The 1996 Guaranteed Access Level (GAL) for Categories 342/642 remains unchanged. The GALs for textile products in the following categories shall be increased:

Category	Guaranteed Access Level
338/638	2,150,000 dozen.
339/639	2,150,000 dozen.

The Committee for the Implementation of Textile Agreements has determined that these actions fall within the foreign affairs exception of the rulemaking provisions of 5 U.S.C. 553(a)(1).

Sincerely,

Troy H. Cribb,

Chairman, Committee for the Implementation of Textile Agreements.

[FR Doc. 96–15842 Filed 6–20–96; 8:45 am]

BILLING CODE 3510–DR–F

Adjustment of Import Limits for Certain Cotton and Man-Made Fiber Textile Products Produced or Manufactured in Nepal

June 18, 1996.

AGENCY: Committee for the Implementation of Textile Agreements (CITA).

ACTION: Issuing a directive to the Commissioner of Customs adjusting limits.

EFFECTIVE DATE: June 19, 1996.

FOR FURTHER INFORMATION CONTACT: Janet Heinzen, International Trade Specialist, Office of Textiles and Apparel, U.S. Department of Commerce, (202) 482–4212. For information on the quota status of these limits, refer to the Quota Status Reports posted on the bulletin boards of each Customs port or call (202) 927–5850. For information on embargoes and quota re-openings, call (202) 482–3715.

SUPPLEMENTARY INFORMATION:

Authority: Executive Order 11651 of March 3, 1972, as amended; section 204 of the Agricultural Act of 1956, as amended (7 U.S.C. 1854).

The current limits for certain categories are being adjusted for special shift.

A description of the textile and apparel categories in terms of HTS numbers is available in the CORRELATION: Textile and Apparel Categories with the Harmonized Tariff Schedule of the United States (see Federal Register notice 60 FR 65299, published on December 19, 1995). Also see 60 FR 62410, published on December 6, 1995.

The letter to the Commissioner of Customs and the actions taken pursuant to it are not designed to implement all of the provisions of the bilateral agreement, but are designed to assist only in the implementation of certain of its provisions.

Troy H. Cribb,

Chairman, Committee for the Implementation of Textile Agreements.

Committee for the Implementation of Textile Agreements

June 18, 1996.

Commissioner of Customs,

Department of the Treasury, Washington, DC 20229.

Dear Commissioner: This directive amends, but does not cancel, the directive issued to you on November 29, 1995, by the Chairman of CITA. That directive concerns imports of certain cotton and man-made fiber textile products, produced or manufactured in Nepal and exported during the twelve-month period which began on January 1, 1996 and extends through December 31, 1996.

Effective on June 19, 1996, you are directed to adjust the limits for the following categories, as provided for in the current agreement between the Governments of the United States and the Kingdom of Nepal:

Category	Twelve-month limit [1]
336/636	218,569 dozen.
340	361,280 dozen.
341	901,769 dozen.
640	91,312 dozen.

[1] The limits have not been adjusted to account for any imports exported after December 31, 1995.

The Committee for the Implementation of Textile Agreements has determined that these actions fall within the foreign affairs exception to the rulemaking provisions of 5 U.S.C. 553(a)(1).

Sincerely,

Troy H. Cribb,

Chairman, Committee for the Implementation of Textile Agreements.

[FR Doc.96–15843 Filed 6–20–96; 8:45 am]

BILLING CODE 3510–DR–F

OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE

Commission ON United States—Pacific Trade and Investment Policy/ Office of the United States Trade Representative

Notice of Meeting of the Commission on United States Pacific Trade and Investment Policy

AGENCY: Commission on United States—Pacific Trade and Investment Policy/ Office of the United States Trade Representative.

ACTION: Notice that the June 26, 1996, meeting of the Commission on United States—Pacific Trade and Investment Policy will be held from 7:30 a.m. to 6:30 p.m. The meeting will be closed to the public from 7:30 a.m. to 8:45 a.m. and from 11:30 a.m. The meeting will be open to the public from 8:45 a.m. to 11:30 a.m.

SUMMARY: The Commission on United States—Pacific Trade and Investment Policy will hold a meeting on June 26, 1996, from 7:30 a.m. to 6:30 p.m. The meeting will be closed to the public from 7:30 a.m. to 8:45 a.m. and from 11:30 a.m. to 6:30 a.m. to 6:30 p.m. The meeting will include a review and discussion of current issues affecting U.S. trade policy with Asia. Pursuant to Section 2155(f)(2) of Title 19 of the United States Code, the USTR has determined that this portion of the meeting will be concerned with matters the disclosure of which would seriously compromise the development by the United States Government of trade policy, priorities, negotiating objectives or bargaining positions with respect to the operation of any trade agreement and other matters arising in connection with the development, implementation and administration of the trade policy of the United States. The meeting will be open to the public and press from 8:45 a.m. to 11:30 a.m. At this time the Commission will continue the study phase of its work and consider: The role of technology in our trade and investment policy with the Pacific region. Attendance during this part of the meeting is for observation only. Individuals who are not members of the Commission will not be invited to comment.

DATES: The meeting is scheduled for June 26, 1996, unless otherwise notified.

ADDRESS: The meeting will be held at Applied Materials, Inc., Bowers Campus, Building 12, 3225 Oakmead Village Drive, Santa Clara, CA 95054, unless otherwise notified.

FOR FURTHER INFORMATION CONTACT:

Nancy Adams, Executive Director of the Commission on United States—Pacific Trade and Investment Policy, Room 400, 600 17th Street, NW, Washington, D.C. 20508, (202) 395–9679.

Nancy Adams,

Executive Director, Commission on United States—Pacific Trade and Investment Policy.

Jeffrey Lang,

United States Trade Representative, Acting.

[FR Doc. 96–15910 Filed 6–20–96; 8:45 am]

BILLING CODE 3190–01–M

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

Federal Aviation Administration

[Docket No. 27782]

RIN 2120–AF90

Policy Regarding Airport Rates and Charges

AGENCY: Department of Transportation, Office of the Secretary and Federal Aviation Administration.

ACTION: Policy statement.

SUMMARY: This document announces Department of Transportation (''Department'') policy on the fees charged by Federally-assisted airports to air carriers and other aeronautical users. The statement of policy (''Final Policy'') was required by the Federal Aviation Administration Authorization Act of 1994, Public Law 103–305 (August 23, 1994). This statement of policy replaces in its entirety the statement of policy published in the Federal Register on February 3, 1995 (''Interim Policy''). This statement of policy incorporates a substantial modification in the approach of the Interim Policy to determining the reasonableness of fees for facilities other than the airfield and public use roadways. In other respects, the approaches of the two policies are similar. The Department proposed the referenced modification in a notice published in the Federal Register on September 8, 1995 (''Supplemental Proposed Policy''). The Final Policy is not significantly revised from that proposed in the September 8 notice.

DATES: This policy is effective June 19, 1996. This agency action is a statement of policy that relaxes restrictions imposed on airport proprietors by the Interim Policy. The Final Policy does not itself impose additional burdens on airlines and other airport users and does not require airport proprietors to impose such burdens.

FOR FURTHER INFORMATION CONTACT: David L. Bennett, Director, Office of Airport Safety and Standards, Federal Aviation Administration, 800 Independence Ave. SW., Washington, DC 20591, telephone (202) 267–3053; Barry L. Molar, Manager, Airports Law Branch, Office of the Chief Counsel, Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591, telephone (202) 267–3473.

SUPPLEMENTARY INFORMATION:

Summary of Policy Statement

The Final Policy requires that fees for the use of the airfield and public-use roadways be established on the basis of costs, and it provides detailed guidance on how costs are to be determined and applied to establish fees. Airfield assets must be valued at their historic cost to the original airport proprietor (''HCA value''). The cost-of-service approach is comparable to common practice in setting fees for regulated public utilities. This approach also reflects the nearly universal practice of establishing fees for the use of the airfield at commercial service airports. Even when airfield fees are set by agreement, the agreement usually reflects a cost-of-service approach. The terms of such agreements generally govern how costs will be calculated.

In formulating the Final Policy, the Department has considered and recognized as reasonable practices that have generally been accepted by industry participants as producing reasonable results. The Final Policy does not seek to disturb those practices. In the case of the airfield and public use roadways, industry practice—HCA-based fees—is the approach supported by aeronautical users as most beneficial to them. For other facilities and services, the Final Policy adopts a different approach.

For those other aeronautical facilities, the Final Policy permits fees to be set by any reasonable method. Fees for such facilities and services are generally established through direct negotiations with individual users. In these negotiations, cost, as defined for reasonable airfield fees, is usually but one of a number of considerations affecting the fees. In the Department's experience, this negotiating process has in almost all cases produced reasonable and non-controversial results. The Department expects that these negotiations will continue to produce reasonable results in all but exceptional situations. The Department has, therefore, adopted a more flexible approach to nonairfield fees to preserve the discretion of airport proprietors and aeronautical users to negotiate the terms for using nonairfield facilities.

The Final Policy also reflects the Department's preference for direct negotiation of fee issues between airport proprietors and airport users. Accordingly, the first of the five fundamental principles listed in the Final Policy states the Department's preference for direct negotiation and resolution. In addition, most of the detailed guidance on establishment of airfield fees need not be followed if airfield users have agreed to a different practice.

The Final Policy retains the structure of the Supplemental Proposed Policy and the Interim Policy. The Final Policy begins with a statement of applicability, and is then organized into five general principles with supporting guidance for each.

As noted above, the first principle states the Department's preference for direct local negotiation between airport proprietors and aeronautical users.

The second principle restates the legal requirement that rates, fees and charges to aeronautical users must be fair and reasonable, with more detailed guidance on the practices and restrictions that define ''fair and reasonable.'' The detailed guidance applies for the most part to fees charged to aeronautical users for airfield facilities and public-use roadways. For other aeronautical facilities, the policy permits fees to be established using any reasonable methodology. Department oversight of these fees focuses on monitoring for progressive accumulation of surplus aeronautical revenue. For the airfield and public-use roadways, the policy incorporates, among other things, the following: flexibility to deviate from the policy guidance based on agreement with airfield users; recognition that both compensatory and residual pricing approaches are legitimate; standards for the valuation of airfield property; prescription of the kinds of costs that can be reflected in the airfield rate base; and guidance on subsidization of other airports. The Final Policy makes certain distinctions in the reasonable accommodation of air carriers versus other aeronautical users. The Final Policy does not establish standards for fees paid by nonaeronautical users or limit the amount of revenues generated by nonaeronautical fees.

The third principle restates the legal prohibition on unjustly discriminatory rates and charges. Guidance identifies some practices that are required to avoid unjust discrimination and some practices that not considered to be unjustly discriminatory.

The fourth principle restates the legal obligation to maintain a fee and rental structure that makes the airport as self-sustaining as possible under the circumstances existing at the airport. Supplemental guidance encourages the sponsor of an airport that is not currently self-sustaining to establish long-term goals and targets to make the airport financially self-sustaining. The self-sustainability requirement must be included in each sponsor's grant assurances pursuant to statute and is subject to enforcement by the FAA in accordance with its grant compliance procedures. However, the Department will not consider on the merits a complaint as to the reasonableness of an airport fee based solely on alleged non-compliance with the self-sustainability requirement. A complaint about compliance with the self-sustainability requirement would be considered by the FAA under its administrative complaint procedures.

The guidance under this principle provides that the Department may investigate the reasonableness of aeronautical fees in a case of progressive accumulation of surplus aeronautical revenue.

The fifth principle restates the basic legal requirements for the application and use of airport revenues. Supplemental guidance has been proposed in the Notice of Proposed Policy and Procedures Concerning the Use of Airport Revenue published at 61 FR 7134 (February 26, 1995).

Finally, the Department is willing to consider arguments that specific provisions of the policy should not apply to a particular airport fee due to unusual circumstances in the context of a proceeding to review that fee. See Los Angeles International Rates Proceeding (''LAX I''), Order 95–6–36, at 16 (June 30, 1995); Second Los Angeles International Airport Rates Proceeding (''LAX II''), Order 95–12–33, at 15 (December 22, 1995).

Background

Two federal statutes have long imposed a reasonableness requirement on the fees charged aeronautical users by airports. When an airport accepts Federal grant money for an airport improvement, it must give certain assurances, including the assurance that the airport will be available for public use on fair and reasonable terms without unjust discrimination. Section 511 of the Airports and Airways Improvement Act of 1982, (''AAIA''), recodified as 49 USC § 47107. This assurance includes an obligation to charge aeronautical users of the airport only reasonable fees. Similarly, section 113(b) of the Federal Aviation Act, the Anti-Head Tax Act, recodified as 49 USC § 40116, allows a publicly-owned airport authority to collect only reasonable landing fees and charges from airlines using airport facilities. See Northwest Airlines v. County of Kent (''Kent County''), 114 S.Ct. 855 (1994). These statutes, however, do not authorize the Department to regulate the reasonableness of fees charged non-aeronautical users.

Airport fees and revenues are subject to other legal requirements as well. Section 511 of the AAIA also bars airports, except for certain grandfathered airports, from diverting airport revenue to nonairport purposes. 49 USC § 47107(b). Section 511 also requires each airport to provide assurances that the airport will maintain a fee schedule that will make the airport as self-sustaining as possible under the circumstances existing at the airport. 49 USC § 47107(a)(13). In addition, the Chicago Convention and many of the United States' bilateral air services agreements obligate the United States to ensure that airports charge foreign airlines the same fees as the U.S. airlines that operate similar services.

On June 9, 1994, the Office of the Secretary of Transportation (''OST'') and the Federal Aviation Administration (''FAA'') issued two related notices on the subject of Federal requirements for airport rates and charges. The Department took this action largely in order to better implement its responsibility to enforce the reasonable fee requirements. A notice of proposed policy entitled ''Proposed Policy Regarding Airport Rates and Charges'' listed and explained the principles that the Department believes define Federal policy on the rates and fees that an airport proprietor can charge to aeronautical users of the airport. Docket No. 27782 (59 FR 29874, June 9, 1994). Notice 94–18, a notice of proposed rulemaking entitled ''Rules of Practice for Federally Assisted Airports,'' proposed detailed procedures for the filing, investigation, and adjudication of complaints against airports for alleged violation of Federal requirements involving fees and other airport-related requirements. Docket No. 27783 (59 FR 29880, June 9, 1994).

The FAA Authorization Act of 1994, Public Law 103–305 (''1994 Authorization Act'') was signed into law on August 23, 1994. Section 113 of that legislation, 49 U.S.C. § 47129, specifically addresses airport fees. Section 47129 directs the Secretary of Transportation (''Secretary'') to determine whether an airport fee imposed on an air carrier is reasonable, upon written request by the airport proprietor or upon complaint filed by an affected carrier within 60 days after the carrier receives written notice of the establishment or increase of the fee. 49 USC § 47129(a)(1). An airport fee subject to section 47129 ''may be calculated pursuant to either a compensatory or residual fee methodology'' or a combination thereof. 49 U.S.C. § 47129(a)(2). Further, in determining the reasonableness of a fee, the Department ''may only determine whether the fee is reasonable or unreasonable and shall not set the level of the fee.'' 49 USC § 47129(a)(3).

Section 47129 also directs the Secretary to publish in the Federal Register final regulations, policy statements or guidelines establishing (1) procedures for acting on written requests or complaints; and (2) ''the standards or guidelines that shall be used * * * in determining under [section 47129] whether an airport fee is reasonable.'' 49 USC § 47129(b)(1),(2).

Pursuant to 49 USC 47129(e), the section does not apply to : (1) a fee imposed pursuant to a written agreement with air carriers; (2) a fee imposed ''pursuant to a financing agreement or covenant entered into prior to the date of enactment of [section 47129];'' or (3) any other existing fee not in dispute on the date of enactment. In addition, nothing in section 47129 shall adversely affect: (1) the rights of any party under an existing written agreement between an air carrier and the airport proprietor; or (2) the ability of the airport to meet its obligations under a financing agreement, or covenant that is in force on the date of enactment. 49 USC § 47129(f).

In response to provisions in the 1994 Authorization Act, the Department issued a supplemental notice of proposed policy with revisions to reflect relevant provisions of that legislation. Docket No. 27782 (59 FR 51835, October 12, 1994).

After reviewing all comments received in response to the notices, the OST and the FAA, on January 30, 1995, issued a ''Policy Regarding Airport Rates and Charges,'' the Interim Policy, and requested further public comment. Docket No. 27782 (60 FR 6906, February 3, 1995). Two airport owners are seeking judicial review of the Interim Policy. *City of Los Angeles et al. v. U.S. Department of Transportation et al.*, D.C. Cir. Nos. 95–1188 and 95–1190 (argued March 4, 1996).

After reviewing the comments received in response to the February 3 request for comments, the OST and the FAA published on September 8, 1995 a supplemental notice of proposed policy, the Supplemental Proposed Policy. Docket No. 27782 (60 FR 47012).

The procedural rules required by section 47129(b)(1) were published in the Federal Register on the same date as the Interim Policy. Docket No. 49830 (60 FR 6919, February 3, 1995). The 1994 Authorization Act also required that the Secretary issue a statement of policies and procedures for the enforcement of Federal restrictions on the use of airport revenue. On February 20, 1996, the FAA issued a Notice of Proposed Policy and Procedures Concerning the Use of Airport Revenue. Docket No. 28472 (61 FR 7134, February 26, 1996).

Comments on the Supplemental Proposed Policy

The Department received more than 50 comments on the Supplemental Proposed Policy. Comments were received from almost all segments of the aviation community, including: airport operators and representative organizations; associations representing U.S. and foreign air carriers and commuter airlines; representatives of other aeronautical businesses at airports; general aviation representatives; a representative of airport concessionaires; individuals with experience in airport operations; and a law firm. In addition, the Department held two public meetings to solicit public input on the Supplemental Proposed Policy. Verbatim transcripts of the meetings have been included in the docket of this proceeding.

The two major US representative organizations for airport operators—Airport Operators Council International/North America (''ACI'') and American Association of Airport Executives (''AAAE'')—filed joint comments. Many individual airport operators endorsed the joint comments of their representative organizations, but some larger airport operators commented independently. Many airport operators' comments were similar, and all of the comments tended to focus on a common group of issues.

On the airline side, the Air Transport Association of America (''ATA'') and Regional Airline Association (''RAA'') filed joint comments. These comments and those of the International Air Transport Association (''IATA'') also tended to focus on the same issues and generally took the same position.

Accordingly, the following discussion of comments is organized by issue, not by commenter. Issues are discussed in the order they arise in the Final Policy. Airport proprietors and their representatives who took the same position on an issue are collectively referred to as ''airport proprietors.'' ATA/RAA and IATA are referred to as ''carriers'' when the organizations took common positions. The summary of comments is intended to represent the general divergence or correspondence in industry views on various issues. It is not intended to be an exhaustive restatement of the comments received. All comments received were considered by the Department, even if not specifically identified in this summary.

After the comment period closed, ACI/AAAE filed reply comments to the comments filed by ATA/RAA. ATA/RAA in turn objected to the reply comments. ATA/RAA requested that the Department reopen the comment period to allow for the filing of reply comments generally, if we accepted the ACI/AAAE reply. The Department has accepted the reply comments for the record. However, we determined that reopening the comment period was not necessary because ACI/AAAE's reply comments were largely repetitions of arguments presented in earlier comments. In no case are the reply comments the sole basis for any decision.

In addition to specific changes noted in the discussion of the issues, the Department has made editorial changes throughout the Final Policy to enhance readability and clarity.

The Department's Authority to Regulate Aeronautical Fees

As noted above, airports have been required by two Federal statutes—the AAIA and the Anti-Head Tax Act—to charge only reasonable fees to aeronautical users. The Department has the responsibility for enforcing these requirements, and the courts have held that a Department decision on the reasonableness of an airport fee is entitled to substantial deference. Kent County, 114 S.Ct. at 864, n. 14; New England Legal Foundation v. Massachusetts Port Authority, 883 F.2d 157, 169 (1st Cir. 1989). Section 113 of the 1994 Reauthorization Act, codified as 49 USC § 47129, requires the Department to resolve significant disputes over the reasonableness of new or increased airport fees on an expedited basis. In that statute Congress also required the Secretary to establish standards for determining the reasonableness of an airport fee. Congress did not limit the Secretary's discretion in any way, except by stating that the Department may not actually set an airport fee.

Given the statutory authority vested in the Secretary, we find that we are empowered both to adopt the guidelines contained in this Final Policy and, in cases heard under section 47129, to examine the fee methodology used by an airport. See LAX I, Order 95–6–36 at 14–15.

ACI/AAAE argue that we must give an airport's fee judgments a presumption of validity, since the decisions of state and local governments are normally entitled to such a presumption. The Final Policy, however, gives airport proprietors substantial discretion in establishing a fee structure. In addition, the airlines challenging an airport fee have the burden of proof. LAX I, Order 95–6–36 at 17–18. We do not agree that we should include an additional presumption in favor of airport judgments on fees in the final Policy. There is a substantial Federal interest in ensuring that aeronautical users pay only reasonable fees, as shown by Congress' directive that we determine on an expedited basis whether such fees are reasonable when carriers file complaints against new or increased airport fees that meet the jurisdictional requirements of section 47129. Congress' requirements that we publish guidelines for determining the reasonableness of airport fees further indicates that we should carefully examine an airport's fee methodology without presuming that the airport's judgment is likely to be correct.

We also note that we did not use such a presumption in the two LAX cases or in our earlier investigation of fees charged by the Massachusetts Port Authority (''Massport'') under its PACE program. Investigation into Massport's Landing Fees, FAA Docket 13–88–2, Opinion and Order (December 22, 1988) (''Massport Order''), aff'd New England Legal Foundation v. Massachusetts Port Authority, 883 F.2d 157 (1st Cir. 1989).

1. Applicability to General Aviation and Foreign Air Carriers

The Supplemental Proposed Policy would apply to aeronautical uses of any airport, including a general aviation airport. However, the Department proposed to take into account differences in methodologies and mechanisms that airport proprietors may use to charge for different facilities and for different category of users. Proposed Applicability of Policy, section A. The Department also proposed that, at airports where fees high enough to achieve self-sustainability would be too high to permit viable commercial operations, the Department would not object to lower fees to assure that the public had access to commercial aeronautical services. Proposed para. 4.1.2. In the explanatory statement, the Department proposed to add language clarifying that in situations not covered by section 47129, the FAA would apply the policy in its role as administrator of grants under the Airport Improvement Program (''AIP''), assuring that an AIP grant applicant is in compliance with its grant assurances. The FAA would not provide a forum for resolving private disputes.

Airport proprietors: Airport proprietors generally oppose application of the policy to general aviation airports and to general aviation facilities. ACI/AAAE consider the Supplemental

Proposed Policy to be an improvement over the interim policy. However, a policy is not needed for general aviation airports and facilities because section 47129 was enacted to respond to airline concerns. If the Department disagrees, ACI/AAAE prefer a separate policy.

Some individual airport proprietors argue that the terms of section 47129 preclude adoption of a policy applicable to any fees except those charged to air carriers and not otherwise excluded by the terms of section 47129. The provisions of section 47129 indicate a belief by Congress that, to minimize the adverse effects of Departmental involvement, certain aeronautical fees should be completely exempt from challenge. Others argue only that such an extension is unwise, based on the differences between commercial service and general aviation airports.

In addition, some airport proprietors object to the application of the policy and the expedited procedures to complaints brought by foreign air carriers on the same grounds.

General aviation: The Aircraft Owners and Pilots Association (''AOPA'') explicitly objects to exclusion of general aviation airports from the scope of the policy, and the National Air Transportation Association (''NATA'') supports applying at least some elements of the policy to general aviation airports.

Other commenters: One individual commenter observed that at many compensatory airports, general aviation pays less than its allocated costs and is subsidized by airlines and their passengers, who suffer congestion caused by these below-cost fees.

The Final Policy: The Final Policy statement applies to general aviation airports and fees charged to general aviation users. However, in response to the comments, we have exercised our discretion to further limit the circumstances in which we will consider a complaint about the reasonableness of fees imposed at a general aviation airport. In addition, the Department reaffirms its earlier decision that foreign air carriers have the same rights as U.S. air carriers under section 47129.

As noted in the preamble to the Supplemental Proposed Policy, the Department has ample authority under other provisions of the Airport and Airway Improvement Act of 1982, as amended (''AAIA'')—49 USC §§ 47107(a), 47122—to adopt policies and guidance defining reasonable fees to be charged by general aviation airports and for general aviation use of commercial service airports. We find nothing in the statute that exempts fees imposed for general aviation uses of any airport from the requirement that airport proprietors charge all aeronautical users reasonable and not unjustly discriminatory fees. The commenters have not provided any other persuasive reason for using one set of standards to judge the reasonableness of landing fees charged to air carriers and a different set of standards to judge the reasonableness of landing fees charged to other users.

However, as noted previously, the Department recognizes that airport proprietors, especially proprietors of general aviation airports, may use different methods for setting fees for general aviation users than those commonly used for setting fees paid by airlines. The Department reiterates its commitment to apply the policy flexibly in evaluating general aviation fees. The narrowing of the detailed guidance on establishing fees to the airfield and public-use roadways should itself provide increased flexibility to general aviation airports over the Interim Policy.

Even as to the airfield, the Department does not anticipate that application of the policy will be unduly burdensome. The Department understands that many general aviation airports operate at a loss, calculated according to generally accepted accounting principles. By definition, such airports are not generating excessive surpluses. The Department would not expect such airports to increase their losses by paying for sophisticated cost allocation and accounting systems to prove that they are losing money. Similarly, the Department understands that many airport proprietors apply a single charge, e.g., a fuel flowage fee, to general aviation users for their use of all aeronautical facilities. The Department does not intend to disturb this practice. Further, a charge that covers the cost of providing nonairfield facilities would be evaluated under paragraph 2.6 of the Final Policy, as discussed below.

The Department notes the concern that general aviation users are being subsidized by other users at many airports. The Department emphasizes that an airport proprietor generally may not charge any aeronautical user or user group more than its allocated costs based on a reasonable, transparent and not unjustly discriminatory cost allocation methodology. Our general approach in this policy is to refrain from disturbing common and non-controversial industry practice. Therefore, the Department will not object when an airport proprietor charges particular user groups less than their allocated costs, if other aeronautical users are not required to finance the shortfall. The applicable Federal requirements do not compel airport proprietors to set fees so high that they become a financial bar to the use of the airport.

The Department is making three modifications to the Final Policy in response to concerns raised in the comments. First, we will strengthen the language of the applicability section that distinguishes the FAA's role in processing complaints about general aviation fees from the Department's role in processing complaints under section 47129. Second, because the threat of unreasonably high fees is remote at most general aviation airports, the Final Policy provides that the FAA will not ordinarily undertake an investigation of the reasonableness of a general aviation airport's fees absent evidence of a progressive accumulation of surplus aeronautical revenues. The general aviation airport segment of the industry should not be burdened with the cost of developing sophisticated accounting systems to address a problem that will occur, rarely, if at all. An allegation of unjust discrimination would be considered by the FAA in accordance with the Final Policy. Third, proposed par. 3.4.1 would require common costs to be allocated ''according to a reasonable, transparent and not unjustly discriminatory cost allocation formula'' that meets the conditions specified in that paragraph. Because many smaller airports cannot afford to develop sophisticated cost allocation formulae, the reference to ''cost allocation formula'' is being modified to ''cost allocation methodology.'' If the airport proprietor elects to develop a cost allocation formula, the formula must meet the conditions specified in that paragraph.

As to the application of the policy to foreign airlines, the relevant statutes make it clear that the policy must apply equally to U.S. and foreign airlines. First, we are adopting the Final Policy primarily because Congress directed us in 49 USC § 47129 to establish guidelines or standards for determining the reasonableness of a new or increased airport fee in cases heard under that statute. The Department analyzed the statute's applicability and determined in LAX I that 49 USC § 47129 must be read as giving foreign airlines the same right as U.S. airlines to file complaints and obtain relief. Order 95–6–36 at 53–56. We reaffirmed that determination in LAX II. Order 95–12–33 at 52. Since section 47129 is the principal basis for the adoption of the Final Policy, the Final Policy must apply to foreign airlines.

Even if Section 47129 did not cover foreign airlines, the Final Policy would have to govern the assessment of the reasonableness of fees charged to foreign airlines. The airport grant statute specifically requires the Department to obtain assurances from each airport sponsor obtaining federal funds that the airport will not unjustly discriminate against any aeronautical user. 49 USC § 47107(a)(1). This provision requires an airport to charge foreign airlines the same fees as similarly situated U.S. airlines. In addition, the United States' obligation under many international agreements to ensure that foreign airlines are treated the same as U.S. airlines would require us to adopt the same standards for determining the reasonableness of airport fees, whether the fees are paid by U.S. airlines or foreign airlines, even if Congress had not enacted 49 USC § 47129.

Several airport parties now object to the Department's adoption of procedural rules allowing foreign airlines to obtain an expedited investigation under section 47129. However, only the City of Los Angeles objected to the inclusion of foreign airlines during the rulemaking proceeding that led to adoption of the Rules of Practice for airport rates and charges cases. 59 FR 53380, 53383 (October 24, 1994); 60 FR 6919 (February 3, 1995). At that time, the Department determined as a matter of discretion that foreign airlines should have the ability to request an expedited investigation, even though it assumed that they did not have such rights under section 47129. The Department's later decision that foreign airlines are covered by 49 USC § 47129 means that foreign airlines by statute have the same procedural rights as U.S. airlines.

2. Applicability to Fees Set by Agreement

Section 47129(e), 49 USC § 47129(e), provides that the section does not apply, inter alia, to fees imposed pursuant to a written agreement with air carriers. Section 47129(f), 49 USC § 47129(f), provides , inter alia, that the section shall not adversely affect the rights of parties to an existing agreement between an air carrier and airport proprietor.

In the applicability section of the Supplemental Proposed Policy, the Department stated that section 47129 did not repeal or narrow the scope of the reasonableness requirement for airport fees. The Department proposed to apply the policy in the case of a dispute over the reasonableness of any aeronautical fee. However, disputes over matters described in sections 47129 (e) and (f) would not be processed under the procedures mandated by section 47129. In the explanatory statement, the Department proposed to take into account the existence of any agreement between U.S. and foreign air carriers and the airport proprietor in making its determination of reasonableness.

The comments: Airport proprietors generally argue that the policy should not apply to fees set by agreements with carriers. ACI/AAAE argue that application of the policy to such fees would frustrate the direction given by Congress and would adversely affect airports that rely on agreements that produce steady and predictable revenue flows. ACI/AAAE and individual airport commenters also argue that the Department is legally barred from applying the policy to fees set by agreement because sections 47129(e) and (f) limit the application of all section 47129, not just the provisions governing the expedited procedures. ACI/AAAE refer to numerous court decisions overturning agency actions that have not properly adhered to statutory exceptions.

Other commenters did not address this issue.

The Final Policy: The Final Policy applies to fees set by agreement, to the extent discussed below. We do not interpret section 47129 to preclude an investigation of fees set by agreement or the application of the policy in such an investigation. However, in keeping with our policy of encouraging direct negotiation of fees, the Department does not expect to investigate routinely fees set by agreement. Moreover, the Department has decided not to consider complaints about the reasonableness of fees set by agreement if filed by parties to the agreement. The Final Policy is modified to reflect this decision.

However, we do not believe that Congress intended to deprive non-party carriers of the opportunity to have their airport fees reviewed by the FAA, solely because the fees are included in an agreement between the airport proprietor and other airlines. While section 47129 directed the Secretary to establish a policy on reasonable fees, the Secretary already had authority to publish such a policy. Section 47129 did not repeal this authority or the underlying requirement of reasonableness. The existence of an agreement may be a critical factor in evaluating the reasonableness of a fee, but section 47129 does not, by its terms, exempt fees set by agreement from the requirement of reasonableness.

However, the Department agrees that section 47129(e) was enacted to preclude carriers from improving on their bargain by bringing an administrative complaint after they have reached agreement with an airport proprietor. That outcome would be unfair to airport proprietors who bargain in good faith. The threat of a complaint could discourage airport proprietors from putting forward their best offers in negotiations. The Department is reluctant to interpret section 47129(e) in a way that would discourage effective negotiations.

Complaints about fees charged to non-parties to the agreement brought by non-parties to the agreement would be considered under provisions of the policy applicable to non-signatory carriers, if significant, as discussed below under the heading ''Charges to Non-Signatory Carriers.'' By giving notice that non-parties may challenge fees imposed on them by agreement, the Department expects that airport proprietors and airport users will be able to achieve reasonable results in their negotiations and obviate a full investigation and determination of reasonableness by the Department.

3. Applicability to Fees Imposed Pursuant to Financing Agreements

Section 47129(e)(2), 49 USC § 47129(e)(2), provides that the section does not apply to fees imposed pursuant to a financing agreement or covenant entered into before the date of enactment of the statute (August 23, 1994). Section 47129(f)(2), 49 USC § 47129(f)(2), provides that the section shall not adversely affect the ability of an airport proprietor to meet its obligations under a financing agreement or covenant in effect on August 23, 1994.

In the applicability section of the Supplemental Proposed Policy, the Department stated that section 47129 did not repeal or narrow the scope of the reasonableness requirement for airport fees. The Department proposed to apply the policy in the case of a dispute over the reasonableness of any aeronautical fee. However, disputes over matters described in sections 47129 (e) and (f) would not be processed under the procedures mandated by section 47129. The treatment of financing agreements was not otherwise discussed in the Supplemental Proposed Policy.

However, in its order setting for hearing under section 47129, carrier complaints against fees imposed by the Puerto Rico Port Authority, the Department further interpreted the financing agreement exceptions. Puerto Rico Ports Authority Rates Proceeding, Order 95–4–6 (April 3, 1995). The Department stated that:

[I]n order to successfully invoke the exception in subsection (e)(2), the airport must show more than generalized language in a financing agreement as the source of the imposition of the fee upon the air carrier. The airport must demonstrate that the agreement specifically required the airport to increase directly the fees to air carriers or that it so circumscribed other alternatives that the airport had to impose a new fee or to increase an existing fee. Order 95–4–6 at 13.

The Department explained that this interpretation of section 47129(e)(2) was necessary so that the provision would not make the statute a nullity. *Id.* at 12.

The comments: Airport proprietors urge the Department to revise its interpretation of section 47129(e) to recognize generalized rate covenant language. The airport proprietors argue that Congress was well aware of the broad terms of typical rate covenants and drafted section 47129(e)(2) to cover the typical situation. They further argue that the legislative history makes clear that section 47129(e)(2) was enacted to avoid disrupting existing financing agreements.

The airport proprietors also argue that their preferred interpretation will not render section 47129 a nullity. They assert that airport proprietors do not routinely invoke a rate covenant as a justification for a fee increase. Doing so would signal dire financial circumstances. Further, if an airport proprietor must raise fees to comply with a rate covenant, it will not single out airlines or other aeronautical users, but will raise the fees for all airport users.

Other commenters did not address this issue.

The Final Policy: The Department will not modify the interpretation of the financing agreement exceptions. As noted in Order 95–4–6, the airport proprietors' preferred interpretation could turn section 47129(e)(2) into the proverbial exception that swallows the rule.

Moreover, the Department's interpretation does not threaten to disrupt existing financing agreements. Under the Final Policy, debt-service expenses, including reasonable amounts for debt-service coverage, may be included in the rate-base. In an investigation into the reasonableness of a fee, the airport proprietor is free to show that a challenged fee is needed to meet debt-service expenses associated with a general rate covenant. However, the airport proprietor may not rely on a general rate covenant to invoke section 47129(f)(2) as a procedural bar to an investigation of the reasonableness of the disputed fee. See, Order 95–4–6 at 13.

4. Definition of Exclusive/Nonexclusive use Aprons for HCA Valuation

The Supplemental Proposed Policy proposed that airfield assets would be valued using the HCA valuation methodology. Proposed par. 2.5.1. Airfield assets would include ramps or aprons not leased on an exclusive use basis and associated land. Proposed Applicability, Section D.

The comments: The State of Alaska, which operates most public airports in Alaska, expressed concern that the HCA valuation requirement for aprons might adversely affect its charging practices. The State's lease lots typically abut the side of a public-use apron and include a portion of the apron for exclusive aircraft parking. Treating the lease lots as a non-exclusively leased apron subject to the HCA valuation requirement would devastate the airport system's revenue situation.

The Department did not receive any other comments on this issue.

The Final Policy: No modification to the Supplemental Proposed Policy is required to address the concerns of the commenter. As described in the comments, the portion of the apron included in each lease lot is available for exclusive use. Accordingly, this portion of the apron and the remainder of the lease lot would be considered exclusively leased, even though the remainder of the apron is a public-use facility.

The Department has, however, decided to modify the definition to avoid potential confusion. We are modifying the provision to exclude from the definition of airfield assets an apron or ramp which is the subject of a preferential, as well as an exclusive lease or use agreement.

Aprons or ramps that are treated as airfield assets are subject to the general HCA valuation requirement. In contrast, the airport proprietor may use any reasonable method to establish the fee for any other apron or ramp. The Department originally proposed this disparate treatment because exclusively leased facilities have more in common with terminals and other aeronautical facilities than with runways and taxiways. In particular, their use and the fees for their use are ordinarily the subject of individual negotiations.

On further consideration of the issue, the Department has concluded that the preferential use agreements are as likely as exclusive use agreements to be the result of individual negotiations and to give rise to the characteristics that make a ramp or apron more like a terminal than a runway. Many lease and use agreements may provide for only preferential use. The Department is therefore modifying the Final Policy to exclude from the definition of airfield assets, aprons and ramps that are subject to a preferential or exclusive lease or use agreement.

5. Cross Crediting Aeronautical Users With Nonaeronautical Revenues

The Supplemental Proposed Policy proposed that aeronautical users be entitled to a cross-credit of nonaeronautical revenues only if the airport proprietor agrees, and that the airport proprietor could agree to a cross-credit even if aeronautical users do not agree to cover nonaeronautical losses. Proposed para. 2.1.1. The Supplemental Proposed Policy also proposed that the airport proprietor could not require aeronautical users to cover nonaeronautical losses, except by agreement. *Id.*

Airport proprietors: Airport proprietors did not address this issue.

Carriers: IATA argues that cross-crediting should be required based on the policy on airport fees set forth by the International Civil Aviation Organization (''ICAO''), laid down in the Statements by the Council to Contracting States on Charges for Airports and Air Navigation Services (ICAO Doc. 9082/4). IATA argues that cross-crediting satisfies the ICAO principle of cost-relatedness, because airport users bring customers to the airport through their operations.

General aviation: AOPA supports mandatory cross-crediting because nonaeronautical businesses thrive due to the ready-made market for their services. AOPA also argues that the Supreme Court's decision in Kent County does not preclude the Department from requiring cross-crediting.

Other commenters: One law firm involved in public finance objects to the proposed requirement that aeronautical users agree to cover nonaeronautical losses. This commenter argues that the proposal is inconsistent with the airport proprietor's right to set fees unilaterally by ordinance or regulation established elsewhere in the policy. The proposal is also inconsistent with the airport proprietor's unconditional right to employ a residual methodology established by 49 USC § 47129(a)(2), according to this commenter.

The Final Policy: The Department is adopting Paragraph 2.1.1, as proposed.

The Department will not require cross crediting of nonaeronautical revenues to aeronautical users, because section 47129 does not permit us to do so. Section 47129(a)(2) preserves the discretion of airport proprietors to use the compensatory methodology. The essence of the compensatory methodology is that fees to aeronautical users reflect the costs of serving them with no cross-crediting of nonaeronautical profits or losses.

Moreover, it would be unfair to require airport proprietors to share nonaeronautical profits with aeronautical users, if we did not also require aeronautical users to share nonaeronautical losses with airport proprietors. The aeronautical users requesting cross-crediting have not indicated that they are willing to accept such a requirement. More importantly, they have not identified a legal basis for imposing cross-crediting.

By authorizing the residual methodology, section 47129(a)(2) does not authorize unilateral increases in aeronautical charges to cover nonaeronautical losses. The Department is not aware of any airport proprietor who, at the time of enactment, charged aeronautical users to cover aeronautical losses without the aeronautical users' agreement to do so. No airport proprietor has asserted a unilateral right to do so in this proceeding docket.

Moreover, one of the fundamental concepts of reasonableness is that users should not, without their consent, be burdened with paying for facilities they do not benefit from or use. The law firm's proposal clearly conflicts with this concept.

6. Rate of Return

The Supplemental Proposed Policy did not propose a separate rate of return to be earned by public entities for airfield facilities and public-use roadways. However, the Department recognized that permitting airport proprietors to use any reasonable methodology to determine the fees for other facilities (proposed para 2.6) might allow an airport proprietor to earn a reasonable rate of return for those facilities. The Department also proposed to allow private equity owners of airports to earn a reasonable return on investment in airfield facilities and public-use roadways. Proposed para. 2.4.

Airport proprietors: Airport proprietors argue that they are entitled to earn a rate of return on investment in all facilities, including the airfield. ACI/AAAE point out that public utilities are compensated for forgoing the opportunity to charge market prices by including a rate of return in their rates. The City of Los Angeles and the Port Authority of New York and New Jersey (''PANYNJ'') argue that the denial of a rate of return amounts to an unconstitutional taking of property. The PANYNJ also argues that a rate of return is needed to provide for accumulation of cash reserves for investment, to compensate for the risks of those investments, and to meet cash-flow tests of bond indentures.

Carriers: ATA/RAA did not specifically address this issue. IATA prefers allowing airport proprietors a reasonable return on investment, in lieu of an allowance for imputed interest and reasonable reserves.

General aviation: General aviation commenters did not address this issue.

Other commenters: One individual argues that imputed interest is the functional equivalent of a return on investment. This commenter asks the Department to clarify whether a privately-owned airport may include both imputed interest and a return on investment in the airfield rate base.

The Final Policy: The Final Policy does not authorize a separate rate of return for public airport owners. In addition, a new paragraph 2.4.1(a), prohibiting a private equity owner of an airport from charging for both imputed interest and a rate of return on its equity investment in the airfield, is added to the Final Policy.

The Final Policy allows public airport proprietors to include an imputed interest charge in fees for the airfield and public-use roadways. Therefore, a separate return on investment is not justified, and would run counter to traditional concepts of reasonableness. As discussed below under ''Application of HCA Requirement to Airfield and Public Use Roadways,'' the imputed interest charge compensates the airport proprietor for the opportunity costs of its investment in the airfield. The imputed interest charge, therefore, serves the function of a return on investment. In addition, as discussed below, a state or municipal airport proprietor does not have the same entitlement to a return on investment under the Constitution as a private investor.

The Final Policy follows the approach of the Supplemental Proposed Policy for publicly-owned airports. Proprietors of publicly-owned airports may charge imputed interest on their airfield investments in accordance with the Final Policy. However, allowing an airport proprietor to include an imputed interest charge and a return on investment in its rates could allow for a double recovery of the airport proprietor's capital costs. Therefore, proprietors of publicly-owned airports may not charge an additional rate of return on investment.

Private equity owners may include a reasonable return on equity investment. Para 2.4. However, under new paragraph 2.4.1, they may not include an imputed interest charge on this investment as well. This new provision is intended to avoid possible double recovery of capital costs by a private equity owner.

In light of other provisions in the Final Policy, the Department does not agree with the PANYNJ's claim that a separate allowance for a return on investment is needed to provide for accumulation of reserves to fund capital projects or to meet cash-flow requirements in financing agreements. The imputed interest charge will provide cash flow for these purposes, and the Final Policy allows the airport proprietor to impose reasonable charges to met cash-flow requirements in financing agreements. Para. 2.4.4.

7. Imputed Interest

The Supplemental Proposed Policy proposed to allow the airport proprietor to charge imputed interest, at a reasonable rate, on funds invested in the airfield, with two exceptions. First, imputed interest could not be charged on funds obtained by debt-financing, if the debt-service costs are included in the rate base. Second, imputed interest could not be charged on funds generated by fees charged for the use of airfield assets and airfield services. The Supplemental Proposed Policy did not propose a specific imputed interest rate. Proposed para. 2.4.1.

Airport proprietors: With one exception, airport proprietors argued that imputed interest should be allowed on all internally generated funds invested in the airfield, including funds derived from airfield revenues. ACI/AAAE and many individual airports argue that the proposed limitation will encourage airport proprietors to borrow funds for airfield investment, rather than use internally generated funds. Borrowing may be the most expensive way to obtain financing. One airport proprietor asserts that the Supplemental Proposed Policy is inconsistent with its own long-standing practice, and it argues that the distinction is arbitrary.

In addition, one airport proprietor noted that the Department's approach could be troublesome due to the difficulty of tracing the source of internal funds invested in the airfield. This airport proprietor noted that requiring airport proprietors to trace the source of funds would make them unable, as a practical matter, to charge imputed interest whenever funds could not be traced.

Carriers: Carrier commenters generally object to allowing airport proprietors to charge imputed interest on any investment made with surplus aeronautical revenues. ATA/RAA argue that the imputed interest allowance serves only to permit the accumulation of excess revenues. According to ATA/RAA and USAir, the Supplemental Proposed Policy would allow airport proprietors to force carriers to first invest in the airport (by paying fees in excess of costs) and then to pay interest on that forced investment through the imputed interest charge. ATA/RAA argue that the U.S. Government strenuously objected to this practice when it was attempted at Heathrow Airport. ATA/RAA further argue that public airport operators (state or city governments or authorities) do not have the same profit motives as private businesses. Therefore, they do not need the financial incentive of imputed interest to trigger investments in the airfield.

IATA also argues that an imputed interest charge serves only to generate surplus aeronautical revenues. Elsewhere in its comments, however, IATA supports allowing airport proprietors to earn a reasonable rate of return on investment.

ATA/RAA and IATA also argue that if imputed interest is allowed, the Department should provide guidelines for the computation of interest. ATA supports use of an airport's bond interest investment rate based on the following reasoning. Interest rates are in part determined by the risk of the investment, and investments that are riskier than airport capital projects might generate higher interest rates. However, by law, public airport proprietors must apply airport revenue to the capital or operating costs of the airport. Given this legal limit on the airport proprietor's investment options, the airport proprietor should not be able to claim a higher imputed interest rate base on alternative investments that are theoretically available.

General aviation: General aviation commenters did not address this issue.

Other commenters: One individual commenter suggests that imputed interest is in practical terms the same as a profit or payment for lost income. The commenter argues that lost income is not a cost. This commenter also suggests that the imputed interest charge is a device for airports to circumvent the prohibition on charging depreciation for Federally-financed assets.

The Final Policy: The Department is adopting the provision of the Supplemental Proposed Policy, as proposed. The Department's approach strikes a reasonable balance between legitimate concerns of airport users, on the one hand, and airport proprietors, on the other.

Airport proprietors do have discretion to choose where on the airport to invest surpluses generated by aeronautical fees, as well as nonaeronautical fees. In choosing between two investment options, airport proprietors have an incentive to select the option that provides more revenue for reinvestment in the airport. Barring an imputed interest charge on all funds invested in the airfield would encourage airport proprietors to invest elsewhere on the airport, and would thereby defeat the Department's long-range objective of assuring adequate investment in airport airfield capacity.

However, the carriers' concerns have some justification. Under the Final Policy, airfield fees potentially could generate revenues in excess of an airport proprietor's cash needs. This excess may arise from various sources: imputed interest charges; allowances for various reserves; debt-service coverage charges; or simply financial performance that exceeds the projections on which airfield fees are based. There is merit to the carrier position that charging imputed interest on funds derived from airfield revenues could require airfield users to finance airfield investment twice: once in the form of the excess revenue that their otherwise reasonable fees generate and once in the form of the imputed interest charge on the investments made with that revenue. For this reason, the policy does not permit airport proprietors to charge imputed interest on funds that are attributable to airfield operations.

However, the carriers' argument that airport proprietors may not charge imputed interest on any investment in the airfield goes too far. This argument would deny the airport proprietor any compensation for the opportunity costs of its investment in the airfield.

The Department recognizes that disallowing imputed interest on sums attributable to airfield fees may encourage airport proprietors to invest elsewhere on the airport. However, the impact on choice of investments should be less pronounced than disallowing all imputed interest. The limit on imputed interest could also encourage bond financing for airfield investment, but the limit would apply only in the absence of an agreement to the contrary. If an airport proprietor can persuade airfield users that charging imputed interest is less costly than borrowing to finance airfield improvements, the airport proprietor is free to impose an imputed interest charge by agreement.

The Department's approach to imputed interest is consistent with the position taken by the U.S. government regarding airport fees at Heathrow. In that dispute, the U.S. government did not object to landing fees set to provide a reasonable rate of return on investment, or to the application of that return to new capital projects. Rather, the U.S. government objected to financing new capital development at the London airports by: (1) directly including the full capital costs of projects under construction in the rate base and (2) charging a rate of return for those projects before they came on-line.

The Department will not provide further guidance on a reasonable rate for assessing imputed interest at this time. In many cases, a rate based on the airport proprietor's own interest rate on borrowed funds may be reasonable. However, the airport proprietor's borrowed-fund rate may be but one of a number of relevant factors in determining a reasonable rate of interest. A policy that defines the borrowing rate as the only reasonable rate would not allow for consideration of these factors. In the event of a complaint, the Department would expect the airport proprietor to justify the reasonableness of its imputed interest rate. The Department would not accept an imputed interest rate that is justified solely as a device to recover a depreciation charge for the Federal share of grant-funded facilities.

As we noted in the explanatory statement to the Supplemental Proposed Policy (60 FR 47013), under the Administrative Procedure Act, a carrier complaining about charging imputed interest on funds generated by airfield fees would bear the burden of proving the source of funds. The airport proprietor need not trace the funds in order to claim imputed interest. However, if the airport proprietor has data available that would enable a complainant to trace the funds, that data should be disclosed during the fee negotiations or during a proceeding to resolve a fee dispute.

8. Limitation of Airfield Rates to Land and Facilities Currently in Use

The Supplemental Proposed Policy proposed that, absent agreement, airport proprietors may include in the rate base all capital costs associated with the provision of airfield facilities and services currently in use and current costs of planning future aeronautical facilities and services. Proposed para. 2.4. The Supplemental Proposed Policy further proposed that the costs of facilities not yet built and operating could not be included in the rate base. However, debt service and carrying costs of an asset under construction could be capitalized and amortized when the asset is put in service. In addition the airport proprietor could include in the rate base the costs of land that facilitates current operations of the airport. Proposed para. 2.5.3.

Airport proprietors: Airport proprietors consider these provisions unduly restrictive and inconsistent with the public interest. ACI/AAAE comment that the prohibition on expensing interest payments during construction is inconsistent with current practice of some airports. In addition, ACI/AAAE and individual airport commenters argue that applying the in-use provision to acquisition of land for future runway development will encourage airport proprietors to delay land acquisition as long as possible. This delay could drive up the cost and reduce the availability of land as development encroaches on the airport.

The City of Chicago points out that land for future development may be funded with AIP grants under circumstances outlined in the FAA's Airport Improvement Program (AIP) Handbook, FAA Order 5100.38A, Para. 603 (October, 1989). According to Chicago, Paragraph 603 demonstrates that land acquisition for future development is appropriate in certain circumstances.

The Port of Portland suggests that the currently-in-use language may not reflect current industry practice for another reason. Portland notes that at the request of the carriers, it is amortizing a terminal upgrade at Portland International Airport for longer than the useful life of the project to lessen the cost impact on carriers. Portland requests that the policy permit this approach at the discretion of the airport proprietor. This commenter also requests clarification on how the term ''currently'' would be applied in different situations.

Airport Users: Airport users did not address this issue.

Other commenters: A law firm specializing in public debt-financing asserts that many public airport proprietors are precluded by local law from capitalizing interest during construction. Such entities would be effectively precluded from financing new facilities, because the policy would not permit the expensing of construction financing and interest. This commenter recommends that the policy allow interest during construction and the cost of land for future development to be included in the rate base.

The Final Policy: The Department is modifying the Final Policy to permit an airport proprietor to show, on an individual basis, that it is reasonable to allow the costs of land acquired for future airfield development to be included in the rate-base, if the conditions of FAA Order 5100.38A are met, and if the airfield development is included in the airport proprietor's currently effective five-year capital improvement plan. The circumstances listed in FAA Order 5100.38A include rising land costs, encroachment on available land by incompatible uses, and the probable unavailability of land for airport use in the future. The provision on construction interest is adopted without modification. In addition, the Final Policy does not allow an airport proprietor unilaterally to depreciate an asset for longer than its projected useful life.

In addressing this subject, the Department must strike a balance between conflicting concerns. On the one hand, when fees are based on cost, it is generally unreasonable to charge users for facilities they do not benefit from or use. Based on this principle, current users generally should not be charged, as a cost item, the capital costs of projects not yet in operation. Of course, this principle does not preclude assessment of reasonable imputed interest charges just because the proceeds of those charges might fund future capital projects. On the other hand, the policy should not work a financial hardship on airport proprietors or unduly interfere with cost-effective airport expansion by precluding timely acquisition of property needed for future airport development.

In addition, the restriction on charging for facilities not yet in use is effectively limited to airfield facilities. Moreover, the restriction does not apply in the case of agreements with airfield users. If the airport proprietor can persuade airfield users that it is less expensive in the long run to deviate from the Final Policy, the airport proprietor is free to do so by agreement. Likewise if users request a depreciation period that is longer than an asset's useful life, the airport proprietor may agree to it. In these circumstances, an additional modification to the policy is not warranted.

The comments on charging for future facilities address two distinct issues. The first is the treatment of construction interest. As to interest paid during construction, the Department is not modifying the approach proposed in the Supplemental Proposed Policy. This approach is commonly used in determining the reasonableness of rates, and permits the airport proprietor to fully recover all construction interest costs, once the facility is in use.

The comments have not persuaded us that this approach will cause a substantial hardship in the industry. ACI/AAAE have not alleged that the practice of expensing interest is wide-spread. Moreover, landing fees at most airports are set by agreement. Under the terms of Paragraph 2.4 of the Final Policy, construction interest may be expensed if users have agreed. Similarly, the law firm comment regarding legal restrictions on capitalizing interest does not state that such local restrictions are wide-spread, and does not explain the basis for them. It is not clear that local laws that prohibit the capitalization of interest would permit the direct expensing of interest, because direct expensing would be more burdensome to users. Moreover, airport proprietors themselves have not raised legal restrictions to capitalizing interest as a serious concern.

The second issue is the treatment of land acquired for future development. On this issue, some modification to the Supplemental Proposed Policy is in order. As the FAA has recognized in administering the AIP program, when the factors specified in paragraph 603 of Order 5100.38A are present, it may be prudent to acquire and hold land for future development. Moreover, there may be circumstances in which such a land acquisition cannot be carried out if the costs are not included in the current airfield rate-base. However, based on the standard of reasonableness, the Department must be careful not to burden unduly present users with the costs of land acquired for future development. Therefore, the Department is modifying the final policy to permit an airport proprietor to show that the inclusion of the costs of land needed for future airfield development is reasonable, if the factors specified in FAA Order 5100.38A are present, and if the airfield development is included in the airport's currently effective five-year capital investment program. The latter condition is intended to assure that the land being acquired will actually be used for airfield development. This condition should also increase the likelihood that the airport users paying for the land will actually benefit from its purchase. The Department would decide the reasonableness of charging for the cost of land for future development on an individual basis. In reviewing the reasonableness, the Department would consider, among other factors, the feasibility and costs of alternative means of financing the land acquisition.

The Department will not permit airport proprietors to depreciate an airfield asset for longer than its useful life, absent user agreement. Such a policy would force airfield users who never used or benefited from the asset in question to pay for a share of its costs. As noted, however, the airport proprietor may provide for a longer amortization period by agreement with airfield users.

In addition, the Department does not consider further guidance on the meaning of ''currently in use'' to be necessary at this time. The meaning of the term should in ordinary circumstances be self-evident—in use during the period when the charge is in effect. See, LAX II, Order 95–12–33 at 50–51. There may be circumstances in which the application of the phrase is not straight-forward, and the Department will address those situations if they arise.

9. Allowance For Environmental Costs

The Supplemental Proposed Policy proposed that an airport proprietor could include the costs of environmental mitigation and remediation to the extent it incurs a corresponding actual expense. Proposed para. 2.4.2. The Supplemental Proposed Policy also proposed that the airport proprietor could charge for the costs of insuring against future liability for environmental contamination. However, the costs of self-insurance could be included in the rate-base only if incurred pursuant to a self-insurance program that conforms to applicable standards for self-insurance practices. Proposed para. 2.4.2(d).

The comments: One airport proprietor has requested that the Department provide additional flexibility to charge for environmental cleanup costs. It suggests that if an activity is expected to generate predictable environmental cleanup costs, e.g., operation of a fuel tank farm, today's airport users may be reasonably charged for those costs, even if the cleanup occurs in the future.

Other commenters did not address this issue.

The Final Policy: The Department will not modify the provisions on allowable environmental costs. The commenter's concern is already addressed by the provision of the Final Policy governing reasonable reserves.

If the use of the airfield today generates predictable environmental remediation expenses in the future, the principle of cost causation would allow, if not encourage, the airport proprietor to charge today's users for those expenses. The policy need not be modified to permit this result.

The policy already permits the airport proprietor to include in the airfield rate base amounts needed to fund debt service and other reserves and to fund reasonable cash reserves to protect against other contingencies. Para. 2.4.4. This provision is sufficiently broad to permit the funding of reserves for predictable costs of environmental remediation caused by current operations. However, if an airport proprietor establishes a reserve for this purpose, the Department would expect the reserve to be separately identified. In reviewing the reasonableness of the reserve, the Department would consider, inter alia, whether the reserve applies to activities that industry experience has shown generate future environmental remediation costs; and whether the reserve reflects industry experience in costs of remediation. Arbitrary reserves or reserves to fund unknown future potential liability would not be acceptable. The latter would be subject to the provision on self-insurance.

10. Debt-Service Coverage

The Supplemental Proposed Policy proposed that the airport proprietor could include in the rate base, *inter alia*, amounts ''needed to fund debt service and other reserves and to meet cash flow requirements as specified in financing agreements or covenants (for facilities in use), including, but not limited to, debt-service coverage.'' Proposed para. 2.4.4.

In the LAX II proceeding, the parties disputed the meaning of the term ''needed'' as it appeared in the Interim Policy. Airport parties argued that the coverage was ''needed'' if financing agreements included a debt-service coverage requirement and if the airport was seeking to recover a share of coverage reflecting the airfield's pro rata share of outstanding debt. Carriers argued that no coverage charge would be ''needed'' if the airport's net cash revenues from nonairfield sources were large enough to satisfy the airport's coverage obligation. Comments on the Supplemental Proposed Policy were due before the Department addressed this issue in the final decision in the LAX II proceeding. Order 95–12–33 (December 22, 1995).

The comments: In this proceeding, several airport proprietors, but no airlines, filed comments on the issue. The Massachusetts Port Authority (''Massport'') argues that debt-service coverage should be permitted in the rate base in proportion to the allowable debt service for the airfield, regardless of whether an agreement governing airfield fees exists. Massport has adopted compensatory rates by resolution, not by agreement. Massport, Los Angeles and the City of San Francisco argue that the carrier position in LAX II—that coverage is not a cost and therefore cannot be included in the rate base absent agreement—is inconsistent with the terms of proposed paragraph 2.4.4 and with the Department's explanatory statement. Massport argues that the Department clearly signaled its intention that debt-service coverage could be included in the rate base even though it is not a cost in the traditional accounting sense.

Massport, Los Angeles and San Francisco also dispute the carrier position that debt-service coverage is needed only if revenues from other sources are insufficient to meet coverage requirements. These commenters argue that this approach amounts to mandatory residual treatment of debt-service coverage; therefore this approach is inconsistent with the airport proprietor's right to adopt a compensatory fee methodology. Massport argues that by using the term ''needed,'' the Department sought to tie the amount of debt-service coverage allowed in the rate base to the terms of applicable bond documents.

Massport further argues that compensatory airports should not be compelled to give a refund or credit to carriers for debt-service coverage, but should be permitted to use the coverage for any lawful purpose. Massport argues that under the terms of its Trust Agreement, Massport devotes the debt-service coverage charge to its Improvement and Extension fund, which finances the costs of airfield improvements.

Los Angeles also argues that many airports that include debt-service coverage in the rate base retain the coverage funds for discretionary purposes.

Other commenters did not address this issue.

The Final Policy: The Department is modifying paragraph 2.4.4 so that it allows airport proprietors to include amounts reasonably needed to meet debt-service coverage requirements. We are not changing the proposed policy on debt-related charges insofar as it allows airports to include charges for debt-service expense.

We are modifying the provision on debt-service coverage charges to address the ambiguity created by the provision of the Interim Policy (which was not resolved in the Supplemental Proposed Policy) and to clarify the Department's position on such charges. When the Department considers charges for debt-service coverage, the Department will not limit its inquiry to determining whether the charge is limited to the airfield's pro rata share of the airport's overall debt-service coverage requirement. The Department instead will consider a number of factors.

Debt-service coverage is different from debt-service expense, an airport capital cost. Debt-service expense refers to the payment of interest and financing charges and the repayment of principal. Debt-service coverage, in contrast, is a cash flow requirement, not an expense.

Airport bonds typically require that the airport's net cash receipts exceed its debt-service expense by 25 to 50 percent, at a minimum. Many airports include charges for debt-service coverage in their landing fee calculations. However, as shown by the record in LAX II, their use of funds generated by debt-service coverage is almost always subject to substantial restrictions. Typically the airport must refund (or roll over) the funds obtained under the coverage charge if they were not needed during the year for which they were paid, or the airport proprietor must use the funds for capital projects benefiting the airlines. See, LAX II, Order 95–12–33 at 45. Not all airports impose such a charge. For example, the landing fees charged at LAX from July 1993 through June 1995 included no debt-service coverage charge. See Order 95–12–33 at 42.

Airlines have not objected to charges for debt-service expense, but the airline complainants in LAX II objected to Los Angeles' charge for debt-service coverage, as outlined above.

We are modifying the provision on debt-service coverage charges to permit reasonable amounts needed to meet debt-service coverage requirements, with due regard to the characteristic of a bond coverage requirement as a minimum requirement that must be met or exceeded at all times. In future airport fee cases involving a charge for debt-service coverage, we will determine whether the charge is permissible on the basis of the facts in the case. In considering the reasonableness of such a charge, the Department may consider a number of factors. For example, in LAX II, the Department found that Los Angeles' debt-service coverage charge was unreasonable since the record showed that the airfield's net cash revenues greatly exceeded the airfield's share of the airport's debt-service coverage obligation. Given that evidence, the Department did not have to address the airlines' claim that the charge was unreasonable because the airport's overall net cash revenues would satisfy the airport's coverage obligation without the inclusion of an additional charge in the landing fee rate base.

Another factor likely to be considered will be whether carriers using the airport receive any benefit from a debt-service coverage charge. For example, the airport may show that the inclusion of the charge improves the airport's credit rating and therefore reduces the airport's overall debt expense. The airport proprietor might show, instead, that the restrictions on the airport's use of the funds may ensure that the funds are used only for projects benefiting the airlines. An airport proprietor's commitment to refund or roll over unneeded funds in the year following payment also would be relevant to determining the reasonableness of the charge.

We are unwilling in this proceeding to adopt more specific standards for determining the reasonableness of a debt-service coverage charge, in part because the comments do not give us an adequate basis for resolving the issue. The Department will therefore resolve the airports' ability to impose a debt-service coverage charge on a case by case basis. The decision will be governed by whether the particular charge challenged is reasonable.

11. Allowance For Reasonable Reserves, Definition of Reasonable

The Supplemental Proposed Policy proposed that the airport proprietor may include in the rate base ''reasonable cash reserves'' to protect against contingencies other than those listed in the policy. Proposed para. 2.4.4. The Department did not propose to further define reasonable reserves.

The comments: ATA/RAA do not object to reasonable reserves for short term fluctuation in revenues or for other emergencies. They are concerned that, without more detailed guidance, airport proprietors will be able to establish reserves well in excess of actual needs. ATA/RAA suggest that the policy allow reserves of no more than one month's average revenue, unless the users agree to a higher reserve or the airport proprietor shows that special circumstances justify one.

IATA opposes the allowance of a reserve as a separate cost item. It urges the Department to limit fees to the airport's total costs plus ''a reasonable return on assets (before tax and interest charges) to contribute toward necessary capital improvements,'' based on ICAO Doc. 9082/4, pp. 3–4.

Other commenters did not address this issue.

The Final Policy: The Department is adopting the provision of the Supplemental Proposed Policy without modification.

The Department is not persuaded that a more specific definition for reasonable reserves is needed or appropriate for national application. The requirement that reserves be reasonable is intended to prevent arbitrary requirements. The Department would expect the airport proprietor to be able to justify its decision on reserve requirements if a dispute arose.

However, defining a reasonable reserve requirement for any particular airport depends largely on the financial and operating circumstances of the airport at the time the airport proprietor establishes the reserve. A uniform definition for reasonable reserves would unduly limit both the airport proprietor's flexibility to tailor its reserve requirements to meet those circumstances and the Department's flexibility to consider those circumstances in reviewing a fee.

12. Allocation of Shared Costs

The Supplemental Proposed Policy proposed that capital costs of facilities used by aeronautical and nonaeronautical users could be allocated to those aeronautical users who use the shared facility in a proportion that reflects the aeronautical purpose and proportionate aeronautical use. Proposed para. 2.4.5(b). Roadways would also be subject to the HCA valuation requirement. Proposed Para. 2.5.1(b).

Airport Proprietors: ACI/AAAE request clarification that notwithstanding the valuation requirement for public-use roadways, the Department is not mandating a particular cost allocation formula for determining the aeronautical portion of roadway costs.

The City of Chicago expresses concern that an allocation based strictly on use could be difficult to implement for some airports and could be burdensome. The City of Chicago urges the Department to modify the policy to explicitly provide more flexibility in cost allocation or to at least interpret the existing provisions of the policy as flexibly as we did in the LAX I decision.

Airport users: Airport users did not address this issue.

Other commenters: One individual suggested that, to minimize the risk that airports are improperly allocating costs to the airfield cost center, the Department should establish criteria for defining cost centers. This commenter suggests that the Final Policy require that any facility that generates revenue be defined as a cost center. In addition, the policy should require that if the facilities generate substantial revenue by direct charges, the full costs should be covered by those charges. Under this approach, roadway costs would be assigned to a landside access cost center apart from the terminal. Further, the costs in this cost center would be recovered entirely from parking garages and lots, rental car companies and commercial limousine, van and taxi operators.

The Final Policy: The Department is not modifying the provisions of the Supplemental Proposed Policy in response to the comments. However, consistent with the decision in LAX II, the Department is modifying the provision to apply to allocation of costs of shared services as well as shared facilities.

The Supplemental Proposed Policy did not propose allocation of shared capital costs based strictly on use. Rather, it proposed consideration of both purpose and proportionate use of the shared facility. This provision of the Supplemental Proposed Policy is being adopted as proposed. The Department determined in LAX II that the possible difficulty of quantifying purpose is not a reason to allocate shared costs based solely on use. LAX II, Order 95–12–33 at 24. Accordingly, no change in the Final Policy is needed to accommodate Chicago's concern.

In reviewing the reasonableness of an allocation, the Department would consider, among other things, whether the allocation had a rational basis and was supported by factual evidence in the record. In addition, the Department would not preclude an airport proprietor from using a reasonable method of allocation just because another method might produce a more precise result. Id. at 33.

We will not adopt the suggestion of the commenter that airport proprietors be required to adopt a separate landside access cost center, which is not funded at all by charges to the aeronautical users. The airport proprietor has discretion in defining cost centers other than the airfield, so long as its cost allocations are reasonable, transparent and not unjustly discriminatory.

Furthermore, the Department specifically determined, in LAX I, that an airport proprietor may allocate a portion of access road costs to the airfield. Order 95–6–36 at 31. As the Department found in LAX I, carriers, other aeronautical businesses and their customers use (or benefit from) terminal area access roadways. Id. Airport proprietors may reasonably allocate a share of roadway costs to the carriers and other aeronautical users. The commenter's proposal would not assure that all passengers who use the roadways are charged for that use—directly or through the charges they pay to commercial enterprises. Many passengers are dropped off by private vehicles that pay no charge for the using the roadways.

In addition, given the Department's reliance on local decisionmaking, the Department is not prepared to dictate how shared roadway costs are allocated to the carriers, so long as the basic requirements of the policy are met. The share allocated to aeronautical use must reflect the purpose and proportionate use of the facility, and the allocation methodology must be reasonable, transparent and not unjustly discriminatory.

Finally, the Supplemental Proposed Policy was silent on the treatment of the costs of shared services. As a result of the deliberations in LAX II, the Department has concluded that there is no reason to treat these costs differently than the costs of shared facilities. Therefore, the applicable provisions of the Final Policy are being modified to apply to services and facilities.

13. Asset Valuation, Limiting HCA Valuation to Airfield and Eliminating the Aeronautical HCA Cost Cap

The Interim Policy required that airport assets included in the aeronautical rate base be valued at historic cost to the original owner (''HCA value''), absent agreement to the contrary. Para. 2.4.1. However, the Interim Policy further provided that, for facilities other than airfield and all airport land employed in providing aeronautical use, other reasonable valuation methods could be used, so long as total aeronautical revenues do not exceed total aeronautical costs, based on HCA accounting. Para. 2.4.1(a).

The Supplemental Proposed Policy proposed to limit the HCA requirement to airfield assets and public use roadways, and to eliminate the HCA cost cap for total aeronautical revenues. Proposed para. 2.5.1. For other aeronautical assets, the Supplemental Proposed Policy would permit the airport proprietor to use any reasonable methodology to establish fees, so long as the methodology is applied on a consistent basis to comparable facilities and is justified. Proposed para. 2.6.1. However, the Department proposed that the progressive accumulation of substantial amounts of surplus aeronautical revenue may warrant an FAA inquiry into whether aeronautical fees are consistent with the airport proprietor's obligations to make the airport available on fair and reasonable terms. Proposed para. 4.2.1.

Airport proprietors: Airport proprietors support the proposed modifications. Among other reasons, these commenters assert that the change would eliminate concerns regarding valuation of tenant-built facilities that revert to the airport proprietor. Further, this proposed modification will address a number of additional concerns of ACI/AAAE, including the following: inconsistency between HCA valuation of nonairfield facilities, on the one hand, and industry practices and local laws and regulations, on the other; potential windfalls for airport tenants that sublease aeronautical facilities; higher landing fees paid by signatory airlines at some residual airports; and inconsistency of the HCA cost cap with the requirement that airports be as self-sustaining as possible, as interpreted by the Office of Inspector General (''OIG'').

Airport proprietors further assert that application of the HCA cap to general aviation airports would be particularly burdensome, as those airports as a class have limited nonaeronautical revenue streams.

Airport commenters dispute the carrier claims that terminal facilities should be treated like the airfield because airport proprietors possess market power. ACI/AAAE note that they accepted HCA valuation for airfield facilities reluctantly because the policy would not disrupt existing practices. Airport proprietors point out that terminal facilities are typically leased on preferential or exclusive use basis. They argue that the facilities are, therefore, more analogous to hangars and cargo facilities than to public use airfields. They further argue that airports compete with each other for designation as international gateways and as airline hub locations and for origin and destination (''O&D'') traffic. The airport proprietors note that initiation of low-fare service at a given airport can draw O&D passengers from other airports in the region.

ACI/AAAE assert that recent increases in airport charges to carriers do not show airport market power and do not show that airport proprietors lack incentives to manage airports efficiently. Factors contributing to increases include the following: compliance with federal mandates and noise mitigation projects; expansion necessitated by increases in passenger activity and airline hubs; replacement of passenger terminals constructed 30–45 years ago; and construction and financing by airport proprietors of airport facilities that had been financed previously by the airlines directly. As evidence that airports face real-world pressures to reduce airline costs, one airport proprietor points to its decision to refinance airport revenue bonds to reduce debt-service expense and thereby reduce airline rates and charges.

Another airport proprietor argues that elimination of the HCA cap will facilitate using price to allocate scarce resources efficiently.

Finally, one airport proprietor suggests that, if the HCA valuation requirement is limited to the airfield and public use roadways, references in paragraphs 2.3, 2.4.1, 2.4.2, 2.4.4, 2.4.5, 2.5, 2.5.1, 2.5.3 and 2.7 should be changed to ''airfield/public use roadway rate base.''

Carriers: Carriers argue that the Interim Policy's provisions governing asset valuation are needed to protect against the exploitation of locational monopoly power by airport proprietors in pricing ''essential facilities.'' Essential facilities are not limited to the airfield and include facilities for baggage, cargo and passenger handling. ATA/RAA contend that airport proprietors exercise monopoly power in pricing airport facilities in addition to the airfield, because of the airports' locational advantages and the barriers to entry of new competitive airports. In addition, ATA/RAA contend that carriers' investments in airport facilities often preclude them from relocating when an airport proprietor imposes excessive fees. ATA/RAA point to dramatic increases in fees at Los Angeles, Orlando, El Paso and Allentown as evidence of the existing monopoly power of airports.

Carriers argue that, without clear guidelines providing a foundation for negotiations, the policy will not promote direct resolution of disputes. In addition, it will be difficult for airport users to justify the burden of analyzing the airport's cost and revenue calculation to prepare a legal challenge to nonairfield fees.

The past absence of complaints over fees does not provide a basis for relying on effective competition, according to ATA/RAA. They argue that, in the past, negotiations were successful because there was a balance of power between airport proprietors and airport users. Airport proprietors needed airport user support for their financial bond issues. Airport users needed airport proprietors' cooperation to develop needed airport facilities. That balance has been disturbed at many airports, which can successfully issue bonds without carrier support. In addition, the claimed airport monopoly power was constrained by a number of other factors, including: common use of HCA valuation and residual agreements; and the expectations of airlines and airports that fee disputes would be resolved in Federal court.

The carriers argue that the threat of investigation of sustained accumulation of aeronautical surpluses will not curtail abuse of monopoly power. Rather, the policy would encourage airports to overallocate costs to aeronautical cost centers other than the airfield so as to show break-even in accounting terms. This problem is compounded by the lack of record-keeping requirements. ATA/RAA are particularly concerned that airport proprietors will overallocate the costs of municipal services provided to the airport. IATA argues that the Department's decision to retain authority to investigate an accumulation of aeronautical surpluses is an implicit admission that reliance on negotiation and effective competition is doomed to fail.

The carriers also argue that the Interim Policy properly balances the interests of airport users and airport proprietors. The carriers assert that the overall cap on aeronautical revenues based on HCA costs protects carriers from abuse of monopoly power. Within the overall cap, the Interim Policy provides ample flexibility to airport proprietors to price individual facilities.

ATA/RAA also argue that the concerns expressed by ACI/AAAE in their earlier comments on the Interim Policy are misplaced. ATA/RAA argue that, if the HCA requirement is inconsistent with a state or local law, the state or local law is preempted. USAir asserts that airports may prevent airport tenants from earning windfalls by exercising their rights to approve subleases. USAir is also prepared to assume the risk, as a signatory carrier, that, under a residual system, it would be required to pay higher fees under the Interim Policy than non-signatories.

ATA/RAA also assert that the Supplemental Proposed Policy will permit airport proprietors to generate surplus revenues from aeronautical activities. To the extent that the surpluses are used for capital investment, current users would be required to pay for future capital assets, in contravention of the policy and the position of the U.S. government in the dispute with the United Kingdom over Heathrow airport user fees. The carriers also argue that the prohibition on diversion of airport revenue is not sufficient to prevent unjustified accumulation of surplus airport revenues. ATA/RAA point to the findings of a Congressional investigation that airport revenue diversion is widespread and that airport proprietors increasingly view financially successful airports as a potential source of funds to alleviate general budgetary shortfalls.

IATA also argues that the Supplemental Proposed Policy would be inconsistent with the ICAO policy that all airport charges are to be set in relation to the costs of facilities and services provided, citing ICAO Doc. 9082/4. As IATA points out, the ICAO guidelines permit the airport proprietor to earn a reasonable return. IATA argues that the approach of the Supplemental Proposed Policy to pricing of nonairfield assets will permit airport owners to establish fees according to arbitrary and unreasonable standards.

General Aviation: While the NATA does not recommend that the Department establish accepted charging practices for facilities leased by aviation businesses, the NATA disagrees with the Department's assertion that disputes over charges for nonairfield assets focus on unjust discrimination. For the NATA members negotiating leases, the level of their fees, rather than unjust discrimination, is the area of disagreement. Therefore, the NATA recommends that proposed paragraph 2.6 be expanded to outline areas for consideration in establishing fees. The NATA acknowledges that each negotiation presents unique circumstances. However, the NATA suggests that the Final Policy identify as relevant the following considerations: physical variables of the airport and leasehold; functional variables of the airport and leasehold; and economic variables of the area served by the airport.

The AOPA asserts that the Interim Policy balanced the needs of airport operators and users. It argues that the approach of the Supplemental Proposed Policy could lead to unreasonable fees. The AOPA is not persuaded that effective competition exists for nonairfield aeronautical assets. Further, neither possible investigation of accumulation of aeronautical surpluses, nor the limitations on use of airport revenue adequately protect against excessive fees.

Other commenters: Two individual commenters object to limiting the HCA requirement to the airfield. They argue that doing so will allow airports to generate substantial surpluses.

The Final Policy: The Department is following the approach of the Supplemental Proposed Policy on this issue. However, we are adding a provision specifying that, if an airport proprietor bases nonairfield fees on cost, the airport proprietor must follow the policy guidance on allocation of shared costs (Paragraph 2.4.5). This addition will assure that, when a cost-based methodology is employed, shared costs will be treated consistently across all cost centers. In addition, we are modifying proposed paragraph 3.1.1 governing allocation of costs among users and user groups to conform to the Final Policy's approach to nonairfield fees.

The approach of the Final Policy is justified by differences between airfield assets and public-use roadways, on the one hand, and other aeronautical assets, including passenger terminals, on the other. The airfield and the public-use roadways are common use facilities, and their use is more or less fungible. Generally speaking no single user derives more or less benefit from a particular use. To the extent that this general principal does not hold true during peak times at congested airports, the Final Policy allows for reasonable and not unjustly discriminatory peak-pricing systems. Otherwise, a detailed, cost-based definition of reasonableness is appropriate for such fungible assets and would not disturb industry practices or prevent airport proprietors from allocating resources efficiently.

In contrast, other facilities are generally leased on an exclusive or preferential use basis. In addition, such facilities, including terminals, are much less fungible. For example, carriers typically take responsibility for outfitting their passenger terminal areas and can reasonably be expected to view that responsibility as an opportunity for promotion. The value of gates to carriers may depend in part on their location in the terminal or the intensity of their use. Other non-terminal facilities may be perceived by users to have different values based on a variety of factors, including the following: proximity to runways and taxiways; source of construction financing; ownership of improvements at the end of lease terms; and expected use of facilities, including rights to exclusive or preferential use. A requirement that revenues from these facilities not exceed an amount determined by a cost-based formula could prevent these differences from being fully recognized in establishing fees. A policy that gives preeminence to the free play of negotiation and exchange of benefits to assure that fees for nonairfield facilities are reasonable would permit these differences to be fully recognized and would continue current industry practices. Accordingly, the latter approach is preferable.

The record contains numerous examples of nonairfield fees set on a basis other than HCA valuation. For example, in the public meeting on the Supplemental Proposed Policy held in Washington, DC, all of the airport proprietors testified that they use methods other than HCA valuation for at least some nonairfield facilities. Supplemental Proposed Policy Regarding Airport Rates and Charges, Public Meeting (October 17, 1995), (''October 17 Public Meeting'') Transcript pp. 31–33, 36–37, 39, 79–80, 81. Further, in their comments on the Interim Policy, ACI/AAAE reported that some airports establish fees for leased property by competitive bid or solicitation, often by operation of state law. Comments of ACI and AAAE in response to the Policy Regarding Airport Rates and Charges, Docket No. 27782 (''ACI/AAAE May 4 Comments'') at 6 (May 4, 1995). Their comments also provided other examples of nonairfield facilities that are priced on some other basis than HCA valuation. Id. 12–13. The limited evidence to the contrary offered by the carriers is insufficient to overcome that offered by the airport proprietors. See, October 17 Public Meeting Tr., pp. 77–78. Thus the record demonstrates that requiring HCA valuation for all aeronautical facilities would substantially disrupt current practices that have not been the subject of complaints.

The Interim Policy was intended to preserve that flexibility for establishing rates for nonairfield facilities. Our experience under the Interim Policy, however suggests that the Interim Policy had altered the status quo. For example, in their comments on the Interim Policy, ACI/AAAE reported instances in which airlines informed an airport proprietor that the maximum rental payments it could require must be based on historic costs. ACI/AAAE May 4 Comments at 24–25. In one case, a carrier had agreed to a new hangar lease at rates exceeding HCA rates but then refused to execute the agreement following publication of the Interim Policy. An airport proprietor also testified to concerns that HCA valuation would be used as the starting point for all negotiations under the Interim Policy. Supplemental Proposed Policy Regarding Airport Rates and Charges, Public Meeting (September 20 1995), (''September 20 Public Meeting'') Docket No. 27782, Transcript at 23–25.

The carriers' claims that airport proprietors exercise monopoly power in pricing essential aeronautical facilities are not supported by the Department's experience. Many U.S. carriers have benefited from airports' competition with each other to be the location of aeronautical facilities, including facilities for passenger and cargo hubs. Moreover, as ATA/RAA themselves argue, in their objections to the treatment of imputed interest, publicly-owned airports do not operate under the same profit motive as private investors. Public airports are operated, for the most part, as public facilities to serve the public good by enhancing local access to the national air transportation system. Airport proprietors generally seek to improve air services for their communities. This objective would be frustrated by charging exorbitant fees for aeronautical facilities. There may be isolated exceptions to this general rule. However, the Department is not prepared to require the vast majority of airports to change their methods of doing business to address the extraordinary situation. In the extraordinary situation, the Department would consider airline complaints concerning significant disputes through an expedited administrative procedure (14 CFR Part 302). Other cases would be processed under the FAA's investigative and enforcement procedures (14 CFR Part 13).

The Supplemental Proposed Policy did not propose to permit every method for establishing fees for nonairfield assets, but only any reasonable method. Users are still free to demonstrate that in the circumstances of a particular airport, a particular method is unreasonable. For example, users may demonstrate that the method is not justified in the circumstances or applied on a consistent basis.

As we noted in publishing the Supplemental Proposed Policy, our decision to take a flexible approach to the pricing of nonairfield facilities is based in part on the relative lack of disputes between carriers and airport proprietors over the reasonableness of fees for such facilities, even those deemed essential by the carriers. The widespread acceptance of these industry practices indicates their reasonableness and general fairness. By relying on industry practices in formulating our policy, the Department is fulfilling the Supreme Court's expectation that the Department would in large measure base its standards for reasonable airport fees on the relevant facts and circumstances of the industry. Kent County, 114 S.Ct. at 863, 864 n. 14. We are not persuaded by carriers' arguments that this experience is unreliable.

First, while residual agreements have been common in the industry, so were compensatory agreements. A 1984 Congressional Budget Office study reported that 42 percent of large hub airports (10 out of 24) and 42 percent of medium hub airports employed a compensatory approach to rate-setting. Financing U.S. Airports in the 1980s, Congressional Budget Office (April 1984). The Kent County litigation stemmed in part from the airport proprietor's decision to continue its historic compensatory approach to landing fees.

Second, based on the comments and testimony in this docket, airport proprietors commonly use methods other than HCA valuation to establish fees for passenger terminal, cargo handling and other ''essential'' nonairfield facilities, as discussed above.

Third, the examples of airport bond financing cited by the carriers do not show that airport proprietors are readily able to obtain debt-financing for nonairfield facilities without carrier agreement. Denver International Airport involved construction of an entire airport in conjunction with the closure of Denver's then existing air carrier airport. Moreover, Denver was unable to maintain investment grade status for the bonds. The Grand Rapids experience involved bond financing for a new runway. Under the Final Policy, runways must be priced based on HCA valuation, absent agreement by the users.

Likewise, the examples of airports that have dramatically raised fees cited by the carriers (Los Angeles, El Paso and Allentown) do not support the claim that airport proprietors exercise market power in establishing fees for nonairfield facilities. First, all three examples involved landing fees, which remain subject to the HCA valuation requirement and detailed guidance of the policy. Second, the conversion from residual to compensatory methodology accounts for much of the increase at two of the airports (Los Angeles and El Paso). ATA/RAA's other example, Orlando, has not yet established new fees. ATA/RAA relies on a projection of what Orlando might do when existing agreements lapse. Moreover, it assumes that the airport will convert from a residual to a compensatory methodology. October 17 Public Meeting Transcript at 38. The selection of either methodology has been deemed reasonable by Congress through enactment of section 47129(a)(2).

Finally, the Department is not convinced that the threat of judicial review of fees for nonairfield facilities was a significant factor in preventing excessive charges. Relatively few airline/airport disputes over airport fees have been resolved by litigation. Of those few, only one or two did not involve charges for use of the airfield. In these circumstances, it is doubtful that the threat of litigation would have proved a significant deterrent to abuse of monopoly power, assuming that power existed.

We have also concluded that, on balance, the approach of the Interim Policy could have additional undesirable results outlined by ACI/AAAE in their joint comments. For example, if market-based rates exceed HCA-based rates, the Interim Policy would have allowed airlines through their subleasing to enjoy the additional revenue, but would have effectively precluded airport proprietors from earning that additional revenue. Thus, that additional revenue would have been unavailable for investment in the national airport system. At a time when Federal resources for airport infrastructure investment are severely strained, we are loathe to restrict unduly the ability of airport proprietors to generate funds for such investment.

The Department agrees that the threat of a Department investigation of accumulation of surplus aeronautical revenue by itself may not be a perfect check against unreasonably high fees for nonairfield facilities. However, we are not relying solely, or even primarily, on this threat. Rather, in our experience, the market generally functions to prevent excessive charges, and airport proprietors have not routinely imposed unreasonably high fees for nonairfield, aeronautical facilities. Moreover, the limitations on the use of airport revenue, including the actions mandated by section 112 of the Reauthorization Act, diminish one possible incentive to generate excessive surplus aeronautical revenue—use of the surplus to fund general governmental activities. At this time, we are not prepared to impose rigid industry-wide pricing criteria for nonairfield facilities to address speculative concerns about a few airports. In explicitly reserving our right to investigate, the Department is signaling its intention to act in those rare situations where intervention would be appropriate. Further, we are signaling our intent to consider the reasonableness of nonairfield fees over the long term and not on the basis of a single year's results. We are, of course, prepared to revisit this issue if experience shows that our approach is not effective in preventing contention, controversy, and unreasonable practices in the pricing of nonairfield aeronautical facilities.

For these reasons, we expect that pricing of nonairfield aeronautical facilities and services under the Final Policy will produce results consistent with the policy guidance that aeronautical charges should not produce unreasonable returns.

The Final Policy merely allows airport proprietors to continue current pricing practices that have not resulted in excessive charges.

Our policy on this issue is consistent with the position of the U.S. government in the dispute over landing fees at Heathrow. In that case, the U.S. government did not argue that the British Airports Authority and (later) BAA plc were not entitled to earn any surplus. Rather, the objections stemmed from circumstances that are unlikely to arise in the United States.

The BAA establishes fees each year following consultation with the users, but without their agreement. The BAA imposed separate landing fees, aircraft parking charges and passenger terminal charges. During the period in dispute, BAA had unilaterally increased its airport user charges at Heathrow to finance on a pay-as-you-go basis substantial new capital improvements at London's Heathrow and Gatwick airports. The BAA had also sought to earn a rate of return on the funds invested in the new projects during construction. Nothing in the Final Policy precludes the Department from determining that an airport proprietor that is financing on a pay-as-you-go basis significant new capital development through unilaterally imposed terminal rents is charging unreasonably high terminal fees. Rather, we are relying on the market mechanism and negotiating process to prevent such an occurrence in the first instance. Nothing in our experience with the US airport industry indicates that a U.S. airport would be able to duplicate the BAA's approach to charging for terminal facilities.

Likewise, the results of our approach to nonairfield assets is consistent with ICAO guidelines. First, the Final Policy does not permit fees to be established for these facilities by any method. Rather, the method must be reasonable. In addition, we rely on market discipline to assure that these fees, which are largely negotiated, are reasonable, and do not result in the generation of excessive profits (or rate of return). As IATA acknowledges elsewhere in its comments, the ICAO guidelines permit an airport proprietor to earn a reasonable return on its investment.

We do not agree with carrier arguments that our approach to enforcing the prohibition on airport revenue diversion will provide incentives to airport proprietors to charge excessive fees for nonairfield facilities and services to obtain additional funds for general municipal purposes. Our approach to nonairfield assets will not undermine enforcement of the requirements on the use of airport revenues. The Department is committed to ensuring that airport revenues are used for airport purposes, as required by law under 49 USC § 47107(b). Moreover, in section 112 of the FAA Authorization Act of 1994, codified at 49 U.S.C § 47107(l), Congress added new requirements relating to both legal and illegal diversion of airport revenue in response to carrier concerns, as well as new sanctions for violations of the revenue diversion prohibition. On February 20, 1996, the FAA issued a Proposed Policy and Procedures Concerning the Use of Airport Revenues, Docket 28472 (61, FR 71344, February 26, 1996). In addition, on March 18, 1996, the FAA published formats for the preparation and filing of two reports by airport sponsors. One report would list amounts paid and services provided by the airport to other units of government, as well as explanations for claims of lawful diversion. The other report would detail the total revenue and expenditures at each commercial airport, including revenue surplus. These reports were required by section 111 of the 1994 Reauthorization Act.

In addition, the statute prohibiting revenue diversion excludes from the prohibitions certain arrangements that were in place when the statute was enacted. Many instances of airport revenue diversion identified in the Congressional Report cited by the carriers involved ''legal diversion'' under this statutory exception.

To date, our experience does not indicate that the statutory provisions and FAA's actions in implementing them are ineffective in assuring that airport revenue is used for lawful purposes. At this time, concerns about airport revenue diversion do not justify curtailing airport proprietors' customary flexibility to establish fees for non airfield facilities.

We are not adopting the NATA's suggestion that additional guidance be given for lease negotiations. As the NATA acknowledges, each lease negotiation will involve unique considerations and circumstances. A factor that is important in one negotiation may have no relevance in a second. Moreover, the Department is committed to applying the Final Policy to general aviation fees in a flexible way. By delineating criteria to be considered in negotiating leases, the policy would decrease, not increase, flexibility.

Finally, the Department has reviewed the detailed guidance under Principle 2 and modified the provisions as appropriate to reflect the narrowing of the requirement for HCA-based fees. Not all of the paragraphs suggested by the commenter have been modified. In some cases the unrevised paragraphs implement statutory requirements in addition to the reasonable fee requirement.

14. Application of HCA Requirement to Airfield and Public Use Roadways

The Supplemental Proposed Policy proposed that airfield facilities, airfield land and public-use roadways, be valued according to their historic cost to the original airport proprietor, except by agreement with users. Proposed para. 2.5.1. In addition, in proposed Paragraph 2.5.1(a), the Department proposed methods for charging for land dedicated to the airfield and public use roadways (''airfield/roadway land''). This provision is discussed separately below. The Department also proposed to allow airport proprietors to charge more than a *pro rata* share of airfield costs to particular users to encourage efficient use of the airfield. Proposed Para. 2.5.1(b). This provision is also discussed separately below.

Airport Proprietors: ACI/AAAE point out that their earlier acceptance of HCA valuation for airfields was not based on analogy to other industries, but based on their conclusion that vast majority of members would not be greatly disadvantaged. ACI/AAAE do not accept the carrier position that airports possess market power with respect to any airport facilities. ACI/AAAE urge the Department to implement the HCA valuation requirement flexibly, to permit direct resolution of disputes. ACI/AAAE also argue that, to be effective, peak-pricing systems must incorporate landing fees that are high enough to balance supply and demand, regardless of the airfield's historic cost. ACI/AAAE request the Department to clarify that an airport using an otherwise acceptable peak-hour pricing system may charge landing fees that are not based on historic cost.

Massport asserts that in some cases, the HCA valuation requirement for the airfield is inconsistent with sound economic theory and efficient allocation of scarce airport resources. Massport suggests that the policy should define HCA valuation for the airfield as presumptively reasonable, but permit an airport proprietor to show that other valuation methods are reasonable.

Los Angeles and San Francisco request that the HCA requirement for the airfield and public-use roadways be eliminated. Los Angeles argues that market-based rents are inherently reasonable, as the Department itself recognized in proposing to narrow the HCA requirement. Market-based rates also reflect economic reality better. Los Angeles further argues that the reasonableness of market-based pricing has been sustained in judicial decisions, including Blum v. Stenson, 465 U.S. 886, 892–95 (1984); Harmon City, Inc. v. United States, 733 F.2d 1381–1382–84 (10th Cir. 1984); and Telesat Cablevision, Inc. v. City of Riviera Beach, 773 F.Supp. 383, 407 (S.D. FL 1991).

Los Angeles and the City of San Francisco argue that market-based pricing for the airfield is most consistent with the requirement that airport proprietors establish a fee and rental structure that will make the airport as self-sustaining as possible. Both airport proprietors rely on the determination of the OIG that airports must receive no less than fair market value for aeronautical land and improvements in order to meet this mandate. Los Angeles also argues that its proposed method of determining FMV, based on the land's next best use, avoids any risk that the FMV determination will reflect the exercise of market power.

Los Angeles further argues that even though the Supplemental Proposed Policy would allow the airport proprietor to amortize the costs of acquired land, the HCA requirement would not allow the airport proprietor to compensate itself for the opportunity costs of maintaining its investment in the airfield rather than using the property for other purposes. Los Angeles asserts that the courts now recognize opportunity costs as a real cost, citing among other decisions, Afram Export Corp. v. Metallurgiki Halyps, S.A., 772 F.2d 1358, 1369 (7th Cir. 1985); Duff v. Marathon Petroleum Co., 985 F.2d 339, 340 (7th Cir. 1993). Los Angeles also complains that the HCA valuation requirement fails to compensate the airport proprietor for the costs of inflation. At a minimum, the policy should be modified to permit adjustments to HCA valuation to reflect general inflation.

Los Angeles also argues that the HCA valuation requirement results in an unconstitutional taking of the airport proprietor's property, because it precludes the airport proprietor from earning a fair return on investment. Los Angeles argues that, under Duquesne Light Co. v. Barasch, 488 U.S. 299, 307, 310 (1989), a rate set at a level that is confiscatory is unconstitutional. A rate that does not allow for a rate of return is per se confiscatory, according to Los Angeles, and therefore, unconstitutional. Los Angeles also suggests that the fair return must be based on the present value of the assets, citing Smyth v. Ames, 169 U.S. 466, 547; Denver Union Stockyard Co. v. United States, 304 U.S. 470, 473 (1938).

Los Angeles also argues (in its comments on the Interim Policy) that the property of public as well as private entities is protected by the takings clause of the Constitution, citing United States v. 50 Acres of Land, 469 U.S. 24, 31 (1984).

Los Angeles further argues that requiring HCA valuation for airfield land subsidizes air carriers needlessly by transferring the value of the airfield assets to the carriers.

In addition, Los Angeles argues that the HCA valuation requirement would make the charge for airfield land in the rate-base a function of happenstance—whether land is owned or leased. If land is leased, the airport proprietor would be able to charge its full rental payments—reflecting fair market value—to the airfield users.

Finally, the Metropolitan Airport Commission (''MAC'') requests the Department to modify the policy to permit any reasonable method for valuing public-use roadways. MAC asserts that off-airport commercial enterprises may attempt to use the provision to pay no more than the roadways' historic costs, even though these enterprises are not aeronautical users. MAC operates the Minneapolis-St. Paul International Airport.

Carriers: Carriers support retaining the HCA valuation requirement for the airfield and public-use roadways consistent with their arguments against elimination of the HCA cost cap for total aeronautical revenues.

General aviation: AOPA expressed general support for HCA valuation of airfield assets.

Other commenters: The American Car Rental Association (''ACRA'') considers the HCA valuation requirement to be inconsistent with fees based on cost recovery. The HCA valuation requirement would, in ACRA's view, perpetuate a subsidy to airfield assets from other parts of the airport.

The Final Policy: The Department is adopting the provisions of the Supplemental Proposed Policy without substantive change. After reviewing all comments, the Department has determined that the HCA valuation requirement for the airfield and public-use roadways should be retained. The requirement reflects nearly universal industry practice. See LAX I, Order 95–6–36 at 21. It is acceptable to the overwhelming majority of airport commenters who addressed the issue and has the unanimous support of aeronautical users. While we are willing to allow airports to use other reasonable methods for establishing fees for non-airfield facilities, the rationale for that decision does not apply to fees for airfield assets, as outlined in the previous section. Among other things, airfield fees have resulted in several major controversies.

Moreover, HCA valuation is recognized as an acceptable method of valuing assets when determining reasonableness, even if it is not the only one. In this regard it is simpler than other methods, especially market valuation techniques. HCA valuation can generally be determined from accounting records. FMV methodologies would invite disputes over appraisals for the value of airfield land. Unlike typical commercial real estate, there is no generally acceptable methodology for identifying and valuing comparable uses for land dedicated to an airfield. Permitting FMV valuation for the airfield would turn landing fee disputes into debates between real estate appraisal experts with the Department in the role of referee. The Supreme Court has noted that the difficulties of calculating FMV caused regulatory agencies to abandon the use of FMV for valuing capital investments by public utilities. Duquesne Light, supra, 488 U.S. at 308–309.

In addition, the HCA valuation requirement allows airport proprietors to fully recover their out-of-pocket costs of providing airfield facilities and services. The policy allows the airport proprietor to fully recover all of its capital expenditures —through depreciation and, for land, through amortization or imputed interest charges. For debt-financed expenditures, the airport proprietor may fully charge airfield users with the costs of paying principal and interest. Other provisions of the policy permit recovery of opportunity costs, and the costs of inflation, to the extent that an airport proprietor is entitled to such recovery, as discussed below. Thus, the HCA valuation requirement for the airfield is not inconsistent with the statutory requirement on self-sustainability. For these same reasons, the HCA requirement is consistent with the principle of cost recovery urged by ACRA and does not result in a subsidy to airfield users.

The Department notes that the Inspector General (in numerous audits of the FAA's monitoring of airport revenue) has recommended that aeronautical leases must be set at fair market value to comply with the self-sustainability requirement. This recommendation is not, as Los Angeles asserts, a basis for eliminating the HCA requirement for the airfield. The Secretary of Transportation, not the Inspector General, is responsible for establishing policy and interpreting the requirements of the AAIA. In promulgating this policy, the Secretary of Transportation has determined that the requirement of self-sustainability does not mandate FMV-based valuation of airfield assets and of other aeronautical assets. The pricing of these assets is also subject to the standard of reasonableness.

The standard of reasonableness and the standard of self-sustainability are not identical in application. The requirement of a fee and rental structure that will make the airport as self-sustaining as possible does not apply to the setting of a particular fee. Rather, the requirement applies to managing the airport's revenues and establishing a schedule of fees that generates sufficient earnings to meet current expenditures, to offset future deficits, and avoid the necessity of reliance on taxation. See, *e.g., Clifton* v. *Passaic Valley Water Commission*, 557 A.2d 299 (N.J. 1989).

Even if we interpreted the self-sustainability requirement to apply to individual fees, that requirement does not override the requirement of reasonableness. A fee set to maximize revenue (as the OIG assumes FMV-based fees do) may be consistent with the requirement of self-sustainability. However, if the fees resulted in surpluses, those fees might be unreasonable. Congress has declared as a matter of policy that airport proprietors should not seek to create revenue surpluses that exceed the amounts to be used for system purposes and other lawful purposes. 49 USC § 47101(13).

The Department has carefully considered the other objections to the HCA valuation requirement, particularly those expressed by Los Angeles. However, Los Angeles has failed to show that the Department's approach is wrong. While the FMV technique has been sustained in judicial decisions as meeting the standard of reasonableness, Los Angeles has cited no authority establishing that the FMV technique is the only reasonable method for determining rates. Indeed, as Los Angeles acknowledges, the Supreme Court in Federal Power Commission v. *Hope Natural Gas Co.*, 320 U.S. 591, 605 (1944), held that HCA valuation is also a valid basis for determining reasonableness. In that case, the Court abandoned its earlier preference for present valuation of assets expressed in the Smyth v. *Ames* and *Denver Union Stock Yard* cases cited by Los Angeles. The courts have recognized that regulatory agencies normally use historic costs for rate cases. Duquesne Light, supra, 488 U.S. at 309–310; Jersey Central Power & Light Co. v. *FERC*, 810

F.2d 1168, 1175 (D.C. Cir. 1987) (en banc).

The Department likewise is not persuaded that FMV-based landing fees are required to compensate airport proprietors for the opportunity costs of airfield investments. Los Angeles' claim for opportunity costs assumes that airport proprietors are free to disinvest in the airfield and put their capital to other uses. Most airport proprietors subject to this policy, including Los Angeles, are not. These airport proprietors have accepted Federal financial assistance or free Federal land for airport development. Los Angeles has accepted both. In exchange for this Federal assistance, they have committed to continue to operate their airports as airports. Los Angeles' compensation for devoting the LAX airfield for use as an airfield was the Federal financial assistance and donated Federal land.

In any event, to the extent that the airport proprietor is entitled to recover any opportunity costs in the airfield rate base, these costs may be recovered through the imputed interest charge under the Final Policy. The imputed interest charge is intended to compensate the airport proprietor for the use of internally generated funds invested in the airfield and not elsewhere on the airport.

Similarly, an airport proprietor may look to the imputed interest allowance to be compensated for inflation. The Final Policy permits an airport proprietor to charge imputed interest at a reasonable rate. The airport proprietor's adoption of an appropriate and reasonable market-based rate should compensate the airport for inflation. Investors in capital markets expect to be compensated for inflation, as well as the opportunity cost of investment. Therefore, market-based imputed interest rates ordinarily reflect investors' expectations on the future rate of inflation.

The HCA valuation requirement will not violate the Constitutional rights of airport proprietors by denying their right to earn a return on their investment or by taking their property without just compensation.

The requirement does not deny airports—whether privately or publicly-owned—their Constitutional right to a rate of return on their investment. The Supreme Court, after all, has held that a regulatory agency's use of HCA valuation in rate-making cases does not violate the Constitutional principle that regulated firms must be allowed the opportunity to earn a return on their investment. See, Duquesne Light, supra, 488 U.S. at 308–310.

In addition, paragraph 2.4 of the Final Policy explicitly allows private owners of airports to earn a rate of return. Assuming that state and local government agencies operating airports were entitled to earn a rate of return, the Final Policy does not deny them that right. The Final Policy allows an airport proprietor to charge imputed interest on its investment in the airfield, except to the extent those investments were made with funds derived from fees paid for the use of the airfield. This imputed interest represents compensation for the airport proprietor's capital invested in the airport, as would a return on investment.

The HCA valuation requirement thus does not violate the takings clause of the Constitution. The Supreme Court considers three factors in determining whether government action constitutes a taking: the action's character, its economic impact, and the extent to which the action interferes with investment-backed expectations. See Connolly v. *Pension Benefit Guaranty Corp.*, 475 U.S. 211, 224–225(1986); *Concrete Pipe & Products* v. Construction Laborers Pension Trust, 508 U.S. 602; 113 S.Ct. 2264, 2291 (1993). The Final Policy's limits on airfield fees cannot constitute a taking under these standards.

First, the HCA valuation requirement causes no physical invasion or permanent appropriation of an airport's property. Instead, as is typical of many regulatory programs, the HCA valuation requirement adjusts the benefits and burdens of economic life in order to promote the common good. That type of regulation is not normally deemed a taking of property.

Second, the economic impact on airports is not severe. As admitted by Los Angeles' expert witness in LAX I, every airport in the United States except LAX has valued airfield land at historic cost in setting fees. Order 95–6–36 at 21. Even LAX used HCA valuation before 1993, when it implemented the FMV-based fees found unreasonable, in part, by the Department in LAX I. Moreover, the HCA valuation requirement enables airports to recover the actual costs of their investment in airfield facilities, and airports may also obtain imputed interest on their investment, unless the invested funds were derived from airfield fees.

Third, requiring HCA valuation cannot interfere with any airport's investment expectations, as demonstrated by the Court's analysis in Connolly, 475 U.S. 226–227. The HCA requirement merely ratifies the airports' existing practices for pricing airfield assets. In addition, as both ATA/RAA and ACI/AAAE point out, state and local governments invest in airports in order to further the well-being and general welfare of their citizens, not in order to make a profit. Furthermore, federal statutes have limited airport aeronautical fees for many years and imposed other restrictions on the use of airport funds and property by airport owners.

Los Angeles' concern about anomalous treatment between leased and owned airfield land does not justify abandoning the HCA valuation requirement for the airfield. First, the situation in which an airport proprietor leases an airfield from an independent entity, rather than owns it, is extremely rare. The Department is aware of only two airport proprietors that lease their airfields—the Port Authority of New York and New Jersey and the Metropolitan Washington Airports Authority. In both cases the airport proprietor is leasing from other governmental entities. Second, even as between two airport proprietors that own their airfields, the Final Policy may well require one airport to charge lower fees than the other, because the former has lower costs. Two airports could have different costs for a number of reasons, including the following: differences in land costs at the time of acquisition; differences in the acreage of the respective airfields; differences in the interest rates payable on bonds used to finance the airfield;, and even differences in the salary and benefit structure of the two airport proprietors. Moreover, even with airfield assets valued at FMV, airfield rates could be determined by a factor that could be deemed ''happenstance''—the market conditions at the time each airport's fees are established. However, the Department would consider each airport proprietor's costs in determining the reasonableness of its airfield fees because each airport's costs vary. This variation is not a reason to ignore those costs, or to avoid using HCA valuation.

The Department will not adopt the suggestion that the HCA valuation requirement be adopted as a rebutable presumption. The practice of using HCA valuation for the airfield is wide-spread and long-standing. Therefore, the Department does not see a need to allow airport proprietors to argue routinely that a different valuation methodology is reasonable. Such arguments could greatly add to the burden of processing complaints under section 47129. However, the Department, on a case-by-case basis, has allowed airport proprietors to argue that the HCA valuation requirement should not be applied to them because of unusual circumstances. See, e.g., LAX I, Order 95–6–33 at 15–17. We would continue to do so.

In addition, the Department is retaining the HCA valuation requirement for the public-use roadways. Public-use roadways are more like the airfield than like terminals. Roadways are common use facilities, like the airfield. An aeronautical user cannot derive commercial or competitive benefit vis-à-vis competitors through the use of the roadways, and aeronautical users do not separately bargain for the use of the roadways.

MAC acknowledges that the provisions of the Final Policy governing reasonable fees do not apply to fees paid by nonaeronautical users. Therefore, nonaeronautical users may not rely on the Final Policy to claim a right to roadway access charges based on HCA valuation.

Airport proprietor concerns about the relationship between the HCA valuation requirement and peak pricing are addressed in the disposition of comments on peak pricing.

15. Airfield Revenue Cap Based on HCA Valuation

The Supplemental Proposed Policy proposed that airfield revenues may not exceed airfield costs (proposed para. 2.2) and included detailed guidance on how airfield costs may be determined. Among other things, airfield assets must be valued based on their historic cost to the original airport proprietor. Proposed para. 2.5.1. Together, these provisions would create a cap on total airfield revenue based on HCA valuation of airfield assets.

The comments: Los Angeles and San Francisco oppose the cap on airfield revenues based on HCA costs. Both airport proprietors assert that the cap provision violates section 47129(a)(3), which directs that the Secretary ''shall not set the level of the fee.'' Los Angeles argues that the cap deprives the airport proprietor of substantial latitude to set fees. Los Angeles further argues that the cap is inconsistent with the airport proprietor's right to use fair market values for airfield land. In addition, the cap would serve no purpose but to encourage airport proprietors to tinker with fees to keep them in sync with costs. San Francisco also argues that the cap amounts to a subsidy to airfield users.

Carriers and general aviation commenters generally support the HCA cap for the airfield.

The Final Policy: The Department is adopting the provisions of the Supplemental Proposed Policy without modification.

The contention that the HCA cap requirement illegally ''sets'' the fee for airfield use within the meaning of section 47129(a)(3) is wrong. The Final Policy provides detailed guidance on the total costs that may be recovered through airfield fees, but it does not establish a single, comprehensive formula for determining the amount of total airfield revenues. For example, the policy does not establish a single methodology to allocate common costs between the airfield and other cost centers, or to allocate indirect costs. Likewise, the policy does not establish a single permissible time-frame over which to depreciate and amortize airfield assets or a single permissible rate for the imputed interest charge. Each of these decisions is left to the discretion of the airport proprietor and will affect the total amount of revenue that the airfield may generate.

Moreover, the Final Policy does not establish a mandatory formula for charging individual airfield users. Rather, the airport proprietor also has some latitude in setting individual fees to recover total airfield revenue. The airport proprietor has some discretion to allocate costs among airfield users and to establish the basis of the charge. Airport proprietors can and do establish weight-based charges, operations-based charges, or charges based on a combination. Each of these decisions will affect the level of fee that an individual user pays.

In these circumstances, the HCA revenue cap cannot be said to ''set'' the level of an airfield fee. Furthermore, Congress has directed the Department to develop reasonableness guidelines. Since the Department has determined that airfield fees must be based on costs to assure that fees are reasonable, the required guidelines must set forth cost standards for those fees.

The Department has concluded that airport proprietors do not have a right to value airfield land at fair market value. Therefore, the HCA revenue cap cannot violate that purported right. Assuming, for the sake of argument, that an airport proprietor has a right to be compensated for the opportunity costs of its investment in the airfield, the Final Policy permits an imputed interest charge to be included in the rate-base. Moreover, as discussed above, the HCA cap does not provide a subsidy to airfield users, because it permits the airport proprietor to fully recover the costs of providing airfield services and facilities.

The airfield cost cap merely implements the Department's approach to pricing the airfield. As noted previously, the fundamental requirement of reasonableness for airfield fees is that the fees reflect the costs of providing services and facilities for users. The Department has chosen to impose a specific requirement to achieve that result and provide detailed guidance on acceptable methods for determining costs. The HCA cap follows logically from this approach.

The HCA cap on airfield revenue does not require a constant tinkering with fees to assure that fees never exceed costs in any charging period. The Department expects airport proprietors to set fees prospectively based on their reasonable projections of traffic and of costs determined in accordance with the policy. The Department also expects that airport proprietors will periodically review their fees and adjust them, on a prospective basis, based on projected changes in costs and traffic. This expectation is based on the standard of reasonableness; it is reflected in a separate provision of the Final Policy (paragraph 2.3), which is independent of the HCA cost cap. Moreover, Los Angeles has chosen to set fees on an interim basis and to make periodic adjustments based on actual results. This approach renders its concerns about tinkering moot.

16. Amortization of HCA Value of Airfield Land

The Supplemental Proposed Policy included provisions describing how the airport proprietor might recover the cost of airfield land through airfield fees. The Department proposed that, if land was acquired with debt financing, the airport proprietor may include a charge for all related debt-service costs, including principal, interest and debt service coverage. For land acquired with internally generated airport funds or donated by the sponsor, the Supplemental Proposed Policy proposed that the airport proprietor could amortize the land. The Department further proposed that upon completion of the amortization or retirement of the debt, the land may no longer be included in the rate base. Proposed para. 2.5.1(a). The Department did not propose to allow any other treatment.

Airport proprietors: Two individual airport proprietors specifically endorse the approach of the Supplemental Proposed Policy on this issue. Other airport proprietors did not comment. In addition, one airport proprietor argues that the amortization provisions should apply to facilities as well as land.

Carriers: Carriers object to the amortization of the cost of land acquired by means other than bond financing, because land is not a wasting asset. Therefore, amortization of land is not permitted by accounting or tax rules, and there is no reasonable basis for determining an amortization schedule for land. The carriers argue that if the Department permits amortization of land, the Department should set forth clear guidelines for the period of amortization. ATA/RAA argue that this period should be considerably longer than 39 years, which is the minimum depreciation period for commercial buildings under the Internal Revenue Code.

General aviation: Other aeronautical users did not comment on this issue.

Other commenters: One individual commenter requests the Department to limit the meaning of the term amortization to recovery of expenditures for land. This commenter points out that some airport proprietors define amortization as recovering the costs of land plus imputed interest.

The Final Policy: The Final Policy adopts the approach of the Supplemental Proposed Policy on recovering the cost of debt-financed land without modification. The Final Policy is being modified to permit an airport proprietor to choose one of two options for recovering the airport sponsor's cost of other land used for the airfield and public-use roadways. First, the airport proprietor may impose a reasonable amortization charge based on the HCA valuation of the land, and remove the land from the rate base upon completion of the amortization. Second, the airport proprietor may retain the original HCA value of the land in the rate-base indefinitely and charge imputed interest, to the extent permitted by this policy. To avoid overcompensation for this land, the airport proprietor may not alternate between methodologies. Amortization is being permitted, in part, because it is used by some airport proprietors and appears to be a reasonable alternative, as discussed below.

The ATA/RAA position on land that was not acquired with debt financing is unreasonable, because ATA/RAA would not permit the airport proprietor to charge either amortization or imputed interest on amounts invested in such land. Thus, ATA/RAA would deny any form of compensation to airport proprietors for their investment in airfield/roadway land.

However, as the carriers argue, land is not a wasting asset. Utility regulators do not generally permit a regulated entity to amortize the cost of land, but permit the regulated industry to include the value of land in the investment base on which it earns a rate of return.

For this reason, the Department has concluded that the Policy should not mandate amortization as the sole means of cost recovery. However, the Department is not persuaded that amortization should be precluded.

While objecting to the practice, ATA/RAA did not argue that the practice is uncommon. Amortization is used at some airports in the United States and has not generated significant controversy at individual airports.

Further, over the long run, it is not clear that the two approaches would produce substantially different results. During the amortization period, amortization would produce higher annual charges. However, eventually, the land would be removed from the rate base and charges would be reduced. In contrast, if the full HCA value of land is retained in the rate base, airfield fees would include an imputed interest charge indefinitely. Over the long run, the imputed interest charges imposed indefinitely may balance out the higher charges imposed for a fixed period under amortization.

In addition, while the Final Policy may contain some provisions that favor debt-financing over internal financing, the Department seeks to avoid providing unnecessary incentives for debt-financing. The Department is concerned that prohibiting the amortization of airfield land that is not financed with debt could bias some airport proprietors toward using debt-financing for land acquisition.

Finally, the Final Policy precludes charging imputed interest on funds generated by airfield fees that are invested in the airfield. If funds attributable to airfield fees were invested in airfield land and the airport proprietor could not amortize the value of that investment, the airport proprietor would have no means of being compensated for its investment in the land.

Based on these considerations, the Final Policy permits either methodology. The airport proprietor may include a reasonable amortization charge, provided that the land is removed from the rate base upon completion of the amortization period. Alternatively, the airport proprietor may retain the HCA value of the land in the rate base and impose a reasonable imputed interest charge, to the extent permitted by the Final Policy. The Final Policy also prohibits an airport proprietor from alternating between methodologies, to obtain undue compensation.

The Final Policy requires that when an airport proprietor elects to amortize its investment the charge must be reasonable. One factor in determining reasonableness is the amortization period. The Final Policy does not specify a particular period because what is reasonable will depend on the individual circumstances of a case. In reviewing the reasonableness of an amortization period, the Department will consider, among other things, whether the airport proprietor has selected a period that gives appropriate recognition to land's character as a non-wasting asset.

The Department will neither permit, nor prohibit, in this policy, the inclusion of an imputed interest element in the amortization charge. The Department would consider an airport proprietor's decision to include an imputed interest element as part of its review of the reasonableness of the amortization charge.

The Department is not adopting the suggestion to expand the provision on amortization to capital assets other than land. Other capital assets are subject to depreciation under generally accepted accounting principles (''GAAP''), and no specific provision in the Final Policy is required to permit depreciation charges. The Final Policy addresses land specifically because land is treated differently than other capital assets under GAAP.

17. Costs of Airport Systems

The Supplemental Proposed Policy proposed that the rate base of one airport could include the costs of a second airport currently in use only if the airport proprietor owns both airports; the second airport is currently in use; and the costs of the second airport to be included in the rate base are reasonably related to the benefits that the second airport provides to the aeronautical users of the first airport. Proposed Para. 2.5.4. The Department also proposed that the latter element would be presumed satisfied if the second airport has been designated as a reliever airport for the first airport by the FAA. Proposed para. 2.5.4(a).

Airport proprietors: The PANYNJ objects to the common ownership requirement. The PANYNJ argues that the owner of a commercial service airport should be able to contribute to the costs of an airport that serves a critical reliever function, even if the reliever is under separate ownership. The PANYNJ would make benefits the sole criterion.

The State of Alaska argues that by limiting the multiple airport system rate base to airports that have a direct traffic relationship, the approach of the supplemental notice is more restrictive than the airport system approach provided in the FAA's grant assurances, and is excessively restrictive for the operator of a large system, like Alaska. The State operates 253 airports and seaplane bases.

Carriers: IATA opposes the approach of the Supplemental Proposed Policy. IATA argues that pricing must be airport specific to promote transparency and that carriers should not be required to pay for airport facilities that they do not or could not use.

General aviation: General aviation users did not comment on this issue.

Other commenters: One commenter—a law firm involved in bond financing—argues that the Department's approach does not give adequate consideration to the obligation of owners of airport systems to operate their systems in a financially self-sufficient way, as reflected in 49 USC § 47107(a)(13). This commenter stated that some airport proprietors may operate systems that are financially linked, but that are operationally distinct.

The Final Policy: The Department is adopting the provision of the Supplemental Proposed Policy without substantive modification. However, we are making editorial revisions to clarify that the provisions apply to systems of more than two airports. In addition, the Department will permit an airport proprietor to show that its existing practice of subsidizing an airport from another airport's airfield fees is reasonable, even if all of the criteria required by the Final Policy are not met. The Department does not wish to disrupt existing practices that have not generated controversy.

The approach of the Final Policy is based on the requirement of reasonableness. Generally speaking, the standard of reasonableness permits an airport proprietor to charge only for the facilities that it provides that are used by the rate-payer or that benefit the rate-payer. If an airport proprietor does not own the other airport, it cannot be providing those facilities. If the other airport is not currently in use, airfield users cannot be using the other airport or benefiting from it. For these reasons, the common ownership and currently-in-use requirements are retained. The requirement of benefit will be retained as well. It can be reasonable to charge a rate-payer for the costs of a facility from which it benefits, even if the rate payer does not directly use that facility.

This principle may be especially true in the case of a commercial airport/reliever airport system. The reliever airport's function is to draw general aviation traffic away from the commercial service airport. If the airport proprietor had to charge the full cost of the reliever airport to general aviation users, the increased price might cause those users to elect the commercial service airport—increasing congestion and the carriers' costs of operating there.

However, the requirement of benefit does not mean that a direct traffic relationship is required in all cases. An airport's status as a designated reliever creates a presumption of benefit. However, an airport proprietor is free to show a benefit exists even when the subsidized airport is not a designated reliever.

The State of Alaska's argument regarding the treatment of airport systems appears to refer to the grant assurance on the use of airport revenue. The assurance permits airport revenue from any source to be used for any airport in a local airport system. However, charges to aeronautical users are subject to a separate and more stringent standard of reasonableness. Similarly, the comment about airport financial systems overlooks the reasonableness requirement. Financial self-sufficiency is also a Federal grant obligation. However, the Final Policy is clear that this obligation does not justify charging the users of the airfield more than the costs of operating the airfield to cover the losses incurred elsewhere at an airport. It follows that this standard does not independently justify charging the users of the airfield more than its costs to cover losses incurred at a separate airport. Moreover, section 47107(a)(13) in fact refers to charges that will make the airport, not the airport system, self sufficient.

In response to the State of Alaska's concerns about its approach to financing its airport system, the Department is modifying the Final Policy to provide for consideration, on a case-by-case basis, of the reasonableness of an existing practice that does not satisfy all three criteria listed in the Final Policy. This modification also furthers another Department goal: minimizing disruption of existing, non-controversial practices.

In addition, the policy on this issue does not preclude an airport proprietor from supporting another airport when the conditions specified in the policy are not met. It only precludes adding the cost of that support to the airfield rate base. Even this limitation can be waived by agreement with airfield users. Thus, the airport proprietor has the opportunity to persuade airfield users that the benefits of the second airport justify including some of its costs in the landing fee.

The Department's approach to airport systems is not inconsistent with our policy favoring transparency. An airport proprietor seeking to charge the users of one airport for the costs of another must justify the charge. The Department expects that as part of that justification, the costs of the other airport will be separately identified and the basis for the cost allocation explained.

18. Charging For Closed Airports

The Supplemental Proposed Policy proposed that, if an airport proprietor closes an airport as part of an approved plan for the construction and opening of a new airport, reasonable costs of disposition of the closed airport could be included in the rate base of the new airport, to the extent that the costs of disposition exceed the proceeds. Proposed para. 2.5.4(b).

Airport proprietors: The City of Chicago requests the Department to clarify that, if an airport is closed and its costs could be included in the rate-base of another airport, then the environmental remediation costs of the closed airport can be included in the rate-base. The City and County of Denver supports the approach of the Supplemental Proposed Policy, because that approach recognizes that an airport proprietor cannot dispose of an airport overnight.

The PANYNJ suggests that the policy should not be limited to airports closed as part of a plan to open a new airport. Rather, the charges also should be permitted if the FAA decides that continued operations at the airport being closed interfere with operations at an existing airport.

Carriers: ATA/RAA urge the Department to delete proposed paragraph 2.5.4(b) from the final policy. ATA/RAA argue that the provision is inconsistent with the fundamental principle that charges be just and reasonable and the requirement in proposed paragraph 2.5 that costs be limited to the capital and operating costs directly and indirectly associated with facilities currently in use. ATA/RAA also argue that by permitting airports to fund facilities not in use (the old airport), the provision is inconsistent with the principle underlying the prohibition of prefunding facilities not yet built. ATA/RAA also argue that the Supplemental Proposed Policy would provide a disincentive to airport proprietors to dispose of airports swiftly and efficiently.

General aviation: General aviation commenters did not address this issue.

Other commenters: Other commenters did not address this issue.

The Final Policy: The Department is adopting the provision of the Supplemental Proposed Policy with one modification. The Final Policy would permit an airport proprietor to add to the rate base of the new airport the reasonable costs of maintenance of the old airport while disposition is pending, so long as proceeds of disposition are applied first to credit or refund fees previously paid. This provision would not, however, apply if the terms of the Department's approved plan or user agreement provide otherwise.

The Department has determined that where an airport closure is part of an approved plan for a new airport, reasonable disposition costs, in excess of proceeds, may be included in the rate base of the new airport.

While ATA/RAA argue that the Department's approach requires airport users to pay for the costs of a facility they do not use, the Department considers its approach to be analogous to a situation in which structures must be acquired and demolished to make way for construction of new airfield improvements at an operating airport. The costs of acquiring those structures and demolishing them could be included in the airfield rate base, once the new facilities are in use, even though the demolished structures are never used by the carriers. Where the FAA has determined that an existing airport must be closed in connection with the opening of a new airport, the FAA has determined that the new airport, and hence its users, will benefit from that closure. Because the new airport users will benefit, it is reasonable to include in the rate base reasonable disposition costs, to the extent that they exceed the proceeds from disposition.

The requirement of reasonableness is intended to encourage swift and efficient disposition. While not defining reasonableness in detail, the Department states that it would not ordinarily consider redevelopment costs to be reasonable. The Department would also consider the diligence with which the airport proprietor pursues disposal.

After reviewing the comments, the Department has determined that additional clarification is appropriate. The Department recognizes that in some circumstances disposition expenses may be incurred before an airport's disposition. A new provision is added to the Final Policy permitting an airport proprietor to charge reasonable maintenance costs to airfield users before disposition, only if those costs are credited or refunded to the users upon receipt of the proceeds from a whole or partial disposition. In reviewing the reasonableness of a charge in this circumstance, the Department would also consider the reasonableness of the airport proprietor's disposal efforts. The Department would ordinarily consider it unreasonable to continue charging for maintenance of the closed airport beyond the time the airport proprietor could have reasonably disposed of that airport. The Department's approach assures that the airport proprietor is not burdened with the costs of maintaining the old airport until the completion of a long disposition process, while also assuring that the users of the new airport are not burdened with the costs of disposition, when disposition proceeds ultimately exceed the airport proprietor's disposition costs.

The Department will not adopt the suggestion that environmental remediation costs of disposed airports be singled out for special treatment. The Department confirms that environmental remediation may qualify as a disposition cost, as discussed above under Issue 9, ''Allowance For Environmental Costs.'' However, the commenter has not offered any explanation for treating environmental remediation differently than any other disposition cost.

The PANYNJ suggests that the policy should permit the disposition costs of a closed airport to be added to the rate-base of an existing airport when the FAA determines that the closure is required to accommodate the operations of the existing airport. The Department is not adopting this suggestion. The PANYNJ's proposed modification would be a solution in search of a problem. The PANYNJ has not offered any examples of this problem arising in the past, and the Department is unaware of any instance in which operations at existing airports have necessitated the closing of nearby airports. Should the situation arise in the future, the Department will address the issue in the context of that specific situation.

19. Charges to Non-Signatory Carriers

The Supplemental Proposed Policy proposed that the prohibition on unjust discrimination would not prevent an airport proprietor from establishing reasonable classifications of carriers, such as signatory and non-signatory carriers, and charging higher fees based on these distinctions. Proposed para. 3.1.1.

The comments: The City of Chicago argues that the historic cost requirement for the airfield could lead to some anomalies as applied to existing arrangements. Some rate agreements provide for signatory carriers to pay, under a residual system, for facilities in addition to the airfield. Thus, they are paying more than the HCA-based rates for the airfield. Non-signatory carriers are required to pay even higher rates. Chicago argues that non-signatory carriers may claim that they are entitled to a compensatory HCA-based rate that is lower than the signatory rate. The City of Chicago requests that the Department clarify that an airport proprietor may impose a surcharge on non-signatory carriers, even if the signatory rates exceed HCA-based compensatory rates.

Other commenters did not address this issue.

The Final Policy: The Department will adopt the provision of the Supplemental Proposed Policy without modification.

The Department agrees that the Final Policy should not make non-signatory status more attractive to carriers than signatory status. Such a result would conflict with the first principle of the Final Policy, reliance on direct negotiation and agreement to establish reasonable fees. In addition, it is accepted industry practice to charge non-signatory carriers higher rates than signatory carriers, based on the decision of the former not to assume all of the obligations associated with signatory status. The Airport and Airway Improvement Act expressly permits the establishment of classifications based on status as a signatory carrier. See, 49 U.S.C. § 47107(a)(2)(B)(ii).

The Department has concluded that the provisions of the Supplemental Proposed Policy on signatory/non-signatory fees provide adequate flexibility to airport proprietors to charge reasonable surcharges to non-signatory carriers. No modifications are necessary to address Chicago's concerns.

The costs of serving a non-signatory carrier would ordinarily be higher than a compensatory rate reflecting the costs of serving exclusively signatory carriers. For example, non-signatory carriers may increase an airport proprietor's risk of revenue fluctuation. The increased risk in turn would justify higher reserves. In addition, the administrative costs of dealing with non-signatory carriers would ordinarily be higher. Further, an airport proprietor might be able to argue that due to their irregularity, or relative infrequency, operations by non-signatory carriers cost more to serve than a corresponding number of operations performed on a regular basis by signatory carriers. Each of these considerations would provide a justification for imposing a surcharge, in some amount, on non-signatory carriers.

In addition, signatory carriers usually assume obligations or responsibilities that non-signatory carriers do not undertake. Airport proprietors receive intangible benefits from having carriers at the airport undertake these additional responsibilities. A surcharge for non-signatory carriers may be justifiable, in part, as compensation to the airport proprietor for the reduction in these intangible benefits when a carrier elects non-signatory status.

The Department is not prepared at this time to modify the Final Policy to permit on a routine basis non-signatory charges that cause total airfield revenues to exceed airfield costs. However, we will review the reasonableness of such non-signatory charges on a case-by-case basis in light of the considerations outlined above.

20. Peak Period Charges

The Supplemental Proposed Policy proposed that under certain conditions, a properly structured peak pricing system would not be considered unjustly discriminatory. Proposed para. 3.2. The Supplemental Proposed Policy did not list prerequisites for peak pricing and did not propose a method for determining peak charges or peak/off peak differentials.

In addition, the Department proposed to permit airport proprietors to charge some segments of airfield users more than their pro rata share of accounting costs based on HCA valuation, to enhance efficient use of the airfield, if the airport proprietor uses a reasonable and not unjustly discriminatory methodology. Proposed para. 2.5.1(b).

Airport proprietors: ACI/AAAE and the PANYNJ argue that, to be effective, peak prices must be set without regard to HCA valuation. ACI/AAAE request the Department to clarify the meaning of proposed par. 2.5.1 and specify that an otherwise acceptable peak-pricing system may charge landing fees that are not based on HCA valuation.

Carriers: ATA/RAA argue that the subject of peak-period pricing is too complicated and potentially injurious to users to be addressed as one element in the larger policy on airport fees. ATA/RAA urge the Department to delete all references to peak pricing.

IATA argues that peak pricing cannot enhance the efficient utilization of airports, especially for international East-West operations.

General aviation: AOPA expresses concerns that the standard proposed—enhancing the efficient utilization of the airport—may provide sufficient latitude to invite abuse. AOPA doubts that many airports are sufficiently congested to justify peak pricing. AOPA suggests that the Supplemental Proposed Policy could serve as an excuse for unreasonable ratesetting.

Other Commenters: Other commenters did not address this issue.

The Final Policy: The Department is adopting the provisions of the Supplemental Proposed Policy without substantive modification.

The Department's policy regarding peak pricing was established in its decision in the Massport PACE fee case. Massport Order, supra. In that decision, the Department concluded that a properly structured peak pricing system could be found reasonable and not unjustly discriminatory. Massport Order at 8–9. The Department's purpose in referring to peak pricing in this policy is not to break new ground or expand on the Department's earlier decision. Rather, it is to confirm our support for that decision.

The Department understands the concerns of airport users regarding abuse. The Department does not intend the policy statement to function as a blanket authorization for peak pricing. In reviewing a peak pricing system, the Department would scrutinize it carefully to determine first whether the airport in fact suffers from congestion, and whether the peak-pricing system is an appropriate response.

Regarding the linkage between peak pricing and HCA valuation, Paragraphs 3.2 and 2.5.1(b) each address the allocation of costs among users or user groups. The purpose of these provisions is to make clear that if a properly structured and justified congestion pricing system is in place, the airport proprietors may, during periods of congestion, charge airfield users more than their allocated share of accounting costs determined using HCA valuation. These provisions do not exempt airport proprietors from the requirement that total airfield revenues not exceed total airfield costs as determined in accordance with the Final Policy. Of course, the peak charge may also reflect any additional accounting costs the airport proprietor incurs in serving traffic during peak periods.

21. Reservation of Authority to Investigate Progressive Accumulation of Aeronautical Surpluses

In connection with the proposal to eliminate the HCA cost cap for all aeronautical revenue, the Supplemental Proposed Policy included a new provision on accumulation of surplus aeronautical revenue. The Department proposed that the progressive accumulation of substantial surplus aeronautical revenue may warrant an FAA inquiry into whether aeronautical fees are consistent with the airport proprietor's obligation to make the airport available on fair and reasonable terms. Proposed para. 4.2.1. In discussing the treatment of nonairfield fees, we explained that the Department expects nonairfield aeronautical fees, over, time, to reflect aeronautical costs, including the airport's capital investment needs. 60 FR 47013.

Airport proprietors: Some individual airport proprietors objected to this provision. They are concerned that this provision combined with the referenced explanatory statement means that the Department may be introducing an implicit aeronautical cost cap.

Carriers: Carriers argue that tying the investigation of the reasonableness of aeronautical fees to the sustained accumulation of surpluses does not provide adequate protection against the exercise of market power in pricing nonairfield facilities. The carriers argue that without clear accounting and cost allocation guidelines, the policy will encourage airports to overallocate costs to aeronautical users to mask aeronautical profits. In addition, they contend that the policy will not provide an adequate mechanism to monitor the accumulation of surplus revenues. ATA/RAA also object that a Department investigation would be triggered only after years of surplus accumulation.

General aviation: AOPA also suggests that the protection will be ineffectual because the investigation would only be triggered after a long period of accumulation.

Other commenters: ACRA requests the Department to clarify that it will investigate the disposition of all airport revenues, not just aeronautical revenues, and that an investigation would be triggered by the accumulation of surplus airport revenues.

The Final Policy: The Department is adopting the provision of Supplemental Proposed Policy without modification.

As discussed above, in the Department's experience, the setting of fees for the use of aeronautical facilities other than the airfield—whether by negotiation or otherwise—has generally produced reasonable results. Further, we do not accept the carriers' argument that those reasonable results were a function of circumstances that are no longer present. Given the low risk of unreasonable results, the Department considers its approach to involve an appropriate level of intervention.

We reiterate that the decision to eliminate the HCA cap for all aeronautical revenue is based in part on our determination that a rigid HCA cap is not necessary to assure that fees for nonairfield aeronautical facilities and services are reasonable.

Furthermore, the Department has recently made available standard financial reporting formats for airports. Notice of Availability and Request for Comments on Airport Financial Reports, Docket No. 28495 (61 FR 11077, March 18, 1996). These formats, once in use, should assist in monitoring nonairfield aeronautical revenues. In addition, to further enhance the consultation process envisioned by Paragraphs 1.1.1 and 1.1.2, Appendix 1 of the Final Policy is modified to include the Airport Financial Reports with the information the Department expects airport proprietors to make available in user-charge consultations.

As to the concerns of airport proprietors, the Department has recognized that a reasonable charge for nonairfield facilities may include a reasonable rate of return on the airport proprietor's invested capital. An airport proprietor would not be entitled to more under the common understanding of the standard of reasonableness and the limits imposed by international obligations, regardless of whether the Department had promulgated a policy statement. In stating the expectation that, over time, aeronautical revenues would not exceed reasonable aeronautical costs, including reasonable capital costs, the Department is not foreclosing the generation of returns—at reasonable levels.

In addition, the Department emphasizes that an inquiry would be focused on the progressive accumulation of surpluses. The Department would not consider a single year's surplus in isolation. Thus, an airport proprietor need not fear that, over time, losses generated by nonairfield assets in some years cannot be balanced out against profits earned in other years.

Further, if the Department determined that nonairfield fees were unreasonably high, and that airfield fees were reasonable, the Department would not ordinarily specify corrective action involving airfield fees. In addition, the corrective action would ordinarily be prospective in nature.

Finally, with respect to the comment by ACRA, progressive accumulation of surplus airport revenue from all sources is governed by Paragraph 5.2 of the Final Policy. In an inquiry conducted pursuant to Paragraph 5.2, the FAA would not be investigating the reasonableness of fees charged to nonaeronautical users.

Policy Statement Regarding Airport Fees

For the reasons discussed above, the Department adopts the following statement of policy for airport fees charged to aeronautical users:

Policy Regarding the Establishment of Airport Rates and Charges

Introduction

It is the fundamental position of the Department that the issue of rates and charges is best addressed at the local level by agreement between users and airports. The Department is adopting this Policy Statement on the standards applicable to airport fees imposed for aeronautical use of the airport to provide guidance to airport proprietors and aeronautical users, to encourage direct negotiation between these parties, to minimize the need for direct Federal intervention to resolve differences over airport fees and to establish the standards which the Department will apply in addressing airport fee disputes under 49 USC § 47129 and in addressing questions of airport proprietors' compliance with Federal requirements governing airport fees.

Applicability of the Policy

A. Scope of Policy

Under the terms of grant agreements administered by the Federal Aviation Administration (FAA) for airport improvement, all aeronautical users are entitled to airport access on fair and reasonable terms without unjust discrimination. Therefore, the Department considers that the principles and guidance set forth in this policy statement apply to all aeronautical uses of the airport. The Department recognizes, however, that airport proprietors may use different mechanisms and methodologies to establish fees for different facilities, *e.g.*, for the airfield and terminal area, and for different aeronautical users, *e.g.*, air carriers and fixed-base operators. Various elements of the policy reflect these differences. In addition, the Department will take these differences into account if we are called upon to resolve a dispute over aeronautical fees or otherwise consider whether an airport sponsor is in compliance with its obligation to provide access on fair and reasonable terms without unjust discrimination.

B. Aeronautical Use and Users

The Department considers the aeronautical use of an airport to be any activity that involves, makes possible, is required for the safety of, or is otherwise directly related to, the operation of aircraft. Aeronautical use includes services provided by air carriers related directly and substantially to the movement of passengers, baggage, mail and cargo on the airport. Persons, whether individuals or businesses, engaged in aeronautical uses involving the operation of aircraft, or providing flight support directly related to the operation of aircraft, are considered to be aeronautical users.

Conversely, the Department considers that the operation by U.S. or foreign air carriers of facilities such as a reservations center, headquarters office, or flight kitchen on an airport does not constitute an aeronautical use subject to the principles and guidance contained in this policy statement with respect to reasonableness and unjust discrimination. Such facilities need not be located on an airport. A carrier's decision to locate such facilities is based on the negotiation of a lease or sale of property. Accordingly, the Department relies on the normal forces of competition for nonaeronautical commercial or industrial property to assure that fees for such property are not excessive.

C. Applicability of § 113 of the FAA Authorization Act of 1994

Section 113 of the Federal Aviation Authorization Act of 1994 (''Authorization Act''), 49 U.S.C. § 47129, directs the Secretary of Transportation to issue a determination on the reasonableness of certain fees imposed on air carriers in response to carrier complaints or a request for determination by an airport proprietor. Section 47129 further directs the Secretary to publish final regulations, policy statements, or guidelines establishing procedures for deciding cases under § 47129 and the standards to be used by the Secretary in determining whether a fee is reasonable. Section 47129 also provides for the issuance of credits or refunds in the event that the Secretary determines a fee is unreasonable after a complaint is filed. Section 47129(e) excludes from the applicability of § 47129 a fee imposed pursuant to a written agreement with air carriers, a fee imposed pursuant to a financing agreement or covenant entered into before the date of enactment of the statute (August 23, 1994), and an existing fee not in dispute on August 23, 1994. Section 47129(f) further provides that § 47129 shall not adversely affect the rights of any party under existing air carrier/airport agreements or the ability of an airport to meet its obligations under a financing agreement or covenant that is in effect on August 23, 1994.

The Department interprets § 47129 to apply to fees imposed on foreign as well as U.S. air carriers.

In addition, the Department does not interpret § 47129 to repeal or narrow the scope of the basic requirement that fees imposed on all aeronautical users be reasonable and not unjustly discriminatory or to narrow the obligation on the Secretary to receive satisfactory assurances that, inter alia, airport sponsors will provide access on reasonable terms before approving Airport Improvement Program (''AIP'') grants. Moreover, the Department does not interpret sections 47129(e) and (f) to preclude the Department from adopting policy guidance to carry out the Department's statutory obligation to assure that aeronautical fees are being imposed at AIP-funded airports in a manner that is consistent with the obligation to provide airport access on reasonable terms.

Therefore, the Department will apply the policy guidance in all cases in which we are called upon to determine if an airport sponsor is carrying out its obligation to make the airport available on reasonable terms. However, a dispute that is not subject to processing under the expedited procedures mandated by § 47129, including a dispute over matters described by §§ 47129 (e) and (f), will be processed by the FAA under procedures applicable to airport compliance matters in general. In considering such a dispute, the FAA's role is to determine whether the airport proprietor is in compliance with its grant obligations and statutory obligations relating to airport fees. The FAA proceeding is not intended to provide a mechanism for adjudicating the respective rights of the parties to a fee dispute.

In addition, the Department will not entertain a complaint about the reasonableness of a fee set by agreement filed by a party to the agreement setting the disputed fee. In the case of a complaint about the reasonableness of a fee set by agreement filed by an aeronautical user who is not a party to the agreement, the Department may take into account the existence of an agreement between air carriers and the airport proprietor, in making a determination on the complaint.

Further, the FAA will not ordinarily investigate the reasonableness of a general aviation airport's fees absent evidence of a progressive accumulation of surplus aeronautical revenues.

D. Components of Airfield

The Department considers the airfield assets to consist of ramps or aprons not subject to preferential or exclusive lease or use agreements, runways, taxiways, and land associated with these facilities. The Department also considers the airfield to include land acquired for the purpose of assuring land-use compatibility with the airfield, if the land is included in the rate base associated with the airfield under the provisions of this policy.

Principles Applicable to Airport Rates and Charges

1. In general, the Department relies upon airport proprietors, aeronautical users, and the market and institutional arrangements within which they operate, to ensure compliance with applicable legal requirements. Direct Federal intervention will be available, however, where needed.

2. Rates, fees, rentals, landing fees, and other service charges (''fees'') imposed on aeronautical users for aeronautical use of airport facilities (''aeronautical fees'') must be fair and reasonable.

3. Aeronautical fees may not unjustly discriminate against aeronautical users or user groups.

4. Airport proprietors must maintain a fee and rental structure that in the circumstances of the airport makes the airport as financially self-sustaining as possible.

5. In accordance with relevant Federal statutory provisions governing the use of airport revenue, airport proprietors may expend revenue generated by the airport only for statutorily allowable purposes.

Local Negotiation and Resolution

1. In general, the Department relies upon airport proprietors, aeronautical users, and the market and institutional arrangements within which they operate, to ensure compliance with applicable legal requirements. Direct Federal intervention will be available, however, where needed.

1.1 The Department encourages direct resolution of differences at the local level between aeronautical users and the airport proprietor. Such resolution is best achieved through adequate and timely consultation between the airport proprietor and the aeronautical users about airport fees.

1.1.1 Airport proprietors should consult with aeronautical users well in advance, if practical, of introducing significant changes in charging systems and procedures or in the level of charges. The proprietor should provide adequate information to permit aeronautical users to evaluate the airport proprietor's justification for the change and to assess the reasonableness of the proposal. For consultations to be effective, airport proprietors should give due regard to the views of aeronautical users and to the effect upon them of changes in fees. Likewise, aeronautical users should give due regard to the views of the airport proprietor and the financial needs of the airport.

1.1.2 To further the goal of effective consultation, Appendix 1 of this policy statement contains a description of information that the Department considers would be useful to the U.S. and foreign air carriers and other aeronautical users to permit meaningful consultation and evaluation of a proposal to modify fees.

1.1.3 Airport proprietors should consider the public interest in establishing airport fees, and aeronautical users should consider the public interest in consulting with airports on setting such fees.

1.1.4 Airport proprietors and aeronautical users should consult and make a good-faith effort to reach agreement. Absent agreement, airport proprietors are free to act in accordance with their proposals, subject to review by the Secretary or the Administrator on complaint by the user or, in the case of fees subject to 49 U.S.C. § 47129, upon request by the airport operator, or, in unusual circumstances, on the Department's initiative.

1.1.5 To facilitate local resolution and reduce the need for direct Federal intervention to resolve differences over aeronautical fees, the Department encourages airport proprietors and aeronautical users to include alternative dispute resolution procedures in their lease and use agreements.

1.1.6 Any newly established fee or fee increase that is the subject of a complaint under 49 U.S.C. § 47129 that is not dismissed by the Secretary must be paid to the airport proprietor under protest by the complainant. Unless the airport proprietor and complainant agree otherwise, the airport proprietor will obtain a letter of credit, or surety bond, or other suitable credit instrument in accordance with the provisions of 49 U.S.C. § 47129(d). Pending issuance of a final order determining reasonableness, an airport proprietor may not deny a complainant currently providing air service at the airport reasonable access to airport facilities or services, or otherwise interfere with that complainant's prices, routes, or services, as a means of enforcing the fee, if the complainant has complied with the requirements for payment under protest.

1.2 Where airport proprietors and aeronautical users have been unable, despite all reasonable efforts, to resolve disputes between them, the Department will act to resolve the issues raised in the dispute.

1.2.1 In the case of a fee imposed on one or more U.S. air carriers or foreign air carriers, the Department will issue a determination on the reasonableness of the fee upon the filing of a written request for a determination by the airport proprietor or, if the Department determines that a significant dispute exists, upon the filing of a complaint by one or more U.S. air carriers or foreign air carriers, in accordance with 49 U.S.C. § 47129 and implementing regulations. Pursuant to the provisions of 49 U.S.C. § 47129, the Department may only determine whether a fee is reasonable or unreasonable, and may not set the level of the fee.

1.2.2 The Department will first offer its good offices to help parties reach a mutually satisfactory outcome in a timely manner. Prompt resolution of these disputes is always desirable since extensive delay can lead to uncertainty for the public and a hardening of the parties' positions. U.S. air carriers and foreign air carriers may request the assistance of the Department in advance of or in lieu of the formal complaint procedure described in 1.2.1.; however, the 60-day period for filing a complaint under § 47129 shall not be extended or tolled by such a request.

1.2.3 In the case of fees imposed on other aeronautical users, where negotiations between the parties are unsuccessful and a complaint is filed alleging that airport fees violate an airport proprietor's federal grant obligations, the Department will, where warranted, exercise the agency's broad statutory authority to review the legality of those fees and to issue such determinations and take such actions as are appropriate based on that review. Other aeronautical users may also request the assistance of the Department in advance of, or in lieu of, the filing of a formal complaint with the FAA.

1.3 Airport proprietors must retain the ability to respond to local conditions with flexibility and innovation. An airport proprietor is encouraged to achieve consensus and agreement with its aeronautical users before implementing a practice that would represent a major departure from this guidance. However, the requirements of any law, including the requirements for the use of airport revenue, may not be waived, even by agreement with the aeronautical users.

Fair and Reasonable Fees

2. Rates, fees, rentals, landing fees, and other service charges (''fees'') imposed on aeronautical users for the aeronautical use of the airport (''aeronautical fees'') must be fair and reasonable.

2.1 Federal law does not require a single approach to airport rate-setting. Fees may be set according to a ''residual'' or ''compensatory'' rate-setting methodology, or any combination of the two, or according to another rate-setting methodology, as long as the methodology used is applied consistently to similarly situated aeronautical users and conforms with the requirements of this policy. Airport proprietors may set fees for aeronautical use of airport facilities by ordinance, statute or resolution, regulation, or agreement.

2.1.1 Aeronautical users may receive a cross-credit of nonaeronautical revenues only if the airport proprietor agrees. Agreements providing for such cross-crediting are commonly referred to as ''residual agreements'' and generally provide a sharing of nonaeronautical revenues with aeronautical users. The aeronautical users may in turn agree to assume part or all of the liability for non-aeronautical costs. An airport proprietor may cross-credit nonaeronautical revenues to aeronautical users even in the absence of such an agreement, but an airport proprietor may not require aeronautical users to cover losses generated by nonaeronautical facilities except by agreement.

2.1.2 In other situations, an airport proprietor assumes all liability for airport costs and retains all airport revenues for its own use in accordance with Federal requirements. This approach to airport rate-setting is generally referred to as the compensatory approach.

2.1.3 Airports frequently adopt rate-setting systems that employ elements of both approaches.

2.2 Revenues from fees imposed for use of the airfield (''airfield revenues'') may not exceed the costs to the airport proprietor of providing airfield services and airfield assets currently in aeronautical use unless otherwise agreed to by the affected aeronautical users.

2.3 The ''rate base'' is the total of all costs of providing airfield facilities and services to aeronautical users (which may include a share of public-use roadway costs allocated to the airfield in accordance with this policy) that may be recovered from aeronautical users through fees charged for providing airfield aeronautical services and facilities (''airfield fees''). Airport proprietors must employ a reasonable, consistent, and ''transparent'' (i.e., clear and fully justified) method of establishing the rate base and adjusting the rate base on a timely and predictable schedule.

2.4 Except as provided in paragraph 2.5.3(a) below or by agreement with aeronautical users, costs properly included in the rate base are limited to all operating and maintenance expenses directly and indirectly associated with the provision of airfield aeronautical facilities and services, including environmental costs, as set forth below, (and may include a share of public-use roadway costs allocated to the airfield in accordance with this policy); all capital costs associated with the provision of airfield aeronautical facilities and services currently in use, as set forth below; and current costs of planning future aeronautical airfield facilities and services. In addition, a private equity owner of an airport can include a reasonable return on investment in the airfield.

2.4.1 The airport proprietor may include in the rate base, at a reasonable rate, imputed interest on funds used to finance airfield capital investments for aeronautical use or lands acquired for airfield use, as provided below, except to the extent that the funds are generated by airfield fees. However, the airport proprietor may not include in the rate base imputed interest on funds obtained by debt-financing if the debt-service costs of those funds are also included in the rate base.

(a) A private equity owner of an airport who has included a reasonable rate of return element in the rate base may not include an imputed interest charge as well.

2.4.2 Airport proprietors may include reasonable environmental costs in the rate base to the extent that the airport proprietor incurs a corresponding actual expense. All revenues received based on the inclusion of these costs in the rate base are subject to Federal requirements on the use of airport revenue. Reasonable environmental costs include, but are not necessarily limited to, the following:

(a) the costs of investigating and remediating environmental contamination caused by airfield operations at the airport at least to the extent that such investigation or remediation is required by or consistent with local, state or federal environmental law, and to the extent such requirements are applied to other similarly situated enterprises.

(b) the cost of mitigating the environmental impact of an airport development project (if the development project is one for which costs may be included in the rate base), at least to the extent that these costs are incurred in order to secure necessary approvals for such projects, including but not limited to approvals under the National Environmental Policy Act and similar state statutes;

(c) the costs of aircraft noise abatement and mitigation measures, both on and off the airport, including but not limited to land acquisition and acoustical insulation expenses, to the extent that such measures are undertaken as part of a comprehensive and publicly-disclosed airport noise compatibility program; and

(d) the costs of insuring against future liability for environmental contamination caused by current airfield activities. Under this provision, the costs of self-insurance may be included in the rate base only to the extent that they are incurred pursuant to a self-insurance program that conforms to applicable standards for self-insurance practices.

2.4.3 Airport proprietors are encouraged to establish fees with due regard for economy and efficiency.

2.4.4 The airport proprietor may include in the rate base amounts needed to fund debt service and other reserves and to meet cash flow requirements as specified in financing agreements or covenants (for facilities in use), including, but not limited to, reasonable amounts to meet debt-service coverage requirements; to fund cash reserves to protect against the risks of cash-flow fluctuations associated with normal airfield operations; and to fund reasonable cash reserves to protect against other contingencies.

2.4.5 Unless otherwise agreed by aeronautical users, the airport proprietor must allocate capital and operating costs among cost centers in accordance with the following guidance, which is based on the principle of cost causation:

(a) Costs of airfield facilities and services directly used by the aeronautical users may be fully included in the rate base, in a manner consistent with this policy. For example, the capital cost of a runway may be included in the rate base used to establish landing fees.

(b) Costs of airport facilities and services used for both aeronautical and non-aeronautical uses (shared costs) may be included in the rate base if the facility or service in question supports the airfield activity reflected in that rate base. The portion of shared costs allocated to aeronautical users and among aeronautical uses should not exceed an amount that reflects the respective aeronautical purposes and proportionate aeronautical uses of the facility in relation to each other and in relation to the nonaeronautical use of the facility, and must be allocated by a reasonable, ‘‘transparent’’ and not unjustly discriminatory methodology. Aeronautical users may not be allocated all costs of facilities or services that are used by both aeronautical and nonaeronautical users unless they agree to that allocation. Likewise, the airfield may not be allocated all of the aeronautical share of commonly-used facilities or services, unless the airfield is the only aeronautical use the facility or service supports.

2.5 Airport proprietors must comply with the following practices in establishing the rate base, provided, however, that one or more aeronautical users may agree to a rate base that deviates from these practices in the establishment of those users’ fees.

2.5.1 In determining the total costs that may be recovered from fees for the use of airfield assets and public-use roadways in the rate base, the airport proprietor must value them according to their historic cost to the original airport proprietor (HCA). Subsequent airport proprietors generally shall acquire the cost basis of such assets at the original airport proprietor’s historic cost, adjusted for subsequent improvements.

(a) Where the land associated with airfield facilities and public use roadways was acquired with debt-financing, the airport proprietor may include such land in the rate base by charging all debt service expenditures incurred by the airport proprietor, including principal, interest and reasonable amounts to meet debt-service coverage requirements.

(b) If such land was acquired with internally generated funds or donated by the airport sponsor (the entity that executes grant agreements with the FAA for airport improvements), the airport proprietor may elect to either include a reasonable amortization charge in the rate base or to retain the full value of the land in the rate base and charge imputed interest in accordance with this policy. The Department considers it unreasonable to alternate between methodologies to obtain undue compensation.

(c) In determining whether an amortization charge is reasonable under paragraph (b), the Department will consider, among other factors, whether the airport proprietor selected an amortization period that gives appropriate recognition to the non-wasting nature of land.

(d) Upon retirement of the debt or completion of the amortization (when the airport proprietor has elected amortization), the land may no longer be included in the rate base.

(e) The airport proprietor may use a reasonable and not unjustly discriminatory methodology to allocate the total airfield costs among individual components of the airfield to enhance the efficient use of the airfield, even if that methodology results in fees charged for a particular segment that exceed that segment’s pro rata share of costs based on HCA valuation.

2.5.2 When assets in the rate-base have different costs, the airport proprietor may combine the costs of comparable assets to develop a single cost basis for those assets.

2.5.3 Except as provided below or as otherwise agreed by airfield users, the costs of facilities not yet built and operating may not be included in the rate base. However, the debt-service and other carrying costs incurred by the airport proprietor during construction may be capitalized and amortized once the facility is put in service. The airport proprietor may include in the rate base the cost of land that facilitates the current operations of the airfield.

(a) The Department will consider an airport proprietor’s claim that inclusion of the costs of land acquired for future airport development is reasonable if (i) costs of land surrounding the airport are rising;

(ii) incompatible uses and development are encroaching on available land;

(iii) land probably will not be available for airport use in the future; and

(iv) the development for which the land is being acquired is contained in the airport proprietor’s currently effective five-year capital improvement plan for the airport.

2.5.4 The rate base of an airport may include costs associated with another airport currently in use only if: (1) The proprietor of the first airport is also the proprietor of the other airport; (2) the other airport is currently in use; and (3) the costs of the other airport to be included in the first airport’s rate base are reasonably related to the aviation benefits that the other airport provides or is expected to provide to the aeronautical users of the first airport.

(a) Element no. 3 above will be presumed to be satisfied if the other airport is designated as a reliever airport for the first airport in the FAA’s National Plan of Integrated Airport Systems (‘‘NPIAS’’).

(b) In the case of a methodology of charging for a system of airports that is in place on the effective date of this policy, the Department will consider an airport proprietor’s claim that the methodology is reasonable, even if all three elements are not satisfied.

(c) If an airport proprietor closes an operating airport as part of an approved plan for the construction and opening of a new airport, reasonable costs of disposition of the closed airport facility may be included in the rate base of the new airport, to the extent that such costs exceed the proceeds from the disposition. The Department would not ordinarily consider redevelopment costs to be a reasonable cost of disposition.

(d) Pending reasonable disposition of the closed airport, the airport proprietor may charge airfield users at the new airport for reasonable maintenance costs of the old airport, provided that those costs are refunded or credited-back to those users upon the receipt of the proceeds from a whole or partial disposition.

2.6 For other facilities and land not covered by Paragraph 2.2, the airport proprietor may use any reasonable methodology to determine fees, so long as the methodology is justified and applied on a consistent basis to comparable facilities, subject to the provisions of paragraphs 2.7 and 4.2.1 below.

2.6.1 Reasonable methodologies may include, but are not limited to, historic cost valuation, direct negotiation with aeronautical users, or objective determinations of fair market value.

2.6.2 If an airport proprietor determines fees for such other facilities on the basis of HCA costs, the airport proprietor must follow the guidance set forth in paragraph 2.4.5 for the allocation of shared costs.

2.7 At all times, airport proprietors must comply with the following practices:

2.7.1 Indirect costs may not be included in the fees charged for aeronautical use of the airport unless they are based on a reasonable, ''transparent'' cost allocation formula calculated consistently for other units or cost centers within the control of the airport sponsor.

2.7.2 The costs of airport development or planning projects paid for with federal government grants and contributions or passenger facility charges (PFCs) may not be included in the fees charged for aeronautical use of the airport.

(a) In the case of a PFC-funded project for terminal development, for gates and related areas, or for a facility that is occupied by one or more carriers on an exclusive or preferential use basis, the fees paid to use those facilities shall be no less than the fees charged for similar facilities that were not financed with PFC revenue.

Prohibition on Unjust Discrimination

3. Aeronautical fees may not unjustly discriminate against aeronautical users or user groups.

3.1 The airport proprietor must apply a consistent methodology in establishing fees for comparable aeronautical users of the airport. When the airport proprietor uses a cost-based methodology, aeronautical fees imposed on any aeronautical user or group of aeronautical users may not exceed the costs allocated to that user or user group under a cost allocation methodology adopted by the airport proprietor that is consistent with this guidance, unless aeronautical users otherwise agree.

3.1.1 The prohibition on unjust discrimination does not prevent an airport proprietor from making reasonable distinctions among aeronautical users (such as signatory and non-signatory carriers) and assessing higher fees on certain categories of aeronautical users based on those distinctions (such as higher fees for non-signatory carriers, as compared to signatory carriers).

3.2 A properly structured peak pricing system that allocates limited resources using price during periods of congestion will not be considered to be unjustly discriminatory. An airport proprietor may, consistent with the policies expressed in this policy statement, establish fees that enhance the efficient utilization of the airport.

3.3 Relevant provisions of the Convention on International Civil Aviation (Chicago Convention) and many bilateral aviation agreements specify, inter alia, that charges 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 among categories of users. Charges to foreign air carriers for aeronautical use that are inconsistent with these principles will be considered unjustly discriminatory or unfair and unreasonable.

3.4 Allowable costs—costs properly included in the rate base—must be allocated to aeronautical users by a transparent, reasonable, and not unjustly discriminatory rate-setting methodology. The methodology must be applied consistently and cost differences must be determined quantitatively, when practical.

3.4.1 Common costs (costs not directly attributable to a specific user group or cost center) must be allocated according to a reasonable, transparent and not unjustly discriminatory cost allocation methodology that is applied consistently, and does not require any aeronautical user or user group to pay costs properly allocable to other users or user groups.

Requirement To Be Financially Self-Sustaining

4. Airport proprietors must maintain a fee and rental structure that in the circumstances of the airport makes the airport as financially self-sustaining as possible.

4.1 If market conditions or demand for air service do not permit the airport to be financially self-sustaining, the airport proprietor should establish long-term goals and targets to make the airport as financially self-sustaining as possible.

4.1.1 Airport proprietors are encouraged, when entering into new or revised agreements or otherwise establishing rates, charges, and fees, to undertake reasonable efforts to make their particular airports as self sustaining as possible in the circumstances existing at such airports.

(a) Absent agreement with aeronautical users, the obligation to make the airport as self-sustaining as possible does not permit the airport proprietor to establish fees for the use of the airfield that exceed the airport proprietor's airfield costs.

(b) For those facilities for which this policy permits the use of fair market value, the Department does not construe the obligation on self-sustainability to compel the use of fair market value to establish fees.

4.1.2 At some airports, market conditions may not permit an airport proprietor to establish fees that are sufficiently high to recover aeronautical costs and sufficiently low to attract and retain commercial aeronautical services. In such circumstances, an airport proprietor's decision to charge rates that are below those needed to achieve self-sustainability in order to assure that services are provided to the public is not inherently inconsistent with the obligation to make the airport as self-sustaining as possible in the circumstances.

4.2 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 for which airport revenues may be spent under 49 U.S.C. § 47107(b)(1), including reasonable reserves and other funds to facilitate financing and to cover contingencies. While fees charged to nonaeronautical users may exceed the costs of service to those users, the surplus funds accumulated from those fees must be used in accordance with § 47107(b).

4.2.1 The Department assumes that the limitation on the use of airport revenue and effective market discipline for aeronautical services and facilities other than the airfield will be effective in holding aeronautical revenues, over time, to the airport proprietor's costs of providing aeronautical services and facilities, including reasonable capital costs. However, the progressive accumulation of substantial amounts of surplus aeronautical revenue may warrant an FAA inquiry into whether aeronautical fees are consistent with the airport proprietor's obligations to make the airport available on fair and reasonable terms.

Requirements Governing Revenue Application and Use

5. In accordance with relevant Federal statutory provisions governing the use of airport revenue, airport proprietors may expend revenue generated by the airport only for statutorily allowable purposes.

5.1 Additional information on the statutorily allowed uses of airport revenue is contained in separate guidance published by the FAA pursuant to § 112 of the FAA Authorization Act of 1994, which is codified at 49 U.S.C. § 47107(l).

5.2. The progressive accumulation of substantial amounts of airport revenues may warrant an FAA inquiry into the airport proprietor's application of revenues to the local airport system.

Issued in Washington, DC, on June 14, 1996.

Federico Peña,

Secretary of Transportation.

David R. Hinson,

Administrator, Federal Aviation Administration.

Appendix 1—Information for Aeronautical User Charges Consultations

The Department of Transportation ordinarily expects the following information to be available to aeronautical users in connection with consultations over changes in airport rates and charges:

1. Historic Financial Information covering two fiscal years prior to the current year including, at minimum, a profit and loss statement, balance sheet and cash flow statement for the airport implementing the charges, and any financial reports prepared by the airport proprietor to satisfy the provisions of 49 USC §§ 47107(a)(19) and 47107(k).

2. Justification. Economic, financial and/or legal justification for changes in the charging methodology or in the level of aeronautical rates and charges at the airport. Airports should provide information on the aeronautical costs they are including in the rate base.

3. Traffic Information. Annual numbers of terminal passengers and aircraft movements for each of the two preceding years.

4. Planning and Forecasting Information.

(a) To the extent applicable to current or proposed fees, the long-term airport strategy setting out long-term financial and traffic forecasts, major capital projects and capital expenditure, and particular areas requiring strategic action. This material should include any material provided for public or government reviews of major airport developments, including analyses of demand and capacity and expenditure estimates.

(b) Accurate, complete information specific to the airport for the current and the forecast year, including the current and proposed budgets, forecasts of airport charges revenue, the projected number of landings and passengers, expected operating and capital expenditures, debt service payments, contributions to restricted funds, or other required accounts or reserves.

(c) To the extent the airport uses a residual or hybrid charging methodology, a description of key factors expected to affect commercial or other nonaeronautical revenues and operating costs in the current and following years.

[FR Doc. 96–15687 Filed 6–19–96; 8:45 am]

BILLING CODE 4910–13–P

Federal Aviation Administration

[Summary Notice No. PE–96–30]

Petitions for Exemption; Summary of Petitions Received; Dispositions of Petitions Issued

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of petitions for exemption received and of dispositions of prior petitions.

SUMMARY: Pursuant to FAA's rulemaking provisions governing the application, processing, and disposition of petitions for exemption (14 CFR Part 11), this notice contains a summary of certain petitions seeking relief from specified requirements of the Federal Aviation Regulations (14 CFR Chapter I), dispositions of certain petitions previously received, and corrections. The purpose of this notice is to improve the public's awareness of, and participation in, this aspect of FAA's regulatory activities. Neither publication of this notice nor the inclusion or omission of information in the summary is intended to affect the legal status of any petition or its final disposition.

FOR FURTHER INFORMATION CONTACT: Mr. D. Michael Smith, Office of Rulemaking (ARM–1), Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591; telephone (202) 267–7470.

This notice is published pursuant to paragraphs (c), (e), and (g) of § 11.27 of Part 11 of the Federal Aviation Regulations (14 CFR Part 11).

Issued in Washington, D.C., on June 18, 1996.

Donald P. Byrne,

Assistant Chief Counsel for Regulations.

Dispositions of Petitions

Docket No.: 5010.

Petitioner: Office of Aviation Standards (FAA) and the Department of the Air Force

Sections of the FAR Affected: 14 CFR 91.119 (b) and (c), 91.159, 91.175 (a) and (b), and 91.179(b)

Description of Relief Sought/ Disposition: To amend Exemption No. 5118, as amended, which permits the FAA Office of Aviation Standards to deviate from certain flight rules required by subpart B of part 91 while conducting flight inspections of air navigation facilities and instrument approach procedures. The amendment lists the Department of the Air Forces Flight Inspection Center as an exemption holder on Exemption No. 5118, as amended, and terminates Exemption Nos. 48A and 132E. *GRANT, May 16, 1996, Exemption No. 5118B.*

Docket No.: 28212.

Petitioner: Air Logistics.

Sections of the FAR Affected: 14 CFR 135.243 (b) and (c) and 135.245(a).

Description of Relief Sought/ Disposition: To allow a foreign pilot who does not possess a pilot certificate issued by the FAA to act as pilot in command (PIC) or second in command (SIC) on Air Logistics aircraft during operations conducted under part 135. *DENIAL, May 21, 1996, Exemption No. 6439.*

Docket No.: 28367.

Petitioner: Mr. Stephen R. Raklovits.

Sections of the FAR Affected: 14 CFR 103.11.

Description of Relief Sought/ Disposition: To permit Mr. Raklovits to operate a powered parachute-type ultralight at night conducting demonstrations, training, and special use operations, including search, rescue, and surveillance, for local, State, and Federal law enforcement agencies. *DENIAL, May 21, 1996, Exemption No. 6440.*

Docket No.: 28419.

Petitioner: United Parcel Service.

Sections of the FAR Affected: 14 CFR 121.433(c)(1)(iii), 121.440(a), 121.441 (a)(1) and (b)(1), and appendix F of part 121.

Description of Relief Sought/ Disposition: To permit the United Parcel Service regulatory relief to the extent necessary to conduct a single visit training program (SVTP) for flight crewmembers, and eventually transition into the Advance Qualification Program (AQP) codified in SFAR 58. *GRANT, May 8, 1996, Exemption No. 6434.*

Docket No.: 28432.

Petitioner: Department of Justice, Federal Bureau of Investigation.

Sections of the FAR Affected: 14 CFR 91.209 (a) and (d).

Description of Relief Sought/ Disposition: To permit the FBI, to the extent necessary, to conduct aerial surveillance operations that are necessary for the performance of its law enforcement and national security mission. *PARTIAL GRANT, May 20, 1996, Exemption No. 6437.*

Docket No.: 28532.

Petitioner: J.R. Aviation, Inc.

Sections of the FAR Affected: 14 CFR 135.143(c)(2).

Description of Relief Sought/ Disposition: To permit J.R. Aviation, Inc., to operate its Robinson R22 helicopter (Registration No. N2346J, Serial No. 2211), without a TSO–C112 (Mode S) transponder installed. *GRANT, May 21, 1996, Exemption No. 6438.*

Docket No.: 28551.