OST-95-474-3

(3511 QA)

BEFORE THE
UNITED STATES DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY

AIR TRANSPORT ASSOCIATION OF AMERICA, et al., Intervenor/Complainants, v. CITY OF LOS ANGELES, CITY OF LOS ANGELES DEPARTMENT OF AIRPORTS, and LOS ANGELES BOARD OF AIRPORT COMMISSIONERS, Respondents.	) Docket No. OST-95-474

BRIEF IN SUPPORT OF
COMPLAINT REQUESTING DETERMINATION PURSUANT TO 49 U.S.C. § 47129 AND DIRECT INTERVENTION OF THE SECRETARY

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48 pgs

TABLE OF CONTENTS

TABLE OF CONTENTS -- (Cont'd)

INTRODUCTION

This brief is filed by the Air Transport Association of America and 59 commercial airlines (collectively, "the Airlines") that serve the Los Angeles International Airport ("LAX"), in support of their Complaint Requesting Determination Pursuant to 49 U.S.C. § 47129 and Direct Intervention of the Secretary ("Complaint"). The Airlines have once again been forced to challenge the fees imposed upon them by the City of Los Angeles, the City of Los Angeles Department of Airports, and the Los Angeles Board of Airport Commissioners (collectively, the "Airport"). After tripling its fees in 1993, the Airport has now increased those fees by an additional 32% for 1995-96. As explained in the Complaint, the Airport has done so by once again (1) unreasonably inflating its fees with fictional costs; (2) unreasonably charging the Airlines -- and improperly transferring to the City -- amounts for purported city services that are not properly chargeable to LAX; and (3) unreasonably misallocating to the Airlines costs that should properly be allocated to other airport users.

The Airlines would have preferred to resolve the significant issues disputed in this proceeding through good faith consultation with the Airport, as required by the Department of Transportation's Policy Regarding Airport Rates and Charges (the "Policy Statement"). The Airport,

however, has embarked on a course of action calculated to give the appearance of cooperation but which, in reality, is intended to deny the Airlines the kind of prudent business analyses typically associated with a multimillion-dollar transaction. Timely and meaningful discussions have not occurred. Despite the Airlines' efforts, there has been virtually no give and take or meaningful dialogue regarding the challenged fees and accompanying budget that would allow the Airlines ask more than the most rudimentary and general questions. The end result of the Airport's game of "hide the ball" is that the Airlines have been forced to bring this action. If the Airport is not required to modify its conduct to comply with the Policy Statement, future litigation is virtually inevitable whenever the Airport increases its fees.

Accordingly, the Airlines respectfully request that the Secretary of Transportation (the "Secretary") find that a significant dispute exists with respect to the issues raised in the Complaint and refer the matter for a hearing. In addition, and just as important, the Airlines request that the Secretary intervene in the fee-setting process at LAX in order to restore the meaningful consultation and disclosure over fees required by law. Although the Airport may believe that its strategic interests are served by denying the Airlines the process they are due as a matter of law, its actions contravene the Policy Statement and are plainly

contrary to the interests of the Airlines, the Department of Transportation ("DOT"), and the traveling public.

FACTUAL BACKGROUND

As the Secretary is well aware, this is not the first time the Airlines have been forced to challenge the fees imposed on them by the Airport. Ever since the Airport adopted its well-publicized strategy of accumulating large surpluses for eventual diversion to general City purposes, and of using LAX to pay for the costs of city services provided to the public, the Airport has dramatically increased the Airlines' fees as a means of further increasing those surpluses and shifting those costs. In 1993, the Airport tripled the Airlines' landing fees (from $0.51 to $1.56 per thousand pounds of landed weight) and for 1995-96 it has raised them by yet another 32% to $2.06, thus quadrupling its fees in only three years. See Complaint ¶ 12.

As a result, the Airport's coffers have grown enormously, to the point where it now projects retained earnings of $894 million, and a surplus of more than $51 million for the current fiscal year alone. Id. ¶ 72. In the meantime, the Airport continues to profess an official goal of revenue diversion. But because federal law prohibits the Airport from doing so outright, the Airport also has embarked on a campaign of indirect revenue diversion, by funneling money to the City in the form of payments for purported "city services."

The Airport has not stopped here. In addition to the items challenged in this Complaint, the Airport has already diverted to the City more than $58,371,260 received from a condemnation of airport land (including nearly $16,000,000 in interest purportedly earned on those funds), a diversion that is the subject of a separate challenge. See Air Transport Ass'n of America v. City of Los Angeles, Docket 13-95-05 (Fed. Aviation Admin.). And the Airport has recently announced that it will begin diverting to the City more than $140 million -- primarily consisting of non-existent "interest" charges on amounts purportedly advanced to the Airport by the City over the last 75 years. See Complaint ¶ 70. That planned diversion will doubtless become the subject of yet another proceeding against the Airport.

The present fee increase must be viewed against this backdrop. For some time, the Airport has been intent on an official policy of eliminating or circumventing federal restrictions on revenue diversion, and of using its monopoly position as a means of generating surpluses for eventual transfer to the City. Id. ¶¶ 61-73. As part of this strategy, it has refused to allow the Airlines to participate in the fee-setting process, thereby forcing the Airlines to challenge each new fee or reconciliation in costly, expedited proceedings without sufficient information to evaluate those fees fully. In this manner, it apparently

hopes to be able to impose unreasonable fees with relative impunity.[1]

As explained below and in the Complaint, the Secretary must put an end to these tactics. The Airport cannot be permitted to inflate its landing fees each year with amounts that are not properly chargeable to the Airlines. And it cannot be permitted to continue shutting the Airlines out of the fee-setting process in violation of the Policy Statement, international law, and recognized industry behavior. If these tactics are condoned here, then other airports doubtless will follow suit, thereby eviscerating the federal protections provided to the airlines and the traveling and shipping public, and leading to more and more expensive and counter-productive litigation that ill serves the public interest.

ARGUMENT

Congress enacted 49 U.S.C. § 47129 "to give airlines . . . the ability to obtain a prompt resolution of significant disputes over the reasonableness of new or

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[1] The Airport's adversarial attitude is demonstrated by the fact that even before it assessed its new fees, it budgeted $1,500,000 for litigation expenses allegedly estimated to be incurred in challenges to those fees. The Airport, moreover, hopes to engage in this litigation at no cost to itself, it has unlawfully included all of the costs of such litigation in the rate base that is charged to the Airlines. See infra at 37.

increased airport fees." Order 95-6-36 at 3. The legal standards governing complaints under that statute are settled. Federal law has long required that public airports charge only "reasonable" fees to aircraft operators. See 49 U.S.C. § 40116 (reenacting, amending and recodifying Anti-Head Tax Act of 1973); 49 U.S.C. § 47107 (reenacting, amending and recodifying Section 511 of the Airport and Airway Improvement Act of 1982). The Policy Statement refined these pre-existing standards and established new procedural regulations, but did not establish new substantive legal requirements. See Order 95-6-36 at 16.

Where, as here, an airport has elected to use a "compensatory" fee methodology, such a fee will be set aside as unreasonable if: (1) the fee exceeds the actual costs associated with an airline's use of airport facilities, or (2) the methodology used to allocate costs to various users is not "reasonable, consistent and 'transparent' (i.e., clear and fully justified)." Policy Statement §§ 2.1, 2.2, 2.3; Order 95-6-36 at 13, 15. See also Recommended Decision of Chief Administrative Law Judge John J. Mathias, Los Angeles International Airport Rates Proceeding, Docket No. 50176 ("RD") at 6-12 (summarizing legal principles). Thus, an airport must apply a "transparent" allocation methodology under which airlines may be charged only those costs that actually relate to the operation of the airport, and only that portion of legitimate airport costs that are actually associated with the airlines' use of airport facilities. In

deciding these questions, evidence of an intent to divert airport revenues to non-airport purposes is relevant in demonstrating that an airport "has a motive for increasing the landing fees to allegedly unreasonable levels." Order 95-4-5 at 25.

In addition, the Policy Statement makes clear that an airport must engage in "adequate and timely consultation" with aeronautical users "well in advance" of a significant change in fee systems, procedures or levels, and must "provide adequate information to permit aeronautical users to evaluate the airport proprietor's justification for the change and to assess the reasonableness of the proposal." Policy Statement §§ 1.1, 1.1.1. Thus, a particular fee methodology is not "transparent" -- and is therefore unreasonable -- where the affected users are not provided sufficient information to assess its reasonableness.

As explained below, rather than comply with these clear directives, the Airport has done just the opposite. The Airport has not engaged in adequate and timely consultation well in advance of the new fees, and has not provided adequate information to evaluate the justification for the fees before their imposition. For these reasons, the Secretary should invalidate the Airport's 1995-96 landing fees, and require the Airport to engage in timely and meaningful consultation and disclosure of information.

I. THE SECRETARY SHOULD INTERVENE TO REQUIRE THE AIRPORT TO ENGAGE IN ADEQUATE AND TIMELY CONSULTATION AND DISCLOSURE.

Since the Airport began implementing its plan to inflate and divert revenues, it has elected to force the Airlines into costly litigation over each disputed item in each new landing fee. The Airport has accomplished this goal by refusing to engage in adequate and timely consultation with the Airlines or disclosure of information prior to the imposition of a new fee, then withholding relevant budget and other financial information until the last possible moment before a complaint would be filed.

Here, the Airport provided virtually no backup to the Airlines before imposing the 1995-96 fees or for almost seven weeks thereafter. Then, within the last eight or nine days before the Airlines were due to file their complaint, the Airport produced (or "made available" in Los Angeles) over 35 boxes of budget and other financial backup for its new fee. See Complaint ¶¶ 50-51. The Airport presumably hopes that it will be able to sustain unreasonable fees -- and therefore accumulate further surpluses for eventual diversion -- if it provides only minimal information to the Airlines in an untimely manner and then forces them to challenge the fees, without any formal discovery, through this expedited proceeding.

These tactics are plainly impermissible under Section 1 of the Policy Statement, and they should be stopped. The Airlines cannot meaningfully influence or

challenge the fees imposed on them if the Airport continues to deny them even a modicum of due process both before and after the fees are imposed. Accordingly, the Secretary should find that the Airport has denied the Airlines the process they are due, and invalidate the fees on this basis alone. The Secretary should then permit the Airport to begin anew its ratemaking process, providing full access to information relating to the 1995-96 fees and engaging in the type of meaningful consultation and disclosure required by the Policy Statement. In addition, to ensure that the Airport complies with its consultation and disclosure obligations in establishing future rates, the Airlines request that the Secretary appoint an independent monitor to oversee the consultation and disclosure that must precede imposition of new fees, and to provide nonbinding resolution of disputes concerning fees at LAX.

At a minimum, the Secretary should order the Airport to produce all information requested by the Airlines but not made available, and bar the Airport from submitting evidence in this proceeding that was not previously provided to the Airlines. Otherwise, both the Airlines and the Secretary will be forced on a virtually continuous basis to devote scarce resources to litigate and adjudicate disputes that could well be avoided through the Airport's cooperation.

A. The Airport Has Conceived and Executed a Plan Calculated to Prevent the Airlines from Participating in the Fee-Setting Process or Evaluating the Basis for those Fees.

Through the Airport's concerted resistance to every effort by the Airlines to participate in the process of setting landing fees at LAX, the public-private partnership that once characterized the dealings between LADOA and the Airlines has devolved into an adversarial relationship. As detailed in the Complaint, collaboration and open communication between LADOA and the Airlines has virtually ceased. LADOA has embraced dilatory tactics such as stalling, refusing to schedule meetings, and withholding relevant information, thereby virtually eliminating the ability of the Airlines to timely and meaningfully evaluate the landing fees, or to mount an effective challenge.

The prevailing adversarial atmosphere at LAX began when the Airport launched its well-publicized policy of revenue-diversion. Beginning with the tripling of its landing fees in 1993, the Airport essentially shut the Airlines out from meaningful consultations over budgets and new fees. With respect to the 1994-95 budget, the Airlines were provided only two days to analyze the voluminous budget materials, and only one unproductive meeting with LADOA staff. The Airport then resisted any meaningful disclosure of information during the prior proceeding, and only produced limited information on the eve of the hearing, and

then only when ordered to by the Secretary.[2] See Complaint ¶¶ 22-27.

The Airlines' efforts at meaningful communication and consultation with respect to the 1995-96 budget and fees have produced equally disappointing results. Once again, LADOA gave the Airlines only two days to analyze budget material in advance of a meeting that, predictably, proved unproductive. At the only other meeting that the Airport permitted the Airlines, the Airport's outside counsel had an inhibiting effect on the discussions. Id. ¶¶ 29-32.

Thereafter, the Airport confirmed that it is no longer interested in working together with the Airlines in a cooperative and productive manner. It refused to provide information necessary for the Airlines to evaluate the reasonableness of the new fees -- notwithstanding repeated requests from the Airlines -- and failed to respond to requests for further consultations. Id. ¶¶ 36-44. For more than a month, it delayed answering a detailed request for specific information, and then responded with a list of minimal, curt "answers" -- akin to a lawyer's responses to formal interrogatories. Id. ¶ 42. For example, in response to a question regarding the basis for a $12,000,000 "noise

[2] Even then, the Airport did not cooperate. To take only one example, before the hearing LADOA staff stoutly refused to explain information codes to the Airlines' expert which the Airport later argued were important to understanding certain documents.

insulation" charge, the Airport responded vaguely that it was engaging in "discussions" with local jurisdictions and the federal government, and then subsequently refused to provide any details about these discussions or their impact on the $12,000,000 charge. Id.

After the Airlines were forced to send a detailed document request similar to the type that might be issued in litigation, the Airport responded that that it would "begin" making critical documents available on August 17, 1995 -- only six business days before the Airlines would have to file a complaint. See Complaint ¶¶ 45-47. The Airport also belatedly responded on August 14, 1995 to the Airlines' repeated requests for a meeting to discuss the 1995-96 fees, far too late for such a meeting to have any meaning whatsoever since the fees had been imposed more than six weeks earlier and any meeting would be held only days before the statutory deadline for filing the Complaint. Id. ¶ 47.

Then, in the last week before the Complaint was finalized, the Airport produced some 35 boxes of material and simultaneously informed the Airlines that much information would simply not be produced at all. Id. ¶¶ 47-52. The Airlines attempted to obtain and review the material made available by the Airport within the time and resource constraints imposed by these expedited proceedings, but were unable to complete this review in order for all of the information to be analyzed in any meaningful fashion.

When viewed as a whole, the Airport's conduct over the past two years points to an unmistakable pattern clearly designed to circumvent the Policy Statement's consultation and disclosure requirements in order to achieve the Airport's ultimate goal -- preventing the Airlines from evaluating or challenging the Airport's enormous landing fee increases. This goal, in turn, fits into the City's overall goal of funneling revenue from the Airport to the City.

B. Federal and International Law Require Meaningful Consultation and Disclosure Prior to Imposition of Any New Fees.

The Airport's actions plainly violate the letter and spirit of the Federal Aviation Administration Authorization Act of 1994, the Policy Statement, international conventions, and universal industry practice. In fact, the Secretary identified as "the first principle" of his Policy Statement "the continued reliance on direct local negotiation between airports and aeronautical users." **60** Fed. Reg. 6906. The Policy Statement thus provides that "[d]irect Federal intervention will be available . . . where needed," but emphasizes that DOT "relies upon airport proprietors, aeronautical users, and the market and institutional arrangements within which they operate, to ensure compliance with applicable legal requirements." Policy Statement § 1. To minimize the need for federal intervention, DOT "encourages direct resolution of differences at the local level between aeronautical users

and the airport proprietor," and specifically states that "[s]uch resolution is best achieved through adequate and timely consultation between the airport proprietor and the aeronautical users about airport fees." Id. § 1.1.

Importantly, the Policy Statement provides that such consultation should occur "well in advance" of significant changes in the level of charges, and that "[t]he proprietor should provide adequate information to permit aeronautical users to evaluate the airport proprietor's justification for the change and to assess the reasonableness of the proposal." Id. § 1.1.1 (emphasis supplied). See also Order 95-6-36 at 40 (information must be made available on a "timely" and "prompt" basis).

The Policy Statement also contains a partial list of information that an airport must provide to airlines in advance of any new fee, including "[h]istoric financial information covering two fiscal years prior to the current year" and "[e]conomic, financial and/or legal justification for changes in the charging methodology or in the level of aeronautical rates and charges at the airport." Id. App. 1.[3] Following the disclosure and consultation, a "good-faith

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[3] See also Federal Aviation Administration Authorization Act of 1994, § 111(b), 108 Stat. 1569, 1573 (Secretary must ensure that airports "provide sufficient information relating to total revenues, operating expenditures, capital expenditures, debt service payments, contributions to restricted funds, or reserves required by financing

[Footnote continued]

effort" should be made to reach agreement. Policy Statement § 1.4. Compliance with these requirements is critical given that there presently is no opportunity for formal discovery prior to, or during, the expedited § 47129 proceedings.

In addition to the requirements of the Policy Statement, meaningful consultation and disclosure prior to the institution of new airport fees is a recognized norm of international law. The International Civil Aviation Organization ("ICAO") has established guidelines requiring that consultations occur between airports and airlines regarding fees. The ICAO, formed in Article 44 of the Chicago Convention, has the authority to promulgate standards and recommend practices for all of its member states, including the United States. See R. Abeyratne, "The Legal Status of the Chicago Convention and Its Annexes," 19 Air & Space Law, Number 3, 1994, at 113.

The ICAO guidelines call on airports to consult with users whenever there is a significant change in the airport charging system or in the amount of the charge "to ensure that the provider gives consideration to the views of users and the effects the charges will have on them . . . ." ICAO, "Statements by the Council to Contracting States on Charges for Airports and Air Navigation Services," Document

[Footnote continued]

agreements or covenants or airport lease or use agreements or covenants").

#9082/4 at 15 (fourth ed. 1992). The ICAO has issued the following guidelines:

> 1. When any significant revision of charges or imposition of new charges is contemplated by an airport operator or other competent authority, appropriate prior notice should, so far as possible, be given at least two months in advance to the principal users, either directly or through their representative bodies, in accordance with the regulations applicable in each State.
>
> 2. In any such revision of charges or imposition of new charges the airport users should, so far as is possible, be given the opportunity to submit their views to and consult with the airport operator or competent authority. For this purpose the airport users should be provided with adequate financial information.
>
> 3. Reasonable advance notice of the final decision on any revision of charges or imposition of new charges should be given to the airport users. This period of notice should take into account the implications for both the users and the airport.

Id. (emphasis supplied).

The United States is also a signatory to approximately 100 individual bilateral agreements containing

consultation requirements.[4] The United States and the United Kingdom also have a specific agreement, in which the United States agreed to encourage its airports to consult with airline users in setting fees, and the British Airports Authority agreed to introduce any changes in fees at Heathrow Airport only after consultation with airport users. See Diplomatic Exchange of Notes re: Airport User Charges, Attachment 4 (Ex. ATA-65).

Advance notice, meaningful consultation, and free disclosure of information -- in addition to being an important policy of the United States government -- are also the practice at airports throughout the nation, and are of critical importance given that airports have sole control over all relevant information. See Complaint ¶¶ 81-83. The Airport's refusal to follow these practices may be in accordance with its perceived tactical interests, but it is not in accordance with law.

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[4] See, e.g. Treaties and Other International Acts Series ("TIAS") #11990 (Australia 1989, Article X) (a party "may, at any time, request consultations relating to this agreement. Such consultations shall begin at the earliest possible date, but not later than 60 days . . . ."); TIAS #11780 (Brazil 1992, Article 13) ("consultations shall begin within a period of 60 days of the date of receipt of the request for consultations"); TIAS #3504 (India 1956, Article 9) (the parties will consult to determine the extent of the agreement, particularly economic issues).

C. The Landing Fees Should Be Invalidated and the Secretary Should Intervene to Assure Future Compliance By the Airport.

None of the consultation, communication or good-faith negotiation contemplated by federal law and international conventions has occurred with respect to the 1995-96 landing fees. As described above, far from working with the Airlines to reach an agreement regarding the appropriate landing fees, LADOA has attempted to manipulate the Secretary's Policy Statement and take advantage of the lack of mandatory discovery in § 47129 proceedings. It has dealt with the Airlines as an adversary, filtering questions through its outside counsel, forcing the Airlines to issue formal document requests, and delaying or denying the Airlines information necessary to evaluate the reasonableness of the landing fees. Beginning with the imposition of the 1993 landing fee, the Airport has intentionally caused a total breakdown in the discussion and exchange of information that must precede a rational consultation on the reasonableness of the landing fees or a meaningful review by the Secretary.

One incident in particular illustrates the Airport's impermissible tactics and the importance of timely and adequate disclosure. On August 23, 1995 -- as this filing was being finalized -- the Airport belatedly provided voluminous material relating to its calculation of charges for Los Angeles Police Department services, notwithstanding earlier repeated requests for such information. See

Complaint ¶ 55. Among this material was a document purporting to modify the LAPD's policy on using LAX sub-station personnel for off-airport duties, a critical issue that had not been finally resolved in the prior proceedings.[5]

Likewise, not until July 28, 1995 did the Airport inform the Airlines as to the general categories of services comprising a $4.3 million charge for "City Services -- Administration." That information indicated that the budget included a double charge for more than $1.6 million in "City Attorney" expenses, but the Airport failed to provide an explanation or any supporting documentation. See Complaint ¶ 57. On August 10, the Airlines requested an explanation for the apparent double-charge. When the Airport failed to provide an explanation, the Airlines repeated their request on August 21, noting that documents recently received had confirmed the improper charge. Id.

Not until this Complaint was going to press did the Airport finally admit the improper double-charging, and indicate that the extra charge (along with two other erroneous charges) would be removed from the rate base. Id. ¶ 58. But even then, the Airport would only state that it

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[5] In view of the Airport's inexcusable delay in providing this information, the Airlines reserve the right to amend their complaint or otherwise rely on this material later in this proceeding (as well to rely upon any other information the Airport may subsequently provide).

would "consider" removing the admittedly erroneous charges, thereby forcing the Airlines to challenge them in their Complaint. Id. Doubtless there are other similar improper charges that the Airlines have not been able to detect due to the Airport's refusal to provide meaningful consultation and disclosure. And if the Airport had provided such consultation and disclosure before the fees were implemented, such improper charges could have been detected and deleted in a timely fashion.

If the Airport is permitted to continue to engage in these tactics with impunity, not only will the consultation and disclosure requirements of the Policy Statement be eviscerated, but the Airport will effectively be able to take more and more of the Airlines' property without due process of law. Given the expedited proceedings under § 47129 and the absence of any formal discovery, airlines cannot effectively challenge the reasonableness of an increased fee if airports -- which have sole control over relevant information -- are permitted to withhold the information necessary to sustain such a challenge.

Despite the Airlines' repeated requests for information and repeated overtures to LADOA to return to a cooperative, collaborative working relationship, LADOA has maintained an adversarial posture. If the current environment endures, the Airlines will have no choice but to file a new complaint every time a new fee is instituted or a reconciliation is imposed, because it is only through formal

proceedings and federal intervention that the Airlines can even begin to meaningfully address the reasonableness of the landing fees. This may be the Airport's preferred way of addressing fee issues, but it is not the Airlines' and we understand it is not the Secretary's.

Because LADOA has refused to alter its current practice the Airlines request the intervention of the Secretary in order to begin establishing standards for timely and adequate disclosure of information, and to facilitate regular, productive meetings, and the development of a relationship between the Airlines and LADOA that may render unnecessary further expensive and burdensome proceedings. Section 1.2.2 of the Policy Statement specifically provides for such intervention. For all the reasons described above, it is critical in this case. See also 49 U.S.C. § 47122 (Secretary may take action he considers necessary to carry out laws relating to airport development and regulation).

Accordingly, the Airlines request that the Secretary take the following steps to penalize the Airport for its dilatory actions and ensure that the Airport will not engage in such conduct in the future: (1) invalidate the Airport's 1995-96 landing fees in their entirety; (2) direct the Airport to provide the Airlines with meaningful consultation and disclosure in setting future fees and, with respect to future fees, appoint an independent monitor to oversee the rate-setting process; and (3) at a minimum bar

the Airport from submitting record evidence in these proceedings if that evidence was not provided to the Airlines well in advance of this Complaint, and requires the Airport to produce all information on the attached list that has not yet been provided. See Attachment B to Certificate Required by 14 C.F.R. § 302.605(c) (filed herewith).

II. THE AIRPORT'S FEES ARE UNREASONABLE.

In addition to being set in an inherently unreasonable fashion, the 1995-96 fees also include several impermissible charges that independently render them unreasonable under accepted principles governing the reasonableness of user fees. See supra at 5-6.

A. The Airport Has Unreasonably Included in its Rate Base a 'Land Rental" Charge That Already Has Been Held to be Unlawful.

In the prior proceedings, the Secretary held that it was unreasonable for the Airport to include a market-based "land rental" charge in its rate base, and that the Airport must instead charge for land according to its historical costs. The Secretary therefore ordered a credit of the invalid amounts and ordered the Airport to "modify the LAX landing fees to eliminate that portion of the fees found unreasonable and so modify the future fees charged all airlines using the airport." Order 95-6-36 at 45. The Airport moved for a stay of certain portions of the Final Decision, but (as the Secretary later noted) it did not move for a stay of that portion directing it to cease imposing

land rental charges in the future. See Stay Order at 14. Accordingly, in a subsequent order the Secretary reiterated that the prior order "made it clear that the City was not entitled to continue charging those fees" and stated that "the City cannot ignore our decision and thereby force us and the airlines to conduct another proceeding to address an issue we have already resolved." Id.

Incredibly, the Airport has elected to defy these orders. It has not modified its 1995-96 fees as required, but has instead continued to include the land rental component in its fees and has demanded that the Airlines pay that amount into escrow under protest. This course of action has thus forced the Airlines to institute new proceedings over this issue -- precisely the outcome that the Secretary sought to avoid. The Airport's actions in this regard are plainly unreasonable and unlawful.

B. The Airport Has Unreasonably Charged the Airlines $12,000,000 for Noise Mitigation Expenses.

The 1995-96 landing fee calculation includes $12 million for "noise mitigation" expenses, all of which have been charged to the airfield cost center. See Complaint ¶ 151. Yet in 1993, the Airport applied for and received FAA authorization to impose a Passenger Facility Charge ("PFC") of $3.00 per passenger, up to $360 million over approximately five years, and to spend $100 million in PFC revenue specifically and exclusively on its noise mitigation program. See id. ¶ 152. Since then, the Airport

has collected over $80 million in dedicated PFC revenues. See Complaint ¶ 154.

In light of these substantial revenues generated from passengers to pay for the Airport's noise mitigation program, it is plainly unreasonable for the Airport now to charge the Airlines additional amounts to pay for the same program. Simply put, the Airport cannot reasonably charge the airlines for projects for which the Airport has an unused, dedicated fund. Where, as here, a dedicated fund exists, there are no additional costs that can reasonably be allocated to airport users. See also 49 U.S.C. § 40117(g)(1)-(2) (an airport may not include capital costs paid for by PFC revenues to establish a price under a contract between the airport and an air carrier).

Although the Airport has informed the Airlines that its "use of PFCs is currently being reviewed and discussed with the FAA," 7/28/95 Letter from J. Driscoll to B. Enarson at item 8(c) (Ex. ATA-36), it has refused to provide the Airlines with its correspondence with the FAA on this subject. See Complaint ¶ 41. In any event, as far as the Airlines are aware, the FAA has not authorized the Airport to shift PFC revenue collected for the Airport's noise mitigation program to any other project. Furthermore, any such authorization would be ineffective because the Airport has not notified or consulted with the Airlines about any such rededication of PFC revenue, as required by

law. See 14 C.F.R. §§ 158.23, 158.37(b); Northwest Airlines, Inc. v. FAA, 14 F.3d 64, 72 (D.C. Cir. 1994).

For these reasons, the entire $12,000,000 charge for noise mitigation should be invalidated and refunds ordered accordingly.

C. The Airport Has Charged the Airlines Unreasonable Amounts for City Services

As recently as April 19, 1995, the Airport has continued to proclaim in official documents that "using moneys derived from operation of the Airport System for City purposes instead . . . is a goal of the City and the Board." April 19, 1995 Report of John F. Brown Company, Inc., Appendix A to 1995 Bond Offering Statement, at A-2. The Airport itself, however, recognizes that this diversion strategy is unlawful. Accordingly, as noted in the same report, the Airport admits that it plans to accomplish its goal indirectly, through the numerous "city services" charges it includes in the rate base. See id. (city services charges listed as one of three ways the Airport intends to accomplish its goal of "revenue sharing").[6]

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[6] The other two methods identified in the John Brown report are the transfer to the City of more than $59 million in proceeds received for the condemnation of airport land, and the transfer to the City of more than $142 million primarily consisting of hypothetical "interest" purportedly owed the City dating back 75 years. See supra at 4.

Thus, it is not surprising that "charges" for city services have increased by nearly 200% in only four years: from $8.8 million for 1991-92 to more than $25 million for 1995-96. See Complaint ¶ 115. As Chief Judge Mathias noted in the prior proceeding, the "burgeoning of City service charges" is "suspicious in view of their dramatic increases and the City's expressed desire to somehow share in the profits of LAX in the foreseeable future." RD at 31. Chief Judge Mathias was correct to be suspicious. Airport administrators are in a position to effect such diversion easily and make detection very difficult.

As explained below, the Airport has adopted a twofold strategy with respect to the city services charges in the 1995-96 landing fees. First, the Airport has included city services "charges" well in excess of the costs reasonably attributable to LAX. Second, it has unreasonably misallocated many of those "charges" to the Airlines rather than to other airport users that benefit from the City service in question, thereby building the Airport's surpluses for diversion (it hopes) at a later date.

1. The Airport Has Unreasonably Allocated the Airfield 90.8% of the Costs of a Fire Department Unit That Primarily Serves Other Airport Users.

In its 1993-94 landing fees, the Airport allocated 100% of the airport-related costs of a fire department unit, Engine Company 51, to the Airlines, notwithstanding undisputed evidence that the unit primarily served other airport

users. In the prior proceeding, the Airlines argued that this allocation was unreasonable, and the Secretary agreed. The Secretary noted that from 1983 to 1992, only 12% of Engine Company 51's response time was spent on airfield incidents, while 72% was spent on incidents in public areas like the terminal and parking lots. See Order 95-6-36 at 42. The remaining 16% was spent on non-airport incidents.

More recent figures for 1993-94 (which were only provided by the in the last several day) reveal that the percentage of airfield-related response time is now even lower. According to those figures, only 9.2% of Engine Company's total response time was spent responding to airfield incidents, while the remaining 90.8% was spent on non-airfield incidents both on and off the airport. See Complaint ¶ 128.

In the prior proceeding, the Airport attempted to justify its allocation based on the status of Engine Company 51 as a "backup" for a dedicated airfield unit. In light of the evidence regarding relative usage, however, the Secretary held that:

> The City is mistaken in its assumption that Engine Company 51's status as a backup for the main crash unit justifies allocating the great majority of its cost to the airfield. Since the company in fact is used primarily for incidents off the airfield, the City's allocation of 84 percent of its cost to the airfield is unreasonable.

RD at 42. Although the Secretary found that the Airport's allocation was unreasonable, he declined to order a refund of the unreasonable amounts at that time in the apparent hope that the Airport would voluntarily modify its unreasonable methodology. Id. at 43.

The Airport has elected instead to defy the Secretary's ruling. In its 1995-96 landing fees, the Airport has once again allocated the lion's share of Engine Company 51 costs to the Airlines -- this time allocating the airfield 30.8% of the unit's total costs. See Complaint ¶ 126. The Airport has done so by allocating the costs between airfield and non-airfield cost centers according to the relative percentages of time incurred in responding to "flightline" and "non-flightline" incidents, but ~~with~~ all "standby" time allocated to the ~~airfield.~~ Id. ¶ 127. Thus, because CFR units spend the vast majority of their time "standing by" for the next incident (according to the most recent figures, 90% of Engine Company 51's total time is spent standing by), this methodology results in the vast majority of costs being allocated to the airfield, even though Engine Company 51 is primarily used for non-airfield incidents. Indeed, the airfield has been allocated 90.8% of Engine Company 51's costs notwithstanding that (as noted above) the most recent data shows that the unit spent 90.8% of its response time on m-airfield incidents. See supra.

The Airport's allocation of Engine Company 51 costs is patently unreasonable. Once again, the Airport has

attempted to justify its allocation by pointing to the status of Engine Company 51 as a "backup" for a dedicated airfield unit. See Complaint ¶ 129. But the evidence of incident reports shows conclusively that when Engine Company 51 is "standing by," it is doing so primarily as a prelude to non-airfield incidents. Thus, the Airport should allocate the total costs of Engine Company 51 according to the relative proportion of response time spent on airfield and non-airfield incidents. As set forth in the Complaint, when this required adjustment is made using the most recent data, the rate base should be reduced by $1,299,900. Id. ¶ 133.

2. **The Landing Fees Include Unreasonable Charges for Police Services.**

As with the charges for CFR, the Airport has also attempted to use police charges to further its goal of shifting the cost of city services to the airport and to the Airlines. The 1995-96 landing fee calculation includes $9,691,402 in Los Angeles Police Department ("LAPD") charges, $2,989,914 of which is included in the Airlines' rate base. See Complaint ¶ 145. As explained below, this charge is unreasonable for two separate reasons. First, the City has improperly charged LAX for costs that should be borne by the City. Second, the Airport has unreasonably allocated all LAPD costs to the indirect "General Administration" cost center, notwithstanding that police

activity can be traced to direct cost centers within the airport, such as the terminal and the concessions.

a. The Airport Has Unreasonably Allocated Police Costs to LAX That Are Not Chargeable to the Airport.

Not until the very eve of this filing did LADOA provide the Airlines with more than the most general description of the specific police activities that have been charged to LAX. Nevertheless, the Airlines believe that the City has charged LADOA for the entire operation of an LAPD sub-station that is located at LAX, but that also has historically served nearby communities. See Complaint ¶ 138.[7] The City also has charged the Airport for certain other police services that are performed at LAX but are unrelated to the operation of the airport. Id. ¶ 139. In the prior proceeding, Chief Judge Mathias held that both of these charges were unreasonable (RD at 31-32), but the Secretary declined to issue a final refund order because the charges had not been formally assessed against the Airlines. See Order 95-6-36 at 44. Now that the charges have in fact been imposed, they should be invalidated and the unreasonable amounts refunded.

[7] As noted above, as this Complaint was being finalized, the Airport provided a large amount of detailed information relating to LAPD costs. Among this information is a document that purports to modify the LAPD policy regarding off-airport duties of LAX sub-station personnel, but still makes clear that the sub-station is not exclusively devoted to airport purposes.

In the prior proceeding, Chief Judge Mathias held that it was unreasonable for the City to charge the airport for 100% of the LAX sub-station costs, because "the LAPD police substation at LAX does not limit its activities to LAX, " but also "serves the adjacent reporting districts" and "respond[s] to emergency calls from non-adjacent reporting districts." RD at 32. In addition, Chief Judge Mathias held that it is unreasonable to charge the Airlines for the costs of services, such as the activities of the Organized Crime Intelligence Division ("OCID"), that are "'non-airport' related." Id. at 30.

In the Final Decision, the Secretary declined to address this issue, but cautioned the Airport that:

> any allocation of the substation's cost to the airport and between the airport's cost centers must be justifiable and transparent. In past cases we and the courts have carefully reviewed airport allocations of crash, fire and rescue costs. If the City's final allocation of police costs leads to complaints involving a significant dispute under 49 U.S.C. 47129, we will examine whether the City has met its obligations to allocate costs in a justifiable and transparent manner.

Order 95-6-36 at 44.

The Airport has plainly failed to satisfy those obligations. It has apparently included 100% of the sub-station costs in the LAX rate base, notwithstanding the undisputed historical evidence that the sub-station also

provides police services to the surrounding area. And it has charged the Airlines for activities at the airport, such as the OCID, that do not relate to the operation of LAX. See Complaint ¶¶ 138-39. These allocations are unreasonable and amount to prohibited revenue diversion.

b. The Airport Has Unreasonably Allocated to the Airlines Police Charges that Should Properly be Allocated to Other Airport Users.

The Airport also has allocated all LAPD charges to the indirect "General Administration" cost center, a portion of which is then included in the Airlines' rate base. See Complaint ¶ 145. Although this represents a change in the prior practice of allocating such charges entirely to the airfield, it is unreasonable because LADOA or the City plainly has the ability to determine the direct cost centers to which specific police activities relate, and to allocate the costs of those activities accordingly. Id. ¶ 146. It is therefore unreasonable for the Airport to allocate all LAPD costs indirectly to General Administration rather than directly to the cost centers to which the activity is actually related. Id.

In the prior proceeding, Chief Judge Mathias held that "it is clear that many [police charges] are not appropriate for the rate base," and cited investigations of rental car credit card fraud as one such example. RD at 30. The Airport has refused to provide the Airlines either with summaries of incident reports involving police activity at

LAX or individual log entries, from which the Airlines could determine the proper allocations. See Complaint ¶ 141. But based on the limited documentation provided by the Airport in time to be reviewed by the Airlines, there are many police activities that are properly chargeable to direct cost centers, including charges for the investigation of stolen or recovered automobiles; many, if not most, of the "walk-ins" handled by the LAX sub-station; and many, if not most, of its narcotics arrests. Id. ¶ 147. Thus, although the Airport has not provided the Airlines with information necessary to determine the proper allocation, much of the "charge" for LAPD expenses is plainly chargeable to the terminal and concessions, not the airfield.[8]

The Airport, of course, has an economic incentive to improperly charge these expenses to the indirect General Administration cost center (a portion of which is then allocated to the airfield and apron) rather than to the direct cost centers to which they actually relate, because of its goal of building surpluses for future diversion. That is because a cost that is allocated to the terminal or concession cost center is not included in the Airlines' rate

[8] Under the Policy Statement, the Airport has the burden of establishing a reasonable and transparent allocation methodology for allocating these costs, and once the Airport has failed to carry this burden, it is not the Airlines' burden to demonstrate precisely how costs should reasonably be reallocated. See Order 95-6-36 at 31 n.27.

base, thereby limiting the growth in surpluses. See Complaint ¶ 146.

D. The Airport Has Unreasonably Charged the Airlines for a Purported "Debt Service Coverage" Cost that the Airport Will Not Incur

The Airport has included $8,788,372 in the 1995-96 rate base for "debt service coverage" (calculated as an additional 25% of budgeted debt service), $1,324,594 of which has been allocated to the airfield and the apron. See Complaint ¶ 159. Debt service coverage is not a cost or reserve, but is merely a test of income level that the Airport must satisfy. If it does, there is no need to impose a charge to drive revenue up to the required level. As explained below, the Airport's own projections demonstrate that it will easily meet the revenue requirements of its bond agreements without the charge. In short, the Airport is not obligated by its bond covenants to impose this charge and it therefore has incurred no cost that lawfully can be added to the rate base.

In 1995, the Airport refinanced all of its debt. The 1995 bonds contain a covenant providing that:

> The Board further agrees that it will establish, fix, prescribe and collect rates, tolls, fees, rentals and charges in connection with Los Angeles International Airport and for services rendered in connection therewith, so that during each Fiscal Year the Net Pledged Revenues will be equal to at least 125% of Aggregate Annual Debt Service.

Master Trust Indenture at 52 (Ex. ATA-60) (emphasis supplied). The term Net Pledged Revenues is defined as the revenues earned by LAX (with certain specified exclusions) less maintenance and operation expenses. See id. at 19 (definition of Net Pledged Revenues); id. at 23 (definition of Pledged Revenues). This is a standard covenant, which is intended to ensure bondholders that the bond issuer's pledged revenues will always exceed debt service requirements by a certain margin. As can be seen, the Airport's bond agreements require a debt service coverage of 125% (i.e., Net Pledged Revenues must be 125% of debt service).

Here, the Airport need impose no additional charge in order to meet this 125% requirement; far from it. According to official projections made by LADOA to its bondholders in its 1995 bond prospectus, its projected revenues will produce a debt service coverage of 242.9% for 1995-96, or more than $50.000.000 in excess of the minimum amount required by its bond covenants. See Complaint ¶ 164. Even if the debt service coverage charge and all other quantifiable charges challenged in the Complaint were to be excluded from the Airport's revenues, LADOA's official projections show that its revenues will produce a debt service coverage of 242.9%. Id. ¶ 163.[9]

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[9] If one uses the Airport's less reliable budget estimates for 1995-96, the Airport's revenues would have to

[Footnote continued]

The Airport's only stated justification for including its debt service coverage charge is that "charging coverage is expressly permitted by the DOT policy." 7/28 Letter from J. Driscoll at item 18. But the Policy Statement makes clear that the Airport cannot include such a charge in this fee. The Policy Statement provides that an airport proprietor "may include in the rate base amounts needed to fund debt service and other reserves and to meet cash flow requirements as specified in financing agreements or covenants (for facilities in use)." Policy Statement § 2.3.4 (emphasis supplied). Thus, where an airport's total revenues are projected to be insufficient to meet a debt service covenant, it might be appropriate to include in the rate base an additional amount to help satisfy that requirement.[10] Here, however, the Airport's total revenues

[Footnote continued]

fall by more than $33,000,000 before it would be in danger of failing to meet its debt service requirements. See Complaint ¶ 164.

[10] In addition, such a charge would be reasonable only if the airport expressly assures that the funds provided by aeronautical users through the debt service coverage charge will either be credited back to them at the end of the fiscal year or used for projects benefiting those users. An airport may not charge a user excess amounts for debt service coverage that are not needed for any actual expenditures, and then retain those amounts or use them to benefit other users. Here, the Airport has refused to assure the Airlines that amounts assessed for debt service coverage will be credited back to them, which is yet another reason why this charge is unreasonable.

are projected to vastly exceed the amounts necessary to meet debt service coverage requirements. Consequently, there is no "need" to include additional amounts in the rate base and any such charges are therefore unreasonable. See Complaint ¶ 167.

A debt service coverage charge is unnecessary and unreasonable and the entire $1,324,594 included in the rate base should be invalidated and a refund ordered accordingly.

E. The Airport Has Unreasonably Required the Airlines to Pay the Airport's Legal Fees.

The 1995-96 Landing Fee Calculation includes a $1,500,000 budgeted amount for "Outside Attorneys," all of which has been allocated to the airfield cost center. See Complaint ¶ 170. According to the Airport, "[t]hese are the estimated costs for rates and charges litigation before the U.S. D.O.T." 7/28 Letter from J. Driscoll to B. Enarson at item 10(a) (Ex. ATA-36). The Airport has refused to provide the Airlines with any further information on these charges, but it is plain that this amount is intended to cover the Airport's attorneys' fees and litigation expenses not only in the present proceedings, but also in other proceedings defending the Airport's various revenue diversion schemes.

Charging these amounts in the rate base is patently unreasonable. First of all, requiring the Airlines to pay for the costs incurred by the Airport in these proceedings contravenes the well-settled principle under which "each party in a lawsuit ordinarily shall bear its own

attorney's fees unless there is express statutory authorization to the contrary." Hensley v. Eckerhart, 461 U.S. 424, 429 (1983). It also violates the Policy Statement, as the Airport's legal fees for this proceeding are not related to the "provision of aeronautical facilities," or any other allowable cost." Policy Statement § 2.3. The Airport expects to incur these costs in defending its unlawful fees (much of which have already been held unreasonable), including attempts to transfer revenue to the City through "city services."[11] Whatever can be said of the utility of the Airport's outside counsel charges, they plainly do not benefit the Airlines in any way, and the amounts therefore cannot be charged to them. In fact, the principal intended beneficiary of these charges is the City -- which hopes to receive the Airport's surplus revenues. LADOA and the City must therefore bear their own legal fees.

Moreover, and just as important, allowing the Airport to charge the Airlines for the Airport's legal fees incurred in this proceeding would further eviscerate the Policy Statement's directive that airports provide

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[11] To the extent that the fees are incurred in efforts at revenue diversion, the FAA has already ruled that such fees cannot be included in the rate base. See Complaint ¶ 174. Given the large magnitude of the $1,500,000 budgeted for outside counsel in the 1995-96 landing fees, it appears clear that the Airport is including charges expected to be incurred in its ongoing revenue diversion efforts.

meaningful consultation and disclosure regarding new fees, and attempt in good faith to resolve issues without litigation. Here, even before the Airport imposed its 1995-96 fees, it had already budgeted $1,500,000 for litigation involving those fees -- thereby demonstrating that it had no real intention of engaging in meaningful, non-adversarial discussions with the Airlines. If the Airport is permitted to charge its legal fees to the Airlines, then it will have almost no incentive to moderate its fee positions or to engage in meaningful consultation in the future.

F. The Airport Has Unreasonably Charged the Airlines Debt Service Expense for Projects Not Completed.

Section 2.4.2 of the Policy Statement provides unequivocally that "[t]he costs of facilities not yet built and operating may not be included in the rate base." Policy Statement § 2.4.2. The Airport's 1995-96 landing fees violate this requirement. These fees include in the airfield cost center a total of $1,270,188 in debt service for at least two projects, the "Southside Taxiways" project and phase two of the "Airfield Signage and Lighting" project, neither of which is presently "built and operating" as required before their debt service may be included in the rate base. See Complaint ¶¶ 179-180. The inclusion in the current rate base of debt service relating to these projects is therefore unreasonable under Section 2.4.2 of the Policy

Statement, and the $1,270,188 included for such purposes should be invalidated and refunds ordered accordingly.

G. Amortization and Excess Aeronautical Revenues.

The 1995-96 landing fee also includes $10.8 million in "amortization expenses" for certain assets purchased while the Airport was operating under a residual methodology. In the prior proceeding, the Airlines argued that these charges were impermissible because they caused the Airport to recover the cost of these assets twice: once under the residual system from fees collected from all airport users and in particular the Airlines; and a second time under the compensatory system via the challenged amortization charges. Chief Judge Mathias found as a fact that the amortized assets were paid for with funds derived from airport users under the prior residual system. See RD at 20 (assets were paid for from funds "obtained from the operation of the Airport System -- including terminal rents, concessions, parking, landing fees, and any other source of revenue.") . In the Final Decision, the Secretary held that "[i]f the City now charged the airlines for an expense which had been paid by any airport users under the residual fee system, the City would be getting paid twice for the same expense, which would be unreasonable" (Order 95-6-36 at 8) -- but ultimately rejected the Airlines' challenge on other grounds. In this proceeding, the Airlines renew their challenge to the amortization expenses and seek to preserve

their right to obtain a refund of those charges pending the outcome of the Airlines' appeal of the Secretary's ruling on amortization expenses.

The Airlines similarly seek to preserve their right to challenge the Airport's failure to credit the landing fee rate base (including properly allocated terminal costs) by the amount of "net" excess aeronautical revenues generated by sources other than landing fees, such as the Airlines' fair market terminal leases with the Airport. Excess aeronautical revenues are required to be credited against the rate base under Section 2.1 of the Secretary's Policy Statement; however, in the prior rates proceeding, the Secretary disagreed with the Airlines as to what must be considered "aeronautical revenues." The Airlines have appealed that ruling to the D.C. Circuit as well.

III. THE AIRLINES' COMPLAINT PRESENTS A SIGNIFICANT DISPUTE.

Pursuant to 49 U.S.C. § 47129(c)(2), a hearing is required on the Airlines' complaint if it presents a "significant dispute." The Secretary looks to many factors in making that determination, no one of which is dispositive. Among those factors are (1) the amount of money at issue; (2) the amount of the increase in fees; (3) whether the increase was due to a significant change in the airport's fee methodology; (4) whether the complaint contains allegations of revenue diversion; (5) the size and relative importance of the airport; (6) the number of issues

raised about the calculation and justification for the fee increase and its component parts; and (7) the amount of evidence indicating that the fees are unreasonable.12

In the prior proceeding, the Secretary found that a significant dispute existed because "Los Angeles is the nation's second-largest city, and LAX is its third busiest airport;" the dispute involved "a sizable amount of money" and "a major increase in the airport's fees;" and the arguments in the complaint "on their face appear to be substantial and worthy of investigation." Instituting Order at 17.

The same circumstances exist -- perhaps even more strongly -- with respect to the present complaint. The amount in controversy, at least $16 million for only the next 180 days, is once again significant. See Complaint at 85. The amount of the increase in the landing fees for 1995-96 -- 34% -- is yet another significant increase in the Airport's prior fees, and their continued escalation is itself a significant factor.

Moreover, the 1995-96 fee includes charges that the Secretary has previously found unreasonable, indicating

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12 See Trans World Airlines, Inc. v. City and County of Denver, Docket OST 95-221; 50414, Order No. 95-7-27 at 14 (July 21, 1995); Delta Air Lines, Inc. v. Lehigh-Northampton Airport Auth., Docket OST 95-80; 50264, Order 95-5-8 at 17 (May 4, 1995); American Airlines, Inc. v. Puerto Rico Ports Auth., Docket 50178, Order 95-4-6 (Apr. 3, 1995); Air Transport Ass'n v. City of Los Angeles, Docket 50176, Order 95-4-5 at 17 (Apr. 3, 1995).

a significant question about the Airport's compliance with the Secretary's orders. The Airport's fee methodology has also changed in several key respects, such as the reallocation of police and fire department costs, and the inclusion of new debt service coverage and outside counsel charges. As in the prior proceedings, there are serious issues of revenue diversion that cast suspicion on the increased fees. And LAX, of course, remains a critically important link in the nation's air transportation system.

Moreover, the present Complaint raises a number of challenges to the Airport's fees which, when considered individually and as a whole, are on their face "substantial and worthy of investigation." Indeed, the Secretary already has found that a significant dispute exists with respect to many issues involved in the present complaint, which remained unresolved at the conclusion of the prior proceedings. For example, the Airport's misallocation of police and fire department costs were found to be significant in the prior proceeding, but the Secretary declined to issue final rulings on those questions. And as noted, the Secretary invalidated the Airport's unreasonable "land rental" charges -- and explicitly ordered the Airport to cease charging such amounts in the future. The Airport's refusal to comply with that order is itself a significant dispute with serious implications for the Secretary's ability to enforce the governing statute through lawful orders. Finally, new aspects of the Airport's fees

challenged in this complaint -- non-existent noise mitigation and debt service coverage costs, and debt service payments for projects not operating -- are important issues of first impression.

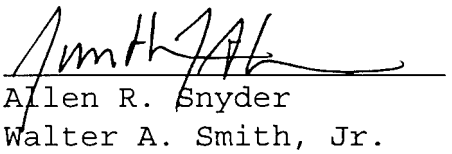
Perhaps even more important than the specific components challenged in this Complaint is the City's blatant refusal to comply with the Policy Statement's directive for early and meaningful consultation and disclosure. DOT has acknowledged that its Policy Statement and the statute's expedited dispute process hinge on compliance with this requirement. This case presents the Secretary with an opportunity to affirm that underlying rationale and give teeth to the Policy Statement's consultation and disclosure requirements. Failure to find a significant dispute in this case will signal the demise of these critical policies and procedures.

As in the prior proceeding, there is no question that the present Complaint presents a significant dispute warranting a hearing.

CONCLUSION

For the foregoing reasons, the Secretary should find that the Airlines' Complaint presents a significant dispute, refer the matter for a hearing, and issue the requested relief.

Respectfully submitted,



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