LEGAL AND REGULATORY FRAMEWORK FOR RATES AND CHARGES

A BRIEF INTRODUCTION

NOVEMBER 8, 2017

Peter J. Kirsch

KAPLAN KIRSCH ROCKWELL
This morning’s presentation

- Basic legal structure for regulation of rates and charges (for non lawyers!)
- Eight underlying principles of federal regulation
- Common issues

"First thing we do, let's kill all the lawyers (jokes)."
View from 30,000 feet
Views of airport rates and charges
Or perhaps...
Key terminology

Aeronautical vs non-aeronautical

Self-sustaining

Reasonable

Not unjustly discriminatory
Umbrella principles

- Reasonable
- Not Unjustly Discriminatory
- Self Sustaining
- Fair Market Value
- No Subsidy

Aeronautical Rates - Charges

Non Aeronautical Rates - Charges
Legal hierarchy

- Federal Law
- FAA Rates and Charges Policy
- Grant Assurance Obligations
- FAA Revenue Use Policy
- FAA Compliance Manual
- Rulings and Precedents
Key federal laws and regs

- Anti Head Tax Act 49 USC 40116
- AIP Act of 1982 49 USC 47107
- Disputes under Grant Assurances – FAR Part 16
- Disputes over air carrier charges – FAR Part 302
Rates and Charges Policy (1996)

- Required by federal law 49 USC 47129
- Provides “guidance” on the legal requirements for airport fees
- Not formally regulatory but practically really important
- Many principles, few specifics
Rates and Charges Policy (cont’d)

- Encourages direct negotiation among parties
- Minimize need for FAA/DOT intervention
- Set principles for future decision making
- 2008 Amendments allow congestion pricing
- Republished in 2013 (78 Fed Reg 55330)
Grant Assurances

- Vehicle for mandating applicability of *Rates and Charges Policy*
- Independent requirement for reasonable, not unjustly discriminatory rates and fees
- Compliance Handbook – considerable guidance
Eight basic principles
Principle #1 – Closed fiscal system

- Airport revenue for airport expenses
- No off-airport diversion (except grandfathered airports)
- Revenue Use Policy
Principle #2 – Self sustainability

- Corollary of ‘closed fiscal system’ principle
- Goal, not requirement
- Charges must be reasonably designed to make the airport self-sustaining
- Airport can recover costs of providing aeronautical facilities and services
- Local subsidy never required
Uses of airport revenue

Incentives, off-airport mitigation; collateral development; intermodal transit

General economic development, gov’t expenses

Capital and operating costs of airport
Principle #3 - Discrimination

- Any discrimination must be justified
- *Reasonable* distinctions among users OK
- Consistent methodology
- Frequent claim by aggrieved airport users
Principle #4 - Reasonableness

- Easy to say, hard to apply
- “Fair approximation of use” of airport
- Not excessive in relation to benefit conferred
- No discrimination against interstate commerce
Permissible (reasonable) bases for charges (examples)

- Weight
- Number of operations/ pax
- Amount of space (rent)
- Revenue (concessions)
- Fuel
- Services rendered
- **User’s burden on airport is key**
Impermissible bases (examples)

- Noise
- Origin, destination or owner of aircraft
- Local preference (fuzzy line)
- Perceived or actual off-airport benefits or impacts
Deriving rates
Compensatory or residual

- **Compensatory** = charging aeronautical users their allocated share of the airport sponsor’s actual cost to build, operate, and maintain the airport facilities they use.

- **Residual** = designating a particular airport user group (typically airlines) to be responsible for making up any shortfall in revenue so that airport revenues equal airport expenses.
Compensatory

Residual

Hybrid (Most Common)
Reasonable use of terminal

- Preferential
- Common
- Per Use
- Exclusive
Principle #5 – Local determinations

- Preference for agreement among users and proprietors
- Rates by ordinance OK
Principle #6 - Subsidies are complex

- Aeronautical users can subsidize each other (sometimes)
- **No** subsidy of non-aeronautical by aeronautical users
- No direct subsidy of an air carrier
Principle #7 – Limitations on R&C Policy

DOES NOT APPLY

- To general aviation fees or GA airports
- To non-aeronautical fees, except
  - self-sustaining requirement
  - fair market value requirement
- To agreed-upon rates
Principle #8 – Principles are difficult to apply
Principle #8 – Principles are difficult to apply

- Highly fact specific
- FAA provides only limited airport-specific fact-specific guidance
- Few broad interpretative rulings
- Knowledge of prior cases and rulings is critical to predict FAA position
Homework
Remember 3 phrases:

REASONABLE
NON-DISCRIMINATORY
CLOSED FISCAL
SYSTEM

Consult informally with ADO

Study comparable airports and their rates/charges

READ RATES AND CHARGES POLICY
THIS WILL BE ON THE FINAL EXAM!
Questions

Peter J. Kirsch

Kaplan Kirsch Rockwell

pkirsch@kaplankirsch.com
www.airportattorneys.com
(303) 825-7000
(202) 596-1112