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Legal Issues Relating to Airports Promoting Competition

This digest was prepared under ACRP Project 11-01, "Legal Aspects of Airport Programs," for which the Transportation Research Board (TRB) is the agency coordinating the research. Under Topic 09-02, this digest was prepared by Eric T. Smith, Kaplan Kirsch & Rockwell, LLP, Washington, DC. The responsible program officer is Marci A. Greenberger.

Background

There are over 4,000 airports in the country and most of these airports are owned by governments. A 2003 survey conducted by Airports Council International–North America concluded that city ownership accounts for 38 percent, followed by regional airports at 25 percent, single county at 17 percent, and multi-jurisdictional at 9 percent. Primary legal services to these airports are, in most cases, provided by municipal, county, and state attorneys.

Research reports and summaries produced by the Airport Continuing Legal Studies Project and published as ACRP Legal Research Digests are developed to assist these attorneys seeking to deal with the myriad of legal problems encountered during airport development and operations. Such substantive areas as eminent domain, environmental concerns, leasing, contracting, security, insurance, civil rights, and tort liability present cutting-edge legal issues where research is useful and indeed needed. Airport legal research, when conducted through the TRB's legal studies process, either collects primary data that usually are not available elsewhere or performs analysis of existing literature.

Foreword

The widespread consolidation that has occurred within the U.S. airline industry (leaving just four majors or network carriers), as well as the rise of several air carrier business models (including "Ultra Low Cost Carriers" that often fly only one flight to certain cities a few days a week), has fundamentally changed the nature of air service and the competition among air carriers at airports.

Consolidation also has occurred in the fixed-base operator (FBO) arena and competition among these service providers has been significantly altered or eliminated. Airport operators have an obligation under their federal grant assurances to provide access to air carriers and FBOs, and certain categories of airports must develop competition plans. Airports also must not grant exclusive rights to aeronautical service providers.

These obligations on airports to not "unjustly discriminate" those seeking to provide aeronautical services can be challenging for airports to meet these obligations while also addressing the needs of the general aviation community in which they serve. The same can apply at commercial service airports that may not have the appropriate capacity to properly serve potential new entrants.

This digest serves to provide to airport lawyers, management, and staff the legally permissible means and methods of encouraging and accommodating competition at U.S. airports. It discusses the history of how competition has been addressed by government and airports and provides the context of the concentration of air carriers and FBOs, the accommodation of air carriers with differing business models, and avoiding the grant of exclusive rights when aeronautical service providers merge.

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LEGAL ISSUES RELATING TO AIRPORTS PROMOTING COMPETITION

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I. PREFACE/SUMMARY

Competition among airlines and fixed-base operators (FBOs) at U.S. airports presents a myriad of issues for the airport sponsor, its executives and for local elected officials—all of whom themselves often face multidimensional challenges and needs. U.S. airports, and especially those which have used federal airport improvement funds, operate within a unique atmosphere.

Congress, through the enactment of airport funding legislation, created a broad and general framework within which airport sponsors must operate. Much of this general framework has been supplemented by United States Department of Transportation / Federal Aviation Administration (DOT/FAA) and provides airport sponsors with some further guidelines within which airports must operate. This framework/guidance, however, relies largely upon general standards such as dealing with airlines and FBOs in a "reasonable" and "not unjustly discriminatory" manner. Given this fact, the resolution of competition issues at any particular airport is necessarily highly dependent upon the locally-derived factual context and, therefore, requires locally-derived solutions.

This digest provides guidance for airport lawyers, management, and staff regarding the legally permissible means and methods of encouraging and accommodating competition at U.S. airports among air carriers and FBOs. It provides a roadmap for understanding the theories, policy, and federal regulatory framework[1] for addressing competition-related concerns at U.S. airports, insight into industry standards and best practices, and guidance for how airport owners and operators may foster competition among air carriers and FBOs.

II. INTRODUCTION

The aviation industry and its competitive landscape in particular has changed significantly over the past two decades. The consolidation of several major airlines, most following their emergence from bankruptcy, as well as the rise of several different business models among air carriers, has fundamentally changed the nature of competition among air carriers at airports. At many airports, there is a concentration of air service among one or more large carriers or an otherwise overwhelmingly dominant carrier. Other airports, particularly small and non-hub airports, have experienced significant declines in commercial air service or, in some cases, the departure of commercial air service altogether. At the same time, the number of FBOs operating nationwide has generally declined, in many cases also through industry consolidation.

While the circumstances of each airport are unique, many of the challenges faced by airports proprietors seeking to foster a robust competitive environment share common elements. The majority of public-use airports in the United States operate under a comprehensive regulatory framework that is imposed as a condition of receiving federal Airport Improvement Program (AIP) grants and/or collecting Passenger Facility Charges (PFCs). It largely consists not of direct regulations issued by the FAA, but rather federal influence exerted indirectly through agreements, incentives, and background laws. This framework not only requires airport sponsors to provide a competitive environment in which aeronautical users and service providers have access to the airport, but also governs (and, in some cases, may limit) airport sponsors' ability to respond to particular competitive concerns in important ways. For example, the AIP grant assurances requires airport sponsors to provide access to the public on reasonable and not unjustly discriminatory terms, and to refrain from granting "exclusive rights" to aeronautical service providers. But at the same time, the principle of unjust discrimination may restrict a sponsors' ability to open up monopolistic or oligarchic markets. An airport's ability to offer more favorable terms to a new entrant carrier or FBO on a long-term or ongoing basis, for example, is highly restricted and often subject to scrutiny by incumbents and the FAA.

It is therefore important that airport sponsors understand this regulatory framework, as well as aeronautical service providers' economic motives, in order to address competitive issues and ensure the long-term viability of their airports. The authors intend this report as a guide to better understanding these factors as they relate to managing competition between air carriers and FBOs at federally-obligated airports. It is specifically geared toward the legal implications of managing competition, including coping with concentrations of air carriers and FBOs, accommodating air carriers with differing business models, and avoiding exclusive rights violations as the result of aeronautical service providers' merger or acquisition.

This report begins with a historical introduction to air carrier and FBO competition at U.S. airports, including the development of the existing regulatory structure and mechanisms to ensure competition at airports and the various economic

[1] Where terms such as "regulatory" or "regulatory framework" are used in this digest, they are intended to encompass the full panoply of federal influence upon competition issues, ranging from federal legislation, regulations issued by federal agencies, formal and information statements made by federal agencies (ex. FAA and DOT), and contractual provisions included in grant agreements between the FAA and airport sponsors.

elements at play. Next, this report details those aspects of the federal regulatory framework and other legal authorities most often implicated by efforts to promote competition. Finally, this report highlights common situations, the strategies and techniques that airports have developed to address them, and their attendant legal implications (and potential pitfalls) that airport sponsors must keep in mind.

III. COMPETITION IN CONTEXT

Airports occupy a unique position in the U.S. transportation system. Once viewed as simply a terminus for travel, airports now are looked upon as a key component in regional economic development, the "front door" to a city or a region, a standalone enterprise that is expected to generate profits, a critical link to the rest of the United States or the world, and/or a quasi-public utility that exists as an essential service for the local citizens.[2] One could certainly add to this list; however, it is clear that airports are tasked to serve multiple roles and, regardless of which of the above is most prominent at a particular airport, airports are no longer viewed as simply a place to board an aircraft.

Airports, cities, and regions compete for air service and, in many cases, to be a destination for general aviation traffic. Within this broad competitive setting are the factors affecting competition among air carriers and on-airport businesses.

The role of the airport proprietor in all of this is complex. Airport executives often find themselves being pulled in multiple directions depending upon which group may be attempting to influence policy at the moment. It is essential that personnel who are responsible for managing this set of complex and often competing factors has command of the legal, practical and historical context that must be considered.

A. DOT/FAA Approach to Regulating Competition

The roots of the modern approach to aviation policy and regulation in the context of ensuring adequate competition reach back to a 40-year-old, then-seismic shift in thinking regarding the economics of the aviation industry and strength of the market forces in play.

Prior to the 1970s, federal regulatory policy was based on the assumption that airline competition was characterized by unstable market characteristics, including monopolistic/oligopolistic and destructive competition tendencies.[3] As a result, federal regulation was thought necessary to serve as a countervailing force to these anticompetitive tendencies.

From the 1960s to the 1970s, however, this economic theory fell largely into disrepute. In its place, economists and policymakers sought to frame the airline industry as a "competitive" or "contestable" market under a neoclassical economic analysis.[4] This perspective posited that the ability of market participants to enter, exit, and compete in the market was sufficiently low that it approximated a "pure" market in which no one entity could control prices.[5] Under this standard, economic regulation of airline fares and routes was thought to inhibit the efficiency of airlines to meet the needs of the flying public.

With limited exceptions, federal aviation policy continues to reflect the core tenet of competitive markets, asserting that deregulation can achieve better outcomes "only if market forces can discipline the pricing behavior of all air carriers" (i.e., only if true competition between carriers is achieved).[6] The same economic logic suggests that "competition is strongest when there are many firms in a market, and no firm has a substantial share of that market."[7] The adequacy of competition, therefore, is often measured by referring to two elements of the market structure—the concentration and number of effective competitors[8]—both of which federal regulations generally attempt to maximize.

Accordingly, rather than direct regulation through the sort of public convenience and necessity determinations that dominated the pre-deregulation era, today most federal influence is exerted indirectly through agreements, incentives, and background laws that attempt to ensure adequately competitive environments in which market forces can act.[9] Indeed, the U.S. DOT is directed to carry out its programs by "placing maximum reliance on competitive market forces and on actual and potential competition to provide the needed air transportation system"[10] and to "encourage[e], develop[], and maintain[] an air transportation system relying on actual and potential competition to provide efficiency, innovation and low prices, and to decide on the variety and quality of, and determine prices for, air transportation services."[11]

The shift in regulatory approach means that airlines are now largely free to enter and exit markets as they please, but it also places greater responsibility on airport sponsors to ensure that

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[2] A deeper look at the role of airports in the United States can be found in a previous ACRP publication. *See,* Economic Development Research Gr., Inc., The Role of U.S. Airports in the National Economy, (Airport Cooperative Research Program Report 132, 2015).

[3] Michael E. Levine, *Airline Competition in Deregulated Markets: Theory, Firm Strategy, and Public Policy,* 4 Yale J. On Reg. 393, 393 (1987); Michael E Levine, *Revisionism Revised? Airline Deregulation and the Public Interest*, 44(1) Law & Contemp. Probs. 179-195 (1981); Andrew R. Goetz and Timothy M Vowles, *The Good, the Bad, and the Ugly: 30 Years of US Airline Deregulation*, 17(4) J. Transp. Geography 251-63 (July 2009).

[4] Levine (1987), *supra* note 3 at 399; Goetz and Vowles, *supra* note 3 at 5.

[5] Levine (1987), *supra* note 3 at 399.

[6] FAA/OST Task Force Study, *Airport Business Practices and Their Impact on Airline Competition*, at ii (Oct. 1999) [hereinafter FAA/OST Task Force Study]. *See also,* U.S. Dept. of Transp., Docket OST-98-3713, *Enforcement Policy Regarding Unfair Exclusionary Conduct in the Air Transportation Industry, Findings and Conclusions on the Economic Policy, and Legal Issues* 5 (2001) [hereinafter OST-98-3713].

[7] U.S. Gov't Accountability Office, GAO-14-515, Airline Competition: The Average Number of Competitors in Markets Serving the Majority Of Passengers Has Changed Little In Recent Years, But Stakeholders Voice Concerns About Competition, 6 (June 2014) [hereinafter GAO-14-515].

[8] *Id.* at 8.

[9] FAA/OST Task Force Study, *supra* note 6.

[10] 49 U.S.C. § 40101(a)(6).

[11] 49 U.S.C. § 40101(a)(12).

the market provides adequate air service for their communities. In this context, the indirect tools of federal policy, implemented through contractual agreements that contain the conditions for receiving federal funding and land grant subsidies, become the critical foci for airports in balancing mandates to promote competition and serve the interest of the flying public. These contractual tools act both as constraints on airport sponsor control over commercial aeronautical activities and as leverage that airport sponsors can use to guide and promote competition.

The means, methods, and parameters which are employed in seeking additional providers (or for that matter, to entice existing providers to expand service) are important variables in the competition equation. The contractual arrangements between the airport and the service provider also becomes an important variable. Both of these components must comply with applicable federal law, regulations, and guidance, address the current business environment, and anticipate what could change during the pendency of the contract.

While largely outside the scope of this report, a robust body of antitrust law has also developed to control anticompetitive behavior regarding the use of limited resources, unreasonable concentrations of market share, price-fixing, and other practices. The most important federal antitrust statute in this context is the Clayton Antitrust Act of 1914,[12] which prohibits mergers and acquisitions where the effect "may be substantially to lessen competition, or tend to create a monopoly."[13] Although the Department of Justice (DOJ) enforces the Clayton Act, the DOT conducts its own antitrust analysis on large airline mergers, which it shares with the DOJ. These antitrust restrictions provide another tool to implement federal policy, although in a way less directly relevant to airport sponsors.

Federal influence is also seen through programs to temper the impact of deregulated carriers' profit-driven motives on service to smaller markets. For example, programs such as Essential Air Service (EAS) and the Small Community Air Service Development Programs, have been developed to facilitate service in areas where the market might not otherwise respond to available demand. For some remote or isolated communities, subsidies through EAS or other programs may be the only mechanism of ensuring viable access to the National Air Transportation and, thus, access to essential services. These programs therefore seek to balance the desire for market-driven results with the need to ensure acceptable availability of and access to public commercial air service, as well as reasonable fares.[14] While some lawmakers have questioned the effectiveness or propriety of such programs in recent years, local stakeholders (including elected officials) are typically swift to object to any proposed reductions.[15]

As in the airline industry, federal policy with respect to FBOs also reflects an approach to ensuring competition through market-driven means. The federal government relies primarily upon "market supply and demand to determine the availability of commercial aeronautical services"[16] with respect to FBOs. For example, federal law prohibits an airport sponsor from granting FBOs (or any other aeronautical service provider) exclusive rights, so as to "promote fair competition at federally-obligated, public use airports for the benefit of aeronautical users."[17] Similarly, airport sponsors are required to ensure a sort of "level playing field," by permitting access by FBOs and other aeronautical service providers on reasonable terms and without unjust discrimination. These restrictions are enforced through grant agreements between the federal government and the airport sponsor, and must also be embedded in the sponsor's agreements with FBOs and in an airport's governing documents.

While the economic theory and federal policy with respect to FBOs tracks that of the federal government's position on airline competition, there are important differences between the two industries. First, unlike the airline industry, whose economic activity was historically subject to extensive regulation, FBOs have never been directly regulated (apart from antitrust laws of general applicability). Accordingly, the federal government has always "strongly encourage[d] sponsors and users to resolve business and economic issues at a local level."[18] Second, the economics of the FBO industry, particularly at small, general aviation airports, often makes it difficult to retain enough FBOs to establish truly competitive local markets.

The net effect of the federal government's influential regulatory approach with respect to FBOs is that the burden of ensuring successful market competition is largely placed on the airport sponsor. The sponsor may, of course, take into consideration its own unique facts and circumstances in this endeavor. Airport sponsors have generally turned to minimum standards and negotiated terms of their agreements with FBOs to ensure adequate aeronautical services at airports. Because the economics regarding FBO competition vary greatly between

[12] Codified at 15 U.S.C. §§ 12-27.

[13] 15 U.S.C. § 18.

[14] The precise meaning and extent of the phrase "reasonable fares" under these programs may be subject to different interpretations depending on context. Federal law defines basic essential services as including flights "at prices that are not excessive compared to the generally prevailing prices of other air carrier for like service between similar places." 49 U.S.C. § 41732(b)(2). In the context of markets with very low underlying passenger demand, application of this standard could mean that fares may be acceptably reasonable even if significantly higher than corresponding fares with stronger underlying passenger demand and corresponding volume of available seats.

[15] *See,* Jesse Paul, *Essential Air Service, program that links small towns to hub airports, could be rescued from federal budget cuts*, The Denver Post (July 14, 2017), https://www.denverpost.com/2017/07/14/essential-air-service-federal-budget-cuts/.

[16] FAA, ACO-100, Q&As – FBO Industry Consolidation and Pricing Practices 5 (2017) [hereinafter FBO Q&As].

[17] FAA, Advisory Circular AC No. 150/5190-6, Exclusive Rights at Federally-Obligated Airports, (Jan. 4, 2007). *See also,* FBO Q&As, *supra* at 4 (An airport sponsor is prohibited from granting an exclusive right for the use of the airport. Nor may an airport sponsor grant a special privilege to anyone providing aeronautical services on the airport or engaging in an aeronautical use. The intent of these restrictions is to promote aeronautical activity and protect fair competition at federally obligated airports.").

[18] *Id.* at 5.

types and sizes of airports, as well as geography, airport sponsors must be strategic, purposeful, and deliberate in promoting FBO competition.

B. Airline Industry Trends

The federal approaches to regulation discussed above have shaped and are in large part responsible for the competitive environment that exists today.

Before 1978, the Civil Aeronautics Board (CAB) regulated elements of commercial interstate air service including fares, routes, and entry into the airline market, on the premise that such service constituted a public utility.[19] The CAB's oversight of air service ensured a strong governmental role in setting fares and routes for the public benefit, but resulted in sluggish regulatory processes and protectionist policies that benefited entrenched air service providers, and ultimately resulted in heightened fares and limited choice.[20] While the CAB and many existing legacy carriers initially fought to maintain the status quo, federal policymakers in the mid-1970s looked increasingly to successful examples of unregulated intrastate air service, as well as contemporaneous moves to deregulate road- and rail-based transportation, for solutions.[21]

In 1978, responding to increasing dissatisfaction with the service and cost of air travel in the United States, Congress passed the Airline Deregulation Act (ADA),[22] which set a schedule to sunset the CAB and close federal regulatory oversight over the routes commercial airlines served and the fares they charged.[23] This watershed moment profoundly impacted the U.S. airline industry, leading to what many argue are lower average prices, better service, and more technological innovation.[24] However, deregulation has created challenges in how to ensure adequate price and route competition to sustain a deregulated model.[25]

A flurry of market entry, mergers, and bankruptcies (both reorganizations and liquidations) reshaped the airline industry in the wake of deregulation.[26] By 1984, forty-seven new entrants had joined the roughly two dozen "legacy" carriers providing service in 1978.[27] However, nearly all of these exited the market or merged with other carriers by the end of the 1980s.[28]

Early on, federal regulators allowed for significant merger activity in the airline industry, in line with the market-oriented approach of the ADA. Mergers were (and remain) attractive to airlines because they generally increase profitability and financial viability through cost reductions and increased revenues.[29] Mergers may also result in cost reductions through the elimination of duplicative operations or redundant city-pair service,[30] and revenue increases through higher capacity, enhanced efficiencies, and greater market share.[31] However, the relatively laissez-faire approach in the 1980s gave way to more significant oversight of mergers and acquisitions in the 1990s, as the federal government took a stronger interest in regulating antitrust issues.[32]

At the turn of the century, the consolidation of major air carriers and their hub-and-spoke networks began to reveal potential flaws in the anticipated benefits of deregulation. By the late 1990s, hub airports dominated by a single carrier were increasing, and, as a result, fares between these airports were not dropping as anticipated.[33] Thus, in 2000, as part of a broad package of air travel reforms under the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR-21)[34], Congress introduced new requirements for major hub airports to develop and implement competition plans based on findings that reflected large airports were increasingly dominated by one airline.[35] Congress' action reflected mounting concern with airline consolidation, maintained a heavy reliance both on market forces and on the role of airport sponsors in ensuring adequate competition within the airline industry.

The terrorist attacks of September 11, 2001, and the subsequent global recession not only generated a great deal of anxiety regarding the viability of the airline industry, but dramatically altered the competitive landscape in the U.S. airline industry. Seeking enhanced cost efficiencies after emerging from bankruptcy protection, the late 2000s to early 2010s saw significant merger activity among major airlines. The DOJ allowed several mergers to proceed, including Delta's merger with Northwest Airlines in 2008 (creating the then-largest commercial airline in the world), and United's merger with Continental in 2010. However, the increasingly narrow field of major air-

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[19] John W. Barnum, What Prompted Airline Deregulation 20 Years Ago?, Presentation to the Aeronautical Law Committee of the Business Law Section of the International Bar Association (Sept. 15, 1998), available at http://corporate.findlaw.com/law-library/what-prompted-airline-deregulation-20-years-ago-what-were-the.html (visited Mar. 2, 2018).

[20] *Id*.

[21] *Id*.; Levine, *supra* note 3 at 394.

[22] Pub. L. No. 95-504, 92 Stat. 1705 (Oct. 24, 1978), codified at 49 U.S.C. § 41713 *et seq*.

[23] *See,* Severin Borenstein and Nancy L. Rose, *How airline markets work… or do they? Regulatory reform in the airline industry*, *in* Economic Regulation and Its Reform: What Have We Learned?, 63-135, at 75 (Nancy L. Rose ed., 2014).

[24] *See, id.*; OST-98-3713, *supra* note 6 at 5.

[25] *See,* Borenstein and Rose, *supra* note 23; Goetz and Vowles, *supra* note 3 at 10.

[26] *See,* U.S. Gov't Accountability Office, GAO-13-403T, Airline Mergers: Issues Raised by the Proposed Merger of American Airlines and US Airways, at 4 (June 19, 2013).

[27] Borenstein and Rose, *supra* note 23 at 87.

[28] *Id.* at 87-88.

[29] U.S. Gov't Accountability Office, GAO-08-845, Airline Industry: Potential Mergers and Acquisitions Driven by Financial and Competitive Pressures, at 5 (July 31, 2008).

[30] *Id.*

[31] *Id.*

[32] Borenstein and Rose, *supra* note 23.

[33] *See,* OST-98-3713, *supra* at 25, 27.

[34] Wendell H Ford Aviation Investment and Reform Act for the 21st Century, Pub. L. No. 106-181, 114 Stat. 61, 106th Cong. (Apr. 5, 2000) [hereinafter AIR-21].

[35] *Id.* Title V, Sec. 155, 114 Stat. at 88, codified at 49 U.S.C. § 40117 note.

lines compelled the DOJ to formally oppose the proposed US Airways–American Airlines merger in 2012, based on concerns of reduced competition on a number of affected routes.[36] The government ultimately reached an agreement that allowed the merger to occur, in return for measures meant to address the anti-competitive consequences (including the divestiture of landing slots and gates at key constrained airports to low cost carriers).[37] Most recently, Alaska Airlines acquired Virgin America in 2016, with approval from DOJ, thus continuing the trend towards consolidation through merger.[38]

Overall, the increase in mergers and bankruptcies since deregulation have resulted in fewer airlines operating a larger share of service. In the period between 1979 and 2012, Airlines for America (A4A) estimates at least 194 airline bankruptcies occurred.[39] Currently, the four largest domestic carriers—American, Southwest, Delta, and United—account for nearly 70 percent of the market share based on revenue passenger miles.[40] Comparatively fewer numbers of carriers competing for market share, the increasing occurrence of airports dominated by one carrier, and loss of service at smaller airports characterize the current state of affairs in the domestic U.S. air travel industry. Yet these trends have not reduced capacity as measured by available seat miles, which has steadily increased.[41]

With respect to competition among airlines, two major trends have emerged from these economic realities: (1) increased hub concentration among legacy carriers, and (2) the development of the predominately point-to-point, low-cost and ultra-low-cost carrier models.

Legacy carriers have traditionally operated (and largely continue to operate) so-called "hub-and-spoke" service models.[42] Hub-and-spoke networks operate by connecting "spoke" locations indirectly through a central network "hub". This system provides significant cost, demand, and competitive advantages, but also tend to result in less airline competition at hub airports because of the limited ability for most airports to accommodate more than one large-scale home operation.[43] Furthermore, hub airline frequency and destination choice give the hub airline a demand advantage at its hub compared to non-hub competitors.[44]

Hub concentration and loss of service are of particular concern to airports, which must work to attract and maintain airline service and/or monitor competition among carriers. Although the market share attributable to one dominant airline, on average, grew at all sizes of airports, the growth was most substantial at small-hub airports, which saw an increase from 28 percent in 2007 to over 45 percent in 2012.[45] By 2015, a single airline dominated the majority of the air travel market of 40 of the 100 largest airports, and only one or two airlines controlled the majority of seats at 93 of the top 100.[46] The dominance of one or two carriers at any particular airport is potentially concerning to airport sponsors because it challenges the premise of federal airline regulation that the indicia of successful competitive markets are more airlines actually competing against one another. The presence of only one (or even two) dominant carrier(s) at an airport raises the specter of non-competitive markets which can cause airports consternation both because of its implication for improved service at its airport and because of the sponsors' responsibility for promoting competition under the current federal regulatory regime.

Airline consolidation, together with increased fuel costs and reduced demand due to struggling local economies, has resulted in reductions in air service to small communities.[47] Many small- and medium-sized airports have lost non-stop service to certain destinations and instead are served via feeding a large carrier's hub. This trend is visible in the data that shows that small- and particularly medium-hub airports have seen a broad decrease in service since 2005.[48] Between 2005, the height of U.S. commercial air traffic to date, and 2016, the last full year of available data, scheduled departures at medium- and small-hub airports decreased over 24 percent.[49] This compares with a much more modest 5.6 percent decrease at large-hub airports over the same period.[50] Legacy carriers have been largely responsible for this difference.[51]

In other small- and non-hub airport markets, maintaining adequate air service can be a significant challenge. Particularly in markets supported under the EAS Program, larger airlines

[36] *See*, United States v. U.S. Airways Group, Inc., 38 F.Supp.3d 69 (D.D.C. 2014).

[37] *See, id.* at 72.

[38] *U.S. Airline Mergers and Acquisitions*, Airlines for America, http://airlines.org/dataset/u-s-airline-mergers-and-acquisitions/ (visited Mar. 1, 2018).

[39] GAO-13-403T, *supra* at 4.

[40] U.S. Bureau of Transportation Statistics, Homepage, U.S. Dept. of Transp., (2017) https://www.transtats.bts.gov (visited June 22, 2017) (statistics for April 2016 to March 2017).

[41] GAO-13-403T, *supra* note 26 at 5.

[42] *See,* Borenstein and Rose, *supra* note 23 at 88-89; OST-98-3713, *supra* note 6 at 19.

[43] Borenstein and Rose, *supra* note 23 at 89; FAA/OST Task Force Study, *supra* note 4 at 1.

[44] FAA/OST Task Force Study, *supra* note 4 at 1.

[45] *Id.* at 31.

[46] David Koenig and Scott Mayerowitz, *U.S. Airports Increasingly Dominated by 1 or 2 Carriers*, Associated Press for USA Today (July 15, 2015), https://www.usatoday.com/story/todayinthesky/2015/07/15/us-airports-increasingly-dominated-by-1-or-2-carriers/30152927/.

[47] GAO-14-515, *supra* note 7 at 36.

[48] *TransStats – Aviation Data – T-100*, Bureau of Transportation Statistics, U.S. Department of Transportation, https://www.transtats.bts.gov/Data_Elements.aspx?Data=2 (visited Mar. 6, 2018) [hereinafter BTS T-100 Data]. *See also,* Michael D. Wittman and Willian S. Swelbar, *Trends and Market Forces Shaping Small Community Air Services in the United States*, MIT Report No. ICAT-2013-02 (May 2013) (noting decline since 2007); W. Spitz, et al., Effects of Airline Industry Changes on Small- and Non-Hub Airports, (Airport Cooperative Research Program Report 142, 2015).

[49] BTS T-100 Data, *supra*, note 48. *See also* GAO-14-515, *supra* note 7 at 35 (decrease of 24 percent at medium and small hub airports, compared to nine percent decrease at large hubs).

[50] BTS T-100 Data, *supra*, note 48.

[51] Wittman and Swelbar, *supra* note 48 at 8.

have ceded the market to "ultra-regional" carriers (discussed further below). While such carriers' comparatively smaller capacity planes are often a better "fit" for the market demand at such airports, communities may lose network connectivity unless such carriers have been able to negotiate interlining agreements with the larger network carriers.[52] The GAO also noted that the percentage of flights that are canceled or diverted is higher at airports in small rural communities than in large metropolitan areas.[53] In total, 24 small airports lost all service between 2007 and 2012.[54]

Legacy carriers' hub concentration contrasts sharply with business strategies of Low-Cost Carriers (LCC) and, increasingly, Ultra-Low Cost Carriers (ULCC). Unlike the legacy carriers, which pursue hub-and-spoke service patterns characterized by consistent, high-frequency routes,[55] ULCC airlines, such as Allegiant Air and Spirit Airlines, eschew hubs and focus near exclusively on point-to-point service in predominantly key leisure origin and destination markets. One potential explanation for this trend is that ULCCs have filled the void in leisure non-stop service created by the consolidation of airlines and their networks.

ULCC air service targets the leisure traveler looking for value above all else, without the frequency, consistency, or perks offered by legacy network carriers. ULCCs also tend to avoid—where possible—other costly industry standards, including branded ticket counters, baggage facilities, passenger clubs, as well as dedicated gates. In addition, ULCCs are generally hesitant to make long-term commitments to a particular airport, so that they have the ability to shift service quickly as demand evolves. A similar situation exists for a new generation of on-demand charter services (e.g., OneJet, Cape Air, Surf Air, Boutique Air, etc.), whose lightly traveled, infrequent, non-stop flight schedules (and airport resource utilization) do not fit the legacy carriers' mold.

In light of the increased ease in market entry and exit, more reliance on potentially volatile market forces, and increased economic pressures from competing business models, airports and airlines have increasingly moved away from traditional airport leasing models. Traditional leases, which lasted for 20 or 30 years (often tracking the debt underlying large terminal improvements) and allocated a dedicated number of gates, have given way to much shorter agreements that grant fewer rights and often derive less revenue for the airport. As discussed below, some airports have sought to accommodate a different business/operating model by offering "per turn" fees to airlines. These fee structures are intended to be a type of "a la carte" proposition that take into consideration the carriers' need for a more limited utilization of the airport's facilities.

C. FBO Industry Trends

The term "Fixed-Base Operator" or FBO is ascribed to privately owned businesses granted the right to provide a variety of aeronautical services on airport property.[56] The most basic (and generally most lucrative) FBO service is aircraft fueling, but FBOs typically also provide other aeronautical services, including hangar use, tie-down and parking, aircraft rental, aircraft maintenance, and flight instruction.[57] In some cases, specialized aviation service operations (SASO) may provide a single or narrow set of aeronautical services, such as stand-alone flight schools.[58] FBOs provide critical services to the aviation community, particularly general aviation operators.[59] Although FBOs are the most common aeronautical service providers for the general aviation community, at some airports the public airport owner may provide FBO services.[60]

The FBO industry dates back to the early days of the aviation industry, predating even the establishment of scheduled passenger service.[61] As the aviation industry began to move away from use of farms, open fields, and other non-aviation-related facilities for non-flight activities and towards purpose-built facilities—the first airports—the need for "fixed" base operators providing supporting services to pilots and aircraft arose with it.[62] Early FBOs coordinated services provided to visiting aircraft at their "home base" airport, initially in a non-commercial manner.[63]

As the aviation industry in the United States grew over the course of the mid-twentieth century, so too did the number of FBOs providing aeronautical services at airports.[64] By the

[52] *Id*. at 11.

[53] *Id.*; U.S. Gov't Accountability Office, GAO-14-454T, Status of Air Service to Small Communities and the Federal Programs Involved (Apr. 30, 2014).

[54] Wittman and Swelbar, *supra* note 48, at 7.

[55] With the exception of Southwest, the major carriers have followed this pattern for years. Southwest long avoided creating hubs and chose instead to focus its flights on "point-to-point" service. However, even Southwest has partially adopted a quasi-hub-and-spoke model utilizing airports at which they have established a major presence (such as Chicago Midway (MDW), Baltimore Washington (BWI), Dallas Love Field (DAL), Denver (DEN), Las Vegas (LAS)). Nonetheless, Southwest generally operates flights on a 7 day a week basis.

[56] FAA Order 5190.6B, Airport Compliance Manual, 10-1, note 29 (Sept. 30, 2009).

[57] *Id.*; *See,* National Air Transportation Association, General Aviation in the United States: A Fact Book on General Aviation and the Aviation Service Businesses That Help It Take Flight, 10 (2009) [hereinafter NATA Fact Book].

[58] FAA Advisory Circular No. AC 150/5190-7, Minimum Standards for Commercial Aeronautical Activities, 14 (2006) [hereinafter FAA AC 150/5190-7]; NATA Fact Book, *supra* note 57 at 11.

[59] *See,* NATA Fact Book, *supra* at 10.

[60] *See, id.*; FAA Advisory Circular No. AC 150/5190-6, Exclusive Rights at Federally Obligated Airports, at 21 (2006). The proprietary exclusive right of airports, which allows the owner of a public-use airport to provide aeronautical services to the public on an exclusive basis, is discussed below in Sections 3.2.2 and 5.5.

[61] Yu Wang, *Identifying and prioritizing critical success factors for Fixed Base Operators in the United States: A mixed method approach*, 1026 Purdue University Open Access Dissertations, 6-7 (2016), available at http://docs.lib.purdue.edu/open_access_dissertations/1026.

[62] *Id.*

[63] Adam Twidell, *What is a FBO?*, PrivateFly (Sept. 15, 2011) https://blog.privatefly.com/what-is-a-fbo (visited Mar. 3, 2017).

[64] *See,* Wang, *supra* note 61 at 7-8.

late 1970s, estimates put the number of FBOs operating in the United States at an all-time high of around 10,000.[65] However, since then the numbers have steadily dropped, with more recent estimates putting the number of FBOs at around 3,000.[66] The causes of this change in trajectory are multifaceted, but generally reflect changing economic trends and conditions. For instance, volatile oil prices in the 1970s and increased aircraft liability for aircraft manufacturers in the 1980s contributed to less general aviation demand, which resulted in harsher economic conditions for FBOs.[67]

Another contributing factor to the decline in numbers of FBOs is the trend towards consolidation and franchising.[68] External economic pressures and the attraction of outside investment capital has led to increasing professionalization of FBOs and growth of larger corporate FBO chains operating in the market.[69] The number of airports at which the largest FBO chains operate have increased dramatically.[70] Meanwhile, surveys conducted by the National Air Transportation Association reveal the trend towards consolidation, with the number of regional and national chains decreasing by around 50 percent between 1990 and 2009.[71] This trend has accelerated since the 2000s, with dozens of acquisitions by major FBO chains, including Signature Flight Support and Atlantic Aviation.[72]

The most recent significant consolidation within the FBO industry occurred in September 2015, when BBA Aviation/Signature Flight Support announced its $2.1 billion acquisition of Landmark Aviation, the biggest business deal in FBO history. Federal regulators took note of the deal's potential local anti-competitive impacts and alleged that general aviation customers at six airports would likely see increased prices and decreased quality of service.[73] Of those six airports, three would have become monopolies, and the other three duopolies where Signature would control at least an 80 percent market share. In February 2016, the DOJ approved the merger under the conditions that Signature divest its newly-acquired Landmark operations at those six airports, and agree not to acquire any further FBOs at airports where it already operates in certain circumstances.[74] The net result of the transaction is that a single entity (Signature) operated at 189 locations, 133 of which were located in the United States. That number now stands at 204 total with 130 in the United States. Signature is also barred from acquiring any FBO at an airport in the United States where it already provides FBO services, unless the operation is valued at less than $20 million, or there are at least two other full service FBOs at the airport.

Despite the recent trend towards franchising and consolidation, most of the several thousand FBOs operating today remain small or sole-proprietor operations. Consolidation has also failed to significantly shift the level of actual competition between FBOs at airports, which has always been relatively low. Over the past twenty years, the number of public-use airports with only one or two FBOs has remained at around 80 percent.[75]

Nevertheless, the growth of larger FBO chains has led to increasing debate among aviation stakeholders regarding the impact on competition and the resulting level of service to aeronautical service customers and the airports that serve them. For instance, larger FBOs argue that consolidation benefits airports by ensuring more economically stable FBO entities that can provide higher levels of service and more benefits to customers through scaled business models.[76] This may be attractive to airports who are seeking to improve service and want to see greater investment in airport services and amenities.[77]

On the other hand, aviation user organizations such as the Aircraft Owners and Pilot Association (AOPA) argue that consolidation means that aircraft operators have less choice regarding FBOs, and that larger FBOs use their size to force operators to purchase bundled services that they do not need along with fuel at inflated rates.[78] AOPA has also disputed the FBO

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[65] *Id.* at 7.

[66] *Id.* at 8-9; NATA Fact Book, *supra* no. 57 at 10. These figures are estimates, as the FBO industry is not well-tracked. *See,* John K. Voges, Michael F. Robertson, Matthew J. Romero, and David A. NewMyer, *Estimating FBO Employment in the United States*, 27(2) Collegiate Aviation Review 77, 84 (2009).

[67] Wang, *supra* note 61 at 7-8.

[68] *Id*. at 9; NATA Fact Book, *supra* note 57 at 11.

[69] Wang, *supra* note 62, at 8-9.

[70] In 2015 the largest FBO chain, Signature Flight Support, operated at over 100 airports. Robert W. Moorman, *The State of FBOs: Déjà vu All Over Again?*, ShowNews (Nov. 15, 2015), http://www.aviationweek.com/nbaa-2015/state-fbos-d-j-vu-all-over-again.

[71] NATA Fact Book, *supra* note 57 at 11 (from 10 national and 12 regional chains in 1990 to four national and six regional chains in 2009).

[72] Clayton Moore, *Large and Small FBOs Find Niches in an Evolving Market*, Airport Journals (May 1, 2008), http://airportjournals.com/large-and-small-fbos-find-niches-in-an-evolving-market/; Bram Hall, Managing Director BlackArch Partners, FBO M&A Market Activity and Valuation, Presentation to National Business Aviation Association Convention and Exhibition (Nov. 18, 2015).

[73] *See,* Complaint, United States of America v. BBA Aviation PLC et al., No. 1:16-cv-00174 (D.D.C. February 3, 2016) (alleging that the Signature-Landmark merger would result in monopolies at Washington Dulles International Airport (IAD), Scottsdale Municipal Airport (SDL), Fresno Yosemite International Airport (FAT), and duopolies at Jacqueline Cochran Regional Airport in Thermal, CA (TRM), Westchester County Airport (HPN) and Ted Stevens Anchorage International Airport (ANC).

[74] *See,* Proposed Final Judgment, United States of America v. BBA Aviation PLC et al., No. 1:16-cv-00174 (D.D.C. February 3, 2016).

[75] National Air Transportation Association, State of the FBO Industry, 2 (Mar. 31, 2017) [hereinafter NATA 2017 SOTI]. This figure applies to public-use airports with a 3000 ft. or greater paved runway—according to the report there are 3,537 of these in the United States.

[76] *See,* Signature Flight Support, Session 5–Understanding General Aviation: The FBO & Business Aviation Perspectives, Presentation to the Georgia Airports Association, slide 16 (2016), available at http://georgiaairports.org/site/file/2016/11/GAA-Session-5-Understanding-General-Aviation-FBO-Business-Aviation-Perspectives-Mike-French-Signature-Flight-Support.pdf (visited Sept. 10, 2018).

[77] NATA SOTI, *supra* note 75.

[78] AOPA, Informal Part 13 Complaint Against Asheville Regional Airport (Aug. 28, 2017); AOPA, Informal Part 13 Complaint Against Key West International Airport (Aug. 28, 2017); AOPA, Informal Part 13 Complaint Against Waukegan National Airport [hereinafter,

industry's argument that aircraft operators enjoy effective competition in fuel prices because they may choose between utilizing airports within close proximity with each other, a position that DOJ has also appeared to endorse.[79] AOPA has made FBO competition a centerpiece of its membership strategy, and has recently engaged in an aggressive campaign to force airports to address what it views as a lack of FBO competition.[80]

Airport owners are increasingly finding themselves in the middle of this debate, balancing the concerns regarding competition from FBO users with the tight economic circumstances within which FBOs often operate. As discussed below, AOPA has recently escalated issues of FBO competition at several airports, urging the FAA to force more FBO competition and filing informal complaints against several airports. In response, FAA initially issued a "Q&As" regarding "FBO Industry Consolidation and Pricing Practices."[81] The FBO Q&As reaffirmed FAA's approach with respect to directly regulating relations between FBOs and airports (i.e., each airport presents unique facts and circumstances and solutions are best developed at a local level), but reminded airports of their federal obligations, particularly under the Grant Assurances, and provided a brief description of salient points that are relevant for dealing with competition and reasonable rates among FBO services. More recently, the FAA largely dismissed AOPA's informal complaints of unreasonable pricing as unsupported.[82]

In any event, AOPA's recent activities reflect a new sensitivity to FBO competition and indicate that airport owners need to consider how they ensure adequate FBO services. The increased pressure from aircraft users and calls for additional regulatory oversight are trends that sponsors need to understand.

AOPA Complaints]. *See also,* AOPA Communications staff, *AOPA Files Official Complaints Over FBO Fees Seeking Reasonable Access to Public Airports and Transparency of Pricing*, AOPA (Aug. 28, 2017) https://www.aopa.org/news-and-media/all-news/2017/august/28/aopa-files-official-complaints-over-fbo-fees.

[79] In its 2016 complaint against the Signature-Landmark deal, DOJ wrote that "obtaining FBO services at another airport is not a meaningful alternative for most general aviation customers." Department of Justice, Antitrust Division, United States v. BBA Aviation plc, et al.*;* Proposed Final Judgment and Competitive Impact Statement, 81 Fed. Reg. 7144, 7146 (Feb. 10, 2016).

[80] AOPA Complaints, *supra* note 78.

[81] FBO Q&As, *supra* note 16.

[82] Letter from Heather A. Haney, Airport Compliance Specialist, FAA Southern Region Airports Division, to Kenneth Mead, AOPA (June 7, 2018) (dismissing complaint against the Greater Asheville Regional Airport Authority); Letter from Heather A. Haney, Airport Compliance Specialist, FAA Southern Region Airports Division, to Kenneth Mead, AOPA, (June 29, 2018) (dismissing unreasonable pricing allegations again Monroe County, Florida pertaining to the Key West International Airport, but preliminarily concluding that the County was in violation of Grant Assurance 22(f)'s requirement that an airport permit pilots to self-service their aircraft).

D. Airport Sponsors' Role and Interest in Promoting Competition

As the discussion above suggests, airport sponsors play a critical role in promoting and regulating competition under current federal policy regarding airlines and FBOs. In place of a centralized regulatory regime, individual airports play a key role in implementing and enforcing federal policy by negotiating and establishing the legal and operational relationship between the airlines and FBOs who conduct their business at airports and the airport proprietors who control the required space. While the emphasis that federal regulation of airlines and FBOs puts on market economies is clear, how well these markets function in practice is highly dependent on airport sponsors enforcing federal policy through the levers provided under federal and contractual law.

In the context of the airline industry, airport sponsors have been placed in the role of directly engaging with airlines in order to ensure effective service through competitive markets, largely through contractual agreement. Airport sponsors are tasked with the challenge of helping to ensure that the theory of open competition among airlines is actually realized in practice. Their actions in monitoring the ability of new potential competitors to operate at an airport serves to provide a market within which to counter potentially monopolistic or anticompetitive activity on the part of existing carriers.

Airport sponsors are not only required to fulfill the market-based policies of the federal government; they also have an interest in promoting competition for the benefit of the flying public and communities they represent. Airport sponsors and local governments may adopt a competitive market approach in order to improve responsiveness of airlines to passenger needs and to act as a driver of local economic activity. A wide selection of routes or marquee destinations can serve as a feather in the cap of local governmental entities, while the presence of multiple airlines can provide more dynamic service.

Owners/operators of different sized airports also need to understand how competition works in the context of existing market trends. The largest and busiest airports these days are often dominated by a single airline with a vested interested in maintaining its dominance. In these cases airports need to think carefully about how to allow for the possibility of new entrants while respecting the often significant investment and benefits that hub status can bring. Mid-sized airports may be able to leverage ULCC interest in order to provide more non-stop service and counterbalance overreliance on service through larger hubs. For the smallest and least busy airports, airport sponsors need to think strategically about leveraging some of the tools that the federal government provides in order to promote service to these areas.[83]

[83] An in-depth discussion of some of these issues appears in a previous ACRP publication. *See,* Michael J. Gordon & Melissa Galvan-Peterson, Strategies for Maintaining Air Service, (Airport Cooperative Research Program Report 68, 2015).

With respect to the FBO industry, the federal government and airport sponsors share the same overriding concern regarding the adequacy and viability of FBO services. Most airports view the FBO as the "front door" not just to the airport, but to the community as a whole. Thus, the physical appearance, services available, and higher-end amenities are of concern to the sponsor. Furthermore, airport sponsors want competitive, market-priced fuel available for aircraft operators. This is particularly so with respect to FBO services provided to the general aviation community.

With this said, what "top-rate service" and "competitive, market-based fuel" means for a airport varies depending upon the airport. This is because the economic reality for operators varies just as much, with each airport attracting different levels of traffic and revenue. Larger airports often provide better service, at higher cost, while smaller airport FBOs can be more affordable. But many purely general aviation airports have their own challenges with lower traffic and fewer tenants. Marginal increases in fuel price are an attractive way to close such gaps between costs and revenue. Meanwhile, "top-rate service" may include "free" amenities ranging from a cup of coffee to a sleep room or crew car—oftentimes included with an FBO's handling or facilities fee, which may be waived with a fuel purchase. Some operators complain that mandatory fees and inflated fuel prices are subsidizing these perks that only a small percentage of customers use. But others equally protest when these "freebies" are phased out while full- and self-service options attempt to better reflect costs for individual customers. [84]

Industry leaders advise operators to compete on service instead of price, arguing that discounting fuel to attract business is a losing proposition for everyone.[85] Likewise, a recent survey of the FBO industry found that "excellent customer services" ranked at the top of almost every respondent's list of success factors.[86] "Fuel services" (including competitive pricing) was high on many lists, but still ranked behind service and "accessibility of the FBO." Of course, such priorities can conflict as competitive fuel prices and "top-rate service" may place inverse pressure on the other.

What is the take-away from all of this for the airport sponsor concerned about competition at its airport? With respect to the larger airports and airports with a substantial amount of high-yield, high-volume traffic, economics alone will both attract and support multiple FBOs and, if properly monitored and addressed by the sponsor, result in meaningful competition. At smaller airports with limited turbine operations and less-substantial small general aviation activity relying on aviation gasoline sales, supporting just one FBO will be a challenge and introducing another could be a recipe for a failure of all FBOs. For those airports that are somewhere in the middle, the individual facts and circumstances will dictate how best to address competition and services issues.

Clearly, airport sponsors play an important role in the regulation and promotion of competition within both the airline and FBO industries. Just as clearly, the unique circumstances of each sponsor's airport will inform how the various mechanisms guiding competitive markets at airports play out.

IV. RELEVANT LEGAL AUTHORITIES

If airport operators are to act responsibly in their role as conduits for federal aviation policy, and if they are to utilize market economics in order to best leverage available resources, then they need to understand the regulatory environment in which they can and must act. A better understanding of the various legal mechanisms put in place to facilitate and regulate competition is critical both to avoiding legal pitfalls and thwarting anti-competitiveness, inefficiency, and monopolistic behavior. A sound understanding of the regulatory environment is equally important to leveraging these tools for the benefit of their airports and the greater community at large. Below is a broad summary of the applicable law. Of note is the fact that much of the legal authority is statutory, regulatory, or guidance materials issued by federal agencies and there is a relatively small set of case law on relevant topics that interprets all of these materials. Of course, each airport's individual facts, circumstances and interests necessarily requires individualized analysis. Thus, application of the framework of relevant data points is somewhat of an art and the following discussion should be read with this in mind.

A. Statutory Framework

Federal aviation policy is expressly tied to the promotion of competitive markets. The provisions of the United States Code that set out federal policy concerning commercial aviation provides that the Secretary of Transportation must consider it to be in the public interest to place "maximum reliance on competitive market forces and on actual and potential competition . . . to provide the needed air transportation system"[87] as well as to "provide efficiency, innovation, and low prices."[88] Federal policy also privileges "entry into air transportation markets by new and existing air carriers"[89] as well as "promoting, encouraging, and developing civil aeronautics and a viable, privately-owned United States air transport industry."[90]

The vehicles for this policy framework are primarily executed through agreements for federal airport funding, as well as conditions for permitting exemptions from anti-head tax provisions (i.e., the permission to collect passenger facility charges). These measures ensure that airport sponsors are enlisted as

[84] Jim Moore, *FBOs in a Bind: No More Freebies?*, Aircraft Owners and Pilots Association (Jan 30, 2014), https://www.aopa.org/news-and-media/all-news/2014/january/30/fbos-in-a-bind.

[85] John Enticknap & Ron Jackson, *FBOs to Compete on Service, Not Price in 2013–Steady 6% Growth Forecast for FBOs*, National Air Transportation Association Safety First eToolkit (Issue 90 February/March 2013).

[86] Wang, *supra* note 61.

[87] 49 U.S.C. § 40101(a)(6)(A).

[88] 49 U.S.C. § 40101(a)(12)(A).

[89] 49 U.S.C. § 40101(a)(13).

[90] 49 U.S.C. § 40101(a)(14).

policy enforcers. In addition, the federal government, through the DOJ with input from DOT, also utilizes its antitrust powers under the Clayton Act.

B. AIP Grant Assurances

The most significant source of regulation with respect to managing competition at airports – and, indeed, most aspects of airport development and operations – are the statutorily required contractual obligations with the federal government, known as "Grant Assurances," to which participating airport must agree in order to receive funding through the AIP.[91]

The AIP was originally established under the Airport and Airway Improvement Act of 1982 (AAIA) and has been subsequently amended and codified in the U.S. Code.[92] Airport owners and operators who apply for and receive AIP funding are known as "airport sponsors."[93]

Public airport sponsors are eligible for AIP grants for airport planning, airport development, noise compatibility planning, and noise mitigation.[94] While most Grant Assurances apply for 20 years after receipt of funds, others are valid in perpetuity.[95] Furthermore, because many, if not the vast majority, of public airports generally receive AIP funding on an annual or nearly annual basis, the duration of the Grant Assurances is for all practical purposes permanent at most airports.[96] Under 49 U.S.C. § 47122, the FAA is statutorily mandated to ensure that airport sponsors comply with the Grant Assurances.[97]

Due to the contractual nature of the Grant Assurances, the FAA prefers to enforce them by encouraging voluntary airport sponsor compliance, and will normally seek non-regulatory means of resolving instances of non-compliance.[98] Otherwise, the FAA will pursue an administrative process to assess whether any Grant Assurances have been violated, and order corrective actions if necessary.[99] The core enforcement tool of the FAA would be the threat of withholding of additional AIP funding.[100]

The FAA has promulgated a standard document containing all Grant Assurances,[101] which obligate the grantee to comply with various federal requirements and policies as a condition of grant approval. The most up to date complete list of all 39 Grant Assurances for airport sponsors may be found on the FAA's website (https://www.faa.gov/airports/aip/grant_assurances/).

The FAA has also published several guidance documents covering compliance with Grant Assurance requirements. These include:

- Order 5100.38D, Airport Improvement Program Handbook (Sept. 30, 2014).
- Order 5190.6B, FAA Airport Compliance Manual (Sept. 30, 2009) ("Airport Compliance Manual").
- Policy and Procedures Concerning the Use of Airport Revenue, 64 Fed. Reg. 7607 (Feb. 16, 1999) ("FAA Airport Revenue Policy") (also available as Appendix E to the Airport Compliance Manual).
- AC 150/5190-6 - Exclusive Rights at Federally Obligated Airports (Jan. 4, 2007).
- AC 150/5190-7 - Minimum Standards for Commercial Aeronautical Activities (Aug. 28, 2006).
- Office of Airports, Airport Compliance and Field Operations, Air Carrier Incentive Program Guidebook, TC10-0034, FAA (Sept. 2010) ("FAA Incentive Program Guidebook").

A number of Grant Assurances, described below, touch upon matters related to competition at airports. They equip airport sponsors with tools to monitor and address airline and FBO markets while also restricting the scope of permissible airport sponsor activity, both in the name of promoting competition and leveraging federal support for the benefit of the flying public.

1. Grant Assurance 22, Economic Nondiscrimination

Grant Assurance 22, concerning economic nondiscrimination, is arguably the most pervasive of the Grant Assurances in managing competition. This Grant Assurance consists of nine subsections aimed at requiring the airport sponsor to prevent "unjust discrimination" among airport users and ensure "reasonable conditions" for public airport use. Grant Assurance 22(a) expresses this purpose most plainly, requiring that all federally obligated airports "be available for public use on reasonable conditions and without unjust discrimination."[102] As this language suggests, the prohibition on unjust discrimination and the requirement that space and services be provided on a reasonable basis are expansive, extending to all aeronautical activities taking place on a federally-obligated airport.[103]

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[91] *See,* Airport Improvement Program (AIP) Grant Assurances, 79 Fed. Reg. 18755, 18755 (Apr. 3, 2014) [hereinafter Grant Assurances].

[92] Pub. L. No. 97-248, 96 Stat. 324 (Sept. 3, 1982), codified as amended at 49 U.S.C. § 47101 to 47175.

[93] *See,* Barry Molar, James Borsari, Rose Agnew, and Firelli Pitters, *Understanding FAA Grant Assurance Obligations Volume 1: Guidebook*, ACRP Project 03-38, S-1 (2015 [hereinafter ACRP Project 03-38].

[94] Grant Assurances, 79 Fed. Reg. at 18755.

[95] FAA Order 5190.6B, *supra* note 56 at 4-2 ("Where land is acquired with federal assistance under AIP, the federal land obligations remain in perpetuity.").

[96] *See,* Nat'l Bus. Aircraft Ass'n, et al. v. City of Santa Monica, FAA Docket No. 16-14-04, Director's Determination (Dec. 4, 2015) (holding that amendment to AIP grant extended compliance dates to 20 years after amendment).

[97] *See*, Virginia One Development, LLC v. City of Atlanta, FAA Docket No. 16-12-09, Director's Determination at 18 (Jan. 26, 2015).

[98] ACRP Project 03-38, *supra* note 93 at S-24.

[99] *Id.*

[100] *Id.*

[101] *See,* 53 Fed. Reg. 3104 (Feb. 3, 1988), as amended by: 53 Fed. Reg. 34361 (Sept. 6, 1988); 54 Fed. Reg. 35748 (Aug. 29, 1989); 59 Fed. Reg. 14149 (June 10, 1994); 60 Fed. Reg. 521 (Jan. 4, 1995); 62 Fed. Reg. 29761 (June 2, 1997); 64 Fed. Reg. 45008 (Aug. 18, 1999); 70 Fed Reg. 15980 (Mar. 29, 2005); 76 Fed. Reg. 15028 (Mar. 18, 2011); 77 Fed Reg. 22375 (Apr. 13, 2012); 79 Fed Reg. 18755 (Apr. 3, 2014).

[102] 49 U.S.C. § 47107(a)(1); Grant Assurance 22(a).

[103] FAA Order 5190.6B, *supra* note 56 at 9-1.

Other provisions of Grant Assurance 22 expand and specify the obligation to provide airport access on reasonable conditions without unjust discrimination. Grant Assurance 22(b) requires any aeronautical business operating on the airport to agree to furnish services on a reasonable and no unjustly discriminatory basis.[104] Grant Assurance 22(c) applies specifically to FBOs, providing that "[e]ach fixed-base operator at the airport shall be subject to the same rates, fees, rentals, and other charges as are uniformly applicable to all other fixed-base operators making the same or similar uses of such airport and utilizing the same or similar facilities."[105] Similarly, Grant Assurance 22(e) provides that each carrier "shall be subject to such non-discriminatory and substantially comparable rules, regulations, conditions, rates, fees, rentals, and other charges with respect to [transportation-related] facilities."[106] Grant Assurance 22(i) makes clear that an airport sponsor may prohibit any type or class of aeronautical use at an airport if safety requires it.[107] Unjust discrimination may occur against an individual or the provider of a type or class of service.[108]

Together, these provisions provide the groundwork for establishing a level playing field for businesses operating at airports to compete effectively with one another. The obligation to make the airport available on "reasonable" terms and conditions is critical to ensuring that the opportunity to compete for business on the airport is not restricted for anticompetitive purposes and that there is reasonable ease of market entry and exit. Likewise, the prohibition on unjust discrimination regulates the arms-length nature of economic interactions by requiring airport sponsors to charge "comparable rates to similarly situated aeronautical users."[109]

Grant Assurance 22's requirements touch upon many aspects of economic competition at airports, from terms of access, to provision of available land and facilities, to the rates and charges that airport sponsors charge tenants. For instance, an airport sponsor's determination regarding the rental fees for airport property for FBO purposes, or consideration as to whether another tenant can be accommodated, requires consideration of whether reasonable access is being provided, and whether different users (e.g., incumbent and new entrant businesses) are being unjustly discriminated against. Grant Assurance 22 provides the backdrop for the airport sponsor's negotiation of economic rights at the airport.

In theory, the language of Grant Assurance 22 provides plain boundaries for assessing airport sponsor discriminatory activity. Airport sponsors may discriminate between two types of users if there is justification for doing so. For instance, an airport sponsor may establish different categories of users and treat those users differently based on their differing circumstances.[110] Reasonable bases for disparate treatment include the "period of lease, business plan proposed, location of facilities, level of service and amenities, scope of the services, investment, market conditions, and reasonable actions by the sponsor to promote and protect its ability to continue to serve the interests of the public in civil aviation, including the enlistment of prudent business practices that may change over time."[111] In order to show unjust economic discrimination, a party "must show that another party similarly situated to the [complaining party] received preferential treatment denied to the [complaining party] in similar circumstances."[112] However, differences between agreements entered into at different times with the sponsor may not necessarily indicate unjust discrimination, since changing circumstances at an airport may necessitate a different approach.[113]

In practice, however, determinations of reasonableness and unjust discrimination are highly fact-driven and legally nuanced. Distinguishing between meaningful and incidental differences between similar types of tenants, for instance, where differences exist in timing, available land, scope of services, etc. can be exceedingly difficult. The difficulty is exacerbated by the unique character of airports.

2. Grant Assurance 23, Exclusive Rights

Grant Assurance 23 requires that AIP-funded airports not give any person providing or intending to provide aeronautical services to the public an exclusive right to do so at the airport.[114] The prohibition against exclusive rights is the oldest federal obligation affecting federally funded airports, dating back to the Civil Aeronautics Act of 1938.[115] After World War II, the federal government implemented similar restrictions as applied to surplus military property provided for airport development under the Surplus Property Act.[116]

It does not matter how the exclusive right has been granted—e.g., through express agreement, unreasonable minimum standards, action of a former sponsor, or otherwise—only that one has been granted.[117] FAA guidance explains that Grant Assurance 23 is intended to avoid granting a special privilege or monopoly to any one aeronautical service provider in order to protect fair competition for these services.[118] This is based on the position that "the existence of an exclusive right to conduct

[104] Grant Assurance 22(b).

[105] Grant Assurance 22(c).

[106] Grant Assurance 22(e).

[107] Grant Assurance 22(i).

[108] FAA Order 5190.6B, *supra* note 56 at 9-1.

[109] *Id*.

[110] *See,* ACRP Project 03-38, *supra* note 93 at 18-19 (discussing Grant Assurance 22(e)).

[111] *Id*.

[112] Alca v. Miami-Dade Cnty, 2010 WL 3826299, *33 (FAA Aug. 31, 2010).

[113] SPA Rental, LLC v. Somerset – Pulaski Cnty. Airport Bd., FAA Docket Nos. 16-13-02, Final Agency Decision, at 22 (Aug. 4, 2016).

[114] 49 U.S.C. § 47107(a)(4); Grant Assurance 23.

[115] FAA Order 5190.6B, *supra* note 56 at 8-1. The provision, Section 303 of the Civil Aeronautics Act of 1938, Pub. L. No. 75-706, 52 Stat. 973, is recodified at 49 U.S.C. § 40103(e).

[116] *See,* Surplus Property Act, Pub. L. No. 80-829, as amended and codified at 49 U.S.C. § 47152(3).

[117] FAA Order 5190.6B, *supra* note 56 at 8-4.

[118] *Id.* at 7-23.

any aeronautical activity at an airport limits the usefulness of the airport and deprives the public of the benefit of competitive enterprise."[119]

The prohibition against exclusive rights may arise where an airport does not have existing capacity to accommodate another air carrier based on unavailability of facilities. The FAA's position is that an airport sponsor "may not deny an air carrier access solely based on the non-availability of existing facilities" and "must make some arrangements for accommodations if reasonably possible."[120]

One of the most common areas of dispute and uncertainty regarding exclusive rights is at smaller airports where the size of the market may only support one aeronautical business providing a particular type of service. Federal statute articulates a particular standard where there is only one FBO operating at an airport. In this context, a right given to an FBO at an airport is not exclusive if "(A) the right would be unreasonably costly, burdensome, or impractical for more than one fixed-base operator to provide the services; and (B) allowing more than one fixed-base operator to provide the services would require reducing the space leased under an existing agreement between the one fixed-base operator and the airport owner or operator."[121]

The existence of only one aeronautical business providing most or all of a particular service at an airport does not by itself indicate that an exclusive right has been granted; rather, an exclusive rights violation occurs only if the airport sponsor denies other businesses the opportunity to compete for service.[122] Accordingly, a single FBO may end up expanding to use up all of available space at an airport if the airport sponsor can demonstrate that it has not excluded other competitors from using or competing for that space.[123] However, an airport sponsor cannot allow a single FBO to lease airport property without putting that property into productive use within a reasonable period of time—i.e., "landbanking."[124]

It is noteworthy that pursuant to Grant Assurance 23, a sponsor may not, solely on the basis of the likelihood that the market will only support one FBO, deny an incumbent FBO to enter the market because that denial of access itself would be creating an "exclusive use" situation. If land is available and the incumbent FBO would meet the minimum standards, despite the potentially adverse impact upon the financial health of both FBOs, then the sponsor would have to allow that second FBO to enter the market. This poses an issue for the airport because both FBOs could potentially suffer economically in such situations and, in the worst-case scenario, both could fail. However, this demonstrates the position of the sponsor in the competition scheme—a provider of access and opportunity to compete for the provision of aeronautical services.

One way in which an airport can demonstrate that all qualified parties have had an opportunity to compete for service at an airport suitable for only one FBO is to engage in a competitive bidding process.[125] Under a competitive bidding process an airport need not accept all qualified bidders without limitation. However, an airport sponsor cannot select only one FBO to provide services at an airport purely as a matter of convenience and without respect to the circumstances present at the airport.[126] Indeed, the FAA will permit an airport sponsor to refuse to permit a single FBO to expand at an airport, or exclude an incumbent FBO from participating under a competitive bidding process, in order to increase the chances that another competing FBO will establish itself on the airport.[127]

Another exception to the rule against granting exclusive rights is known as the proprietary exclusive right. This refers to the right of the owner of a public use airport to provide any or all aeronautical services itself.[128] The critical difference here is that the airport sponsor, using its own employees and resources, not any third party, is providing the service.[129] FAA guidance suggests that an airport sponsor may wish to assert its proprietary right in circumstances where either there is insufficient economic incentive to attract a private FBO, or where demand is so high that the airport desires to control the market for the purposes of making the airport more financially self-sustaining.[130] However, whether or not an airport sponsor asserts its proprietary exclusive right, an airport user is still entitled to "self-serve," i.e., arrange for its own fueling needs using its own employees.[131]

3. Grant Assurance 24, Fee and Rental Structure

Grant Assurance 24 requires federally obligated airports to "maintain a fee and rental structure for the facilities and services at the airport which will make the airport as self-sustaining as possible under the circumstances existing at the particular airport, taking into account such factors as the volume of traffic and economy of collection."[132] In evaluating whether a contract or lease between an airport sponsor and airport business does not violate Grant Assurance 24, the FAA will assess "whether the fee or rate charged generates sufficient income for the airport property or service provided, rather than looking at the financial status of the entire airport."[133] Economic conditions at a particular airport may not allow an airport sponsor to charge a self-sustaining fee, in which case the airport sponsor may

[119] *Id.* at 8-4.

[120] *Id.* at 9-10.

[121] 49 U.S.C. § 47107(a)(4).

[122] FAA Order 5190.6B, *supra* note 56 at 8-10.

[123] FAA, AC 150/5190-6, *supra* note 60 at 5.

[124] *Id.*

[125] *Id.*

[126] *Id.*

[127] *Id.* at 6.

[128] *See,* FAA Order 5190.6B, *supra* note 56 at 8-10; *see also,* Jodi L. Howick, Analysis of Federal Laws, Regulations, and Case Law Regarding Airport Proprietary Rights, (Airport Cooperative Research Program Report Legal Research Digest 10, 2010).

[129] FAA Order 5190.6B, *supra* note 56 at 8-10.

[130] *Id.*

[131] *Id.*

[132] Grant Assurance 24; 49 U.S.C. § 47107(a)(13)(A).

[133] FAA, Airport Revenue Use Policy, Section VII.B., 64 Fed. Reg. 7696, 7720 (Feb. 16, 1999) [hereinafter FAA Revenue Use Policy].

charge a lower rate or fee so long as it seeks to make the airport self-sustaining in the long run.[134]

The FAA Rates and Charges Policy sets out the FAA's policy and procedures regarding challenges to airports' rates and charges on aeronautical users.[135] Additional guidance on fee and rental structure is available in the FAA Revenue Use Policy, the FAA Incentive Program Guidebook,[136] and the FAA/OST Task Force Study.[137] Under Grant Assurance 24 and the FAA's policy guidance, airport sponsors are not required to charge aeronautical users fair market value rates, and in fact an airport sponsor may be prohibited from doing so due to its obligations under federal law and Grant Assurance 22 to make airports available on reasonable and not unjustly discriminatory terms.[138] Instead, the FAA considers a self-sustaining fee to be one that "reflects the cost to the airport sponsor of providing aeronautical services and facilities to users."[139] The FAA has stated that fees based on a residual rate-setting methodology satisfies self-sustaining requirements.[140] However, beyond this, few limits have been established, leaving much up to the airport sponsor to craft.

To understand Grant Assurance 24's impact on competition at airports, it is important to read its provisions along with Grant Assurance 22's requirements regarding reasonable access without unjust discrimination. Whereas Grant Assurance 22 prevents unequal treatment and serves as a check against seeking excessive rates and charges from tenants and other users, Grant Assurance 24 ensures that the airport sponsor seek a responsibly sufficient amount of compensation for use of the airport to maintain the airport's sustainability. Together, Grant Assurance 22 and Grant Assurance 24 provide mechanisms for ensuring that the economic relationships established at airports in order to serve the public resemble an open market with arms-length transactions, to the extent possible without undermining the need to serve the public.

4. Grant Assurance 25, Airport Revenues

Grant Assurance 25 requires airport sponsors to use revenue generated from airport operations and local taxes on aviation fuel solely for airport-related costs. Specifically, federal law allows for airport revenues to be spent on: "the capital or operating costs of the airport; the local airport system; or other local facilities which are owned or operated by the owner or operator of the airport and which are directly and substantially related to the actual air transportation of passengers or property; or for noise mitigation purposes on or off the airport."[141]

One key issue arising under Grant Assurance 25 is distinguishing between use of revenue for the benefit of the airport versus the benefit of a particular airport user or business. For instance, airport sponsors may not use funds to directly subsidize services, including air carrier operations.[142] However, under Grant Assurance 25, permissible airport-related costs for which airport revenue may be used includes costs related to the public promotion of an airport's facilities and services. This may include costs associated with advertising new air service at an airport, so long as the name of the airport is prominently featured in the material.[143] The FAA Revenue Use Policy,[144] FAA Incentive Program Guidebook,[145] and FAA/OST Task Force Study[146] provide additional guidance on use of airport revenue.

The requirements regarding airport revenue ensure that rents collected by the airport sponsor are reinvested in the airport. This is for the benefit of commercial entities operating at the airport and, ultimately, the flying public. In order to attract sufficient private interest and investment in operating a business on the airport, airport sponsors must ensure fiscal responsibility. On the other hand, using airport revenue to subsidize one particular private user or company would skew the competitiveness of the market and dis-incentivize other potential market entrants from competing. Grant Assurance 25 denies airport sponsors the ability to use airport revenue in this manner, but does allow for limited expenses that promote the airport and also promote a particular service or offering. This exception prevents abuse of airport revenue for the benefit of one particular entity or service, or of activities unrelated to the airport.

5. Grant Assurance 39, Competitive Access

Grant Assurance 39 requires medium- and large-hub airports that deny a request by an air carrier for access to gates or other facilities to file a report with the FAA.[147] Such competitive access reports must include a description of the request, an explanation as to why the request could not be accommodated, and a time frame in which the airport sponsor expects that the request will be accommodated.[148] In the event a request and denial triggers the competitive access reporting requirement, a report is due on the following February 1 or August 1, whichever comes first.[149] Thereafter, the airport must file a competitive access report every six months until the request is accommodated.

Grant Assurance 39 provides the FAA with a means of monitoring compliance with the requirements that airport sponsors must make airports available to carriers. Grant Assurance 39 itself does not require accommodation of an airline; that re-

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134 *Id.*

135 Policy Regarding Airport Rates and Charges, 78 Fed. Reg. 55, 330 (Sept. 10, 2013) [hereinafter FAA Rates and Charges Policy].

136 FAA Office of Airports, Airport Compliance and Field Operations, TC100-0034, Air Carrier Incentive Program Guidebook (Sept. 2010) [hereinafter FAA Incentive Program Guidebook].

137 *See,* FAA/OST Task Force Study, *supra* note 6.

138 FAA Revenue Use Policy, 64 Fed Reg. at 7720-21.

139 *Id.* at 7721.

140 *Id.*

141 Grant Assurance 25(a); 49 U.S.C. §§ 47107(b) and 47133.

142 FAA Order 5190.6B, *supra* note 56 at 15-4 to 15-5; FAA Airport Revenue Use Policy, Section V.A.3., 64 Fed. Reg. at 7718.

143 FAA Order 5190.6B, *supra* note 56 at 15-4 to 15-5; FAA Airport Revenue Use Policy, Section V.A.3., 64 Fed. Reg. at 7696.

144 *See,* FAA Airport Revenue Use Policy 64 Fed. Reg. at 7696.

145 *See,* FAA Incentive Program Guidebook, *supra* note 136.

146 *See,* FAA/OST Task Force Study, *supra* note 6.

147 49 U.S.C. § 47107(r)(2); Grant Assurance 39.

148 *Id.*

149 *Id.*

quirement falls within the purview of Grant Assurance 22.[150] The requirement to submit a competitive access report can also help monitor compliance with Grant Assurance 23's prohibition against granting exclusive rights. The competitive access reporting requirements also serve to induce airport sponsors to expressly acknowledge and consider competitive conditions in responding to requests for access.

The competition-oriented objectives intended through Grant Assurance 39 are reflected in its intended implementation. Grant Assurance 39 does not, for instance, categorically require an airport sponsor to report a case where it refuses to accept a carrier's terms for leasing or accessing space.[151] So long as an airport sponsor is willing to negotiate for access within the parameters set by the other Grant Assurances, it will not trigger the competitive access reporting requirements. Likewise, an airport sponsor is not required to report where it cannot provide a carrier's request for precise flight schedules or other arrangements, or where it terminates a hangar lease while still providing access to the terminal.[152] However, where an airport sponsor cannot provide access to gates on a schedule that is reasonably close to an air carrier's request, then it will likely require reporting.[153] As an example, an airport sponsor's ability to accommodate only four flights a day, where a carrier has requested five, may trigger the reporting requirement.[154]

Ever since enactment in 2003, the federal statutory provision providing for Grant Assurance 39 has included a sunset clause, which has continually been extended over the years.[155]

6. Grant Assurance 5, Rights and Powers

Grant Assurance 5 requires an airport sponsor to retain "rights and powers necessary to perform any or all of the terms, conditions, and assurances" contained in the federal grant agreement.[156] This requirement restricts airport sponsors from giving up rights that would, or could, unreasonably hamper the sponsor from providing aeronautical services to the public generally and further prohibits airport sponsors from granting tenants property interests that restrict an airport sponsor's ability to enforce federal laws on the airport.[157]

As it relates to managing competition, Grant Assurance 5 is often implicated when a sponsor contracts out the overall operation of the airport or significant portions thereof. In these circumstances, it is critical that airport sponsors retain sufficient rights to ensure that the airport or facilities are made available to the public on reasonable terms and without unjust discrimination. Delegating operating, maintenance or similar rights to a tenant that itself provides aeronautical activities is an action may be particularly prone to anticompetitive abuse.[158]

C. Surplus Property Conveyances

The receipt of federal property for airport use is another way in which the federal government can assert regulatory oversight over an airport. Under the Surplus Property Act of 1944,[159] surplus government property may be transferred to a state or local public entity for use as a public airport, subject to a number of statutory conditions and restrictions.[160] These statutory conditions and restrictions are contained in the instrument of conveyance to the state or local authority, and generally run with the land.[161]

Subject surplus property must be available for aviation use, or for use to produce airport income, and cannot be leased or rented at a discount or for nominal consideration to subsidize non-airport objectives.[162] Surplus property also cannot be used, leased, sold, salvaged, or disposed of for non-airport purposes without FAA approval.[163] Surplus property recipients also may not grant any exclusive right in the property to conduct aeronautical activities or aeronautical-related businesses.[164] The federal government may also convey non-surplus property to state and local entities for airport purposes,[165] and the instruments conveying these properties also subject the conveyee to federal obligations, including the prohibition on exclusive rights.[166]

The form of restrictions in prior approved conveyances of federal property for airport use are not uniform and vary based on the context of property conveyance, as well as the period of conveyance (due to changing federal law and administrative oversight).[167] However, the core requirements regarding competition, including most notably non-exclusive use, are consistent across time.[168]

The FAA provides additional guidance regarding the rights and responsibilities of airport sponsors under the Surplus Property Act,[169] and on non-surplus property conveyances for airport purposes.[170]

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[150] ACRP Project 03-38, *supra* note 93 at 50-51.

[151] *Id.* at 51.

[152] *Id.*; Tropical Aviation Ground Serv., Inc. and Air Sunshine v. Broward Cty. FAA Docket No. 16-12-15, Director's Determination (2015).

[153] ACRP Project 03-38, *supra* note 93 at 50-51.

[154] *Id.*

[155] *See,* 49. U.S.C. § 47107(r)(3), notes; Pub. L. 108-176, Sec. 424, 117 Stat. 2555 (2003).

[156] 49 U.S.C. § 47107(a); Grant Assurance 5(a).

[157] FAA Order 5190.6B, *supra* note 56 at 6-2 and 6-4.

[158] *Id*. at 6-10.

[159] Codified as amended at 49 U.S.C. §§ 47151-47153.

[160] 49 U.S.C. § 47151(a).

[161] FAA Order 5190.6B, *supra* note 56 at 3-3, 3-7.

[162] *Id.* at 2-16.

[163] *Id.* at 2-16.

[164] 49 U.S.C. § 47152(3).

[165] This may be under Section 516 of the AAIA, recodified at 49 U.S.C. § 47125, or predecessor statutory provisions, including Section 16 of the Federal Airport Act of 1946 and Section 23 of the Airport and Airway Development Act of 1970.

[166] *See,* FAA Order 5190.6B, *supra* note 56 at 3-8 to 3-9.

[167] *See, id.* at 3-5 to 3-7.

[168] *See, id.* at 3-1, 3-9.

[169] FAA Order 5150.2A, Federal Surplus Property for Public Airport Purposes (Sept. 19, 1972); FAA Order 5250.2, Applicability of Exclusive Rights Provisions of Public Law 80-289 to Previously Obligated Public Airports (Mar. 29, 1965).

[170] FAA Order 5170.1, Transfer of Federal Lands, section 23 of the Airport and Airway Development Act of 1970 (Mar. 18, 1977).

D. Passenger Facility Charges

Passenger Facility Charges are charges imposed on enplaning passengers at commercial airports.[171] Section 40117 of Title 49 of the United States Code grants the FAA authority to approve requests by airport sponsors to impose, collect, and use PFCs for projects that enhance safety, security, or capacity; reduce noise; or increase air carrier competition.[172]

The PFC statute is an exception to the federal Anti-Head Tax Act,[173] which otherwise prohibits states and local political subdivisions, including airport authorities or city airport departments, from imposing any tax or fee on a person conducting interstate travel by air. The PFC statute and associated regulations allow the local imposition of a charge up to $4.50 per enplaned passenger at an airport.[174]

PFC-approved projects serving to enhance competition often involve terminal development to provide more accessible space. Eligible costs include those concerning new construction, rehabilitation, or demolition of terminal facilities that directly affect the accommodation of air carrier at an airport.[175] Pursuant to FAA's PFC regulations, any airport sponsor proposal for use of PFCs to fund terminal development project affecting gates, ticket counters, baggage carousels, or other air carrier operations must include consideration of the impact to competition in the application.[176]

In keeping with the purpose of promoting competition at airports, the FAA's approval of PFC authority is conditioned on certain limitations and requirements. These limitations are included in a list of assurances to which airport sponsors must agree in order to obtain PFC authorization (PFC Assurances).[177] For example, no project funded with PFC funding may be subject to an exclusive long-term lease or use agreement with an air carrier.[178] In any lease or use agreement for PFC-funded facilities, the airport sponsor must also agree to include provisions allowing the sponsor to terminate the lease or use agreement if the carrier has an exclusive lease or use agreement for existing facilities at the airport, and any portion of its existing exclusive use facilities is not fully utilized and not made available to potential competitors.[179]

In addition, the PFC Assurances contain some financial restrictions regarding how to account for PFC revenue (e.g., not treating PFC revenue as "airport revenue" for purposes of establishing a rate, fee, or charge and prohibiting the airport from including the portion of capital costs of a project paid for with PFCs within a rate-setting methodology). Furthermore, those regulations and PFC Assurances also state that the rates and charges paid by carriers using a facility that are paid for (even partially) with PFCs cannot be less than the fees paid by carriers using similar facilities that were not paid for with PFCs. All of these factors should be kept in mind when structuring a rate-setting methodology to be paid by carriers for use of airport facilities.

FAA's PFC regulations also prohibit any agreement between an air carrier and an airport sponsor to "impair the authority of such public agency to impose a PFC or use the PFC revenue" as provided under the regulations.[180] This provision directly addresses the common practice at medium- and large-hub airports of including majority-in-interest (MII) clauses in lease and use agreements between signatory airlines and public airport owners. Traditional MII provisions require signatory airline approval of proposed capital projects financed through rates and charges assessed against those airlines.[181] In the past, MII clauses have been identified as a potential source of anticompetitive behavior at airports, where incumbent carriers have delayed or prevented construction of new facilities in order to accommodate new entrants.[182] FAA's PFC regulations enable airports to use PFC unencumbered by MII clause requirements.

E. Competition Plans and Competitive Access Reports

In 2000, AIR-21 introduced new requirements that certain large- and medium- hub airport operators whose airports are dominated by one or two carriers develop and submit competition plans.[183] The purpose of a competition plan is to compel airport operators to consider and demonstrate how they will provide for new entrant access and expansion of incumbent carriers.[184] In order to ensure compliance, AIR-21 conditioned FAA authorization of imposition of PFCs, and award of AIP funding, on submission of a competition plan by covered airports.[185]

Competition plans must "include information on the availability of airport gates and related facilities, leasing and subleasing arrangements, gate-use requirements, gate-assignment policy, financial constraints, airport controls over air- and ground-side capacity, and whether the airport intends to build or acquire gates that would be used as common facilities."[186] Generally speaking, the core aspects of a competition plan will point to specific aspects of the airline use and lease agreement

[171] FAA Order 5500.1, Passenger Facility Charge, 1-7 (2001).

[172] 49 U.S.C. § 40117; *see also,* 14 C.F.R. Part 158 (associated regulations).

[173] 49 U.S.C. § 40116.

[174] 49 U.S.C. § 40117(b); 14 C.F.R. § 158.5.

[175] FAA Order 5500.1, *supra* note 171 at 55-56.

[176] *Id*. at 56; 14 C.F.R. § 15.25(b)(7).

[177] *See,* 14 C.F.R. Part 158, App. A.

[178] *See id.*, Assurance B.5. *See also,* FAA Order 5500.1, at 10.

[179] 14 C.F.R. Part 158, App. A, Assurance B.7.

[180] 14 C.F.R. § 158.7.

[181] FAA/OST Task Force Study, *supra* note 4 at ix.

[182] *Id.* at ix, 7-8.

[183] 49 U.S.C. §§ 40117(k)(1), 47106(f)(1).

[184] FAA Order 5100.38D, Airport Improvement Program Handbook, App. X, X-2 (September 30, 2014).

[185] *See,* 49 U.S.C. §§ 40117(k) (condition for PFC authorization), 47106(f)(1) (condition for AIP funding). The separate statutory authority provides for similar but not identical reporting requirements depending on whether PFC or AIP funding is involved. *See,* FAA Program Guidance Letter 00-3, Requirements for Airline Competition Plans, 1 (May 8, 2000) (Canceled).

[186] 49 U.S.C. § 47106(f)(2).

or airport policies. For example, the use and lease agreement may only allow preferential use of gates (as opposed to exclusive rights) and have certain minimum utilization levels that, if an airline drops below, the gate reverts to the airport. Detailed content requirements are listed in the FAA's Airport Improvement Program Handbook.[187]

In the years since the implementation of AIR-21 and competition plans, the DOT Office of the Secretary (OST) and FAA have sought to streamline the competition plan review process.[188] Among these reforms, FAA has amended its initial policy of periodic update reviews to be triggered only if the airport sponsor (a) submits a competitive access report stating that it had denied access to an air carrier for gate or facilities within the last six months, or (b) executes a new master lease and use agreement, or significantly amends a lease and use agreement.[189] The FAA has also significantly reduced the review period needed for reviewing submitted competition plans.[190]

The consequence of an airport operator failing to submit a competition plan as required is the potential withholding of authorization to impose PFCs and withholding of AIP funding. Of course, a covered airport utilizing neither of these sources of funding would not be required to submit a plan. Given the widespread usage of these sources of funding, however, particularly with respect to AIP funding, the incentive to report is high.

F. Airline Deregulation Act

In addition to deregulating the airline industry on a federal level, the ADA also preempts state or local regulation of price, route, or service of air carriers.[191] Congress's primary purpose in doing so was to promote competition within the airline industry.[192] As federal courts have noted, "[i]n reducing federal economic regulation of the field . . . Congress obviously did not intend to leave a vacuum to be filled by the Balkanizing forces of state and local regulation."[193]

Accordingly, where a state or local law has the effect of regulating an airline's prices, routes, or service, it will be preempted unless the law comes within the narrow exception under Section 41713 for exercise of proprietary powers. Although state and local airport sponsors are not preempted from carrying out their proprietary powers and rights as airport owners, these proprietary powers must be carried out in a reasonable, non-arbitrary, and non-discriminatory manner.[194]

To the same extent that the federal deregulation enabled more open markets to help guide development and expand service, preemption of state regulation serves the same purpose. The broad preemption of commercial air service prevents local interests and agendas from overtly distorting the playing field set by federal law.

G. Private Contracts

In addition to statutory and regulatory requirements, private contracts also serve as an important legal mechanism for facilitating competition at airports. Indeed, the focus placed on setting the context for and guiding the terms and conditions of private agreements between airport operators and their tenants and users makes clear how foundational private contracting is in terms of the federal policy of promoting economic competition. In both the airline and FBO contexts, certain contractual provisions have an outsized impact on competition at airports.

Over the course of the modern aviation industry, complex contractual arrangements have developed between airport operators and tenant airlines. Historically, these agreements were often negotiated as part of the original financing for existing airport facilities.[195] One basic term of these agreements that impacted competition was the length—the duration of these agreements were normally termed for the useful life of the facilities. Such agreement durations made it more difficult for airport operators to adjust terms as needed in order to respond to new opportunities.[196] The more recent trend towards shorter agreements has allowed for greater flexibility in adjusting terms.[197]

Similarly, in the FBO context, agreements were often linked to construction of general aviation facilities (such as terminals, hangars, ramps, etc.) where the non-airport party committed substantial capital for such constructions. Both because of the need to finance such investments and because of the need to realize a positive rate of return on such investments, the terms of those agreements were lengthy; usually in the 30 to 40-year range. These long terms in and of themselves create competition-related concerns. Increasingly airports are reexamining the propriety of having such long-term agreements with FBOs and looking at other ways to finance needed capital projects with a goal of gaining more control over the competitive context within which FBOs operate.

Traditionally, many airport use and lease agreements also contained majority-in-interest clauses. As discussed above, MII provisions require signatory airline approval of proposed capital projects financed through rates and charges assessed against those airlines.[198] In the past, MII clauses have been identified as a potential source of anti-competitive behavior at airports, where incumbent carriers have delayed or prevented construc-

[187] FAA Order 5100.38D, App. X.

[188] FAA, Memorandum re: Program Guidance Letter 04-08 (Sept. 30, 2004) (Canceled) [hereinafter FAA Letter 04-08].

[189] *Id.*, at 2-3; FAA, Competition Plan Covered Airport List for FY-2017 (Apr. 17, 2017), at 2 note 2.

[190] FAA Letter 04-08, at 2.

[191] 49 U.S.C. § 41713(b)(1).

[192] Am. Airlines, Inc. v. Dept. of Transp., 202 F.3d 788, 805 (5th Cir. 2000).

[193] *Id.* quoting New England Legal Found. v. Mass. Port Auth., 883 F.2d 157 (1st Cir. 1989).

[194] *See*, British Airways Bd. v. Port Auth. of N.Y. & N.J., 558 F.2d 75 (2d Cir. 1977), aff'd, as modified, 564 F.2d 1002 (2d Cir. 1977); Arapahoe Cty. Pub. Airport Auth. v. FAA, 242 F.3d 1213, 1244 (10th Cir. 2001).

[195] FAA/OST Study, *supra* note 6 at vii.

[196] Joseph M Faulhaber, et. al., Airport/Airline Agreements—Practices and Characteristics, (Airport Cooperative Research Program Report 36, 47, 2010) [hereinafter ACRP Report 36].

[197] *Id.*

[198] FAA/OST Task Force Study, *supra* note 6 at ix.

tion of new facilities in order to accommodate new entrants.[199] This is the reason why FAA's PFC regulations enable airports to use PFCs unencumbered by MII clause requirements.

Since deregulation, the increasing ease of market entry and exit has caused pressure on airports to move from providing gates on an exclusive-use basis to preferential or common-use arrangements.[200] Where this change has occurred, it has aided airport operators in their ability to accommodate new entrants, thereby improving the competitive environment.[201] Accordingly, the FAA has endorsed the shift towards preferential and common use arrangements.[202]

Another use and lease agreement term impacting competition at airports is the so-called "most favored nation" or "MFN" clause. An MFN clause entitles a lessee to the same or substantially similar rights and privileges offered to its competitors. While such a clause may appear to be facially neutral or could be viewed as a tool to improve the competitive landscape, it also may be used to inhibit competition by providing incumbent airlines with a contractual right to inhibit airport efforts to attract new entrant carriers or FBOs. For example, as discussed below, airport proprietors may, and frequently do, offer incentives to carriers for new airline service, such as waived or reduced landing and/or terminal use fees. Depending on the scope and wording of an MFN clause, however, incumbent signatory airlines may argue that the airport owner/operator has contractually agreed to limit the authority it would otherwise have under the Grant Assurances.

In the context of contracting with FBOs for service, similar contractual issues arise with respect to limiting the influence of incumbent lessees. Common issues include MFN clauses as well as options or rights of first refusal on airport development, all of which can be used by incumbent tenants to protect their established interests. As discussed above, options and rights of first refusal can lead to land-banking by incumbent FBOs, which can cause airport sponsors to run afoul of Grant Assurance 23's prohibition against exclusive rights.[203] Agreements with FBOs also need to reflect Grant Assurance 22's requirement that airport tenants provide services on reasonable terms and without unjust discrimination.[204] Airport sponsors should also include subordination clauses in their agreements with FBOs that subordinate the lease to the airport sponsor's federal obligations.[205]

V. LEGAL ISSUES RELATING TO PROMOTING AIRLINE COMPETITION

Except for the competition plan statute and its attendant regulatory framework, most of the above-referenced legal authorities were drafted within the first several years after deregulation, a markedly different era with respect to airline competition. It is only in the past several years—as airlines have emerged from the crisis sparked by 9/11 and the global recession, and the competitive challenges created by increasing airline consolidation and hub concentration have gelled—that sponsors have begun assuming more proactive roles in remedying competitive deficiencies at their airports (beyond, as has traditionally been the solution, building expanded facilities). As a result, the extent to which many of the legal authorities discussed above will impact sponsors' efforts to enhance airline competition are untested. Indeed, there are few, if any, final determinations of the DOT or FAA to analyze, and those that do exist involve unique factual scenarios.

The following section is intended as a guide to the legal considerations likely to arise when sponsors undertake to influence airline competition through developing (1) alternative rates and charges methodologies; (2) air carrier incentive programs; and (3) common- or preferential-use gate or other facility protocols that accommodate new entrants.

A. Alternative Rates and Charges Methodologies

Airport sponsors' terminal agreements (or "use and lease agreements") with airlines are one of the broadest and most robust tools to foster competition (or at least ensure that it is not unnecessarily impeded). Use and lease agreements set out the terms and conditions of an airline's use of and payment for airfield and terminal facilities, and often include terms regarding the financing of future (or recently completed) airport facilities.[206] Because they are the primary mechanism for assigning and managing terminal facilities, use and lease agreements' structure is critical to ensuring adequate facilities and access for competition among airlines.

At the core of most use and lease agreements is the rates and charges methodology developed by the airport sponsor, i.e., the basis for how airlines will be charged for the space that they use. A comprehensive discussion of rates and charges methodologies is well beyond the scope of this report.[207] However, in general, methodologies are categorized as compensatory, residual, or hybrid.[208] Compensatory methodologies refer to agreements under which the airport operator charges airline tenants fees and rental charges sufficient to cover costs of providing airport facilities for each user's respective benefit, including operation and maintenance (O&M) expenses, associated debt service, and amortized capital expenses.[209] The risk that revenues from other sources will not cover all airport expenses remains with the airport sponsor. In contrast, under a residual agreement, signatory airlines agree to backstop the capital and operating costs of the airport to the extent they are not recovered from other

[199] *Id.* at ix, 7-8.

[200] ACRP Report 36, *supra* note 196 at 48.

[201] *Id.*

[202] *See, id.*

[203] *See,* FAA AC 150/5190-6, *supra* note 17 at 5.

[204] Grant Assurance 22(b).

[205] FAA Order 5190.6B, *supra* note 56 at 12-3.

[206] FAA/OST Task Force Study, *supra* note 6 at vii.

[207] For a more robust discussion, *see generally,* ACRP Report 36, *supra* note 196.

[208] FAA/OST Task Force Study, *supra* note 6, at vii; 49 U.S.C. § 47129(a)(2).

[209] FAA/OST Task Force Study, *supra* note 6, at vii.

users or by non-airline revenues.[210] Hybrid agreements refer to agreements that combine elements of both compensatory and residual agreements.

The assumption of greater risk on the part of the air carrier(s) in a residual agreement is often mitigated by enhanced carrier control over capital expenditures through MII clauses. As noted earlier, MII clauses grant the signatory airline (or a majority of signatory airlines) power of approval over certain capital expenditures.[211]

The FAA and DOT have noted that the nature of control over airport operations allocated to tenant carriers under a residual (and to a lesser extent, hybrid) use and lease agreement can negatively impact competition.[212] As a result, the FAA and DOT caution airport proprietors with residual or hybrid use and lease agreements to monitor the consequences of this form of agreement and its impact on competition at the covered airports.[213]

Increasingly, airport sponsors are moving away from purely residual agreements to maintain a maximum degree of control over new construction; in particular, new construction that would enhance competitive opportunities. Sponsors negotiating new use and lease requirements that do not anticipate significant capital improvements or changes in the operation over the term (and may, accordingly, not need airlines to backstop substantial risk), should consider transitioning to a compensatory methodology, or curtailing the scope of an MII clause. As discussed above, it is also important to recognize that PFCs, which are expressly available to finance terminal improvements that would enhance competitive opportunities, may not be controlled by the airline under the terms of a use and lease agreement.[214]

Of course, the cost of operating at a particular airport, regardless of the rates and charges methodology, is also an important factor in providing for adequate competition. While airport rents and landing fees account for only approximately five percent of U.S. airlines' expenses overall,[215] carriers nevertheless carefully examine the yields on a flight-by-flight basis and, if costs are too high at a given airport, may choose not to come, or to leave. Variables such as frequency (both flights per day or flights per week), aircraft size, and whether a mainline or a regional affiliate aircraft is used all impact the true cost associated with flights for each airline.

But, keeping costs low, as a general principle, is no longer enough to ensure competitive rates. As discussed above, the advent of the ULCC model has forced airport sponsors to critically examine traditional rate-making methodologies. This model predominately caters to leisure and discretionary travelers that do not necessarily value or desire frequency of service and are extraordinarily "no frills." Correspondingly, many ULCC stations have little for long-term: branded gates, ticketing positions, and/or staffing arrangements. And in many cases, requiring this sort of traditional arrangements would jeopardize the ULCC's cost basis (it is frequently uneconomical, for example, to lease a full gate module if an airline intends to operate less than daily service).

As discussed below, one way of accommodating ULCCs, as well as other types of non-traditional models, is through implementing protocols for common-use gate assignment or preferential-use gate sharing. However, sponsors have met significant resistance from legacy carriers in adjusting their rates and charges methodologies to accommodate these models.

In late 2014, Airlines for America, the most prominent U.S. airline advocacy group, requested an opinion from the FAA regarding what it alleged was discriminatory rate-setting at "a number of smaller airports."[216] A4A's letter focused on whether the FAA Rates and Charges Policy permitted a range of hypothetical scenarios that reflected (but, arguably, mischaracterized) various airports' efforts to accommodate the ULCC model.

For example, A4A asked several questions regarding permissible means of calculating per turn fees, such as:

- Does the Policy allow airports to calculate turn charges (whether at the gate or ticket counter) based on a methodology that does not achieve full cost recovery even if the facility is fully utilized? For example, an airport sets the turn rate assuming usage will be at the maximum of eight turns per day but even that usage would not achieve full cost recovery and actual usage may, in fact, be less.
- When calculating facility charges, are airports required to use reasonable usage and space assumptions? For example, an airport sets the turn charge based on eight turns per day when actual and projected usage is four turns per day.
- If an airport wishes to offer airlines rate methodology options, does the Policy allow an airport to discriminate between airlines by excluding an airline from an option made available to other airlines? For example, can an airport offer a turn charge methodology to some airlines but not others? If so, under what circumstances can an airport discriminate in this manner between operators?

A4A also asked whether "a common use space/facility rate methodology that is strictly use-based and does not include a component to allocate some portion of fixed costs evenly to all users reasonable under the Policy when that methodology disproportionately shifts costs to signatory carriers and results in competitively advantageous charges for limited use per-turn

[210] *Id.* at vii.

[211] *Id.* at 7-8.

[212] *See, id.* at 8.

[213] *See,* FAA Rates and Charges Policy, 78 Fed. Reg. 55,330, 55,336 (discussing additional information expected from airport proprietors with residual or hybrid use and lease agreements during consultation with FAA regarding airport rates and charges consultations).

[214] 14 C.F.R. § 158.7(b).

[215] *A4A Passenger Airline Cost Index (PACI),* Airlines for America, http://airlines.org/dataset/a4a-quarterly-passenger-airline-cost-index-u-s-passenger-airlines/ (visited Nov. 27, 2018).

[216] Letter from Laura A. McKee, Vice President, Airline Services, Airlines for America, to Randall S. Fiertz, Director, Airport Compliance & Field Operations, Federal Aviation Administration, dated December 17, 2014.

users?"[217] In other words, does the Policy permit an airport proprietor to allocate common use space entirely on the basis of either enplanements or operations (or both)?

In response to A4A's letter, the Airports Council International-North America (ACI-NA) and the American Association of Airport Executives (AAAE) first noted the "skewed" nature of the questions, and urged the FAA not to take a concrete positions regarding A4A's questions for fear of "muddying" the waters on guidance regarding airport rates and charges.[218] They emphasized, however, that the FAA Rates and Charges Policy allows airports to "adopt different ratemaking methodologies as long as the fees imposed on airlines are reasonable and not unjustly discriminatory."[219] And, "the fact that one particular methodology may be more appealing to certain types of carriers due to the nature of their operations does not mean that an airport must exclusively use that methodology."[220]

In early 2016, the FAA issued its response to A4A's letter.[221] While the FAA declined to opine on specific legal questions without a factual background to contextualize its decision, it did provide generalized responses to A4A's questions. Regarding differences in rate-setting methodologies, FAA stated that "[t]here may be reasons why carriers would be charged different rates that are not unjustly discriminatory, including, for example, differences in the carrier's category of operation, difference in the condition, quality, or features of facilities, differences in the actual cost of providing the terminal facilities, or possibly the use of a blended rate to distribute capital improvement costs among all facilities over time." The FAA also determined that, "[w]here there are differences in [a] carriers' use of the airport, the airport sponsor may determine that those differences warrant different approach to fee determination and not offer the use of every methodology to every carrier."[222]

These responses largely bolster a position that airport sponsors have considerable latitude in setting rates and charges. Indeed, the FAA emphasized that the Policy "does not dictate a single approach to rate-setting, and . . . fees may be set using any rate-setting methodology . . . as long as it is 'applied consistently to similarly situated aeronautical users and conforms' with the Policy."[223] It remains to be seen, however, exactly how these standards will be applied in the event the FAA is called upon to adjudicate a particular case.

[217] *Id.*

[218] Letter from Thomas R. Devine, General Counsel, ACI-NA, and Melissa Sabatine, Senior Vice President, Regulatory Affairs, AAAE, to Randall Fiertz, Director, Airport Compliance and Management Analysis, Federal Aviation Administration, dated May 15, 2015.

[219] *Id.* at 2.

[220] *Id.* (citing Transport Association of America v. United States Department of Transportation, 613 F.3d 206, 214 (D.C. Cir. 2010)).

[221] Letter from Byron Huffman, Acting Director, Office of Airport Compliance and Management Analysis, Federal Aviation Administration, to Laura A. McKee, Vice President, Airline Services, Airlines for America, dated February 12, 2016.

[222] *Id.*

[223] *Id.* (quoting the Revenue Use Policy)

In the interim, many airports have reported that legacy carriers have been unwilling to sign on to use and lease agreements that incorporate alternative methodologies such as a per-turn option or an allocation of joint use space that considers operations. This has led some airport sponsors to adopt alternative rates and charges methodologies by ordinance. The FAA has made clear that sponsors "have the same responsibility for consultation and transparency in adopting a fee by ordinance as in negotiation, [but] ultimately the sponsor can adopt the ordinance fee unilaterally."[224]

B. Air Carrier Incentive Programs

Airport sponsors and communities looking to enhance air service frequently develop risk mitigation or incentive programs to entice carriers to develop new service at their airports.

Recent research indicates that the success of such programs is mixed and highly dependent on the underlying market dynamics of the location being serviced.[225] Generally, larger, fast-growing cities are the most successful at retaining regular scheduled service initiated under an incentive program, while smaller airports and those closer to larger hubs have been less successful at recruiting or retaining new air service under an incentive program.[226] Anecdotally, carriers have often intimated that incentive programs are more likely to affect the timing of new service's launch or a choice among viable alternatives than they are to influence new route decisions in the first instance. Incentive programs are therefore unlikely to substitute for robust market opportunities but are nevertheless important components in enhancing competition.

Incentives may consist of one or more of three basic components. Strictly speaking, an incentive component, in FAA parlance, is one which offers discounts or fee waivers to air carriers providing new service in accordance with parameters defined by the airport sponsor. Permissible incentives "include, but are not limited to, waiving or reducing landing fees, rental fees, or fuel flowage fees."[227] Sponsors offering proprietary services, such as ground handling or de-icing, may waive or reduce these fees, as well. A marketing component is generally designed to enhance public and industry awareness of new air service and promote the use of the airport. A risk mitigation or subsidy component includes "providing aircraft parts, free fuel, interest-free loans, pay for service, or any other form of direct or indirect air carrier subsidy."[228] As discussed below, each of these components is subject to a host of federal requirements and varying degrees of scrutiny, depending on their structure.

One of the most important legal principles to consider in designing an incentive program is the principle of unjust discrimination, embodied in Grant Assurance 22. An airport sponsor

[224] *Id.*

[225] Megan S. Ryerson, *Incentivize It and They Will Come? How Some of the Busiest U.S. Airports Are Building Air Service With Incentive Programs*, 82 J. Am. Planning Ass'n 4, 303-315 (Autumn 2016).

[226] *Id.*

[227] FAA Incentive Program Guidebook, *supra* note 136 at 17.

[228] *Id.*

is, as discussed above, required to make the airport available on reasonable terms and without unjust discrimination among aeronautical users. Incentive programs are permissible notwithstanding this requirement because the FAA views "new service" to be dissimilarly situated from already existing air service;[229] ≈˛recall that the principle of unjust discrimination requires similarly treatment of similarly situated users.

The FAA has traditionally defined "new service" as (a) service to an airport destination not currently served, (b) nonstop service where no nonstop service is currently offered, (c) a new entrant carrier, or (d) increased frequency of flights to a specific destination.[230] More recently, the FAA has recognized that upgauging aircraft (i.e., using aircraft with a larger seating capacity) can also constitute "new service"—akin to increased frequencies—as long as the net result of the upgauging is to add capacity.[231] An airport sponsor may not, for example, provide an incentive for carriers to use a larger aircraft if the carrier would simultaneously reduce frequencies.[232]

New service is not dissimilarly situated from existing service in perpetuity, however. The FAA views new entrant carriers to be similarly situated with incumbent carriers after one year of service.[233] Thus, if a sponsor's incentive program is offered to only new entrant carriers, then a participating carrier may not receive incentives, marketing support, or subsidy for longer than a one-year period.[234] If, however, an incentive is offered to both new entrants and incumbent carriers—for example, for new non-stop service to an unserved destination—then the FAA views the new service as dissimilarly situated for two years.[235] After these periods, continuing to offer an incentive would become unjustly discriminatory. Thus, sponsors must carefully consider—and clearly state—the eligibility criteria for an incentive; if it is not clear that incumbent carriers may participate by offering the incentivized service, then the FAA will likely find the incentive period of the program must be limited to a maximum duration of one year.

The distinction between existing and new service only goes so far. The FAA does not permit sponsors to further limit the availability of incentives by offering them only to carriers that commit to flying a particular type or size of aircraft, or that operate under a particular type of business model (i.e., LCCs and ULCCs). Incentives may be designed for a particular frequency of service, however, and a sponsor may, in its discretion, either prorate the incentive for carriers flying less than the sponsor's service target or refuse to offer an incentive for lesser service.

Grant Assurance 25 and the FAA Revenue Use Policy, which generally restrict the use of airport revenues to the capital or operating costs of the airport, also feature prominently in the design of an incentive program. The FAA views incentives—discounted or waived fees for the use of airport facilities—as a permissible "expenditure" of airport revenue within the parameters discussed above.[236] However, the principle of unjust discrimination, as applied to rates and charges, requires that cost of providing such incentives not be included in air carriers' rate base without their specific consent (i.e., carriers not receiving an incentive cannot be compelled to cover the cost of the incentive).[237] Thus, as a practical matter, the cost of incentives will generally be covered by the sponsors' non-aeronautical revenues.

The marketing component of an incentive program must also be carefully structured to ensure that consistency with the FAA Revenue Use Policy. Federal law expressly prohibits "use of airport revenues for general economic development, marketing, and promotional activities unrelated to airports or airport systems."[238] Through the FAA Revenue Use Policy and the FAA Incentive Program Guidebook, the FAA has interpreted this language to permit promotion of the airport, promotion of new air service and competition at the airport, and marketing of airport services.[239] Permissible promotional expenditures may include, for example, the cost of employees engaged in the promotion of airport services, or cooperative airport-airline advertising of air service, provided that the airport is specifically included in marketing materials.[240] However, marketing programs that focus on increasing regional revenue for the benefit of general economic development, such as destination or tourism marketing, may not paid from airport revenues.[241]

Subsidies, defined by the FAA as the "payment of airport revenue to a carrier or to any provider of goods or services to that carrier, in exchange for additional service by the carrier," are categorically prohibited by the FAA Revenue Use Policy. Thus, the sponsor may not lease property or equipment on behalf of a carrier, guarantee a minimum revenue to mitigate start-up risks, offer cash incentives to passengers, pre-purchase airline seats for use by community businesses, or participate in some other form of indirect subsidy using airport revenues.[242]

Sources of funds *other* than airport revenues, however, may be used for these and other forms of subsidy programs. For example, some sponsors may have access to funds from special taxing districts, either through their own taxing authority or that of a non-sponsor. Similarly, economic development corporations or Chambers of Commerce may be willing to provide the sponsors with funds for these purposes. Provided these

[229] *Id.* at 7.

[230] *Id.*

[231] *See,* FAA, Policy and Procedures Concerning the Use of Airport Revenue: Petition of the Clark County Department of Aviation to Use a Weight-Based Air Service Incentive Program, FAA Docket No. FAA-2011-0361, 77 Fed. Reg. 21148 (Apr. 9, 2012).

[232] *See, id.*

[233] FAA Incentive Program Guidebook, *supra* note 135 at 7.

[234] *Id.* at 15.

[235] *Id.*

[236] *Id.* at 17.

[237] *See, id.* at 17, 23.

[238] 49 U.S.C. § 47107(k)(2)(B).

[239] 64 Fed. Reg. at 7703.

[240] 64 Fed. Reg. at 7703; FAA Incentive Program Guidebook, *supra* note 136 at 3, 20.

[241] FAA Incentive Program Guidebook, *supra* note 136 at 3.

[242] *Id.* at 21.

funds are not derived from airport users, the sponsor's activities at the airport, or taxes on aviation fuels (and access to the program is otherwise in accordance with the grant assurances), subsidy programs are permissible. Sponsors must ensure, however, that their accounting systems maintain complete segregation between airport revenues and non-airport revenues that are used for such purposes.

Under normal circumstances, a sponsor must make an incentive program available to all carriers that are willing to provide the new service on the terms that the sponsor has identified. There may be cases, however, where the sponsor desires to make the incentive available to a smaller number of carriers, or just one carrier. For example, the sponsor may not have enough funds to support more than one carrier in the program. In these cases, the FAA encourages airports to utilize a Request for Proposals (RFP) to ensure that all interested carriers have an equal opportunity to compete for the incentive.[243] If this process is utilized, it is important that the sponsor structure and publicize the RFP so as not to discriminate against any carrier. The FAA is likely to scrutinize, for example, an incentive that was awarded to a single carrier which had the benefit of extensive consultation with the sponsor prior to an RFP.[244]

It is important to note that all of the limitations discussed in this subsection up to this point are imposed on an airport sponsor by virtue of its grant assurance obligations. The same limitations do not exist for entities other than airport sponsor, which are not bound by grant agreements with the United States. Thus, certain non-sponsor entities, such as Chambers of Commerce, may choose to work with a single carrier and provide a revenue guarantee, reimburse airport fees, establish a ticket bank, or any number of other programs. It is critical, however, that the airport sponsor play no role whatsoever in delivering such an incentive. The airport sponsor may not be party to the incentive agreement, nor it may negotiate or monitor the airlines performance with the agreement in any manner.[245]

Finally, apart from any federal requirements that may be applicable, sponsors should take care to ensure that incentive programs and their implementing agreements are structured to ensure that the sponsor receives the full benefits of the service it is incentivizing. It is common for sponsors to require, as a condition of receiving an incentive, that the airline maintain good on-time performance and maintain a set schedule of flights for the duration of the incentive period. Additional guidance on incentive program design may be found in the forthcoming ACRP publication, *Building and Maintaining Air Service Through Incentive Programs*.

1. Access to Airport Facilities and Sponsor Role in Space Allocation

Access to airport facilities is, obviously, a critical component to competition in that carriers seeking to serve an airport in response to the demand for such additional service must be able to use facilities such as ramps and gates in order to serve the public. Issues arise when incumbent airlines (i.e., airlines already serving the airport) occupy but do not fully utilize airport gates and other facilities. Even at airports that may have available space, barriers to entry may exist, such as financial requirements that have a de facto anticompetitive impact.

Access to physical facilities is broadly guided by several important federal requirements, including the prohibition on exclusive rights and the requirement to provide airport facilities on reasonable terms and without unjust discrimination. In addition, operators can still influence elements of competition through air service incentive programs.

A bulwark of the federal requirement to maintain competitive air service from the standpoint of airport operators is the prohibition against the granting of exclusive rights. The exclusive rights prohibition is provided for in federal law governing the use of federal land and funds for airport purposes,[246] as well as the federal programs, agreements, and policies implementing those laws.[247] This prohibition prevents airports operators from allowing air carriers to establish monopolies at particular airports or along certain routes. These requirements enlist airport operators in policing air carrier activity and prohibits contractual arrangements that prevent airport operators from enforcing federal law, including the prohibition on exclusive rights.

Airport sponsors can also influence air service competition by wielding their right and obligation to provide access to all qualified air carriers on reasonable terms and without unjust discrimination.[248] This requirement prohibits airport operators from the following activities:

(1) Deny[ing] access by disapproving an otherwise-qualified air carrier's application or by unreasonably delaying access;
(2) Adopt[ing] unjustified standards prohibiting a certain class of carrier from operating at the airport or containing criteria not relevant to operations, not reasonably attainable, not uniformly applied, or intended to protect incumbents;
(3) Defer[ing] completely to incumbent tenants' determination on whether or not, and how, to accommodate requesting airlines;
(4) Permit[ing] unreasonable sublease fees or conditions to be imposed on new entrants; or
(5) Unreasonably deny[ing] signatory status to an authorized air carrier willing to assume the obligations of a signatory carrier.[249]

With these prohibitions as a foundation, airport operators proceed to create the field upon which airlines will operate and compete via the policies they set and the contracts between the airport and airlines.

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[243] *Id*. at 13.

[244] *Id*.

[245] *Id*. at 24.

[246] 49 U.S.C. §§ 47101 *et seq.*, 40103(e), 47151-47153, 47125.

[247] *See*, *e.g.*, Grant Assurance 23; FAA Order 5190.6B, *supra* note 56 at 7-23, 8-4. FAA AC 150/5190-6, *supra* note 17 at 1.

[248] 49 U.S.C. § 47107(a)(1); Grant Assurance 22(a).

[249] FAA/OST Task Force Study, *supra* note 6, at 14.

The level of control over which the airport operator will retain will be a critical component in the competition equation. With respect to gates, they are generally leased to airlines on one of several bases: exclusive, preferential, or common.[250] Common-use gates refer to gates that are entirely controlled by the airport sponsor and that may be assigned to air carriers on a "temporary, per-turn basis or on a short term (e.g., 30-day) arrangement."[251] Gates leased on a preferential-use basis generally mean that an airport tenant has leased a gate "on a preferential basis where the lease requires the lessee to allow another to use the facility to the extent such use does not interfere with the lessee's actual use of the facility."[252] An exclusive-use lease "typically assigns to one airline the right to use and occupy gates and facilities for a specified duration and the right to sublet or assign the facilities, conditioned on the prior written approval of the airport management."[253] (It is noteworthy that FAA strongly encourages transitions from exclusive-use gate agreements to preferential-use or even common-use gate agreements instead in order to increase airport control over facilities (i.e., comply with Grant Assurance 5) and to foster a more flexible and competitive environment.)

If an over-abundance of unused gates exists at an airport, available space will not be a factor that could limit competition. On the other hand, if most gates are occupied by airlines, this could have an adverse impact upon competition initiatives. Maintaining a certain level of control over gates is therefore essential for airport sponsors to enable them to accommodate new requests for air service, whether by a new entrant carrier or by an existing carrier seeking to expand its operations.

Use of other airport space, such as ticket counters and baggage claims, may also be an area of consideration when it comes to promoting competition. Two central areas of concern exist for airport sponsors. The first is having space available for new entrant carriers that may wish to serve the station. This may be accomplished via a variety of means including carefully examining existing airlines' needs and narrowly tailoring leased space to those needs. In addition, an airport may reserve areas that will be used by airlines on a common basis. Many airports are examining whether it is advisable to convert all their preferential-use ticketing and baggage areas to a common use scheme. This enables the airport to shift the use of facilities as demand and carrier mix evolves.

As mentioned elsewhere herein, many airports are required to have competition plans as a prerequisite to being eligible for approval of PFCs. Competition plans usually rely upon provisions of the airport's agreements with airlines on important matters such as gate use policies, whether the airport's gates are leased to airlines on an exclusive or non-exclusive basis and whether the airport has retained control over certain gates for use by new-entrant carriers. Thus, while the competition plan may outline an airport sponsor's intentions with respect to maintaining availability of its facilities to a variety of air carriers, the competition plan in and of itself does not stand alone as an enforceable document. Instead, it relies upon the sponsor's contractual obligations and has underlying it all of the above-referenced Grant Assurance-based obligations (such as the prohibition against granting exclusive rights, making facilities available on reasonable and not unjustly discriminatory basis).

It is worth noting that, with respect to the general availability of space for new entrant carriers, airports are expected to, at least eventually, have enough space to allow all carriers who wish to serve the airport to do so. As mentioned previously herein, the prohibition against exclusive rights may arise in instances where an airport does not have existing capacity to accommodate another air carrier based on unavailability of facilities. The FAA's position is that an airport sponsor "may not deny an air carrier access solely based on the non-availability of existing facilities" and "must make some arrangements for accommodations if reasonably possible."[254] What this means for an airport sponsor is a matter of debate. Indeed, the FAA itself stated that such "access issues can often be complex and are not always easy to resolve." [255] Generally speaking, much is left to the sponsor to accommodate such demand beyond capacity and it is, at least implicitly, expected that additional facilities will be constructed. However, it is noteworthy that between the exclusive rights, statements regarding "mandatory access," and the availability of PFC funds for the promotion of competition, one could reasonably conclude that the expectation of the FAA is that those facilities will be constructed if demand so dictates. Whether the FAA would step in if the sponsor failed to build new facilities to accommodate new carriers is unknown.

For better or worse, simply setting the stage for robust competition may not end the airport sponsor's involvement. Clearly, when an airport has gates and other space available to provide an airline wishing to initiate service (or expand an airline's existing presence), the airport simply provides access to those areas. However, issues arise when space is "occupied" by existing airlines and operations. What "occupied" means may vary from situation-to-situation. For example, all gates may be leased by existing airlines, but the utilization of those gates may be low, thus allowing another carrier to use these unused time slots. In other situations, time may be available on airport-controlled common-use gates, but the available time may not fit an incumbent airline's desires. Furthermore, where gates may be available, an incumbent airline may seek to initiate service at a given airport, but do so only infrequently (for example, only three days a week) such that its contracting for an entire gate (i.e., a gate that is primarily assigned to such airline) would be overkill and thus, too expensive to justify such infrequent air service.

In these situations, it will be critical for the airport operator to have in place, in advance of such situations arising, clear policies and procedures concerning how gates and other space will be allocated. It is critical that airport sponsors provide themselves the leverage necessary, through agreement and agreed

[250] *Id.* at viii.

[251] *Id.* at 41.

[252] *Id.* at 37 note 8.

[253] *Id.* at 38.

[254] FAA Order 5190.6B, *supra* note 56 at 9-10.

[255] *Id.*

procedures, to be able to enforce their federal obligations, and to provide itself and existing and potential tenants with clarity regarding the process for enforcing these rights. This is most effectively accomplished via detailed contractual provisions in airline use and lease agreements.

While the specifics of these provisions are beyond the scope of this report, some best practices for promoting competitive gate allocation provided by the FAA include:

- Promoting new entry by becoming advocates for competition.
- Continually monitoring gate-utilization practice of airlines.
- Invoking "use-it-or-lose-it" authority if incumbent carriers are not using their gates fully.
- Providing clear guidelines and a timeline to prospective entrants on what they must do to gain access to an airport and when they will be able to begin operations, and clear standards to incumbent carriers that seek additional space to expand operations.
- Monitoring all sub-lease agreements to ensure that fees are reasonable.
- Creating an environment where third-party contractors provide competitive ground-handling and support service.
- Taking actions to recover gates when they become available and to convert gates and other facilities to common-use status.
- Working to ensure that any new [majority-in-interest] agreements entered into [with signatory airlines] do not prevent or delay projects that could be beneficial to new entrants or smaller airlines service their airports.
- Using the tools provided by the PFC program to finance terminal expansion projects that provide greater opportunities for new entrants and increase airline competition.[256]

Of particular note in this arena, while an airport operator cannot disregard the terms of its agreements with carriers, even where carriers have exclusive use of gates the airport operator retains the federal obligation to ensure new entrant access to the airport.[257] This could potentially mean taking gates back and retaining them as common-use or subject to short-term agreements.

Lastly, airport sponsors should also stay aware of anti-competitive activity related to tying the provision of services to subleases for gates and airport facilities. Unless there is a legitimate business reason for doing so, requiring use of ground-handling services as a condition of allowing use of a gate may be a violation of antitrust laws, depending on how much control the tenant air carrier has over the overall airport facilities.[258]

C. Recent Dispute/Litigation Regarding Gate Access

A recent dispute at Love Field Airport (Love Field) in Dallas, Texas, provides an illuminating if tangled example of the complications of enforcing federal competition requirements at airports. The dispute arose between Southwest Airlines (Southwest), the historically dominant airline operating out of Love Field pursuant to a long-term lease with the City of Dallas (City), and Delta Air Lines (Delta) who had operated a small number of flights out of the airport for several years under a month-to-month sublease with another airline. In late summer of 2014, unable to secure a continuing lease for gates at Love Field, Delta formerly requested that Love Field's owner, the City of Dallas, make accommodations for it at Love Field. Southwest, who acquired a sublease for the gates Delta had been using, objected to ceding any of its gates' rights to Delta, indicating that it anticipated substantially increasing service at Love Field so as to take up any extra capacity there was for an additional carrier to serve Love Field.

The legal circumstances framing the dispute are unique. Since 1979, Love Field has been subject to special federal legislation limiting the number and composition of air carriers serving it.[259] This special status was borne out of a unique series of events during the transition of the majority of air service from Love Field to the newly built Dallas-Fort Worth (DFW) Airport in the 1970s.[260] In essence, in order to protect the financial viability of DFW, which all relevant carriers except Southwest had agreed to utilize, Congress restricted the interstate routes that could connect directly with Love Field.[261] This remained the situation until 2006 when, at the urging of Congress, the two major airlines operating out of Love Field pursuant to long-term agreements, Southwest and American Airlines, as well as the City of Dallas, the City of Fort Worth, and the DWF Airport Board entered into an compromise agreement providing for the reduction of gates at Love Field and the allocation of just over half of the remaining gates to Southwest on a "preferential-use" basis.[262] The agreement also provided for a procedure for accommodating "new entrants" at the airport in the event such airlines could not arrive at a negotiated agreement between themselves. Finally, the agreement provided that restrictions on routes connecting with Love Field would be lifted in October 2014. Congress subsequently officially sanctioned this agreement by passing a law enacting some of its provisions.

In addition to this unique legal history, the City was also subject to competition-related federal obligations, including its Grant Assurance obligations pursuant to receipt of AIP grants and competition plan requirements tied to receipt of

[256] FAA/OST Task Force Study, *supra* note 6, at xiii-xiv. The FAA/OST Task Force Study outlines the benefits of using PFC funds, which are less restrictive than AIP funds, for airport expansion that is not reliant on and tied to incumbent carrier funding and use. *See id.,* at 56-57.

[257] *Id.* at 15.

[258] FAA Incentive Program Guidebook, *supra* note 136 at 27-28.

[259] Wright Amendment Reform Act of 2006, Pub. L. No. 109-352, 120 Stat 2011 (Oct. 13, 2006) [hereinafter WARA].

[260] For a broader history of the unique history of Love Field, City of Dallas v. Delta Airlines, Inc., Case No. 3:15-cv-02069-K (N.D. Tex. 2016) [hereinafter *Dallas I*], *aff'd in part* 847 F.3d 279 (5th Cir. 2017) [hereinafter *Dallas II*].

[261] *See,* WARA, *supra* note 254; *Dallas I*, slip op. at 3.

[262] CITE

PFC funds.[263] Accordingly, when Delta submitted its request for accommodation in 2014, the City had to consider requirements to accommodate air carriers relating to its agreements with the current carriers operating at Love Field and the federal government pursuant to Grant Assurances under its AIP grant agreements, as well as specific federal law sanctioning its airline agreements and general laws related to AIP and PFC funds. In addition, the DOJ effectively prohibited Dallas from considering the only two of Love Field's gates not under Southwest's control to Delta because they were part of an agreement regarding its settlement with American and U.S. Airways, and were allocated to another airline.[264]

Uncertain about the extent to which it could or was required to force Southwest to cede gates to Delta Airlines, the City of Dallas requested that DOT provide clarification on the City's responsibilities under federal law. DOT responded to the city's request by stating that Dallas was required to accommodate Delta pursuant to its competition plan under AIR-21 and its Grant Assurances under the AIP, and that it should expect to provide ongoing accommodation to Delta according to a similar pattern of service as existed before the dispute.[265] DOT warned the City that it should not take into account an airline's future anticipated use of airport facilities as doing so would "give a signatory carrier the ability to block a competitor's accommodation request by deciding or asserting, after a request is made, that it will expand service."[266] DOT left the responsibility of how to accommodate Delta up to the City, however.[267] Southwest disputed DOT's legal conclusions and petitioned the D.C. Circuit for review of DOT's letter to the City, but the D.C. Circuit ultimately denied Southwest's petition on the grounds that the letter did not constitute a final agency decision.[268]

With neither Southwest nor Delta willing to back down, and with agreements for temporary accommodation between the two airlines terminating, the City filed a suit in federal court against both Southwest and Delta seeking a determination about its required action.[269] Southwest and Delta joined in the action, with both seeking preliminary injunctions with respect to temporary accommodation of Delta at Love Field.[270] The City requested grant of relief to either party.[271] Shortly thereafter, the FAA initiated a Part 16 proceeding to assess the City's compliance with its grant obligations.[272] In that proceeding Delta argued that the City's failure to accommodate Delta and its acquiescence to the sublease of additional gates to Southwest in 2014 amounted to denial of open competition at Love Field in contravention of the City's federal obligations.[273] The City argued that the FAA does not have jurisdiction over the City's accommodation policy, given that the accommodation policy is provided under federally enacted lease terms pursuant to WARA rather than the more traditional Grant Assurance and competition plan bases.[274]

With respect to the City's suit, the district court decided the preliminary injunction issue on contractual grounds, holding that Delta was a third-party beneficiary to the lease agreement between Southwest and the City and thus could enforce the accommodation provisions in that agreement. It furthermore determined that there was a substantial likelihood that Delta would succeed on the merits of its position with respect to accommodation under the terms of the agreement. On appeal, the Fifth Circuit affirmed the preliminary injunction in favor of Delta, but without ruling on whether Delta was in fact a third-party beneficiary to the lease agreement. Instead, the Fifth Circuit granted relief based on the City's request for relief.[275]

FAA has since withdrawn its notice of investigation under 14 C.F.R. Part 16 without prejudice, ostensibly pending the outcome of the litigation in the federal court system.[276] As of the date of this publication, this litigation was continuing at the District Court level. Given the ongoing nature of this dispute, it is too early to tell what its outcome will be. However, it does underline the tricky nature of ensuring effective competition at airports.

VI. LEGAL ISSUES RELATING TO PROMOTING FBO COMPETITION

In the FBO context, "competition" may be approached differently depending on the size of the airport and its role in the national system. While all sponsors are generally concerned with whether fuel prices and the cost of other services meet the needs of its users, the means of correcting any competitive deficiency may vary. For airports with abundant and robust commercial activity, adequate competition may mean having (or at least potentially having) more than two or more FBOs on the field. Much smaller general aviation airports with lower levels of activity may only be able to realistically support one FBO. The relevant marketplace in those instances may be regional, and the issue whether there are sufficient viable alternatives at other airports for the purchase of fuel to check an otherwise monopolistic tendency.

[263] *See, Dallas I*, slip op. at 38.

[264] *See id*., at 6.

[265] *Id*. at 12.

[266] *Id*. at 14.

[267] *Id*.

[268] Southwest Airlines Co. v. U.S. Dept. of Transp., 832 F.3d 270 (D.C. Cir. 2016).

[269] *Dallas I*.

[270] *Id*., slip op. at 15.

[271] *Id.* at 17-18.

[272] In re Compliance with Federal Obligations by the City of Dallas, FAA Docket No. 16-15-10, Notice of Investigation (Aug. 7, 2015).

[273] Invited Brief of Delta Air Lines, Inc., FAA Docket No. 16-15-10, FAA-2015-3561-0011 (Filed Feb. 9, 2016)

[274] Reply of the City of Dallas to the Invited Comments on the Notice of Investigation and to the Federal Court Preliminary Injunction Decision, FAA Docket No.16-15-10, FAA-2015-3561-0013 (Filed Feb. 9, 2016).

[275] *Dallas II*, 832 F.3d at 291.

[276] In re Compliance with Federal Obligations by the City of Dallas, FAA Docket No. 16-15-10, Notice of Withdrawal and Dismissal Without Prejudice (Apr. 4, 2018).

In December 2017, the FAA issued a guidance document entitled, "Q&As – FBO Industry Consolidation and Pricing Practices." The Q&As recognize that airport sponsors have an increased interest (and, perhaps, arguably an obligation) in monitoring the competitive opportunities for FBOs in light of the "continuing consolidation of the FBO industry, the post-9/11 security demands placed on the airport and FBO, the lack of traffic volume to support FBOs, and airport sponsors' need to operate self-sustaining enterprises." The Q&As do not establish any new interpretations of sponsors' grant assurance obligations, but rather suggest a range of tools that sponsors concerned about high pricing may use to address competitive deficiencies:

- Consider the relevant sections of the FAA Rates and Charges Policy to the situation at the airport with regards to setting fees, rates, and charges;
- Establish different classes of FBOs with different levels of service, that may include ancillary and support services;
- Take over FBO services to address a shortcoming;
- Establish self-service fueling;
- Clarify the scope and detail of the right to self-service operations;
- Adjust rules, regulations, leases, and minimum standards and review periodically;
- Publicly disclose rates and charges for airport access and service;
- Retain exclusive control over ramp areas;
- Outline and address restrictions on exclusive leasing of Federally funded infrastructure, such as ramps;
- In Requests for Proposals, require fuel pricing policies in agreement/leases; and
- Require fuel price adjustments or imposed profit limits in local laws or ordinances.[277]

This section details several of these tools in the airport sponsor's toolbox and their attendant legal considerations.

A. Rates and Charges

The costs associated with operating at an airport that are attributable to the airport/owner's agreement with the FBO presents an almost unlimited set of variables. Each airport presents its own set of challenges and opportunities with respect to how to best (and profitably) serve aeronautical users. As mentioned elsewhere herein, due to the fact that agreements with FBOs are aeronautical in nature, sponsors need not get market rent from FBOs and may instead fashion arrangements that are tailored to the airport's and FBO's particular needs, interests and financial circumstances.

Numerous factors impact how financial arrangements are made between an FBO and an airport operator as to how the operator will be paid in exchange for the FBO's operation. These arrangements may be as simple as the FBO merely paying ground rent to the airport (most often in situations where the FBO may have solely paid for the construction of facilities in exchange for a long-term rent of airport property) to revenue sharing structures whereby the FBO and the airport share in FBO-generated profits.

A myriad of variations of payment structures are possible and the specifics depend upon many factors such as the airport's access to capital, its risk tolerance and how much control/involvement it seeks to maintain over FBO operations on an ongoing basis. These specifics are beyond the scope of this report. However, the financial arrangements are similar to those used by airports in structuring economic development projects and airport sponsors should consult other ACRP projects for insight and guidance.[278]

B. Minimum Standards

Grant Assurance 22 requires that all aeronautical service providers be granted access to the airport on reasonable terms and without unjust discrimination.[279] The FAA recommends—but does not require—that airport sponsors implement this requirement in part through developing "minimum standards."[280] Minimum standards set forward the conditions under which aeronautical service providers are permitted to supply goods and services at a public-use airport. With respect to FBOs, minimum standards outline what an airport sponsor wants an FBO to be: how big its physical footprint must be, what services amenities must be available to pilots and passengers, and what ancillary services must be available within the confines of the FBO property.

Minimum standards are typically published as a standalone document and incorporated by reference into commercial leases or operating permits at the airport. In this way, sponsors may point to an objective set of criteria in making decisions about the terms of access for different sorts of aeronautical service providers, as well as provide prospective providers with a clear understanding of the conditions they will be required to meet. The FAA will not generally countenance allegations of unjust discrimination against a sponsor where the sponsors has:

(1) Applied minimum standards consistently to all providers of aeronautical services;
(2) Imposed conditions that ensure safe and efficient operation of the airport in accordance with FAA rules, regulations, and guidance;
(3) Ensured standards are reasonable, not unjustly discriminatory, attainable, uniformly applied and reasonably protect the investment of providers of aeronautical services to meet minimum standards from competition not making a similar investment;

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277 *Id.*

278 *See*, *e.g.*, ACRP 03-39, Generating Revenue from Commercial Development On or Adjacent to Airports; ACRP 01-15, Assessing and Implementing Innovative Revenue Strategies—A Guide for Airports; ACRP 09-03, Permitted Airport Involvement in Economic Development Efforts.

279 Grant Assurance 22.

280 *See,* FAA AC 150/5190-7, *supra* note 58; FAA Order 5190.6B, *supra* note 56 at Ch.10; Carey v. Afton-Lincoln Cnty. Mun. Airport Joint Powers Bd., FAA Docket No. 16-06-06, 2007 WL 430630, *26 (Jan 19, 2007).

(4) Ensured standards are relevant to the activity to which they apply; and
(5) Ensured standards provide the opportunity for newcomers who meet the minimum standards to offer their aeronautical services within the market demand for such services.[281]

Minimum standards are an effective tool in managing airport development and protecting the sponsors against allegations of unjust discrimination. However, because they are effectively the filter through which new aeronautical service providers must pass to operate at an airport, their development and periodic reevaluation are critical to ensuring adequate competition.

On the one hand, setting minimum standards too low runs the risk of allowing unqualified or uncommitted aeronautical service providers to compete alongside more established entities that have made substantial investments in the airport. The sponsor must ensure that minimum standards "reasonably protect the investment of providers of aeronautical services to meet minimum standards from competition not making a similar investment."[282]

It is also critical that minimum standards are not too high. A significant amount of space is often needed to provide top-rate FBO services. Large hangars, ramp areas, and parking lots require substantial amounts of land. Minimum standards generally set the floors for these types of facilities and may act as a significant barrier to the entry of an additional FBO if the cost of providing such facilities is too high, or there is insufficient developable land at the airport to establish them. Accordingly, if an airport wishes to address current or future competition issues, consideration should be given to how land will be made available for new service providers.

There is a critical distinction, however, between minimum standards that act as a de facto limitation on potential, competing aeronautical service providers, and those that are intended to protect the existing service providers from competition. The FAA cautions that "[a]ny use of minimum standards to protect the interests of an exclusive business operation may be interpreted as the grant of an exclusive right and a potential violation of the airport sponsor's grant assurances and the FAA's policy on exclusive rights."[283] Sponsors should be wary of efforts by existing aeronautical providers to ratchet up minimum standards after substantial investment; minimum standards are intended to ensure "a safe, efficient and adequate level of operation and services is offered to the public,"[284] not to protect an incumbents' competitive position.

FAA encourages sponsors to "provide for periodic reviews of the minimum standards to ensure that the standards continue to be reasonable," but strongly cautions sponsors not to engage in constant juggling of their minimum standards to the benefit (or detriment) of particular operators.[285] Indeed, minimum standards can, and should, "be modified to reflect the airport's desire to learn from experience and to be watchful for improvements in the way it does business in order to protect the public interest."[286] To avoid setting the minimum standards at inappropriate levels, however, the standards "should be updated to reflect current conditions that exist at the airport and not those that existed in the past." And, to ensure revised minimum standards have the greatest possible support from existing aeronautical users, the FAA strongly encourages sponsors to notify and involve incumbents in the process.[287]

The FAA has heard many cases addressing allegations that a sponsor has increased minimum standards in order to shut out potential competitors;[288] however, the agency has not had a specific occasion to consider whether a sponsor may reduce minimum standards to allow for more competition at an airport. Particularly where a sponsor can demonstrate that lowered minimum standards will not compromise the safety or quality of aeronautical services provided, it is unlikely that the FAA discourage sponsors' efforts to open an airport to additional competition. The FAA has generally recognized sponsors' proprietary interest in fostering competition and has permitted actions directed toward enhancing opportunities for competition, even when they technically discriminate against incumbent service providers.[289] And, the FAA has clearly indicated that "no grant assurance protects an aeronautical service provider from more effective competition."[290]

C. Multiple Classes of FBO

As the discussion above indicates, it is important to make sure that minimum standards are set at levels appropriate to ensure a competitive marketplace at the airport. There are, however, more structural modifications that may be made to minimum standards to address deficiencies in the quality or availability of aeronautical services at the airport.

Minimum standards are effective because they assist the airport sponsor in ensuring that similarly situated aeronautical service providers are subject to similar terms and obligations (i.e., the bedrock principal of avoiding unjust discrimination). Implicit in this function, minimum standards also draw lines between aeronautical service providers that are similarly situated, and those that are not. To take an obvious example, most minimum standards would describe aircraft maintenance oper-

[281] FAA AC 150/5190-7, *supra* note 58 at 4.

[282] *Id.*

[283] *Id.* at 3.

[284] *Id.*

[285] FAA AC 150/5190-7, ¶ 1.2.e. at 4-5.

[286] SPA Rental, LLC v. Somerset-Pulaski Cnty. Airport, FAA Docket No. 16-13-02, Director's Determination, at 21 (Sept. 1, 2015).

[287] FAA AC 150/5190-7.

[288] *See, e.g.*, Carey v. Afton, 2007 WL 430630 at *26; Platinum Aviation and Platinum Jet Ctr. BMI v. Bloomington-Normal Airport Auth., FAA Docket No. 16-06-09, Director's Determination at 8 (June 4, 2007).

[289] *See, e.g.*, Corporate Jets, Inc. v. City of Scottsdale, 2002 FAA LEXIS 169 (2002) (finding sponsor may exclude incumbent from an RFP to promote additional competition at the airport).

[290] 41 N. 73 W., Inc v. County of Westchester, New York, FAA Docket No. 16-07-13 (Sept. 18, 2009).

ators and flight schools as two distinct types of service provider, and subject them to two different sets of minimum standards. One may be required to construct and maintain a large hangar, while the other may not. This is permissible from a compliance standpoint for the very reason that that the entities are not similarly situated.

Some airports, in attempting to enhance the services offered to the light general aviation sector (typically, piston-powered aircraft with maximum gross takeoff weights below 12,500 pounds), have further distinguished among FBOs by creating different tiers of FBO. Indeed, the FAA notes that tiering may be an effective means of modifying minimum standards when it is difficult to address the needs of both existing and future aeronautical businesses: "a tiered set of minimum standards be developed to address the same type of aeronautical activity but differ significantly in scale and investment (i.e., an FBO building large hangars and serving high performance aircraft and a second FBO building and only T-hangars and serving only smaller general aviation aircraft)."[291]

In the case of Westchester County, New York, for example, the County undertook to enhance the services available to light general aviation users of the airport. Although the County already had multiple FBOs on the field, their clientele, and thus their services, catered more to the larger business jets that frequented the airport. Accordingly, the County issued a request for proposals for what it called "light general aviation (LGA) FBOs."

The LGA FBOs were required to provide most traditional FBO services, but were prohibited from selling jet fuel[292] or servicing aircraft over a specified maximum certified gross takeoff weight.[293] In order to support the County's goal of enhancing light general aviation services and facilitating the entry of LGA FBOs, the County also used PFC revenue to construct facilities that would be used by the LGA FBOs. The County also offered the successful bidders lease agreements that were tied to a percentage of their gross profits, rather than a fixed market rent.

One of the larger FBOs at the airport filed a formal complaint against the County, claiming that this arrangement—particularly after the County authorized the LGA FBOs to begin selling jet fuel—constituted unjust discrimination. However, the FAA disagreed. Because the LGA FBOs were restricted from servicing all types of aircraft and were required to provide certain light general aviation services that were optional for larger FBOs, the two types of FBO were not similarly situated, and the grant assurance did not compel the County to treat them the same.

Other unique features of an airport and its competitive landscape may justify treating two otherwise similarly situated FBOs or operators differently. For example, the desirability of one operator's location on the airfield, the degree of their capital investment, the type of lease (i.e., whether the operator is leasing only ground or existing facilities, and whether additional improvements revert to the sponsor at the expiration of the agreement), all may justify disparate treatment.[294] It is important to be aware of these distinctions when trying to attract competing aeronautical service provides and the flexibility they may afford the sponsor.

D. Unbundling of FBO Services

Traditionally, when one thinks of an FBO, a "full-service" FBO comes to mind for most of the U.S. aviation industry. Historically, airport users expect FBOs to provide a wide array of services, ranging from into-aircraft fueling, full aircraft repair and maintenance and substantial square footage of both hangar and support (lounge, rest areas, etc.) facilities. At some airports, depending upon the level of demand, providing all of these services may present a financial and practical challenge for the FBO. If this is a challenge for the existing FBO, having minimum standards that incorporate all of these services and amenities, for an FBO examining the feasibility of competing with the existing FBO, the challenges may be insurmountable.

At other airports, however, having an FBO occupy so many aeronautical service categories may create a situation whereby competition is low or non-existent. In such situations, prices may be higher than may otherwise exist elsewhere or service levels may suffer. Thus, many airports are reconsidering whether the FBO should be the all-in-one aeronautical service provider.

Given the changing demands of aeronautical users and the increasing challenges for service providers, more and more airports are examining "unbundling" what was always a one-stop-shopping proposition. The concept of a SASO has been around for a long time.[295] However, airports and generally, FBOs, have sought to have as many services provided under the FBO umbrella as possible. By separating out some core services, FBOs may benefit by focusing on front line aircraft servicing and opportunities may be created for small businesses that may only provide one service (such as aircraft repair).

The truly controversial issue is whether it is advisable to unbundle fuel from the core FBO services in order to foster competition in that arena. FBOs argue that fuel is the source of the vast majority of their income at most airports and by allowing others to provide fueling (or even to allow self-fueling for AvGas (100LL)) would be risking their on-going viability. However, in appropriate circumstances (i.e., high demand for fuel, extraordinarily high fuel prices, exhaustion of efforts by the airport to address such high fuel prices via Grant Assurance-based contractual provisions), such unbundling of fueling may be appropriate.

Again, the analysis, issues and econometrics vary based upon an individual airport's circumstances. Airports should carefully conduct an analysis of the demand for the subject aeronautical services and the impact of the injection of additional sources

[291] FAA AC 150/5190.7, *supra* note 58 ¶1.2(g)(1).

[292] The County later permitted the LGA FBOs to provide jet fuel, which prompted, in large part, the Part 16 complaint discussed herein.

[293] *41 N. 73 W.*, FAA Docket No. 16-07-13.

[294] B. Molar, Understanding FAA Grant Assurance Obligations Volume 1: Guidebook, ACRP Web-Only Document 44, at 13 (2017).

[295] *See*, *e.g.*, FAA AC 150/5190-7, *supra* note 58 at 6.

upon the competitive landscape prior to making any definitive decisions in this arena.

E. Proprietary (Exclusive) Services

Where a sponsor's efforts to encourage a private FBO to offer its products and service at more competitive prices, or attract competitors to the marketplace, are unsuccessful, some sponsors have elected to provide these services themselves.

Whether an airport should enter the marketplace to provide FBO services is a complex business proposition requiring consideration of many factors, most of which are beyond the scope of this research document.[296] An airport sponsor generally has substantially different profit motives from a private FBO and may therefore be able to offer products and services at cost or close to it. At the same time, however, a sponsor-operated FBO may be unable to leverage the same economies of scale as larger network FBOs and, depending on local conditions, it may be more difficult to recruit and retain qualified personnel. Where a sponsor would compete directly with existing service providers on the field, the sponsor should carefully evaluate the potential impact of its entry as a competitor on the local marketplace, just as it would in considering whether to solicit interest from a second FBO, as discussed above. The FAA notes that proprietary services may make most sense where "the revenue potential is insufficient to attract private enterprises and it is necessary for the airport sponsor to provide the aeronautical service, or situations where the revenue potential is so significant that the airport sponsor chooses to perform the aeronautical activity itself in order to become more financially self-sustaining."[297]

Before considering providing FBO service itself, the airport sponsor should also closely examine its existing agreement with FBOs and other aeronautical service providers already on the field. In some cases, the sponsors have in the past undertaken contractual promises not to compete with aeronautical service providers, or otherwise limited their ability to offer proprietary services.[298] Similarly, airport sponsors must ensure that they possess sufficient legal authority under state or local law to operate as an FBO, and whether state or local law imposes any substantive restrictions on pertinent pricing policies or profits.

Other legal considerations regarding proprietary aeronautical services vary significantly depending on whether the sponsor will offer such services as the exclusive provider thereof and intend to keep it that way (i.e., exclude other private entities from competing), or is willing to compete with new or existing aeronautical service providers at the airport.

As discussed above, Grant Assurance 23 generally prohibits an airport sponsor from granting an exclusive right to provide aeronautical services. However, this obligation does not apply to services that are provided by the airport sponsor.[299] This so-called "proprietary exclusive right" allows the airport sponsor to be the sole provider of FBO services (or individual aeronautical services, such as fueling or de-icing) at the airport. However, "[i]f the airport sponsor opts to provide an aeronautical service exclusively, it must use its own employees and resources."[300] In other words, the sponsor may not declare itself the exclusive provider of an aeronautical service, but then contract with a third party to provide those services on its behalf.[301]

The requirement to exercise a sponsor's proprietary exclusive right with its own employees and equipment is often more significant than it may first seem. A sponsor may not, for example, organize a public limited liability corporation to provide aeronautical services at the airport which is separate and apart from the sponsor itself. Similarly, the sponsor may not allow resale of its products. For example, the sponsor could not maintain a proprietary exclusive right by requiring tenants to purchase all fuel from the sponsor, but then allowing those tenants to resell the fuel or perform into-wing delivery thereof to aircraft operators.[302] And, although it may be relatively common for private FBOs to subcontract for the provision of certain discrete services, such as flight training or aircraft maintenance, an airport sponsor could not, in so doing, maintain a proprietary exclusive right to provide these services.

It is also critical to observe that the proprietary right to be the exclusive commercial provider of services does not free the sponsor of its obligation to permit self-service, including self-fueling.[303] An airport proprietor may impose reasonable self-service standards that enhance the safety and efficiency of the airport.[304] However, the FAA has held it "impermissible for an airport sponsor to enact overly restrictive requirements on self-fueling in an attempt to divert self-fuelers to the airport's own proprietary exclusive fueling operation."[305]

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[296] The many considerations in choosing an airport-operated FBO model among several models are comprehensively discussed in L. Kramer, Airport Operator Options for Delivery of FBO Services, (Airport Cooperative Research Program Synthesis 86, 2018).

[297] FAA AC 150/5190-6, *supra* note 17 ¶ 1.3(b)(1).

[298] In some cases, restrictions on proprietary activity may implicate Grant Assurance 5. Sponsors should therefore carefully scrutinize such provisions to determine whether they impinge upon the sponsors' ability to comply with its grant assurance obligations, including the requirement to provide access to the airport on reasonable terms and without unjust discrimination and to avoid granting an exclusive right. Where Grant Assurance 5 is implicated, sponsors may consider exercising their rights under a subordination clause or else renegotiating the offending provision at the next opportunity.

[299] FAA AC 150/5190-6 ¶ 1.3(b)(1).

[300] *Id.*

[301] *Id.*

[302] Jet 1 Center, Inc. v. Naples Airport Auth., FAA Docket No. 16-04-03, Director's Determination (Jan. 4, 2005). ("It is not sufficient that the Authority used its own employees to provide the fuel to the tenant initially. To maintain its proprietary exclusive, the Authority must provide the fuel to the end-users using the Authority's employees.").

[303] The permissible bounds of self-service activity are outside the scope of this digest, but are detailed in the Airport Compliance Manual at Chapter 11, and discussed at length in D. Prather, The Right to Self Fuel, (Airport Cooperative Research Program Legal Research Digest 8, 2008).

[304] Airborne Flying Serv., Inc. v. City of Hot Springs, FAA Docket No. 16-07-06, Final Agency Decision (May 2, 2008).

[305] Scott Aviation v. DuPage Airport Auth., FAA Docket No. 16-00-19, Director's Determination (July 19, 2002).

If the sponsor does not intend to be the *exclusive* provider of aeronautical services (or, importantly, fails to observe the above limitations on the exercise of a proprietary exclusive right), then it must provide such services on same terms and conditions that would apply to any other commercial operator (e.g., the airport's minimum standards).[306] In such cases, the sponsor "must exhibit extreme caution to ensure that it is not providing its FBO an unacceptable effective exclusive right at the airport by granting its FBO any powers, privileges, or other rights while excluding another FBO from enjoying a similar power, privilege or other right."[307]

Within these parameters, however, a competing sponsor-owned FBO retains a unique opportunity to compete. For example, because an airport sponsor has markedly different financial obligations with respect to the airport overall than that of an ordinary commercial tenant, "an airport sponsor is not obligated to impose an identical fee and rental structure upon itself" for the provision of aeronautical services.[308] Similarly, an airport sponsor may legitimately determine to run its FBO at a loss. "The fact that an airport sponsor-owned FBO fails to make a profit, in itself, does not constitute a violation of the sponsor's Federal obligations," provided such losses are neither [309] Rather, it is only when an airport sponsor's losses begin to impact its obligations toward the rest of the airport, such as the maintenance of the airfield or snow removal activities, that such losses could jeopardize a sponsor's grant assurance compliance.[310]

Whether the sponsor offers aeronautical services as a competitor or pursuant to its proprietary exclusive rights, it is important to recognize that its revenues are "airport revenues," and therefore subject to Grant Assurance 25. "Thus, any profits realized by a sponsor-owned FBO are, in turn, realized by all airport users, including competitors . . . ."[311] Similarly, sponsor-operated FBOs should not establish rates and charges for those services that would generate revenue surpluses that exceed the amounts to be used for the airport system and for other purposes for which airport revenues may be spent, including reasonable reserves and other funds to facilitate financing or to cover contingencies.[312]

F. Requests for Proposals

The initial instinct of many airport sponsors facing an uncompetitive environment at their airports is to simply issue an RFP for the desired competition. While this can be a useful tool, taking affirmative steps to bring a competitor to the airport is not always in the sponsor's (or other airport stakeholders') best interest.

Indeed, one of the most important legal points regarding competition between FBOs or other aeronautical service providers at the airport is that it is not, strictly speaking, required. The FAA has long recognized that, at many airports, the market will naturally select a single entity to provide most or all aeronautical services. The FAA also recognizes that a single, successful entity may expand, including to the point that it occupies all available space at the airport. Neither scenario, in and of itself, is a violation of the prohibition against granting an exclusive right. Instead, a grant assurance violation may lie only where the sponsor has unreasonably denied an otherwise qualified entity an opportunity to enter the marketplace.[313]

Thus, before embarking on an RFP, the sponsor should carefully consider what the local market is likely to support (i.e., reasons may exist as to only one FBO is present on the airfield). While competition between service providers is generally desirable, competition for its own sake can be a risky proposition. The sponsor must assess whether the introduction of another market participant on certain terms could have a detrimental effect on existing on-airport businesses.[314] Proceeding to issue an RFP and award a new lease without solid, reliable, and practical data points from which to assess current and future needs could lead the sponsor into creating a situation whereby the financial stability of all FBOs is threatened. In some cases, utilization of existing contractual mechanisms and leveraging the grant assurance obligations discussed herein may present a more "surgical" solution to the sponsor's concerns.

Assuming an RFP is appropriate, it is important that a sponsor review its minimum standards and other governing documents prior to issuance.[315] The sponsor may also consider updating its master plan if it has not recently done so.

Where an RFP is utilized, it must be structured to ensure that responsive proposals will, in fact, satisfy the sponsor's policy objectives, and that the sponsor's discretion in not unduly limited. The FAA affords sponsors considerable discretion in conducting competitive solicitations for new aeronautical service providers, and its review in such cases has generally been limited to whether entities were given a full and fair opportunity to compete in the solicitation. The FAA has also expressly recognized RFPs as a unique tool to remedy competitive deficiencies, and therefore allows sponsors to exclude incumbents from participation, at least where the stated goal of the RFP is to increase competition.[316]

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[306] Grant Assurance ¶ 22.g; TAC Air v. Chattanooga Metro. Airport Auth., FAA Docket No. 16-11-08, Director's Determination (Oct. 4, 2013) ("[W]hen the sponsor owns an FBO and hires a third party to operate its FBO, the FBO must 'provide the same level of service' required of other FBOs, as required by Grant Assurance 22(g).").

[307] *Id*. at 46.

[308] *Id*.

[309] *Chattanooga* at 48.

[310] *Id*. at 48, note 33.

[311] *Id*. at 48.

[312] *Id*. (quoting Policy Concerning the Use of Airport Revenues, 64 Fed. Reg. 7,696, 7,721 (Feb. 16, 1999)).

[313] FAA Order 5190.6B, *supra* note 56 at 8.9.b., 8-10.

[314] The converse of this proposition is not true: the FAA does not permit airport sponsors to deny qualified users an opportunity to provide aeronautical services on the basis that the sponsor does not believe the market will support it. Instead, the FAA views a private entity's desire to provide service, notwithstanding their investment and other risks, as *de facto* evidence that the market may support the desired service.

[315] FAA AC 150/5190-7, *supra* note 58 at 5.

[316] FAA Order 5190.6B, at 8.7.b.2

A recent RFP conducted at the John Wayne-Orange County Airport (SNA) provides an illustrative example. There, Signature and Atlantic were incumbent FBOs, creating a "duopoly of sorts" that resulted in fuel prices 20 percent above market rates.[317] After Signature's lease expired, SNA issued a Request for Qualifications (RFQ) when other operators expressed interest, which prominently noted the sponsor's overriding interest in ensuring that the pricing policies of the selected FBO would contribute to lower fuel prices and requested proposer's fuel price estimates. Although Signature's proposal scored highest, the sponsor selected both another incumbent and a new operator—Atlantic and ACI Jet—in order to break up the existing duopoly and further suppress the price of aviation fuels.

The FAA summarily dismissed Signature's claim that selecting a lower scoring proposal was a violation of Grant Assurance 22. The FAA held the sponsor had a "right and responsibility to consider pricing in FBO selection," and was unwilling to "second-guess [sponsor's] analysis of pricing or the weight it accorded the pricing information provided by the bidders." [318] "It was well within the County's discretion to choose a new applicant that would provide specific services or pricing that the County deem[ed] desirable."[319]

G. Controlling Prices or Quality of Service

An airport sponsor's Grant Assurances play an important role in lease and access agreements between an airport sponsor and an FBO. Grant Assurance 5, which requires that the sponsor maintain adequate control over its operations, and Grant Assurance 22, that requires that aeronautical services be provided in on reasonable terms and without unjust discrimination, are critical in this area.

The importance of these safeguards in the aeronautical service provider arena is evidenced by the inclusion of specific language that is required to be included in agreements with FBO within the Grant Assurances:

* * *

> In any agreement, contract, lease, or other arrangement under which a right or privilege at the airport is granted to any person, firm, or corporation to conduct or to engage in any aeronautical activity for furnishing services to the public at the airport, the sponsor will insert and enforce provisions requiring the contractor to
>
> 1. furnish said services on a reasonable, and not unjustly discriminatory, basis to all users thereof, and
> 2. charge reasonable, and not unjustly discriminatory, prices for each unit or service, provided that the contractor may be allowed to make reasonable and nondiscriminatory discounts, rebates, or other similar types of price reductions to volume purchases

* * *[320]

When included in agreements between the sponsor and the FBO, the above provisions can act as a check upon unreasonable or anti-competitive practices.

Other clauses within the FBO agreement are prudent and justified under Grant Assurance 5 as well (such as reserving sponsor approval of any change in service or requiring specific standards be maintained (which are subject to review in the sponsor's sole discretion). However, as discussed above, the pricing provision have the focus of much attention recently.

Agreements with FBOs are also the mechanism through which airport sponsors establish that an FBO does not have an exclusive right to offer a particular service at the airport, in accordance with the airport sponsor's federal funding obligations.

Competitive fuel prices are a common source of conflict affecting considerations of accessibility on airports. While every airport sponsor wants lower fuel costs in order to promote access and use of the airport, fuel prices must be adequate to allow FBOs, to remain profitable. Complaints about fuel prices are growing more and more common and factors such as consolidation among large FBO companies and the economic challenges of single FBO operators at smaller airports have heightened the awareness of such issues.

The range of pricing for fuel and services can vary greatly depending on the particulars of the airport. As a general rule, larger airports may have more leverage in dictating the terms of service, which could result in higher fuel prices. Fixed costs at larger airports in the form of Minimum Annual Guarantees (MAGs), security, insurance, ground leases, and labor costs are often times higher than at a General Aviation (GA) only airport. FBOs at smaller airports may have lower overhead due to fewer airport requirements, but may struggle to remain financially viable due to fewer customers.

Issues surrounding fuel pricing recently rose to such a level that AOPA filed a series of informal complaints with the FAA under 14 C.F.R. Part 13, alleging that airports with single FBOs were violating their Grant Assurance obligations by permitting those FBOs to charge unreasonably high fuel prices and for bundled services that users did not want or need.[321] In AOPA's view, the pricing practices of FBOs at these airports effectively amount to an access restriction for transient GA users which, AOPA alleges, the sponsor has a duty to resolve under its AIP Grant Assurance obligations. Indirectly referencing the AOPA Complaints, the FAA at first responded by issuing a "Question and Answer" document that attempted to outline the issues and potential solutions for several situations.[322]

Most relevant to the issues addressed herein concerning pricing was the answer to Question #3:

[317] Kerry Lynch, *Orange County to Replace Signature with ACI Jet at SNA*, Business Jet Traveler (Jan. 2017), https://www.bjtonline.com/business-jet-news/orange-county-to-replace-signature-with-aci-jet-at-sna.

[318] Signature Flight Servs. Corp. v. Cty. of Orange, FAA Docket No. 16-17-02, Director's Determination, at 6 (July 21, 2017).

[319] *Id.*

[320] Grant Assurance 22(b).

[321] *See*, AOPA Complaints, *supra* note 78. More recently, the organization threatened similar litigation against ten other airports on its so-called Airport Access Watch List, announced in April 2018, but has not yet taken any further steps down that path.

[322] FBO Q&As, *supra* note 16.

What is the Nature of the Airport Sponsor-FBO Relationship in Regard to Airport Fees and Reasonableness?

> Generally, an airport sponsor-FBO relationship is a landlord/tenant relationship, governed by the contractual terms of a lease agreement. The terms of that relationship, to the extent necessary for the airport to remain in compliance with its grants, may be subordinated to the grant assurances. There is discretion on how these fees are assessed and collected. Some airport sponsors assess and collect fees, while others assess and permit the FBO to collect the fees on its behalf.
>
> Airport sponsors are obligated per Grant Assurance 22 to ensure the fees imposed upon users are reasonable and non-discriminatory. Airport sponsors cannot waive their Federal obligations via terms in their FBO leases or agreements. Airport sponsors should be prepared to consider claims of unreasonable and discriminatory service and unreasonable and discriminatory prices by FBOs.
>
> Airport sponsors can manage and may affect the quality and pricing of services on the airport through a competitive procurement process and open communications with proposed or selected FBOs. Additionally, periodic review of FBO fee schedules may be an effective way to ascertain the levels and pricing of services being provided at the airport. However, it is important to keep in mind that airport sponsors may take into account additional factors that can influence pricing, including (1) capital investment of the FBO in physical facilities; (2) long-term financial commitment to operate an FBO; (3) positive economic impacts the FBO may have at the airport; (4) prevailing labor supply and corresponding rates, fuel inventory levels, and costs; (5) Federal and local policy requirements; (6) insurance requirements; (7) safety and related technical training initiatives; and (8) increases in rents and other fees paid by the FBO.
>
> These factors may impact the economic vitality of an FBO. When setting and monitoring rates, airport sponsors must give consideration to airport development policies and priorities. For example, in cases where the airport sponsor requires FBOs to offer certain services, make improvements, and/or maintain facilities, the airport sponsor must consider these requirements when evaluating if airport fees are reasonable.[323]

Essentially, this states that if the sponsor complied with its obligations to include the provisions in its FBO agreements, then a mechanism exist for the sponsor to get involved in situations where FBO pricing may be at issue.

In June, 2018, the FAA put a finer point on this issue when it dismissed AOPA's unreasonable pricing informal claims against the Greater Asheville Regional Airport Authority and Monroe County, Florida (the sponsor of Key West International Airport).[324] The FAA determined that the sponsors reasonably concluded that the FBO's pricing practices were reasonable and that AOPA had not provided any evidence that would justify "second-guessing" the sponsors' conclusions. The FAA also found that Signature, the FBO at both airports, is entitled to set its fees and pursue a business model that provides a reasonable return of its investment.

Practically, having the sponsor act as "price police" is something that few airports wish to do and acting in such a role implicates a complicated set of challenges (ranging from what is the relevant market from which to judge "reasonable" pricing and to what extent does FBO profitability factor in to such an analysis). Indeed, by citing to the eight factors in the FBO Q&A, the FAA acknowledges that pricing is a complex area and one that a one-size-fits-all solution is not appropriate. Its decisions in the AOPA Complaints only further underscores that point.

How to adequately and appropriately get involved in pricing disputes is beyond the scope of this research document. However, airport sponsors are well-advised to gather as many facts as possible and involve all stakeholders in the process so as to have the highest potential for devising an adequate solution.

VII. CONCLUSION

As demonstrated herein, competition among air carriers and FBOs at U.S. airports is a complex, multidimensional and evolving topic. The federal government has created a broad and general framework within which airport sponsors must operate. However, issues with respect to competition at any particular airport are, by their very nature, highly dependent upon local concerns, services and other factors that require locally-derived solutions. Terms such as "reasonable," and "not unjustly discriminatory" are bedrock guiding principles but offer little concrete guidance to airport executives when faced with competition issues at their airport. Furthermore, when the general standards are interpreted and applied by a governmental agency or a court, the decisions are often fact-specific and the only solid conclusion an airport sponsor may draw is, as the saying goes, "if you have seen one airport, you've seen one airport."

However, as described above, airport sponsors have many tools at their disposal to address competition concerns that may be present at their airport and/or within the region in which the airport operates. Crafting solutions that will work for all stakeholders, both practically and legally, is by design a customized and artistic endeavor. The key to success is to fully understand the potential legal and practical pitfalls, appreciate the core factual challenges of all involved, and be able to bring to bear the available tools to address the issues. It is hoped that this Digest aids the reader in that endeavor.

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[323] *Id.* at 3.

[324] *See,* Letters from Heather A. Haney, *supra* note 82. Prior to those decisions, AOPA withdrew its complaint against the Illinois Department of Transportation and its sponsorship of the Waukegan National Airport. Joe Kildea, AOPA, *Credit Where Due: Progress Leads AOPA to Withdraw FAA Complaint Against Waukegan Airport* (Jan. 31, 2018), https://www.aopa.org/news-and-media/all-news/2018/january/31/credit-where-due

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