System (ACAIS) as the basis for determining which carriers should be served. As these parties note, airports already use the list of carriers on the ACAIS in determining which carriers to serve with respect to Passenger Facility Charges under 14 CFR Part 158. Accordingly, we believe that the ACAIS list can similarly serve as the basis for an acceptable means of compliance with the service requirements of subpart F as well.

While the ACAIS list provides an objective and convenient starting point for parties needing to serve all carriers, it must be recognized that the list is based on carriers that served the airport during the preceding year, and thus may not include new entrants. In addition, carriers operating under 14 CFR Part 135 are not required to submit data for ACAIS, although many do so voluntarily. Therefore, as ACI–NA proposed, any party intending to make use of the ACAIS list for service must also serve any other carrier known to be operating at the airport but not on the list. This is the same practice that is followed with respect to PFC applications.

[1] For the same reason, we will not adopt ATA's contingent suggestion to allow carriers to serve only a written notice that a complaint had been filed, along with instructions on how to obtain complete copies. We believe interested persons must have immediate, full information about the filing. (In any event, ATA stated that its suggestion assumed additional time would be allowed for follow-on complaints).

The ACAIS list is routinely made available to airport operators. However, since carriers do not file PFC applications, we recognize that they have not previously used the ACAIS list to identify carriers for the purposes of service. The Department's Office of Aviation Analysis will provide the names of the carriers on the most recently published ACAIS list at the request of a carrier considering filing a complaint about a newly established or newly increased airport fee. Not all information from ACAIS will be available on request. Much of the data is potentially sensitive, and we believe most carriers would not want it made available to competitors. Therefore, only carrier identities will be released through this process.

The Los Angeles Department of Airports objected to the requirement to certify that the parties served have actually received the documents, arguing that it cannot know when a document will be received. It argued that parties should only have to certify that the documents were sent. We disagree. The short response time required by these procedures makes it essential that the receiving party receives the maximum notice possible that a complaint, request, or responsive document has been filed. Moreover, while we recognize that this constitutes an additional burden on the filer, that burden is not insurmountable. All three of the specified service methods allow the sender to ascertain quickly that the receiving party has received the filing. In the case of hand delivery, receipt is obvious. For electronic transmission, both facsimile machines and many electronic mail systems provide for receipts from the recipients. And the availability of immediate proof of delivery is a widely-advertised service of major overnight express delivery companies.

The Los Angeles Department of Airports also argues that hand delivery and overnight express may not be available to serve foreign air carriers, and it suggests that we permit utilization of ''the next most-expeditious, commercially available manner for sending documents to the country in which the foreign air carrier must be served.'' Since in many cases this would make it difficult or impossible to achieve service in time to allow meaningful responsive pleadings, we cannot agree. Overnight express delivery is increasingly available commercially throughout the world, although it is true that the service is not available everywhere. However, that is one reason why the NPRM also proposed to permit service by electronic transmission. There are few if any places in the world where facsimile service and/or electronic mail are unavailable. Indeed, it is hard to imagine in today's market that a carrier could conduct international operations without having some capacity to receive electronic communications. Moreover, many carriers, even foreign air carriers, will not need to be served with complaints or requests for determination in their home country. Unless a carrier indicates that a different person should receive service for the purposes of this subpart, the final rule authorizes service on the person responsible for communicating with the airport on behalf of the air carrier or foreign air carrier about airport fees. This person will be familiar with fee disputes involving the airport, and is a logical contact point for routing the document quickly to other key carrier personnel.

In addition to the foregoing, one additional point warrants mention with regard to the service of documents. All exhibits and briefs prepared on electronic spreadsheet or word processing programs should be accompanied by standard-format computer diskettes containing those submissions. Word processing and spreadsheets files must be readable by current versions of one or more of the following programs, or in such other format as may be specified by notice in the **Federal Register**: Microsoft Word, Word Perfect, Ami Pro, Microsoft Excel, Lotus, Quattro Pro, or ASCII tab-delineated files. Parties should submit one copy of each diskette to the docket section, one copy to the office of the Chief Administrative Law Judge (M–50), and one copy to the Chief, Economic and Financial Analysis Division (X–55), of the Office of Aviation Analysis. Submissions in electronic form will assist the Department and the administrative law judge in quickly analyzing the record and in preparing decisions under these expedited procedures. The paper copy will be the official record copy, but filers shall certify that files on the diskette are true copies of the data file used to prepare the printed versions of the exhibits or briefs. Filers should ensure that files on the diskettes are locked.

Section-by-Section Analysis

Section 302.601 Applicability

Section 302.601 describes the kinds of proceedings for which the Department will employ the expedited procedures contained in subpart F. ATA complained that we should not be issuing a procedural rule separate from

the policy statement that will govern consideration of airport fee disputes. (As noted above, the FAA's Supplemental Notice of Proposed Policy was published in the **Federal Register** on October 12, 1994 (59 FR 51836). The comment period closed on the proposed policy on October 26, 1994, and a final policy statement is published elsewhere in today's **Federal Register**.) ATA urges us to consolidate these proceedings and allow additional comment on a consolidated proposal. We disagree. Because of the extremely short deadline for issuing rules governing these proceedings, the Department decided that the best course was to proceed in this two-stage fashion. Relatively few changes were needed in the proposed policy statement after the adoption of the FAA Authorization Act, while the FAA's previously proposed procedures had to be completely rewritten. If we had waited until the new proposed procedures were ready so that we could issue a consolidated document, the highly-abbreviated public comment period that was necessary in this proceeding would have had to apply to both the proposed procedures and the proposed policy statement.

As discussed above, the final rule adopts the proposal to include complaints by foreign air carriers, but complaints by other airport users would not be heard under this subpart. Subpart F also contains the procedural rules for reviewing an airport owner or operator's request for a determination of the reasonableness of an airport fee.

By statute, a fee is subject to review under this subpart only after it has been ''imposed'' on air carriers. As was proposed, § 302.601(a) states that a fee is considered to be imposed as soon as the airport owner or operator has taken all steps necessary under its procedures to establish the fee. Under the FAA Authorization Act in new 49 U.S.C. 47129(a)(1)(B), one essential element to those procedures is providing written notice to carriers of any new or increased fee. Also as proposed, the 60-day filing period for complaints begins to run as soon as the requirements for imposing a fee are met, whether or not the fee is being paid by the carriers. ACI–NA points out that this ''may help resolve fee disputes before the airport is actually counting on receiving the amounts in dispute, and would thus be less disruptive of airport planning and financing.'' To the extent that it encourages airports to avoid raising fees on short notice, it should be less disruptive of carrier planning as well.

AAAE commented that the language in § 302.601 should be made consistent with the final language in the policy statement. Specifically, it suggests adding the words ''for aeronautical use'' to describe the kinds of fees imposed by airports on carriers that may be challenged under this subpart. The Department agrees that the language of the procedural rule should be parallel to that in the policy statement, and the suggested change has been adopted.

Paragraph (b) of § 302.601 sets out the three limitations on applicability contained in the Authorization Act. The Secretary would not entertain complaints about a fee imposed pursuant to a written agreement with carriers using the facilities of an airport; a fee imposed pursuant to a financing agreement or covenant entered into prior to August 23, 1994, or any other existing fee not in dispute as of August 23, 1994. August 23, 1994 is the date the Authorization Act was enacted.

Some commenters suggested additional provisions. ACI–NA, for example, recommends that ''Airlines should not be allowed to challenge a fee increase that is the result of the recalculation of airline fees due to the airport's loss of one or more air carriers, or the substantial diminution of service by one or more air carriers.'' We do not agree that this should be added to the final rule. If a fee is increased as a result of a proper recalculation of charges, the increase will be found reasonable. However, that is no basis for denying a carrier's right to file a complaint under this subpart. ATA would have us limit the exclusions on using subpart F to challenge fees imposed pursuant to agreements with carriers or pursuant to a financing agreement. These exclusions should apply, ATA believes, only if the agreements contain a basis for determining how fees are to be set. ''[S]ome airports require air carriers to sign operating agreements that provide * * * that the carrier is required to pay whatever fees are established by the airport operator.'' We will not adopt ATA's comment; the statutory language is clear that these rules may not be used to challenge fees based on agreements.

Section 302.603 Complaint by an Air Carrier or Foreign Air Carrier; Request for Determination by an Airport Owner or Operator

This section describes the requirements for carrier complaints and airport requests for determination. In keeping with the proposal, paragraph (a) states that both complaints and requests would be submitted in accordance with the usual technical requirements of proceedings under 14 CFR Part 302. (14 CFR § 302.3 specifies such matters as the number of copies to be filed, the size of pages that may be used, and the filing address.) ATA's comments stated that the proposed rule failed ''to specify the type and form of briefs to be presented upon the filing of complaints.'' ATA is thus incorrect.

As noted above, no commenter objected in principle to the basic procedure proposed in the NPRM for consolidating all complaints and any request for determination once any carrier has filed a complaint under this subpart. The final rule adopts the language of the NPRM. Following the first complaint, other air carriers or foreign air carriers wishing to file their own complaints would have seven days to do so. An airport owner or operator's request for determination would also have to be submitted no later than seven days after a carrier complaint. The Authorization Act specifies that all complaints would have to be submitted within 60 days of the written notice, even if this is less than seven days after the initial complaint. The law does not provide for entertaining later complaints. No potential complainant, having had 54 or more days to prepare, will be disadvantaged by the immutability of the 60-day filing limit. As indicated above, JAL's request to extend the statutory deadline for foreign carriers is denied. While there is no statutory limitation on submitting airport requests for determination, no commenter objected to our proposal to impose a similar 60-day limit on such requests, and that proposal is also made final here. As noted in the NPRM, airport fee increases become incontestable under this subpart 60 days after the airport provides written notice to carriers of the imposition of a new or increased fee. The early determination of the reasonableness of a fee, which is the purpose of the Act, would be undermined by allowing more time. There is no point in expending Departmental resources on airport requests brought after that date.

Section 302.605 Contents of Complaint or Request for Determination

Most of the issues pertaining to this section have been fully discussed above. The following is only a brief summary of the requirements in the final rule.

Carriers filing complaints and airports filing requests for determination will generally be expected to submit documentation that contains the filing party's entire position and supporting evidence. We recognize, however, that an airport may control information or documents that a complaining carrier would need. If that is the case, and the carrier has unsuccessfully attempted to obtain the necessary information, § 302.605 now provides that the carrier

must state that fact in the complaint. As discussed above, the Department anticipates that airports will promptly disclose any necessary information.

The carrier filing the complaint or the airport owner or operator filing the request must serve the complaint or request and accompanying documents on all carriers serving the airport using the expedited procedures proposed in the NPRM. If a complaint has already been filed with respect to a particular airport's fees, additional complaints are due seven days after the initial complaint. All complaints must be filed within 60 days after the carrier has received written notice of a new or increased fees.

The final rule retains the language that the filing carrier or airport would have to certify that it had previously attempted to resolve any fee dispute directly. In addition, as noted above, the filing party must certify that any submission on computer diskette is a true copy of the data file used to prepare the brief or exhibit.

Section 302.607 Answers to a Complaint or Request for Determination

As discussed above, the most significant change in this section involves the time for filing answers to complaints or requests for determination. Answers will be due 14 days after the first complaint is filed rather than seven days after each complaint. Answers are to respond to both the initiating complaint and any follow-on complaints, which will continue to be due seven days after the initial complaint. This will respond to requests that we make it possible for parties to submit a consolidated answer to all complaints, while still allowing the Department sufficient time to review complaints or requests and the answers submitted.

Under the final rule, therefore, upon receiving a copy of a complaint filed by another carrier, an air carrier or foreign air carrier could file its own complaint within seven days or an answer to the first complaint within 14 days. As noted in the preamble to the NPRM, it is technically permissible for a party to submit both its own complaint and an answer to the initiating complaint. However, because of the limited time available for the Department to review complaints and answers, parties are strongly urged to avoid duplicative filings. Naturally, answers, including answers in support of a complainant's position, do not give the answering party status as an additional complainant, nor may answers raise new objections to a fee or fees in dispute. A carrier that wants to raise any new arguments in opposition to the fee should do so in a follow-on complaint under § 302.603.

Both the airport owner or operator and any carrier serving the airport may file an answer to a complaint under this subpart. In the case of an airport request for determination, any carrier serving the airport would be authorized to file an answer. While only carriers subject to a new or increased fee at the airport may submit a follow-on complaint under § 302.603, any carrier at the airport may submit an answer.

As stated above, answering parties would generally be expected to set out all of their responsive arguments, testimony and exhibits in their answer.

The answering party will serve the complaining carrier or carriers or the airport owner or operator requesting the determination by hand, by electronic transmission, or by overnight express delivery. The answering party must certify that the answer and accompanying documents will be received no later than the day the answer is due, and that any submission on computer diskette is a true copy of the data file used to prepare the brief or exhibit. Answers need only be served on the party to which the answer is directed.

Section 302.609 Replies

ACI–NA argued that we should eliminate the opportunity to file replies, claiming that they are unnecessary, and that the requirement that they be filed two calendar days after the answer makes the opportunity to reply illusory. We see no need to eliminate the opportunity to file replies, although we emphasize that replies are voluntary submissions.

While no other party suggested eliminating replies altogether, Massport, the Maryland Aviation Administration, and AAAE all recommended that we allow two business days rather than two calendar days. In part, it appears that this recommendation may stem from a misunderstanding of our procedures. AAAE, for example, states that ''The rules as proposed would require that a party replying to an answer filed on a Friday file its reply on Sunday evening, when the agency is not even open for business.'' This is simply wrong. As provided in our rules of practice (14 CFR § 302.16), any filing that would be due on a Saturday, Sunday, or government holiday is automatically due instead on the next business day. Accordingly, when an answer is due on a Thursday or Friday, any reply to the answer would be due by close of business on the following Monday (or the first business day thereafter). In such a case, the replying party would thus have at least three calendar days to prepare and submit its reply, although we recognize that two of those days are on the weekend.

In accordance with our proposal, only the carrier originating a complaint or the airport originating a request for determination would be authorized to file a reply. Except as provided in subpart A of 14 CFR Part 302, replies by any other party would not be accepted, nor would further responsive pleadings. For that reason, the NPRM did not propose to require that replies be served under the expedited procedures required for complaints, requests for determination, and answers. The NPRM specifically invited commenters to address whether expedited procedures were necessary for replies, but no party did so. We conclude that ordinary service as provided by 14 CFR § 302.8 (including service by mail) will suffice for replies. As with complaints, requests for determination, and answers, however, the replying party must certify that any submission on computer diskette is a true copy of the data file used to prepare the brief or exhibit.

Section 302.611 Review of Complaints

As was proposed, paragraph (a) of § 302.611 provides that the Secretary will determine within 30 days after a complaint is filed whether a significant dispute exists and whether the complaint meets the procedural requirements of subpart F. If the Secretary determines that there is no significant dispute, he or she will issue an order dismissing the complaint, as required by the FAA Authorization Act. The Secretary's order will include an explanation of the reasons for the determination. If the Secretary determines that the complaint does not meet the procedural requirements of this subpart (for example, the complaint was not properly served on the airport owner or operator), the Secretary will dismiss the complaint without prejudice. In this case, the order would explain any conditions necessary for the complaint to be re-filed.

When one or more properly filed complaints have been submitted, the Secretary will issue an instituting order consolidating all complaints that raise significant issues and any request for determination. The instituting order will assign the consolidated case to an administrative law judge and describe the issues to be considered and the parties that will participate.

In addition, § 302.611 now provides that the instituting order may contain special provisions for exchange or disclosure of information by the parties.

As discussed above, the Department presumes that airports will provide all information necessary for carriers to understand the basis and justification for any new or increased airport fee. However, we have included this provision to clarify the Department's ability to ensure that adequate information is made available.

Finally, the Secretary's order will state when the administrative law judge must issue a recommended decision (60 days after the instituting order, unless the order specifies a shorter period).

Section 302.613 Review of Requests for Determination

An airport owner or operator's request for determination of the reasonableness of an airport fee will generally be handled in the same manner as a carrier complaint. As discussed above, we have revised the language of § 302.613 to clarify the timing for action on an airport's request.

When only an airport request has been filed, and not a carrier complaint, the Secretary will determine within 30 days whether there is a significant dispute and whether the procedural requirements of the subpart have been met. Properly submitted requests raising a significant dispute will be assigned to an administrative law judge in the same manner as carrier complaints, with appropriate guidelines on the scope of the issues and the parties to participate. If there is a procedural deficiency, the request will be dismissed without prejudice, and the order of dismissal will set forth the terms and conditions under which a revised request could be filed.

However, when both an airport request and one or more carrier complaints have been filed, the Secretary will proceed under the statutorily prescribed schedule for resolving the complaint. As required by the FAA Authorization Act, the Secretary will determine whether any complaint presents a significant dispute within 30 days after the first complaint is submitted. If the first complaint is filed after the airport owner or operator's request, the request will be reviewed in conjunction with the complaints, and the consolidated instituting order may be issued more than 30 days following the request.

As discussed above, the Secretary will not dismiss an airport owner or operator's request for determination on the basis that it does not raise a significant issue. In such cases, the Secretary would usually proceed directly to issue a final order determining whether the fee is reasonable. While this determination would ordinarily not require any additional procedures, the Secretary would retain discretion to require whatever additional procedures are necessary in a particular case.

ACI–NA notes that paragraph (b) differs from paragraph (c) in that the latter specifies that the Secretary's determination with respect to reasonableness will be issued within 120 days after the airport request is filed. ACI–NA asks that we insert the 120-day language in paragraph (b) as well. While ACI–NA is correct that the two provisions should be parallel, § 302.619(b) contains the completion time applicable to all requests for determination. Therefore, to avoid confusion, the final rule deletes the last sentence of proposed paragraph (c).

Section 302.615 Decision by Administrative Law Judge

As provided by the FAA Authorization Act, § 302.615 requires the administrative law judge to issue a recommended decision within 60 days after the case is assigned by the Secretary for hearing, unless the instituting order specifies a shorter period.

ATA asked that we set out in this subpart specific requirements for hearings on airport fee disputes. It recommended that ''the Rule provide clear definition as to the nature of these hearings and a standardized approach to the resolution of the complicated factual and legal issues raised by airport fee disputes. As presently crafted, the NPRM would apparently rely upon the Secretary's order to draft a different approach in each and every case. Aside from the logical impracticality of such an unpredictable approach, we believe it to be so lacking in procedural guidance as to be fundamentally inconsistent with the requirements of Section 47129. As an alternative, we propose that the Secretary incorporate the procedures governing hearings set forth in 14 CFR part 302, subpart A, as modified in order to meet the time constraints imposed by Section 47129.''

ATA appears to be suggesting that the Department lacks authority to impose specific requirements on the conduct of individual proceedings. This is simply incorrect, and indeed one important purpose of an instituting order is to tailor the general rules to the needs of a particular case. However, with respect to ATA's alternative suggestion that we rely generally on subpart A procedures, no change from the NPRM language is necessary. We have made it clear throughout this rulemaking that subpart A procedures will apply in the absence of a specific applicable provision in this subpart or a direction in the instituting order. As the FAA Authorization Act expressly states, following assignment of the proceeding to an administrative law judge, ''the matter shall be handled in accordance with part 302 of title 14, Code of Federal Regulations, or as modified by the Secretary to ensure an orderly disposition of the matter within the 120-day period and any specifically applicable provisions of this section.'' (49 U.S.C. 47129(c)(2)). Similarly, subpart A of part 302 states as follows:

> Subpart A of this part sets forth general rules applicable to all types of proceedings. Each of the other subparts of this part sets forth special rules applicable to the type of proceedings described in the title of the subpart. Therefore, for information as to applicable rules, reference should be made to subpart A and to the rules in the subpart relating to the particular type of proceeding 14 CFR 302.1(b).

ACI–NA argued that a prehearing conference should be mandatory for all parties in any proceeding brought under this subpart in which an oral hearing is scheduled. Although ACI–NA points out that this is common practice in the federal courts and many state courts, we do not believe that it is desirable to include this requirement in the rule. Once the case is assigned for hearing, we anticipate that the administrative law judge will frequently choose to order a prehearing conference. There might even be situations in which it would be appropriate for the Secretary to require a prehearing conference, in which case the instituting order will direct one be held. However, there is no reason for the final rule to make a prehearing conference mandatory in all cases.

Section 302.617 Petitions for Discretionary Review

The Los Angeles Department of Airports objected to our proposal to provide for the filing of petitions for discretionary review of the administrative law judge's recommended decision. Instead, it argues that the FAA Authorization Act mandates Secretarial review of the recommended decision. It advocated allowing seven days for parties to provide exceptions to the recommended decision, and an additional seven days in which to file cross-exceptions.

As we stated in the preamble to the NPRM, we anticipate that the Secretary will issue all final orders in proceedings under subpart F. Nevertheless, we do not agree that the Authorization Act makes this mandatory. In fact, the statute specifically anticipates that the Secretary might not issue a final order: It provides that the administrative law

judge's recommended decision is to be considered the Secretary's final order if the Secretary does not act within 120 days after a complaint is filed. Accordingly, we will adopt the proposed structure of providing for discretionary review of the recommended decision.

As we proposed, a party to the proceeding will be able to file a petition for discretionary review of the administrative law judge's decision within five days after the recommended decision is served. The petitioner will serve all parties by hand, electronic transmission or overnight express delivery, and will certify that all parties had received the petition or would receive it by the date of filing. Any other party could then submit an answer, which would be due four days after the petition is filed. AAAE and ACI–NA stated that answers should be subject to the same expedited service requirements as petitions, but they did not explain why this would be necessary. The Department does not anticipate permitting further pleadings at this stage of the proceeding, and we do not believe that the burden of expedited service is justified.

Section 302.619 Completion of Proceeding

This section sets out the completion dates for proceedings conducted under this subpart. No comments were submitted on it, and it is unchanged from the NPRM.

Paragraph (a) states that the Secretary will issue a final order determining whether the disputed fee is reasonable within 120 days after the filing of a complaint by an air carrier or foreign air carrier, unless the complaint is dismissed as provided in proposed § 302.611. This is the time limit for resolving air carrier complaints set forth in the FAA Authorization Act.

Paragraphs (b) and (c) address proceedings involving requests for determination by airport owners and operators. Although the FAA Authorization Act does not impose a time limit on such requests, § 302.619 provides a 120-day limit on these proceedings as well. When an airport has filed a request for determination but there are no carrier complaints with respect to the same fee, paragraph (b) states that the Secretary would issue a final order within 120 days of the request. However, as noted in § 302.613, the Department will consolidate proceedings concerning the same airport fee or fees that are the subject of both a carrier complaint and an airport request for determination. In this situation, paragraph (c) provides that the timetable for resolving carrier complaints would control the schedule for action by the Department. Thus, if a carrier complaint is filed before the airport request, the Department would issue a final order in the consolidated proceeding in less than 120 days after the airport's request for determination. If one or more carriers file a complaint after the airport request, the 120-day period would begin on the day the first carrier complaint is filed.

Section 302.621 Final Order

Following review of the recommended decision, the Secretary will issue a final determination with respect to the reasonableness of an airport fee that is the subject of a complaint or a request under this subpart. The Secretary's order will set forth the reasoning underlying the determination, and, if a fee is determined to be unreasonable, the order will provide for a refund or credit of the unreasonable charge. As noted in the NPRM, the exact terms under which the refund or credit would be ordered would vary with the particular circumstances of each case, but the Department intends to ensure prompt action.

The FAA Authorization Act, in new 49 U.S.C. Section 47129 (a) (3), limits the Secretary's order to determining reasonableness, and the order would not set the level of the fee. The Maryland Aviation Administration expressed concern in its comments that disputes may not really be resolved within the 120-day limit unless the Department states what a reasonable fee would be. In the absence of such a statement, a revised fee would still be subject to challenge. Because the limitation on the Secretary's authority is a matter of statute, there is nothing we can do in this rulemaking to change it. However, the Secretary's order will attempt to set out the analysis underlying the decision as clearly as possible. If a fee is found unreasonable, we hope and expect that parties will be able to establish a reasonable fee after reviewing the decision and analysis.

The Maryland Aviation Administration also states that ''the Department, or as may be required, the framers of the underlying statutory scheme, should consider whether the Department should award costs to airports'' when a disputed fee is found reasonable. As the commenter appears to appreciate, the Department does not have authority to award costs to the prevailing party in a fee dispute under subpart F. Accordingly, the comment is beyond the scope of this rulemaking.

ACI–NA asks that the rule clarify that ''any finding of unreasonableness resulting from a complaint filed by a non-signatory carrier does not affect the underlying rates for signatory carriers, since the signatory fees may not be challenged.'' No rule change is needed here. However, it is obvious that no fee will be found to be unreasonable under subpart F unless it is the subject of a complaint or a request for determination.

As stated above, the Department expects the Secretary to issue all final orders. However, if the Secretary fails to issue an order within 120 days after a complaint is filed, the FAA Authorization Act requires that the administrative law judge's decision be deemed the final order of the Secretary. Section 302.621(c) restates this requirement. There is no corresponding legislative requirement with respect to airport requests for determination. Therefore Section 302.621 does not contain any provision for automatic adoption of the administrative law judge's decision. The Department nevertheless intends to resolve airport requests for determination within 120 days after they are filed.

Justification for Immediate Effectiveness

Section 553 of the Administrative Procedure Act provides that the effective date of a new rule should be at least 30 days after it is published, unless the agency finds good cause for a shorter period.

In enacting the FAA Authorization Act, the Congress made it clear that it intends for fee disputes between carriers and airports to be resolved promptly. Congress required that the Department issue this rule within 90 days of enactment of the Authorization Act, and mandated that all proceedings brought under the new procedures lead to a final order within 120 days. The Department will be unable to process any carrier complaints under this subpart until the procedures are effective. Accordingly, the Department finds that good cause exists to make this rule effective on publication in the **Federal Register**.

Regulatory Evaluation Summary

This final rule contains new procedures for the filing and adjudication of complaints by air carriers and foreign air carriers alleging that an airport has imposed an unreasonable fee or charge on the complaining carrier. It also sets forth corresponding procedures under which an airport owner or operator may request and receive a determination of the reasonableness of a fee or charge it

has imposed on one or more air carriers or foreign air carriers. The new procedures replace existing procedures under 14 CFR part 13, and impose no new substantive requirements on either carriers or airports. The only commenter to question the tentative conclusion in the NPRM that the economic effect of the proposed rule would be minimal was the Maryland Aviation Administration, which argues that ''[t]he cost to provide expert witnesses and legal counsel if it is determined that there is a 'significant dispute' may well prove to be material.'' The Maryland Aviation Administration did not attempt to quantify the costs it believed involved. More importantly, it did not establish that the costs are actually the result of the procedural rules at issue here rather than the general cost of the litigation authorized by 49 U.S.C. 47129. Accordingly, the Department concludes that the economic impact of the final rule is minimal and that further calculation of the economic effects is not warranted.

Regulatory Flexibility Determination

The Regulatory Flexibility Act of 1980 (RFA) was enacted by Congress to ensure that small entities are not unnecessarily or disproportionately burdened by government regulations. The RFA requires a Regulatory Flexibility Analysis if a rule would have a significant economic impact, either detrimental or beneficial, on a substantial number of small entities. This rule contains procedural requirements for processing carrier complaints and airport requests. The Department concludes that the rule will not have a significant economic impact on a substantial number of small entities.

Federalism Implications

The final rule will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 12612, it is determined that this rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

Paperwork Reduction Act

This rule contains no information collection requirements that require approval of the Office of Management and Budget pursuant to the Paperwork Reduction Act of 1980 (44 U.S.C. 3507 *et seq.*).

Conclusion

Although the Department has concluded that the economic effects of this rulemaking are minimal, this rule is considered significant under Executive Order 12866 because of the public interest in this rulemaking. The Department certifies that this rule will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. This rule is considered significant under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1978).

List of Subjects in 14 CFR Part 302

Administrative practice and procedure, Air carriers, Airports, Postal Service.

The Amendments

Accordingly, the Department of Transportation amends 14 CFR part 302 as follows:

PART 302—RULES OF PRACTICE IN PROCEEDINGS

1. The authority citation for 14 CFR Part 302 is revised to read:

Authority: 5 U.S.C. 551 *et seq.*; 39 U.S.C. 5402; 42 U.S.C. 4321; 49 U.S.C. 40101, 40102, 40113, 40114, Chapters 411–415, 41702, 41705, 41706, 41901, 41907, 41909, 41910, 42111, 46301, 46302, 46303, 46105, 47129.

2. A new subpart F is added to 14 CFR Part 302 to read as follows:

Subpart F—Rules Applicable to Proceedings Concerning Airport Fees

Sec.

Subpart F—Rules Applicable to Proceedings Concerning Airport Fees

§ 302.601 Applicability of this subpart.

(a) This subpart contains the specific rules that apply to a complaint filed by one or more air carriers or foreign air carriers, pursuant to 49 U.S.C. 47129 (a), for a determination of the reasonableness of a fee increase or a newly established fee for aeronautical uses that is imposed upon the air carrier or foreign air carrier by the owner or operator of an airport. This subpart also applies to requests by the owner or operator of an airport for such a determination. An airport owner or operator has imposed a fee on an air carrier or foreign air carrier when it has taken all steps necessary under its procedures to establish the fee, whether or not the fee is being collected or carriers are currently required to pay it.

(b) This subpart does not apply to—

(1) A fee imposed pursuant to a written agreement with air carriers or foreign air carriers using the facilities of an airport;

(2) A fee imposed pursuant to a financing agreement or covenant entered into prior to August 23, 1994; or

(3) Any other existing fee not in dispute as of August 23, 1994.

§ 302.603 Complaint by an air carrier or foreign air carrier; request for determination by an airport owner or operator.

(a) Any air carrier or foreign air carrier may file a complaint with the Secretary for a determination as to the reasonableness of any fee imposed on the carrier by the owner or operator of an airport. Any airport owner or operator may also request such a determination with respect to a fee it has imposed on one or more air carriers. The complaint or request for determination shall conform to the requirements of this subpart and § 302.3 concerning the form and filing of documents.

(b) If an air carrier or foreign air carrier has previously filed a complaint with respect to the same airport fee or fees, any complaint by another carrier and any airport request for determination shall be filed no later than 7 calendar days following the initial complaint. In addition, all complaints or requests for determination must be filed on or before the 60th day after the carrier receives written notice of the imposition of the new fee or the imposition of the increase in the fee.

(c) To ensure an orderly disposition of the matter, all complaints and any request for determination filed with respect to the same airport fee or fees will be considered in a consolidated proceeding, as provided in §§ 302.611 and 302.613.

§ 302.605 Contents of complaint or request for determination.

(a) The complaint or request for determination shall set forth the entire grounds for requesting a determination of the reasonableness of the airport fee.

The complaint or request shall include a copy of the airport owner or operator's written notice to the carrier of the imposition of the fee, a statement of position with a brief, and all supporting testimony and exhibits available to the carrier on which the filing party intends to rely. In lieu of submitting duplicative exhibits or testimony, the filing party may incorporate by reference testimony and exhibits already filed in the same proceeding.

(b) All exhibits and briefs prepared on electronic spreadsheet or word processing programs should be accompanied by standard-format computer diskettes containing those submissions. Word processing and spreadsheets files must be readable by current versions of one or more of the following programs, or in such other format as may be specified by notice in the **Federal Register**: Microsoft Word, Word Perfect, Ami Pro, Microsoft Excel, Lotus, Quattro Pro, or ASCII tab-delineated files. Parties should submit one copy of each diskette to the docket section, one copy to the office of the Chief Administrative Law Judge (M–50), and one copy to the Chief, Economic and Financial Analysis Division (X–55), of the Office of Aviation Analysis. Filers should ensure that files on the diskettes are unalterably locked.

(c) When a carrier files a complaint, it must also submit the following certifications:

(1) The carrier has served the complaint, brief, and all supporting testimony and exhibits on the airport owner or operator and all other air carriers and foreign air carriers serving the airport by hand, by electronic transmission, or by overnight express delivery. (Unless an air carrier or foreign air carrier has informed the complaining carrier that a different person should be served, service may be made on the person responsible for communicating with the airport on behalf of the carrier about airport fees.);

(2) The parties served have received the complaint, brief, and all supporting testimony and exhibits or will receive them no later than the date the complaint is filed;

(3) The carrier has previously attempted to resolve the dispute directly with the airport owner or operator;

(4) When there is information on which the carrier intends to rely that is not included with the brief, exhibits, or testimony, the information has been omitted because the airport owner or operator has not made that information available to the carrier. The certification shall specify the date and form of the carrier's request for information from the airport owner or operator; and

(5) Any submission on computer diskette is a true copy of the data file used to prepare the printed versions of the exhibits or briefs.

(d) When an airport owner or operator files a request for determination, it must also submit the following certifications:

(1) The airport owner or operator has served the request, brief, and all supporting testimony and exhibits on all air carriers and foreign air carriers serving the airport by hand, by electronic transmission, or by overnight express delivery. (Unless the air carrier or foreign air carrier has informed the airport owner or operator that a different person should be served, service may be made on the person responsible for communicating with the airport on behalf of the carrier about airport fees.);

(2) The carriers served have received the request, brief, and all supporting testimony and exhibits or will receive them no later than the date the request is filed;

(3) The airport owner or operator has previously attempted to resolve the dispute directly with the carriers; and

(4) Any submission on computer diskette is a true copy of the data file used to prepare the printed versions of the exhibits or briefs.

§ 302.607 Answers to a complaint or request for determination.

(a)(1) When an air carrier or foreign air carrier files a complaint under this subpart, the owner or operator of an airport and any other air carrier or foreign air carrier serving the airport may file an answer to the complaint as provided in paragraphs (b) and (c) of this section.

(2) When the owner or operator of an airport files a request for determination of the reasonableness of a fee it has imposed, any air carrier or foreign air carrier serving the airport may file an answer to the request.

(b) The answer to a complaint or request for determination shall set forth the answering party's entire response. When one or more additional complaints or a request for determination has been filed pursuant to § 302.603(b) with respect to the same airport's fee or fees, the answer shall set forth the answering party's entire response to all complaints and any such request for determination. The answer shall include a statement of position with a brief and any supporting testimony and exhibits on which the answering party intends to rely. In lieu of submitting duplicative exhibits or testimony, the answering party may incorporate by reference testimony and exhibits already filed in the same proceeding.

(c) Answers to a complaint shall be filed no later than fourteen calendar days after the filing date of the first complaint with respect to the fee or fees in dispute at a particular airport. Answers to a request for determination shall be filed no later than fourteen calendar days after the filing date of the request.

(d) All exhibits and briefs prepared on electronic spreadsheet or word processing programs should be accompanied by standard-format computer diskettes containing those submissions. Word processing and spreadsheets files must be readable by current versions of one or more of the following programs, or in such other format as may be specified by notice in the **Federal Register**: Microsoft Word, Word Perfect, Ami Pro, Microsoft Excel, Lotus, Quattro Pro, or ASCII tab-delineated files. Parties should submit one copy of each diskette to the docket section, one copy to the office of the Chief Administrative Law Judge (M–50), and one copy to the Chief, Economic and Financial Analysis Division (X–55), of the Office of Aviation Analysis. Filers should ensure that files on the diskettes are unalterably locked.

(e) The answering party must also submit the following certifications:

(1) The answering party has served the answer, brief, and all supporting testimony and exhibits by hand, by electronic transmission, or by overnight express delivery on the carrier filing the complaint or the airport owner or operator requesting the determination;

(2) The parties served have received the answer and exhibits or will receive them no later than the filing date of the answer; and

(3) Any submission on computer diskette is a true copy of the data file used to prepare the printed versions of the exhibits or briefs.

§ 302.609 Replies.

(a) The carrier submitting a complaint may file a reply to any or all of the answers to the complaint. The airport owner or operator submitting a request for determination may file a reply to any or all of the answers to the request for determination.

(b) The reply shall be limited to new matters raised in the answers. It shall constitute the replying party's entire response to the answers. It shall be in the form of a reply brief and may include supporting testimony and exhibits responsive to new matters raised in the answers. In lieu of submitting duplicative exhibits or testimony, the replying party may incorporate by reference testimony and

exhibits already filed in the same proceeding.

(c) The reply shall be filed no later than two calendar days after answers are filed.

(d) All exhibits and briefs prepared on electronic spreadsheet or word processing programs should be accompanied by standard-format computer diskettes containing those submissions. Word processing and spreadsheets files must be readable by current versions of one or more of the following programs, or in such other format as may be specified by notice in the **Federal Register**: Microsoft Word, Word Perfect, Ami Pro, Microsoft Excel, Lotus, Quattro Pro, or ASCII tab-delineated files. Parties should submit one copy of each diskette to the docket section, one copy to the office of the Chief Administrative Law Judge (M–50), and one copy to the Chief, Economic and Financial Analysis Division, (X–55) of the Office of Aviation Analysis. Filers should ensure that files on the diskettes are unalterably locked.

(e) The carrier or airport owner or operator submitting the reply must certify that it has served the reply and all supporting testimony and exhibits on the party or parties submitting the answer to which the reply is directed and that any submission on computer diskette is a true copy of the data file used to prepare the printed versions of the exhibits or briefs.

§ 302.611 Review of complaints.

(a) Within 30 days after a complaint is filed under this subpart, the Secretary will determine whether the complaint meets the procedural requirements of this subpart and whether a significant dispute exists, and take appropriate action pursuant to paragraph (b), (c), or (d) of this section.

(b) If the Secretary determines that a significant dispute exists, he or she will issue an instituting order assigning the complaint for hearing before an administrative law judge. The instituting order will—

(1) Establish the scope of the issues to be considered and the procedures to be employed;

(2) Indicate the parties to participate in the hearing;

(3) Consolidate into a single proceeding all complaints and any request for determination with respect to the fee or fees in dispute; and

(4) Include any special provisions for exchange or disclosure of information by the parties.

(c) The Secretary will dismiss any complaint if he or she finds that no significant dispute exists. The order dismissing the complaint will contain a concise explanation of the reasons for the determination that the dispute is not significant.

(d) If the Secretary determines that the complaint does not meet the procedural requirements of this subpart, the complaint will be dismissed without prejudice to filing a new complaint. The order of the Secretary will set forth the terms and conditions under which a revised complaint may be filed.

§ 302.613 Review of requests for determination.

(a) Except as provided in paragraph (e) of this section, within 30 days after an airport owner or operator files a request for determination of the reasonableness of a fee under this subpart, the Secretary will determine whether the request meets the procedural requirements of this subpart and whether a significant dispute exists.

(b) If the Secretary determines that a significant dispute exists, he or she will issue an instituting order assigning the request for hearing before an administrative law judge. The instituting order will establish the scope of the issues to be considered and the procedures to be employed and will indicate the parties to participate in the hearing. The instituting order will consolidate into a single proceeding all complaints and any request for determination with respect to the fee or fees in dispute.

(c) If the Secretary finds that the request for determination presents no significant dispute, the Secretary will either issue a final order as provided in § 302.621 or set forth the schedule for any additional procedures required to complete the proceeding.

(d) If the Secretary determines that the request does not meet the procedural requirements of this subpart, the request for determination will be dismissed without prejudice to filing a new request. The order of the Secretary will set forth the terms and conditions under which a revised request may be filed.

(e) When both a complaint and a request for determination have been filed with respect to the same airport fee or fees, the Secretary will issue a determination as to whether the complaint, the request, or both meet the procedural requirements of this subpart and whether a significant dispute exists within 30 days after the complaint is filed.

§ 302.615 Decision by administrative law judge.

The administrative law judge shall issue a decision recommending a disposition of a complaint or request for determination within 60 days after the date of the instituting order, unless a shorter period is specified by the Secretary.

§ 302.617 Petitions for discretionary review.

(a) Within 5 calendar days after service of a decision by an administrative law judge, any party may file with the Secretary a petition for discretionary review of the administrative law judge's decision.

(b) Petitions for discretionary review shall comply with § 302.28(a). The petitioner must also submit the following certifications:

(1) The petitioner has served the petition by hand, by electronic transmission, or by overnight express delivery on all parties to the proceeding; and

(2) The parties served have received the petition or will receive it no later than the date the petition is filed.

(c) Any party may file an answer in support of or in opposition to any petition for discretionary review. The answer shall be filed within 4 calendar days after service of the petition for discretionary review. The answer shall comply with the page limits specified in § 302.28(b).

§ 302.619 Completion of proceedings.

(a) When a complaint with respect to an airport fee or fees has been filed under this subpart and has not been dismissed, the Secretary will issue a determination as to whether the fee is reasonable within 120 days after the complaint is filed.

(b) When a request for determination has been filed under this subpart and has not been dismissed, the Secretary will issue a determination as to whether the fee is reasonable within 120 days after the date the request for determination is filed.

(c) When both a complaint and a request for determination have been filed with respect to the same airport fee or fees and have not been dismissed, the Secretary will issue a determination as to whether the fee is reasonable within 120 days after the complaint is filed.

§ 302.621 Final order.

(a) When a complaint or request for determination stands submitted to the Secretary for final decision on the merits, he or she may dispose of the issues presented by entering an appropriate order, which will include a statement of the reasons for his or her findings and conclusions. Such an order shall be deemed a final order of the Secretary.

(b) The final order of the Secretary shall include, where necessary,

directions regarding an appropriate refund or credit of the fee increase or newly established fee which is the subject of the complaint or request for determination.

(c) If the Secretary has not issued a final order within 120 days after the filing of a complaint by an air carrier or foreign air carrier, the decision of the administrative law judge shall be deemed to be the final order of the Secretary.

Issued in Washington, DC, on January 30, 1995.

Federico Peña,

Secretary.

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