Published by the Federal Bar Association Transportation and Transportation Security Law Section

Fall 2012

TransLaw

*Federal Regulation of Airports: Rethinking the Appropriate Role**

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One of the most difficult things for lawyers to comprehend when they first begin to represent airports is the extent to which the federal government regulates airports without codified regulations.[1] Many of us who practice in this area have been swimming in this murky sea for so long that we just accept that this is the way it is, without really questioning whether it actually makes sense or is a reasonable way to govern. It would be interesting to see how the experience of those of us concerned with federal regulation of airports compares to that of practitioners who represent recipients of other federal transportation grants.

Certainly the federal restrictions on airports are not intuitively obvious to local political leaders, or even the general public. Many airport attorneys have heard some variation of the following questions, from political leaders and interested citizens: You mean we can't use funds generated by our airport for other city/county/state projects? Why can't we restrict the operations of the noisiest aircraft? Can we provide incentives for low-fare carriers, so we can get our sky-high airfares down? And so on.

A primary mechanism for regulation is the array of grant assurances imposed on airports for accepting federal airport grants under the Airport Improvement Program (AIP), and related policies and orders. There are no codified regulations associated with the AIP.[2] Instead, the FAA utilizes its Airport Improvement Program Handbook to implement the Airport and Airway Improvement Act of 1982 (AAIA),[3] although the Handbook is not regulatory.[4] Subject areas in which the federal government regulates airports without codified regulations include use of airport revenues, airport rate-setting,[5] the use of airport property, and landlord-tenant (or operator-user) relations.

Links Between Federal Funding and Federal Regulation of Airports

In 1970, in response to congestion and capacity concerns at airports around the country, Congress established the Airport Development Aid Program and the Planning Grant Program, and created the Airport and Airway Trust Fund (AATF) to pay for federal aid to airports through levies on aviation users and fuel.[6] These programs tied revenue from federal aviation user taxes directly to FAA funding of airport capital development, in contrast to the previous practice of funding FAA capital grants through the general fund of the U.S. Treasury.[7]

In 1982, after two years in which Congress failed to authorize taxes supporting the AATF, it passed the Airport and Airway Improvement Act of 1982

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**The views expressed herein do not necessarily reflect the views of any KKR client, the Federal Bar Association, the Transportation and Transportation Security Law Section, or any government agency.*

[1]Regulations concerning certain aspects, primarily safety-related, of airport facilities and operations are contained in 14 C.F.R. Part 139 (2011). This article discusses regulation of airports beyond the scope of Part 139.

[2]To further confuse matters, however, there are still regulations on the books associated with the prior, superseded federal airport grant programs: 14 C.F.R. Parts 151 and 152 (2011), relating to the Federal Aid to Airports Program (FAAP) and the Airport Development Aid Program (ADAP), respectively. The statutory authorities for those programs, the Federal Airport Act of 1946 and the Airport and Airway Development Act of 1970, were repealed in 1970 and 1982, respectively.

[3]Pub. L. 97-248, 96 Stat. 671, as amended and recodified without substantive change at 49 U.S.C. § 47101 *et seq.* (2006).

[4]The Airport Improvement Program Handbook "provides guidance and sets forth policies and procedures for the administration of the Airport Improvement Program (AIP) by the Federal Aviation Administration (FAA)." Order 5100.38C (June 28, 2005) (available through FAA website at www.faa.gov).

[5]However, in reviewing the DOT/FAA Policy Regarding Airport Rates and Charges, 61 Fed. Reg. 31994 (June 21, 1996), the Court of Appeals stated that, "[a]lthough he calls it a Final 'Policy,' the Secretary has clearly promulgated a rule." *Air Transp. Ass'n of America v. U.S. Dep't of Transp.*, 119 F.3d 38, 40 n.3 (D.C. Cir. 1997).

[6]Cong. Research Service, *Airport Improvement Program (AIP): Reauthorization Issues for Congress* [hereinafter Cong. Research Service] (2009) at 3.

[7]Cong. Budget Office, *The Status of the Airport and Airway Trust Fund* [hereinafter Cong. Budget Office] (1988) at 4.

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(AAIA), which reestablished airport grant funding and established the AIP.[8] The AAIA set up a grant funding program similar to predecessor programs under the 1970 legislation while altering the system for distributing funds, expanding aviation capital spending, and renewing and increasing aviation user fees.[9] The AAIA also contained provisions, first enacted in 1976, to cap the amount of funding that could be allocated to FAA operations, thereby reinforcing the program's emphasis on funding capital projects.[10]

The AAIA also mandated that DOT include an array of "grant assurances," obligations to be imposed on airports, in any agreement to provide AIP grants to an airport.[11] The AAIA-mandated grant assurances covered areas such as prohibiting unjust discrimination against aeronautical users, prohibiting the grant of exclusive rights to aeronautical service providers, and a requirement to set fees so as to be as self-sustaining as possible,[12] and have been expanded over the years to include terms for hangar rentals,[13] intercity bus access,[14] and the participation of certain types of small businesses in the provision of the sale of consumer goods and services, [15] i.e., concessions whose facilities are ineligible for AIP funding. The grant assurances last for the useful life of the project being funded, up to a maximum of 20 years,[16] with exceptions for assurances related to the diversion of airport revenues, conferring an exclusive right upon an aeronautical user, and civil rights, which do not expire.[17] Thus, even if an airport proprietor declined any further AIP funding, it would be subject to most of the grant assurances for another 20 years, except for the three that last in perpetuity.

Due to recent and ongoing changes in the U.S. political and financial landscapes, there is interest in potentially excluding larger airports from AIP funding and possibly letting them out of the grant assurances. Federal funding of airports has been reduced,[18] with further cuts likely, due to federal budget concerns and pressures for other uses of revenues generated by aviation user fees and taxes, principally FAA operations.

The concept of dropping larger airports from federal funding and related obligations has been debated since before the AAIA. In 1981, there were proposals from the administration[19] and the Senate[20] to "defederalize" the 69 busiest airports (large and medium hubs)[21]—make them ineligible for federal funding and let them out of their existing federal obligations related to previous federal airport grants. This concept was ultimately abandoned, only to bubble up again now, 30 years later.

The relationship among federal restriction of airports' ability to raise funds from air travelers, federal funding of airports, and broader federal regulation of airports has evolved over the past forty years. The U.S. Supreme Court declared that a charge imposed by airport proprietors on air travelers is reasonable, and therefore lawful, "if it (1) is based on some fair approximation of use of the facilities, (2) is not excessive in relation to the benefits conferred, and (3) does not discriminate against interstate commerce."[22] In response, Congress passed the Anti-Head Tax Act (AHTA), which prohibited airports from imposing direct and indirect charges on air passengers using their facilities. [23] In 1990, Congress enacted a limited exception to the AHTA, allowing airports, with FAA approval, to impose a Passenger Facility Charge of up to $3.00 per trip segment, subject to certain restrictions, including eligibility standards for uses of PFC revenue.[24] The PFC cap was raised to $4.50 in 2000.[25] Through federal statutes imposing aviation user fees/taxes[26] and providing federal airport grants,[27] the government, in essence, raises revenue from those same air passengers, and gives *a fraction of it* to airports.

In this context, it is reasonable for airports to question whether "federal funding" is an appropriate basis for federal regulation that controls signifi-

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[8] *Id.* at 8-9.

[9] *Id* at 9.

[10] *Id.*

[11] 49 U.S.C. § 47107.

[12] 49 U.S.C. § 47107(a)(1-3), (4), and (13).

[13] 49 U.S.C. § 47107(a)(21).

[14] 49 U.S.C. § 47107(a)(20).

[15] 49 U.S.C. § 47107(e).

[16] FAA Order 5190.6B, *FAA Airport Compliance Manual*, App. C, p.27 (Sept. 30, 2009) [hereinafter *Compliance Manual*] ¶ 4.3, p. 4-2.

[17] *Id.* at p. 4-3.

[18] In 2008, Congress authorized $3.675 billion and made $3.471 billion available for AIP grants. In 2009, Congress authorized $3.9 billion and made $3.385 billion available such grants. Cong. Research Service, *supra* note 6, at 11. For FY2012, AIP funding is $3.35 billion. FAA Modernization and Reform Act of 2012, Pub. L. 112-95, 126 Stat. 15 (2012).

[19] *Bill Summary & Status—97th Congress (1981-1982) H.R.2930 (By Request)—All Information*, Lib. Cong. THOMAS, thomas.loc.gov/cgi-bin/bdquery/z?d097:HR02930:@@@L&summ2=m& (last visited June 8, 2012).

[20] *Bill Summary & Status—97th Congress (1981-1982) S.508—All Information*, Lib. Cong. THOMAS, thomas.loc.gov/cgi-bin/bdquery/z?d097:SN00508:@@@L&summ2=m& (last visited June 8, 2012).

[21] *See* Office of the Secretary of Transportation, *The Effects of Airport Defederalization Final Report, U.S. Department of Transportation, Report of the Secretary of Transportation to the United States Congress Pursuant to Section 522 of Public Law 97-248, Airport and Airway Improvement Act of 1982* 10 (1987).

[22] *Evansville-Vanderburgh Airport Auth. Dist. v. Delta Airlines*, 405 U.S. 707, 716–17 (1972).

[23] *See* Pub. L. No. 93-44, 87 Stat. 88 (1973), now codified at 49 U.S.C. § 40116 (the Anti-Head Tax Act) (2006).

[24] Omnibus Budget Reconciliation Act of 1990, Pub. L. 101-508, § 9110(2), 104 Stat. 1388 (Title IX, Aviation Safety and Capacity Expansion), codified at 49 U.S.C. § 40117.

[25] Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, Pub. L. No. 106-181, § 105(a), 114 Stat. 61, 71 (2000) (codified at 49 U.S.C. § 40117(b)(4)).

[26] The Internal Revenue Code of 1986, § 9500 et seq. ("Trust Fund Code of 1981").

[27] 49 U.S.C. § 47101, *et seq.*

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cant aspects of airport operations and development that are unrelated to the AIP-funded projects. Even if federal funding generally justifies federal conditions, the scope of federal regulation of AIP grant recipients is broader, for instance, than it is for recipients of federal transit grants, as discussed below. Some have suggested that the AIP assurances are simply the deal airports have accepted, and so they must live with it. This may be a reasonable argument, were it not for the fact that:

1. The federal government has not been faithful in adhering to the "deal" concerning the purpose for which Airport and Airway Trust Fund revenues were initially raised, i.e., to fund airport grants and FAA's Facilities and Equipment, and Research and Development (R&D) programs, and *if any funds were left over* ***after fulfilling these capital needs***, the *remainder* could be used to fund FAA operations;[28]
2. Instead, Congress subsequently reversed the priorities of the Trust Fund, so that huge amounts of Trust Fund revenues are siphoned off for FAA operations, leaving capital programs, such as AIP and FAA's Facilities and Equipment program, to be funded from what is left over; and
3. At times, the government has unilaterally broadened or extended the scope of airports' federal obligations, even retroactively.[29]

On the other hand, when Congress reversed the top priority for the use of passenger taxes from capital funding to FAA operations, Congress also included significant increases in AIP funding. For instance, AIP funding increased from $450 million in 1982 to $1.9 billion in 1992.[30] In 2001, there was a further 70% increase in AIP funding to $3.2 billion.[31] AIP funding for 2012 is $3.35 billion.[32]

Nonetheless, for many air carrier airports, AIP funds represent only a small portion of an airport's total funding—or even its capital funding. For example, the Airports Council International-North America (ACI-NA) estimates that AIP funding amounts to only 16% of funding for committed projects in the 2011-2015 timeframe.[33] It is reasonable to ask whether the acceptance of AIP dollars should dictate how an airport carries out a project or control how an airport conducts its operations, development, land use management, and tenant relations that have nothing to do with the project, or whether federal regulation of airport construction should be more proportionate to the federal contribution.

Interestingly, FAA, itself, has recognized that many of the AIP grant assurances (most of which are mandated by Congress[34]) are unrelated to the projects whose AIP funding triggered the assurances. In 2004, when there were 38 grant assurances, the agency published a proposal to recategorize the grant assurances into three groups.[35] The first two groups, totaling 19 provisions directly related to the grant-funded projects, would have become grant certifications or grant conditions, because they address how the projects will be carried out.[36] The remaining 19 assurances in the third group have nothing to do with the projects being funded.[37] Airports have reason to question whether it is appropriate to apply these assurances—relating to airport-tenant relations, use of airport property and airport funds, and access by aeronautical users—to airports simply because they accept federal funds.

Specific Anomalies in How the Federal Government Regulates Airports

Use of Airport Property

FAA regulates the use of airport property, *including property not donated or paid for by the federal government*. But why should FAA exert control over the use of airport sponsor donated or purchased airport land[38] except for considerations of safety and efficiency of operations, i.e., not allowing airports to use airport property in a way that interferes with the safe, efficient operation of aircraft?

At the present time, FAA may require airports to obtain its approval or acquiescence in order to transfer or encumber airport property (even via lease) or to change the use of property from aeronautical to non-aeronautical use.[39] FAA may invoke Grant Assurance 5 to ensure that airports comply with FAA guidance for

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[28]*See* Cong. Budget Office, *supra* note 7, at 1-11. *See also* Gen. Accounting Office, B-281779, *Whether the Airport and Airway Trust Fund was Created Solely to Finance Aviation Infrastructure* (1999).

[29]*See* 49 U.S.C. § 47133; Policy and Procedures Concerning the Use of Airport Revenue, 64 Fed. Reg. 7696, 7699 (February 16, 1999) [hereinafter Revenue Use Policy].

[30]Cong. Research Service, *supra* note 6, at 9.

[31]*Id.* at 10.

[32]FAA Modernization and Reform Act of 2012, Pub. L. 112-95, 126 Stat. 15 (2012). See note 18 for examples of higher AIP funding in recent years.

[33]Airports Council International-North America, *Airport Capital Development Costs 2011-2015* 10-11 (Feb. 2011).

[34]49 U.S.C. § 47107(a) and (b).

[35]Airport Improvement Program Grant Assurances; Proposed Modifications and Opportunity to Comment, 69 Fed. Reg. 52057 (Aug. 24, 2004).

[36]*Id*. at 52058-59 (Chart).

[37]*Id*. at 52058-63 (including Chart).

[38]Note that restrictions imposed as a result of free transfer of federal lands are a different matter. Land transfers legitimately impose restrictions on the use of the transferred parcels. But such restrictions in the non-government context generally apply only to that land, rather than imposing "super restrictions" beyond the transferred parcel's boundaries, so as to control the use of the donee's other land.

[39]*See* Grant Assurance 5 (The airport sponsor "will not sell, lease, encumber, or otherwise transfer or dispose of any part of its title or other interests in the property shown on Exhibit A to this application . . . for the duration of the terms, conditions, and assurances in this grant agreement without approval by the Secretary."). *See also* Assurance 29, related to Airport Layout Plans.

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certain decisions on the use of airport property, such as appropriate lease terms (e.g., duration, lease payments) for aeronautical or non-aeronautical uses of airport property.

In an environment in which airports are seeking to become more entrepreneurial and develop non-aeronautical revenue sources, it is difficult to understand why the federal government restricts the proprietor's use of airport property that was not federally donated or funded. It can be quite a cumbersome process to obtain releases or necessary designations for changing proposed land use. It is reasonable for airport proprietors to wonder why they do not have the right to determine the appropriate use of their own property based on airport objectives and market conditions.

It is worth noting that another DOT agency, the Federal Transit Administration, does not impose the same expansive requirements on "project property" that the FAA imposes on airport property. For example, the FTA does not require grant recipients to obtain FTA approval prior to selling or leasing land that has *not* been federally donated to the project or paid for by the federal government. Unless it acquired property using federal funds or contributed the property as part of the local share of a federally funded project, a grant recipient is free to determine the best use of the property it owns without federal involvement or oversight.[40]

Incentives

FAA's Revenue Use Policy prohibits the use of airport revenue to provide subsidies and revenue guarantees to air carriers, because the FAA considers such actions to promote "general economic development."[41] However, air service is the fundamental purpose of air carrier airports. Precluding the use of airport funds to provide incentives, including direct credits, offsets, and revenue guarantees to air carriers to provide service seems peculiar in light of the fact that FAA allows airports to use airport revenues for marketing personnel to seek air service.[42] If air service merely constituted general regional development, airport revenues could not fund an airport's efforts to obtain it.

Moreover, Congress, by explicitly authorizing airports to use residual and hybrid rate-setting methodologies,[43] essentially allows airports to provide cash incentives to air carriers to induce them generally to provide air service. For example, at a residual airport, if net concession revenues equal $20 million, that amount is credited to all signatory air carriers, who can do whatever they want with the money.[44] It seems anomalous that airport revenue can be given to airlines to induce air service on a macro basis, but not on a more targeted basis.

Airport sponsors are also not allowed to tailor incentives for specific types of service they often seek. For instance, airports are not allowed to limit incentives to jet service, or low-fare service.[45] But many airports believe that their passengers strongly prefer jet service. Not all airports share that view, but the key point is that airports should not be forced to include service they do not desire in their incentive programs.

Similarly, if an airport seeks low fare service that provides real competition to particular markets, it is fair to ask why it cannot provide incentives that are limited to low-fare service, however the airport defines it. Such action would not be barred by the Airline Deregulation Act (ADA) prohibition against state/local government regulation of airline rates, routes and services,[46] because, as FAA has acknowledged in reviewing a specific air service incentive, the ADA does not apply to voluntary incentives programs adopted by airports.[47] In fact *all* incentive programs allowed by the FAA are intended to affect airline routes, and there is no distinction under the ADA between affecting routes, on one hand, and affecting rates or services on the other. The ADA does not cover situations such as incentive programs, where airlines are not compelled to take any action; they may choose to comply with the requirements of such programs (and thus earn the incentives) or not.

Restrictions on Airport Rate-Setting

Airports are subject to a requirement to impose only reasonable fees on air carriers from a number of sources, both statutory[48] and grant assurance.[49] In general, DOT seems willing to give airports some latitude in the specifics of their charging mechanisms, but for landing fees, the latitude relates more to establishing the appropriate costs to include in the rate base, rather than allowing significant flexibility in establishing a new type of charging methodology.

DOT guidance implies that airports must provide special justification for any deviation from traditional weight-based landing fees,[50] stating that, although congestion is technically not a prerequisite for setting fees by a methodology that is not based solely on aircraft weight, "it is not clear what

[40] *See, e.g.*, 49 C.F.R. § 18.31 (2011); FTA Circular C5010.1D, *Grant Management Requirements* Ch. IV (Nov. 1, 2008).

[41] Revenue Use Policy, *supra* note 29, at 7709-10, 7720.

[42] *Id.* at 7718.

[43] 49 U.S.C. § 47129.

[44] In contrast, at an airport employing a compensatory methodology, that same $20 million constitutes airport revenue and is subject to Grant Assurance 25 (prohibition against diversion of airport revenue) and the FAA's Revenue Use Policy.

[45] Air Carrier Incentive Program Guidebook: A Reference for Airport Sponsors (September 2010), p. 10 and 21 (available at http://www.faa.gov/airports/airport_compliance/air_carrier_incentive (accessed August 20, 2012)).

[46] 49 U.S.C. § 41713 (2006).

[47] *See* Letter from David L. Bennett, FAA Office of Airport Safety and Standards, to Bailis Bell, Dir. of Airports, Wichita Airport Auth., (Nov. 18, 2003), at p. 4.

[48] *See, e.g.*, 49 U.S.C. §§ 40116 and 47107(a).

[49] *See* Grant Assurance 22.

[50] Typically, U.S. airport landing fees are based on the certified landed weight of aircraft divided by 1,000 pound increments.

other circumstances might justify such a fee." [51] But under the applicable statutes, there is no reason to require special justification for deviating from the traditional weight-based charging system, whose rationality has long been questioned by economists. DOT has declared traditional weight-based landing fees to be reasonable and not-unjustly discriminatory. While it makes sense not to disrupt the widespread—almost universal—weight-based landing fee system employed by U.S. airports, why should innovation and a desire to promote airport goals through rational rate-setting be stifled?[52]

Airport-User Relations

Grant-obligated airport sponsors must allow all types, kinds, and classes of aeronautical uses at their airports, even though certain uses may not be appropriate at all airports, and mixing various uses may not promote a sponsor's priorities in the use of airport facilities. FAA mandates that airports "negotiate in good faith" with prospective aeronautical service providers[53] if aeronautical land is available—*regardless of how many similar service providers are already on airport*.[54] FAA regards the mere fact that someone seeks to use the land as sufficient evidence that there is demand for the service.[55] The airport's views on the appropriate use of the land may be disregarded, unless FAA has specifically approved them in an Airport Layout Plan (ALP). Airports understandably find it perplexing that a prospective tenant's views may thus be given precedence over their views as the landlord concerning land use decisions.

While FAA may allow an airport sponsor some leeway in establishing the terms of a lease for the use of its facilities, this does not eliminate the fundamental control FAA exercises over them. It may be more appropriate to allow airport sponsors to exercise traditional landlord control over the use of land and facilities at their airports. For example, airports should be able to determine the appropriate mix of uses and exercise discretion in dealing with tenants who provide poor service, gouge the market, or otherwise act contrary to the interests of the airport or the public.

Although the FAA's grant assurance compliance program ostensibly "protect[s] the public interest in civil aviation,"[56] airports find that more often than not, it is invoked by particular airport tenants or prospective tenants to promote their parochial business interests rather than the public interest. A typical example is an FBO that has a dispute with another FBO, or an FBO that has a dispute with an airport over a routine landlord-tenant issue. For instance, different FBOs have alleged, in formal FAA administrative complaints, that airports violated their grant assurances by failing to automatically renew a long-term lease that had expired, and by allowing a new, competitor FBO to build a facility on the last developable aeronautical parcel on the airport (thus breaking the incumbent FBO's monopoly at the airport).[57]

These claims are so far afield from the purpose of the compliance program that it is understandable that airports may want FAA to preclude airport tenants and wannabe tenants from literally making a federal case out of routine business disputes. FAA should consider whether its compliance program is being used by private parties to advance private interests in ways that do nothing to promote the public interest. Altering the compliance program to preclude such self-interested actions would enhance the public interest that the compliance program is intended to protect.

Use of Airport Facilities for Charitable, Community, or Governmental Purposes

FAA prohibits communities that have invested in airports from using airport facilities for non-airport purposes except for *de minimis* use. Sponsors cannot, for example, store equipment on airport land that is not currently being used for airport purposes or use vacant offices for meetings or other purposes.

Neither the underlying statute[58] nor the revenue use grant assurance[59] prohibits the use of airport space for other sponsor functions. The Revenue Use Policy, thus, goes farther than required in considering the use of airport facilities by local governments as essentially the same as using airport revenue for non-airport purposes.

The FAA takes the exact opposite position elsewhere in the Policy concerning airline incentives, by providing that an airport *may* allow airlines free use of facilities, even though airport revenues *may not* be used to pay airlines to provide air service.[60] Moreover, statutorily mandated grant assurances *require* airports to allow the federal government free use of facilities (unless such use is "substantial"),[61] based on the fact that the federal government provides some AIP funding to the airport. Also, airports must provide free land to the FAA for ATC

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[51]Policy Regarding Airport Rates and Charges, 73 Fed. Reg. 40430, 40437 (July 14, 2008).

[52]It is noteworthy that, in administering the air traffic control (ATC) system, Congress and the FAA have wrestled, unsuccessfully, with the same types of rate-setting issues; perhaps they could benefit from the development of innovative rate-setting models by airports.

[53]Aeronautical service providers include, for example a "Fixed-Base Operator (FBO). A business granted the right by the airport sponsor to operate on an airport and provide aeronautical services such as fueling, hangaring, tie-down and parking, aircraft rental, aircraft maintenance, flight instruction, etc." *FAA Compliance Manual*, App. C, p. 27.

[54]*Id.* ¶ 9.7.

[55]*Id.*

[56]*Id.* ¶ 1.5.

[57]This FBO also alleged that the airport unjustly discriminated against it by filing a defense to an action the FBO filed against the airport in state court.

[58]49 U.S.C. § 47107(b).

[59]Grant Assurance 25.

[60]Revenue Use Policy, *supra* note 29, at 7720.

[61]49 U.S.C. § 47107(a)(11).

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and weather facilities[62] (whether or not related to the airport).[63]

It seems paradoxical for the government to impose a *requirement* to allow the FAA free use of airport facilities, but to forbid an airport sponsor from enjoying free use of airport facilities—*even if the sponsor has invested far more of its own general funds in the airport than the airport has received in AIP funds.*

It is fair to ask whether extensive regulation and oversight by FAA and the DOT Office of Inspector General concerning local use of airport facilities is an appropriate or effective use of federal resources. Loosening the current restrictions would make the standards for use of airport property more balanced in relation to the benefits airports have received from airport sponsors, without interfering with aeronautical operations.

Should a Notice and Comment Rulemaking Process be Used When FAA Regulates Airports?

Currently, Congress and the FAA regulate airport behavior by prescribing and implementing AIP grant assurances covering a wide variety of airport activities far beyond the scope of the projects funded with AIP dollars. Moreover, the FAA engages in extra-regulatory practices, such as imposing requirements on airports via FAA policy or advisory circulars;[64] treating draft policies as final, enforceable requirements;[65] and imposing burdens on airports through FAA "internal guidance."[66]

In an era when federal funding is diminishing and the appropriate role of the federal government in a variety of areas is being debated, it is fair for airports to ask decision-makers to consider whether: (1) the Federal government should limit its regulation of airports to matters of safety, security, and system efficiency; (2) FAA should be required to undertake a notice and comment rulemaking process when seeking to impose burdens on airports; and (3) FAA should refrain from directly or indirectly enforcing existing guidance, advisory circulars, and policies that have not been subject to full regulatory process.

Perhaps, legitimate safety issues should be regulated through *actual regulations*, issued pursuant to a notice and comment process conforming to the Administrative Procedure Act.[67] If safety is the FAA's number one priority, is it appropriate to regulate safety by contract, such as an AIP assurance contained in a grant agreement?[68] The fact that Congress and the FAA routinely regulate airports via contract or by guidance relating to a contract[69] evidences a peculiar federal perspective that the grant assurances are the convenient way for the government to regulate.[70]

Similarly, when the FAA imposes burdens on airports, it should go through a full regulatory process. This process includes public notice and opportunity for comment, and provisions designed to preclude arbitrary, burdensome regulations, such as consideration of costs and benefits; analysis of unfunded mandates; and federalism analysis of impacts on the relationship between the federal government and state and local governments that own and operate airports.

The problem with the failure to follow the rulemaking process is threefold: (1) it denies the regulated parties the opportunity to participate in the development of obligations that will be imposed on them; (2) it avoids serious analysis of potential burdens of the requirements; and (3) it allows the FAA to decide on an *ad hoc* basis whether or not to follow the requirements.

This is a particularly good time to consider and address airport concerns about the level and nature of federal regulation, because the appropriate role of the federal government is broadly being debated. Serious consideration is being given to whether, in general, the federal government's reach should be smaller and whether the government should reduce existing regulatory burdens, and not impose additional regulatory burdens that are a drag on the economy. ❖

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[62] 49 U.S.C. § 47107(a)(12).

[63] Although the statutory provision also requires airport proprietors to provide property interests in airport buildings for such purposes, this requirement has been essentially nullified by annual appropriations act provisions. *See, e.g.,* Consolidated and Further Continuing Appropriations Act, Pub. L. 112-55, § 111, 125 Stat. 552, 648 (2012).

[64] *See, e.g.,* Grant Assurance 34, making compliance with Advisory Circulars mandatory.

[65] *See, e.g.,* Weight-Based Restrictions at Airports: Proposed Policy, 68 Fed. Reg. 39176 (July 1, 2003).

[66] *See, e.g.,* FAA Order 5200.11, *FAA Airports (ARP) Safety Management System (SMS)* (Aug. 30, 2010).

[67] 5 U.S.C. § 552 and 553 (2006).

[68] *See, e.g.,* Grant Assurance 20, concerning Hazard Removal and Mitigation, requiring airport sponsors to assure that terminal airspace needed to protect instrument and visual operations will be adequately cleared and protected.

[69] The FAA recognizes, in some documents and Part 16 decisions, the legal principle that internal guidance, such as the Compliance Manual, is not regulatory and is not intended to control airport sponsor conduct. However, the Compliance Manual is routinely cited by parties, FAA, and even courts in interpreting airports' federal obligations.

[70] However, as the Third Circuit recently observed, "*Chevron* deference is inapplicable to agency interpretations rendered in 'opinion letters, policy statements, agency manuals, and enforcement guidelines.'" *Tinicum Twp. v. U.S. Dep't of Transp.*, No. 11-1472, slip op. at 12-13 (3d Cir. July 6, 2012) (citing *Mercy Catholic Med. Ctr. v. Thompson*, 380 F.3d 142, 154-55 (3d Cir. 2004)).