

BEFORE THE UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY

ALASKA AIRLINES, INC., et al.,	:	
	:	
Complainants,	:	
	:	
v.	:	Docket OST-2007-27331
	:	
LOS ANGELES WORLD AIRPORTS,	:	
et al.,	:	
	:	
Respondents.	:	

**THE TERMINAL 1 AND 3 CARRIERS' BRIEF
TO THE DEPARTMENT DECISION MAKER**

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TABLE OF CONTENTS

INTRODUCTION2

STATEMENT OF FACTS7

LEGAL STANDARD AND BURDEN OF PROOF.....14

ARGUMENT17

I. LAWA'S NEW TERMINAL CHARGES UNJUSTLY
DISCRIMINATE AGAINST THE T1/T3 CARRIERS17

 A. The T1/T3 Carriers Make "Similar Use" of LAX as the
 T2/T4-8 Carriers But are Subject to Dramatically Higher
 Terminal Charges.....18

 B. LAWA Cannot Rely on the Signatory/Non-Signatory or
 Tenant/Non-Tenant Classifications to Justify the Discrimination
 Against the T1/T3 Carriers19

 C. LAWA's Use of Different Lease Expiration Dates to Discriminate
 Against the T1/T3 Carriers is Not Based on Any Reasonable
 Distinction Between the T1/T3 and T2/T4-8 Carriers20

 1. The Disparity in Terminal Charges is Massive and
 Likely to Continue for Many Years21

 2. There is No Connection Between the Disparity in Terminal
 Charges and LAWA's Cost of Serving the Respective
 Terminals, and *Per Se* Discrimination is Not Permitted.....23

 3. LAWA has Denied the T1/T3 Carriers and New
 Entrant Airlines Any Opportunity to Avoid
 Discriminatory Charges29

 D. LAWA's Huge Increases in T1/T3 Charges will have
 Profound Negative Economic and Competitive Effects
 on both the Affected Airlines and Travelers using LAX32

E. Given that LAX has Operated Profitably under the Prior Rental Methodology and Enjoys a Surplus of Hundreds of Millions of Dollars, There is No Justification for Imposing Dramatic and Discriminatory Fee Increases on the T1/T3 Carriers34

F. LAWA is Improperly Using the Discriminatory Terminal Charges to Increase its Surplus and Seek Funding for Unapproved Future Capital Projects36

II. LAWA’S APPLICATION OF THE RENTABLE SPACE FORMULA IS UNREASONABLE38

III. LAWA'S USE OF FAIR MARKET VALUE IS UNREASONABLE.....42

IV. LAWA’S NEW M&O METHODOLOGY IS UNREASONABLE45

V. THE “WRITTEN AGREEMENT” EXCEPTION OF 49 U.S.C. § 47129(e)(1) DOES NOT APPLY46

REFUNDS OWED TO THE T1/T3 CARRIERS.....48

CONCLUSION.....49

TABLE OF AUTHORITIES

FEDERAL STATUTES

49 U.S.C. § 47107.....14, 15, 20, 26, 29

49 U.S.C. § 47129.....46, 50

FEDERAL CASES

ATA v. DOT,
119 F.3d 38 (D.C. Cir. 1997).....44

Air Cal., Inc. v. City and County of San Francisco,
865 F.2d 1112 (9th Cir. 1989)40

Alcoa Steamship Co. v. FMC,
321 F.3d 756 (D.C. Cir. 1963).....17

City of Los Angeles v. DOT,
165 F.3d 972 (1999).....43

Director, OWCP v. Greenwich Collieries,
512 U.S. 267 (1994).....16

Duquesne Light Co. v. Barasch,
488 U.S. 299 (1989).....43

Greater Boston Television Corp. v. FCC,
444 F.2d 841 (D.C. Cir. 1970).....17

Port Authority of N.Y. and N.J. v. DOT,
479 F.3d 21 (D.C. Cir. 2007).....17, 27, 30

STATE CASES

City of Los Angeles v. T.D. Dannenbrink,
234 Cal. App. 2d 642 (1965)40

Corporation to Revise and Increase Rates Charged for Water Service v. Idaho Pub. Util. Comm'n, 916 P.2d 1259 (Idaho 1996)29

<i>Postal Telegraph-Cable Co. v. Associated Press</i> , 127 N.E. 256 (N.Y. 1920).....	28
--	----

<i>Stagg v. Municipal Court</i> , 2 Cal. App. 3d 318 (1969)	40
--	----

AGENCY CASES AND AUTHORITIES

"Airport Business Practices and Their Impact on Airline Competition Task Force Study" FAA/OST (October 1999)	14, 15, 38
---	------------

<i>Air USA, Inc.</i> , No. FAA-1999-6649-11, 2000 WL 34227676 (DOT July 10, 2000).....	17
---	----

<i>Brendan Airways, LLC v. Port Auth. of N.Y. and N.J.</i> , DOT Docket OST-05- 20407 (Final Order) (" <i>Port Authority</i> "), Order 2005-6-11 (June 14, 2005), <i>aff'd in part and rev'd in part</i> , 479 F.3d 21 (D.C. Cir. 2007)	16, 36, 43, 48
---	----------------

<i>Delta Air Lines, Inc. v. Lehigh-Northhampton Airport Authority</i> , OST-95-80, Order 95-5-8	47
--	----

DOT Policy Statement on Airport Rates and Charges, 61 Fed. Reg. 31994 (June 21, 1996)	26, 34, 35, 37, 43
--	--------------------

FAA Order 5190.6A (Airport Compliance Handbook).....	26, 29
--	--------

<i>First Los Angeles International Airport Rates Proceeding ("LAX I")</i> , Order 95-6-36 (June 30, 1995).....	43
---	----

<i>In the Matter of Richard W. Kuhling</i> , No. FAA-2000-8122, 2003 WL. 21403976 (FAA May 6, 2003).....	17
---	----

<i>In the Matter of Citizenship of DHL Airways</i> , OST-2002-13089, Order 2004-5-10 (May 13, 2004)	17
--	----

<i>Second Los Angeles International Airport Rates Proceeding ("LAX II")</i> , OST-97-2329, et al., Order 97-12-31 (Dec. 23, 1997)	17, 42, 43
--	------------

MISCELLANEOUS

Rise J. Peters, <i>Northwest Airlines v. Count of Kent, Michigan: More Than You Ever Wanted to Know About Airport Rate Setting, Part One</i> , 22 Transp. L.J. 291, 1994	38
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**THE TERMINAL 1 AND 3 CARRIERS' BRIEF
TO THE DEPARTMENT DECISION MAKER**

Complainants¹ respectfully request that, based on the evidence presented in the four-week hearing in this case and the applicable law, the Department adopt the Recommended Decision of Administrative Law Judge Richard C. Goodwin ("RD") and find that the new airport terminal charges imposed by Los Angeles World Airports Authority ("LAWA") at Los Angeles International Airport ("LAX") Terminals 1 and 3 ("T1/T3") are unjustly discriminatory, unreasonable, unjustified, not cost-based and otherwise unlawful.

¹Alaska Airlines, Inc. ("Alaska"), AirTran Airways, Inc. ("AirTran"), ATA Airlines, Inc. ("ATA"), Frontier Airlines, Inc. ("Frontier"), Midwest Airlines, Inc. ("Midwest"), Southwest Airlines Co. ("Southwest") and US Airways Group, Inc. (which includes US Airways, Inc. and America West Airlines, Inc.) ("US Airways") (collectively "Complainants" or the "T1/T3 Carriers").

INTRODUCTION

At its core, this case is about an airport operator that has lost sight of its public-use obligations under federal law, and has instead resorted to what it calls the practices of a “normal commercial landlord” to maximize the revenue it can collect from its captive airline tenants. To that end, LAWA unilaterally and selectively imposed a new leasing methodology and enormous rent increases on the T1/T3 Carriers, whose leases had expired, but not on their airline competitors at LAX who continue to lease comparable space under long-term leases at significantly lower rates and under a much more favorable rate setting formula.

Following an exhaustive hearing and extensive briefing, Judge Richard C. Goodwin agreed with what the T1/T3 Carriers have been trying to get LAWA to acknowledge for nearly two years, namely that:

. . . [t]he new and increased terminal charges at terminals 1 and 3 are unreasonable and they unjustly discriminate against the respective complaining carriers (RD, at 9, 77)

This finding that the new charges are unjustly discriminatory and otherwise unreasonable is entitled to considerable deference as it was based on the Judge's "review of the entire testimonial record and exhibits with due regard for logic and probability, consideration of the demeanor and credibility of the witnesses" RD, at 49, 77.²

²From March 26 through April 20, 2007, Judge Goodwin conducted 16 days of hearings plus a day-long tour of the LAX terminals. He reviewed "over 11,000 pages in almost 500 exhibits." RD, at 18.

LAWA's increase in charges to the T1/T3 Carriers is massive: In the first year alone their rents will nearly triple, from \$20 million to \$55 million, producing rates that are as much as 11.5 times higher per square foot than the airlines at LAX terminals 2, 4, 5, 6, 7 and 8 (the "T2/T4-8 Carriers"). RD, at 69.

Among other things, LAWA's new commercial leasing policy changes the method by which terminal charges are allocated to the affected airlines from a "usable space" to a "rentable space" formula. The effect of this change is to charge the T1/T3 Carriers rent for the vast majority of *non-airline*, "common use" space in the terminal (*e.g.*, corridors, bathrooms, *etc.*). As a result, the T1 carriers are now being assessed rental charges on approximately 87% of the terminal space, compared to 52% under the prior methodology, while T3 carriers have experienced a similar increase, from 61% to 82%. RD, at 55. LAWA has not imposed its new rentable space formula on the long-term lease carriers at T2/T4-8, which collectively account for nearly 70% of LAX domestic operations.

The expansion of terminal space allocated to the T1/T3 Carriers not only increases the base rent those airlines are charged, but also the proportion of airport maintenance and operating expenses ("M&O") which they are required to pay. Moreover, as LAWA pursues future airport-wide capital projects, this increase in chargeable square footage will force the T1/T3 Carriers to pay a disproportionate share of the costs of those projects as well. Again, the competitor airlines at T2/T4-8 with long-term leases are not subject to these higher charges.

Further reflecting its desire to emulate the ability of a private landlord to maximize lease revenue, LAWA adopted a “Fair Market Value” (“FMV”) formula (which it applies to the newly expanded square footage allocation) to determine the “base rent” component of terminal charges at T1/T3. LAWA’s use of the FMV formula – which Judge Goodwin found to be “unreasonable” as applied to both T1 and T3 (RD, at 9, 56-58, 77) – allows LAWA to charge base rents that are two and seven times higher, respectively, than the airport’s fully allocated historic costs to provide the land and terminal buildings to the T1/T3 airlines.

Faced with discriminatory and dramatically increased rental rates, based on a non-negotiable FMV provision and an expanded allocation of square footage that would significantly increase both the base rent and their M&O charges, the T1/T3 Carriers declined to sign the new leases proposed by LAWA. LAWA then sought, and the Board of Airport Commissioners (“BOAC”) approved, a “Tariff” that unilaterally imposed its new leasing policy on the T1/T3 Carriers – but *not* on their competitor airlines at T2/T4-8 with long-term leases that do not expire for another 15 to 19 years.

The essence of this case is simple and straightforward: LAWA has unilaterally imposed greatly increased terminal rental rates, determined under a new methodology designed to emulate private leasing practices, on the T1/T3 Carriers but not their competitors at T2/T4-8, simply because the T1/T3 leases have expired. Moreover, LAWA is charging the T1/T3 Carriers much more than for the space they actually occupy, by forcing them to pay the “fair market value” of non-airline space as well. This higher square footage allocation increases the overall share of M&O expenses, as

well as the share of future capital expenditures at LAX, borne by the T1/T3 Carriers. Yet, LAWA has imposed these new fees without any showing of economic necessity or justification, since LAX has been consistently profitable and has generated large surpluses under the previous, unchallenged rental methodology.

Although the T1/T3 Carriers make the same use of airport facilities as all other LAX carriers, LAWA argues that its new terminal charges are not unjustly discriminatory because the T1/T3 Carriers entered into their leases at different times, and allegedly under "different circumstances" than the T2/T4-8 carriers. But, as Judge Goodwin found, the T1/T3 Carriers are in fact "similarly situated" with the T2/T4-8 Carriers (RD, at 50), and LAWA offered no evidence of alleged different circumstances, much less showed how such differences would justify a disparity in rental charges. To the contrary, LAWA officials expressly conceded there is no linkage whatsoever between the disparity in its terminal rents and any cost differences that LAWA may have experienced between T1/T3 and the other terminals. Instead of advancing a cost-based justification for its new charges, LAWA seeks a *per se* rule that would permit an airport to impose even hugely disparate rates on carriers simply because their leases were executed at different times, and without requiring any showing that the differences were based on actual cost differences experienced by the airport. Such a *per se* rule has never been countenanced by the DOT or the courts, and would lead to absurd and dangerous policy consequences.

Complainants recognize that there will almost always be *some* difference in "circumstances" when leases are entered into at different times, and that every term of

every lease need not be identical. But this is not a case where the disparities in terminal charges are small and such differentials would exist for relatively short periods of time due to the normal give and take of airport operations and lease terms. Rather, the disparity in rental charges in this case amounts to approximately \$220 million to \$265 million in the first five years alone. (RD, at 70). Moreover, this huge disparity will likely continue for nearly 20 years.³ It is this combination of *magnitude plus duration* of the increased charges imposed on the T1/T3 Carriers – coupled with the absence of linkage to any cost differential at the respective terminals – that dispels any doubt that the discrimination here is indeed *unjust*.

The Department must reject the position espoused by LAWA that the circumstances and norms which exist in commercial leasing situations should apply in a public-use airport environment. To do so would effectively remove the prohibitions on unreasonableness and unjust discrimination from federal law and the Department's Rates and Charges Policy, because LAWA, unlike most commercial landlords, has substantial market power over its airline users. Allowing an airport to dictate rates and terms based on a unilateral determination of what it claims is commercially acceptable

³The Department's Instituting Order ("IO") erroneously found that LAWA had imposed disputed airport terminal charges on Complainants "for a five-year term," and therefore directed the ALJ to "make findings as to the reasonableness and/or justification for the disputed fees for a five-year term." IO, at 27. In requesting correction of that factual error, Complainants pointed out that this finding was contrary to express language in the Tariff, which stated that it has "no durational limit," and therefore the disparities between Complainants and the T2/T4-8 Carriers are likely to continue for the next 15 to 19 years while the long term leases remain in effect. (Doc. 64). After that request was denied (Doc. 132), Complainants filed, on May 15, 2007, a Petition for Review with the D.C. Circuit challenging this error in the IO.

would not only permit the airport to charge airlines far in excess of costs of their own space, but also to discriminate against airlines whose leases had expired and directly contravene the Department's policy to ensure that new entrant carriers are not unfairly disadvantaged *vis-a-vis* incumbents. In fact, LAWA has candidly admitted that there is nothing that the T1/T3 Carriers or new entrants can do to get onto comparable footing with the T2/T4-8 Carriers *vis-à-vis* the rental formula, in particular the use of "rentable" versus "usable" space. If LAWA's new charges are allowed to stand, the ultimate victims will be the traveling public, who will suffer from the higher airfares, reduced air service, and resulting loss of airline competition that will inevitably follow from the discriminatory imposition of significantly higher airline costs.

STATEMENT OF FACTS

On December 18, 2006, the BOAC, at LAWA's request, approved a massive increase in the terminal charges applicable to the T1/T3 Carriers (T1/T3 Exs. E-25 to E-28), which were subsequently imposed on those carriers via a "Tariff" approved on January 22, 2007. (Res. No. 23198, T1/T3 Ex. E-29).

The Shift to the "Rentable Space" Formula

As Judge Goodwin found, the current "disparity" in terminal charges at LAX "primarily results from the larger footprint ('rentable' versus 'usable' space) used in the T1/T3 terminals, which is not imposed on the T2/T4-8 terminals (1 Tr. 150-51, 165)." RD, at 69. Before imposition of the new Tariff, LAWA had assessed terminal rent on the T1/T3 Carriers based upon a "usable space" formula whereby terminal costs were allocated based upon the space the carriers actually occupied (either exclusively or

jointly with other airlines) – *i.e.*, ticket counters, gates, hold-rooms, baggage claim areas and other terminal areas used by the carriers. In November 2006 LAWA requested that the BOAC approve a new terminal leasing policy in order to, among other things, authorize LAWA to charge rent based on the purported "value" of the "rentable area in the building," including "a proportionately allocable portion of the value of the lobbies, corridors, restrooms and other areas of the building used in common by all tenants." (LAX Ex. 0002-0013, § 6.9). The BOAC approved the new policy at its November 20, 2006 meeting.

LAWA's use of a "rentable space" formula, and its corresponding allocation of the vast majority of *non-airline* space for the purposes of calculating rent, has increased the space chargeable to the T1 Carriers from approximately 52% of the terminal building to approximately 87%. (Ex. A-1-a, at p. 5, ¶ 8; Staff Rep. 9, T1/T3 Ex. B-7, at 3, JC-00147; RD, at 55), while at T3, the increase is from approximately 61% to approximately 80 to 82%. (*Id.*) These increased space allocations apply not only to base rent and charges incurred to maintain and operate T1/T3, but also to airport wide expenses that are allocated to the terminals. Among other things, the airport security expenses are allocated to the T1/T3 Carriers using the new rentable space formula. (Pan, 2523:23-2524:8). In addition, as the airport pursues capital projects in the future, such as a planned "people mover" to transport passengers to the central terminal area, the costs of such projects will be part of the "access" charges that will thus be allocated disproportionately to the T1/T3 Carriers under the new rentable space formula. (Pan, 2526:9-2527:21).

In contrast to its treatment of the T1/T3 Carriers under the Tariff, LAWA is continuing to charge the T2/T4-8 Carriers – including American Airlines, Continental Airlines, Delta Air Lines, Northwest Airlines and United Airlines (which collectively account for 69% of LAX domestic passenger traffic (Tubert Decl. ¶ 10)) – only for the space they actually occupy because the new leasing policy does not “overrid[e] the terms and conditions of an existing lease between LAWA and a tenant.” (LAX Ex. 0002-0006). The T2/T4-8 Carriers' leases do not expire for 15-19 years. (Tubert, 3346:7-3352:18; RD, at 44).

LAWA has sought to impose increased M&O fees on the T2/T4-8 Carriers (albeit under the less burdensome “usable space” allocation formula), but those carriers have filed suit asserting that LAWA’s imposition of increased M&O fees violates their leases. LAWA is insisting, however, that the T1/T3 Carriers pay the higher M&O charges regardless of the outcome of its dispute with the T2/T4-8 Carriers. LAWA has adamantly refused repeated requests of the T1/T3 Carriers to maintain parity with other LAX airlines by refunding the increased M&O charges in the event that the T2/T4-8 Carriers succeed in their court challenge. LAWA’s position is that “a commercial owner of space would not agree to it.” (T1/T3 Ex. C-15, at 2, JC-00464)

The Use of Fair Market Value to Set Base Rent

LAWA also has based a component of the new terminal rent charged to the T1/T3 Carriers on a fair market value methodology, instead of its prior, and much lower, historical cost-based methodology. Under the FMV or “market method,” total terminal rents for T1 are more than *twice as high* as they would have been had the fully

allocated cost method been used. Jt. Ex. 1 ¶ 3 (\$6.5 million vs. \$3 million). For T3, the base rent is more than *seven times higher* than under the fully allocated costs method. Jt. Ex. 1 ¶ 4 (\$5 million vs. \$700,000). RD, at 56, n. 227. LAWA has even threatened to convert airline space such as passenger hold rooms to concession space if airlines are not willing to pay fair market value rates for renting terminal space. As Ms. Tubert testified:

Q. What you meant here . . . is that the airport can take away the hold room area where people wait to board flights and give that to a concession; is that correct?

A. It can make that choice.

Q. Where do the people who are going to go on the airplane go? Where are they supposed to go?

A. They can be waiting in the restaurants. They can be waiting in the lobby area. . . .

Q. Do you expect people to wait in a restaurant right until the moment they're going to board the flight? You're going to take their gate space away?

A. I do.

Q. You do expect that?

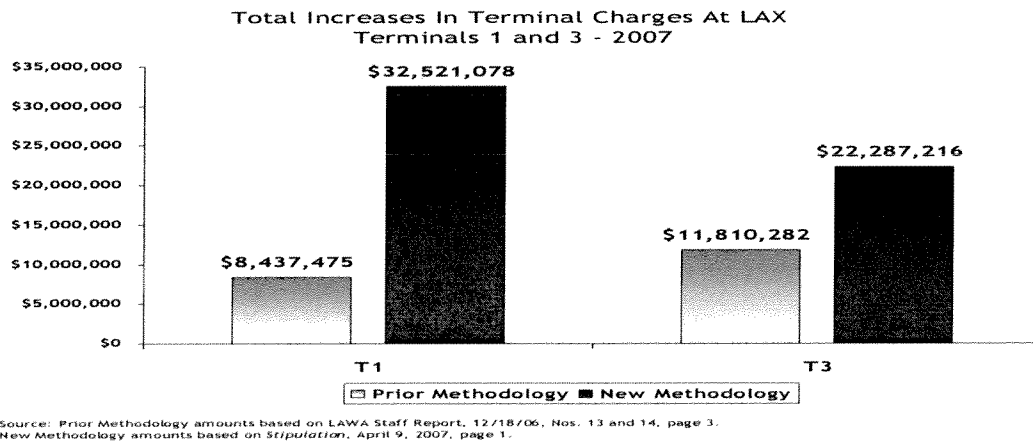
A. Yes – no, that's what I do.

Q. That's what you want everybody to do? . . . That's what LAWA plans to do?

A. As a person who is also in charge of concessions, that would work out well for us. (Tubert, 3449:21-3450:17)

Both the Magnitude and Duration of the Increased Terminal Charges are Enormous.

The Tariff that the BOAC unilaterally imposed on the T1/T3 Carriers increased their terminal rents dramatically. According to LAWA, “in CY2006, the T1 airlines [were] scheduled to pay only approximately \$8,437,475 in Terminal Rent” (“Base Rent and M&O Rent”), and “If no action [was] taken to adjust the Terminal Rents, the T1 airlines would [have paid] approximately the same Terminal Rent – about \$8.4 million – in CY2007.” (T1/T3 Ex. B-7, at 3, JC-00183). In addition, “in CY2006, the T3 airlines [were] scheduled to pay only approximately \$11,810,282 in Terminal Rent,” and “If no action [was] taken to adjust the Terminal Rents, the T3 airlines would [have paid] approximately the same Terminal Rent – about \$11.8 million – in CY2007.” (12/18/06 Staff Rep. 14, T1/T3 Ex. B-7, at 3, JC-00191). In the first year alone (T1/T3 Ex. F-20):



LAWA’s increased terminal charges at T1 nearly quadruple the charges to be paid by the T1 Carriers in the first year alone from \$8.4 million to approximately \$32.5 million, an increase of \$24.1 million. (Jt. Ex. 1, ¶ 1; Ex. A-1-a, p. 3, ¶ 6; T1/T3 Ex. F-20). In

has risen from \$67 to \$155.⁵ The "most significant part" of the disparity in terminal charges "is the shift from usable to rentable space which is being applied . . . to the T1/T3 carriers but not to the carriers in T2 and T4 through 8." (Kasper, 151:16-19; RD, at 69).

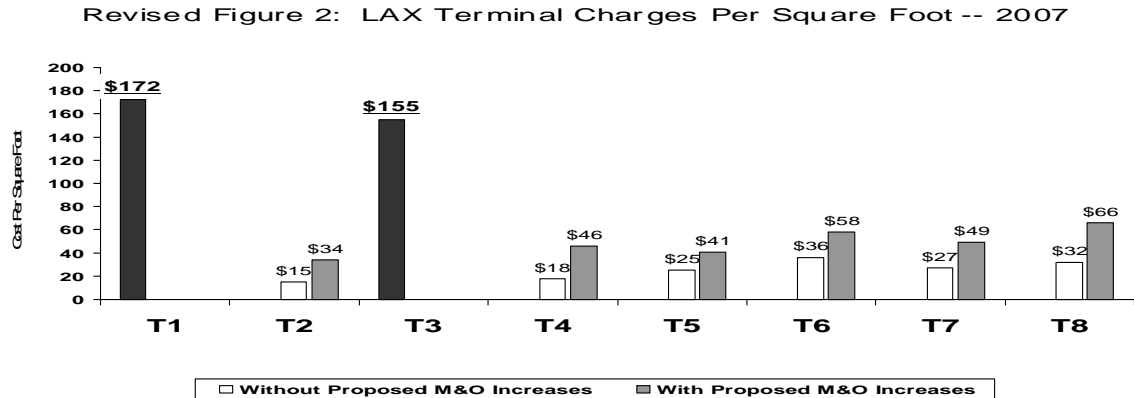
LAWA's attempt to characterize its new terminal charging methodology as typical of other airports is not only unsupported in the record but flatly contradicted by the testimony of its Deputy Executive Director Patti Tubert. Although Ms. Tubert was the principal architect of the new terminal charges, she was unable to name a single airport that imposed a terminal charge methodology identical to that used in the Tariff. (Tubert, 3391:22-3392:5). In point of fact, Southwest's Vice President of Properties testified that "the ratemaking scheme imposed by LAWA – an amalgamation of the 'rentable area' formula that is completely devoid of any offsetting benefit (*i.e.*, revenue sharing or another type of credit) accruing to the airlines and a 'fair market value' component - represents the most onerous and unfair airport ratemaking formula Southwest has ever encountered at our 63 airports served nationwide." (T1/T3 Ex. A-15, at 1-2; *see also* RD, at 59-65).

The Huge Disparity in Terminal Charges

LAWA's new terminal charges subject the T1/T3 carriers to a huge disparity in charges compared with their competitor airlines at T2/T4-8. Whereas the new terminal charges result in the T1 Carriers paying terminal charges of \$172 per square foot, and

⁵RD, at 69; T1/T3 Ex. A-1-a, p. 19, Fig. 7; LAWA Staff Reports 13 and 14 (p. 3) (costs) and 10, at Attachment 1 (square feet); T1/T3 Ex. F-19.

the T3 Carriers paying \$155 per square foot, the T2/T4-8 Carriers are paying far less:



(From Ex. A-1-a, at 4 (Rev. Fig. 2); *see also* T1/T3 Ex. F-23)

Accordingly, if the T2/T4-8 Carriers win their challenge to the M&O increase, the T1/T3 airlines will pay as high as 11.5 times as much in terminal rent, on a square foot basis, than their competitors: *i.e.*, Terminal 1 (\$172 ft²) versus Terminal 2 (\$15 ft²). RD, at 69. If the T2/T4-8 Carriers lose their challenge, the disparity will still be as high as five times: *i.e.*, Terminal 1 (\$172 ft²) versus Terminal 2 (\$34 ft²). *Id.* "The disparity is significantly more pronounced when measured over the next five years." *Id.*

LEGAL STANDARD AND BURDEN OF PROOF

Section 511 of the Airport and Airway Improvement Act of 1982 ("AAIA") requires airports that receive federal grants for development projects to charge "reasonable" fees. 49 U.S.C. § 47107. It requires airports to ensure that "air carriers making similar use of the airport will be subject to *substantially comparable charges* . . .

for facilities directly and substantially related to providing air transportation"⁶ The statute states, in relevant part:

(a) General written assurances. -- The Secretary of Transportation may approve a project grant application under this subchapter for an airport development project only if the Secretary receives written assurances, satisfactory to the Secretary, that—

(1) the airport will be available for public use on reasonable conditions and without unjust discrimination;

(2) air carriers making similar use of the airport will be subject to substantially comparable charges—

(A) for facilities directly and substantially related to providing air transportation; and

(B) regulations and conditions, except for differences based on reasonable classifications, such as between--

(i) tenants and nontenants; and

(ii) signatory and nonsignatory carriers;

(3) the airport operator will not withhold unreasonably the classification or status of tenant or signatory from an air carrier that assumes obligations substantially similar to those already imposed on air carriers of that classification or status (49 U.S.C. § 47107(a)(1), (2) and (3))

In other words, "air carriers making similar use of the airport" must be subject to "substantially comparable charges" unless the "differences" in the charges are "*based on*" a "reasonable classification" among air carriers.

In addition, pursuant to the AAIA, airports that receive federal funds must specifically agree to numerous written "Grant Assurances" that spell out the airport's

⁶49 U.S.C. § 47107(a)(2)(A) (emphasis added).

obligations under federal law. Grant Assurance 22, entitled "Economic Nondiscrimination," requires, in pertinent part, that the sponsor of a federally obligated airport, "will make the airport available as an airport for public use on reasonable terms and conditions and *without unjust discrimination* to all types, kinds and classes of aeronautical activities"

In *Brendan Airways, LLC v. Port Auth. of N.Y. and N.J.*, Docket OST-05-20407 (Final Order) ("*Port Authority*"), Order 2005-6-11, at 14 (June 14, 2005), *aff'd in part and rev'd in part*, 479 F.3d 21 (D.C. Cir. 2007), the Department set forth the applicable burden of proof in a Section 47129 case:

When an airline seeks a determination as to the reasonableness of a fee imposed on the airline by an airport, the airline bears the burden of proof. The airline complainants *must submit evidence* sufficient to show that the challenged fees are unreasonable. . . . However, if the complainants present a prima facie case that a fee is unreasonable, the burden shifts to the airport. The airport *must then submit sufficient evidence* to show that the fee is, in fact, reasonable.

Final Decision at 14 (italics added); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 280 (1994) ("once the licensee establishes a prima facie case, the burden shifts to the Government to rebut it. This is perfectly compatible with a rule placing the burden of persuasion on the applicant, because when the party with the burden of persuasion establishes a prima facie case supported by 'credible and credited evidence,' it must either be rebutted or accepted as true").⁷

⁷LAWA's contention that it bore no burden of production in response to a *prima facie* showing of unjust discrimination by Complainants (LAWA Reply to ALJ, at 4) is completely at odds with the Department's statement in *Port Authority* that the airport (footnote continued)

"An ALJ's credibility findings will not be overturned lightly on appeal." *In the Matter of Richard W. Kuhling*, No. FAA-2000-8122, 2003 WL 21403976, *5 (FAA May 6, 2003). Such judicial findings are "entitled to deference because the ALJ is able to observe the witness's demeanor at a hearing." *Id.* *5; *Air USA, Inc.*, No. FAA-1999-6649-11, 2000 WL 34227676 (DOT July 10, 2000); *In the Matter of Citizenship of DHL Airways*, OST-2002-13089, Order 2004-5-10 (May 13, 2004) at n. 20 ("ALJ findings on credibility are entitled to substantial deference from reviewing courts"); *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 853 (D.C. Cir. 1970) (agency's decision must "reflect attentive consideration to the Examiner's decision"); *Alcoa Steamship. Co. v. FMC*, 321 F.2d 756, 758 n. 5 (D.C. Cir. 1963) ("Examiner's decision . . . entitled to great weight in the Commission's conclusions").

ARGUMENT

I. LAWA'S NEW TERMINAL CHARGES UNJUSTLY DISCRIMINATE AGAINST THE T1/T3 CARRIERS.

The Department should affirm Judge Goodwin's finding that the "new and increased terminal charges at terminals 1 and 3 are unreasonable and . . . unjustly discriminate against" the T1/T3 Carriers. RD, at 77. The T1/T3 Carriers met their burden of presenting a *prima facie* case of unjust discrimination by showing that (1) although they use the same types of airport facilities as the T2/T4-8 Carriers, (2) they

must "submit sufficient evidence" in response to such a *prima facie* demonstration. See RD at 71-72, n. 303; *LAX II*, Order 97-12-31 (Dec. 23, 1997), at 10; *Port Authority*, 479 F.3d at 37 n. 17.

are being subjected to significantly higher terminal charges than the T2/T4-8 Carriers, and (3) such discrimination is likely to continue for as long as 19 years. In response to this *prima facie* demonstration, LAWA failed to "submit evidence to show" that the terminal charges at T1/T3 are "in fact" not unjustly discriminatory because the huge disparity in terminal charges is somehow based on a reasonable classification among carriers, or otherwise. RD, at 71-72.

A. The T1/T3 Carriers Make "Similar Use" of LAX as the T2/T4-8 Carriers But are Subject to Dramatically Higher Terminal Charges.

The evidence of record clearly demonstrates that the T1/T3 and T2/T4-8 Carriers make similar use of comparable facilities at LAX. As the Judge found, "all the airlines occupy essentially comparable facilities and all terminals have essentially the same passenger amenities." *Id.* at 49. "The carriers use the same types of airport facilities (e.g., ticket counters, office space, baggage claim areas, baggage handling systems, [baggage] storage rooms, passenger holding areas, passenger walk-ways, et al." *Id.* at 50 and 39; *see also* McGlade, 685:24-686:6; Berg, 1676:25-1678:20; Tubert, 3371:15-3374:14; Resp. Answer, T1/T3 Ex. E-36, p. 9, ¶ 23. Indeed, the Judge properly concluded that the T1/T3 and T2/T4-8 Carriers "are similarly situated." RD, at 50.

Despite these critical similarities, the T1/T3 Carriers are now subject to massively larger terminal charges that are not "substantially comparable" to those levied on their competitors using T2/T4-8. RD, at 58. The new terminal charges at T1/T3 are up to 11.5 times higher on a per-square-foot basis than the terminal charges in T2 and T4-8. (RD, at 69). Even if the T2/T4-8 Carriers lose their challenge to the M&O increase, the disparity will still be as high as five times: *i.e.*, Terminal 1 (\$172 ft²) versus

Terminal 2 (\$34 ft²). *Id.* The new charges will impose \$220 to \$265 million on the T1/T3 Carriers in terminal charges more than those other carriers during the next five years alone. (Ex. A-16-a, at 2, ¶ 5) As Judge Goodwin stated:

According to LAWA's own figures, terminal M & O charges for the T1 airlines have gone up over \$24 million, nearly quadrupling the old figure (from \$8.4 to \$32.5 million), while charges for the T3 carriers have increased by more than \$10 million (from \$11.8 to \$22.2 million) (Jt. Ex. 1; 12 Tr. 2632 (Pan)). Measured on a square-foot basis, the T1/T3 complainants are paying higher charges than are paid by T2 and T4-8 carriers. T1 carriers are paying about \$172 per square foot, more than triple the \$51 per square foot they had previously, and T3, \$155/sq. ft., about 2.3 times their previous rate of \$67 (T1/T3 Ex. A-1-a, p. 19, Fig. 7; T1/T3 Ex. F-19). The carriers enjoying the benefit of long-term leases currently are paying \$34-\$66 per sq. ft, and would pay just \$15-36 if they win their lawsuit. The disparity primarily results from the larger footprint ("rentable" versus "usable" space) used in the T1/T3 terminals, which is not imposed on the T2/T4-8 terminals (1 Tr. 150-51, 165).

The disparity is significantly more pronounced when measured over the next five years. (RD at 69)

B. LAWA Cannot Rely on the Signatory/Non-Signatory and Tenant/Non-Tenant Classifications to Justify the Discrimination Against the T1/T3 Carriers.

In its opening brief to the ALJ, LAWA contended that its discrimination between the T1/T3 and T2/T4-8 Carriers is justified because the T1/T3 Carriers are non-signatories and non-tenants at LAX. (LAWA Br. at 52-53, and n. 10) This argument contradicted the testimony of LAWA's own Deputy Executive Director and principal trial witness Patti Tubert, who made it clear that the discrimination was *not based* on treating the T1/T3 Carriers as non-signatories or non-tenants. (Tubert, 3379:16-3380:4; 3360:9-10; 3346:7-14) It also ignored the fact that T1/T3 Carriers have been signatories and tenants at LAX for many years (going back to the 1980's, and in the case of US

Airways back to 1958), and would still be so today were it not for LAWA's demand that they agree to unjustly discriminatory and unreasonable terms as a condition of signing new leases. (*See* T1/T3 Ex. A-2-a through A-8-a)

Further, this argument is irrelevant in any case given LAWA's acknowledgement that there was no linkage between the increased terminal charges to T1/T3 Carriers and the additional costs borne by LAWA, if any, because of their "status." In fact LAWA has made no determination that it costs more to serve the T1/T3 Carriers than the T2/T4-8 Carriers (*see* Tubert, 3396:22-3397:1), nor has LAWA imposed any "surcharge" on the T1/T3 Carriers because of any higher cost to serve them (*id.* 3346:15-18, 3397:14-19). Instead, LAWA has admitted that the sole reason it imposed its new lease policy selectively on the T1/T3 Carriers is that their leases have expired while those of other LAX carriers have not. (Tubert, 3399:18-3400:1; T1/T3 Ex. C-17, at 2, JC-00474)

C. LAWA's Use of Different Lease Expiration Dates to Discriminate Against the T1/T3 Carriers is Not Based on Any Reasonable Distinction Between the T1/T3 and T2/T4-8 Carriers.

Judge Goodwin properly ruled that "there are no differences warranting any difference in classification" between the T1/T3 and T2/T4-8 Carriers. RD, at 50. LAWA's primary defense to the claim of unjust discrimination is that it properly created a *new classification* – not listed in 49 U.S.C. § 47107(a)(2)(B) – between airlines whose leases have expired and those whose have not. As LAWA's former Executive Director stated, "differences between new lease terms and old lease terms . . . are hardly unjust discrimination or unreasonable." (T1/T3 Ex. C-17, at 2, JC-00474).

The Judge properly rejected LAWA's argument that the long-term tenants at LAX are "not similarly situated" because they have long term leases, characterizing it as "a distinction without a difference." RD, at 50 ("The evidence conclusively shows that T1/T3, TBIT and T2/T4-8 carriers have similar and comparable facilities and make similar use of LAX"). Judge Goodwin stated that "LAWA's attempt to establish any difference in classification based on the fact that the T2/T4-8 carriers have long term leases while the T1/T3 carriers have expired or shorter leases is artificial." *Id.*

The Judge explained:

LAWA argues it has properly created "new classifications," namely airlines with leases and airlines without leases – the [proverbial] "haves" and "have-nots." I reject those artificial classifications as in and of themselves unjustly discriminatory and unreasonable. This disparity is even more onerous because the evidence has established the disparity between T1/T3 and T2/T4-8 is virtually open-ended in its duration. (RD, at 59)

Even if imposition of wildly disparate terminal rents – based solely on lease expiration dates and not on any actual cost differential that exists at the respective facilities and for a period "virtually open-ended in its duration" – were lawful for private commercial landlords, it is not permissible conduct by a public use airport that has received federal funds and is therefore subject to FAA grant assurances and other federal prohibitions against unjust discrimination.

1. The Disparity in Terminal Charges is Massive and Likely to Continue for Many Years.

Complainants recognize that not every difference in airline-airport lease terms constitutes unjust discrimination, and that modest disparities in lease terms or charges may exist for relatively short durations when justified by particular circumstances. But

that is obviously not the case here. As the Judge observed, "a determination of unjust discrimination involves a comparison of factors such as 'the overall dollar impact, the absolute impact, and the extent and duration' (2 Tr. 278) as well as the comparability of the facilities (2 Tr. 333)." RD, at 70. Here, the disparity is calculated to be approximately \$220 million to \$265 million in the first five years alone. (RD, at 70). Moreover, the Tariff contains no durational limit (LAX Ex. 24), and the long-term leases at T2/T4-8 are of 15 to 19 more years in duration. Thus, absent relief from the DOT the discrimination is likely to last not only for the foreseeable future but far beyond. RD, at 69-71.

Furthermore, the discrimination in terminal charges between the T1/T3 Carriers and their competitors using T2/T4-8 is likely to grow significantly worse over the next several years, for two reasons. First, LAWA can, and is likely to, increase these new rates even further over the 15-19 year period that the long-term leases at T2/T4-8 remain in effect. Second, the T1/T3 Carriers will be forced to pay a disproportionate share of the costs of future LAX capital projects, such as the automated airport "people mover" system that LAWA is planning. Under the new "rentable space" formula, the T1/T3 Carriers will be charged a higher percentage of the projects' costs, while the T2/T4-8 Carriers will pay a lesser percentage of the costs under the "usable space" formula, or even none of the costs (if they prevail in their federal lawsuits). Thus, the more money LAWA spends on LAX capital projects – likely in the billions of dollars over the next several years – the more extreme and

unjust the discriminatory impact on the T1/T3 carriers will become.⁸

2. There is No Connection Between the Disparity in Terminal Charges and LAWA's Cost of Serving the Respective Terminals, and *Per Se* Discrimination is Not Permitted.

Even assuming, *arguendo*, that different lease expiration dates could serve as a legitimate "classification" for airport terminal charges (which Complainants deny), that fact alone cannot justify differential treatment where, as here, it is undisputed that there is no linkage between the large disparity in terminal charges and any cost difference at the respective terminals. LAWA does not even *attempt to argue* that the airport incurs higher costs to serve the T1/T3 Carriers than the T2/T4-8 Carriers. As LAWA's Deputy Executive Director Tubert testified:

Q. . . . LAWA has made no express determination that it costs LAWA more money to serve the T1/T3 airlines than the Terminal 2, 4 through 8 carriers, has it?

A. No, it has not. (Tubert, 3396:22-3397:1)

Q. . . . is LAWA claiming that the rate disparity that now exists is somehow tied to specific differences which exist at those terminals?

A. In only the leases that exist.

Q. Because there are leases that's why there is different treatment?

A. That's correct. If those long-term leases were not there, we would be applying the new lease terms to those tenants as well. (Tubert, 3399:18-3400:1)

⁸See Hubbell, 684:10-685:4; Hubbell Decl., Ex. A-2-a, ¶ 8; Berg Decl., Ex. A-3-a, ¶ 8.

Furthermore, although LAWA claims that the "circumstances" were different when the T2/T4-8 Carriers entered into their long-term leases in the 1980's, it admits that the airport made no attempt to link the increase in charges at T1/T3 to the debt obligations incurred by the airlines at T2/T4-8 for capital improvements to their terminals. LAWA's Chief Financial Officer, Karl Pan, testified:

Q. In calculating the new terminal charges for Terminals 1 and 3 under the tariff, did LAWA make any attempt to link the increase in charges at those terminals to the amount of debt obligations incurred by the airlines at Terminals 2, 4 through 8 in connection with capital improvements to their terminals?

A. No, it did not.

(Pan, 2729:9-16; *see also* Tubert, 3343:19-3344:10). Indeed, LAWA has never sought to justify the amount of new terminal charges by reference to the amount of investment that carriers in other terminals may have made in their terminals. (Tubert Decl. at 18, ¶ 56).⁹ Nor has LAWA imposed a "surcharge" on the T1/T3 Carriers because they did not sign 40-year leases or did not incur the same level of debt for terminal improvements as the T2/T4-8 Carriers. (Tubert, 3346:15-18, 3397:14-19).

⁹In addition, over the last several years LAX has paid rent credits to the long-term lease carriers to pay for public use areas of the terminals that were renovated in the 1980's. (Tubert, 3362:25-3363:4) Between 1996 and 2001 the airport granted rental credits of approximately \$60 million to the long term lease carriers. (T1/T3 Ex. E-6, Tubert, 3364:18-3365:4) As of 2003, the airport owed rental credits of approximately \$55.5 million to Delta. (TBIT Ex. 80) Delta also continues to owe \$46 million in principal. (Pan, 2729:17-20) Further, those carriers in bankruptcy (including Continental, Delta, Northwest and United) have had significant amounts of their prior debt extinguished.

Judge Goodwin acknowledged that not "every difference in the way LAWA treats its air carrier tenants is necessarily unjust." RD, at 71. However, the Judge properly concluded that LAWA had failed to base the disparity in charges at T1/T3 on a reasonable classification. *Id.* The Judge stated:

The T1/T3 Carriers concede that "rates can reflect legitimate differences in cost" (2 Tr. 286). But LAWA does not argue that cost differences between the T1/T3 and TBIT terminals and the other terminals justify different treatment (2 Tr. 427-28). The evidence in fact showed that the facilities at T1, T3, and TBIT are substantially comparable to those at T2 and T4-8 (2 Tr. 457) – a fact Respondents acknowledge (Resp. Post-Hearing Reply Br., p. 6). While the facilities are not identical of course, relevant differences such as structure, amenities, and location are not sufficient to justify the fee disparities complained of (2 Tr. 427-28). Moreover, LAWA did not pursue this argument. It is Respondents' contention only that the difference in lease terms warranted the disparate cost treatment complained of (15 Tr. 3396-99) (Tubert)). (RD, at 71)

The Judge correctly pointed to the failure of LAWA to support its claim that "different circumstances" warranted the disparity in terminal charges:

LAWA defends the differences by suggesting that the long-term leases resulted from economic conditions and the legacy carriers' relative bargaining power when the leases were signed. These carriers agreed to back bonds co-terminous with the leases which were used to help finance substantial Airport construction in preparation for the 1984 summer Olympics held in Los Angeles (11 Tr. 2324, 2352 (Montgomery); 15 Tr. 3335-36 (Tubert)). *Respondents, however, made no attempt to quantify or otherwise tie these circumstances to the new charges* (13 Tr. 2729 (Pan)). *No other evidence respecting conditions at the time that the long-term leases were executed was proffered.* Moreover, Respondents' stated intent to bring these long-term leases into line with its new Lease Policy suggests that LAWA does not ascribe economic or legal significance to the circumstances surrounding the long-term leases' signings (TBIT-61, p. 16). (RD, at 71-72; emphasis added)¹⁰

¹⁰Judge Goodwin properly rejected LAWA's argument that the T1/T3 Carriers bore the "evidentiary burden regarding the circumstances surrounding LAWA's entry into long- (footnote continued)

The complete absence of any linkage between the higher charges imposed on T1/T3 than other LAX terminals and the actual costs at the respective terminals is fatal to LAWA's defense of the disputed fees. As the applicable statute makes clear, "air carriers making similar use of the airport" must be "subject to substantially comparable charges" *unless* the difference in charges is "*based on* reasonable classifications" 49 U.S.C. § 47107(a)(2)(B) (emphasis added). Thus, there must be a "classification" that is "reasonable," *and* the difference in airport charges must be "*based on*" that classification.

In adopting the final version of its Policy Statement, DOT made clear that there must be a factual underpinning in order to justify discriminatory charges:

The costs of serving a non-signatory carrier would ordinarily be higher than a compensatory rate reflecting the costs of serving exclusively signatory carriers. For example, non-signatory carriers may increase an airport proprietor's risk of revenue fluctuation. The increased risk in turn would justify higher reserves. In addition, the administrative costs of dealing with non-signatory carriers would ordinarily be higher. *Further, an airport proprietor might be able to argue that due to their irregularity, or relative infrequency, operations by non-signatory carriers cost more to serve than a corresponding number of operations performed on a regular basis by signatory carriers.* Each of these considerations would provide a justification for imposing a surcharge, in some amount, on non-signatory carriers. (61 Fed. Reg. 31994, 32015 (June 21, 1996); emphasis added).

In addition, FAA Order 5190.6A describes in detail the responsibilities assumed by the owners of public-use airports developed with federal assistance.

term leases in the early 1980s (Resp. Br. ¶ 8, p. 55) and with regard to any difference between those circumstances and circumstances today (Resp. Br., ¶ 116, p. 35)." RD at 71-72, n. 303. As the Judge stated: "While Complainants bear the ultimate burden of proof, if they make at least a *prima facie* case for unjust discrimination – and they have – Respondents then bear the burden of production." *Id.*

Section 4-14 makes it clear that the airport is required to justify differences in charges imposed on carriers that use substantially comparable facilities. See § 4-14(d)(1)(c) ("In respect to a contractual commitment, a sponsor may charge different rates to similar users of the airport if the differences can be justified as nondiscriminatory and such charges are substantially comparable. *These conclusions must be based upon the facts and circumstances involved in every case*") (emphasis added).

Likewise, the D.C. Circuit in *Port Authority* assumed, without deciding, that *per se* discrimination by airports – *i.e.*, the imposition of different rates without any basis in actual cost differences at the airport – “would indeed be improper” 479 F.3d at 42.

DOT’s Policy Statement foresees a limit on rate differences based on signatory status, in that it states that extra costs and risks incurred by airport operators in serving non-signatories “would provide a justification for imposing a surcharge, *in some amount*, on non-signatory carriers,” and concludes that the new rules “provide adequate flexibility to airport proprietors to charge *reasonable* surcharges to non-signatory carriers.”

479 F.3d at 42 n. 16 (citing Policy Statement, 61 Fed. Reg. at 32015) (emphasis supplied by Court). Indeed, the Port Authority’s brief to the D.C. Circuit (authored by counsel for LAWA in the present case) acknowledged that DOT “had never adopted such an extreme interpretation” of the law that would allow a *per se test* for discrimination. Final Brief for Intervenor the Port Authority of New York and New Jersey, June 13, 2006, T1/T3 Ex. E-31, at 24. Yet, it is precisely a *per se test* for discrimination that LAWA now seeks here.

Significantly, LAWA has acknowledged – in other legal forums– that its new terminal charges are unjustly discriminatory. In pleadings filed in the Delta Airlines and

Northwest Airlines bankruptcy cases, the City of Los Angeles argued that the airport should be allowed to terminate the Delta and Northwest terminal leases early in order to avoid unjustly discriminating against other airline tenants at LAX. In the Delta case, the City pointed to the fact that "airlines in Terminals 1 and 3" are subject to the new Tariff and contended that "the City's federal law obligation to treat its airlines in a nondiscriminatory fashion . . . constitute[s] 'cause' for the Court to grant relief from the automatic stay to permit all actions related to the City's exercise of its early termination rights under the Terminal 5 lease" (T1/T3 Ex. F-14, at 21). A similar admission was made in the Northwest proceeding. (T1/T3 Ex. F-16, at 19, ¶ 44).¹¹ These candid admissions by the City in other forums expose the disingenuous nature of LAWA's attempts to deny the existence of unjust discrimination to the Department.

An airline whose lease expires does not thereby put itself outside the protection of the law, and give license to an airport to impose increased rates while showing favor

¹¹It is entirely speculative whether the City will prevail in its attempts to obtain early termination of the Terminal 2 and 5 leases. Both Delta and Northwest have filed pleadings strongly opposing the early termination efforts. (T1/T3 Exs. F-17, at 16; F-18, at 21, ¶ 92). LAWA's Ms. Tubert would not "speculate" that LAWA would prevail in its attempts to obtain early termination of the LAX 2 or T5 leases. (Tubert, 3355:7-18; see also Pan, 2589:20-2590:4) In addition, LAWA has not sought to defease the bonds at any other terminals (Pan, 2592:25-2594:18), and in presenting the new terminal charges to the BOAC, Ms. Tubert told the Board "it will take a long time" to apply the new policy to the other terminals. (T1/T3 Ex. B-9, at 11; Pan, 2597:24-2599:11). Moreover, Judge Goodwin found that, "Reading the leases as a whole, it is clear that the T2/4-8 leases preclude imposition of the new Terminal Regular Expenses on the T2/4-8 carriers under the existing leases or leases created pursuant to the option to renew." RD, at 45.

to its rivals solely on that basis. *See Postal Telegraph-Cable Co. v. Associated Press*, 127 N.E. 256, 257 (N.Y. 1920) (utility could not "justify discrimination among customers by dividing contracts into new and old, and applying a different rate to each"; "classes are not 'just and reasonable' when the only principle of classification is one of order in time, with a resulting division between old customers and new. Favoritism would be unchecked if such a classification were accepted"); *Corporation to Revise and Increase Rates Charged for Water Service v. Idaho Pub. Util. Comm'n*, 916 P.2d 1259, 1263 (Idaho 1996) (water utility's increased hook-up fees unlawfully discriminated between old and new customers by allocating the costs of new plant construction solely to new customers).

3. LAWA has Denied the T1/T3 Carriers and New Entrant Airlines Any Opportunity to Avoid Discriminatory Charges.

LAWA's claim that it can charge hugely disparate terminal rents for many years simply because the favored carriers have unexpired long term leases would effectively eliminate the federal prohibition against unjust discrimination in airport rates and charges. This is especially true because, as LAWA concedes, there is nothing that the T1/T3 Carriers or any new entrant airline at LAX can do to receive the same treatment as the T2/T4-8 Carriers.

Federal law makes clear that an airport may not withhold from airlines the ability to be treated the same as their competitors. 49 U.S.C. § 47107(a)(3); Grant Assurance 22(e); Order 5190.6A § 4-14(a)(1) ("Such classification or status as tenant or signatory shall not be unreasonably withheld by any airport provided an air carrier assumes obligations substantially similar to those already imposed on air carriers in such

classification or status"). In direct violation of these requirements, LAWA concedes that there is nothing the T1/T3 Carriers can do to achieve a level playing field with the T3/T4-8 Carriers. As LAWA's Deputy Executive Director Tubert testified:

Q. So there's nothing [the T1/T3 Carriers] could have done to have usable space applied to them the same way as currently being applied at Terminals T2, 4 through 8? . . . There's nothing they could do to get that same deal, is there?

A. Nothing that I'm aware of. (Tubert, 3360:19-3361:1)

Ms. Tubert further testified:

Q. And there's nothing that the Terminal 1 and 3 airlines could have done to be charged the same terminal rents as those being charged

A. They couldn't have assumed the same obligations because it had already been built out.

* * *

Q. Sitting here today, you can't think of anything specific that the Terminal 1 and 3 airlines could have done to get the same deal as what happened with American Airlines in 2007 using usable space methodology, correct?

A. That's correct, I do not know of anything of that magnitude that we need the airlines to do.

Q. It's clear you're not aware of any specific offer being made to the Terminal 1 and 3 airlines to be able to use the usable space methodology in 2007?

A. That's correct. (Tubert, 3384:8-18)

In *Port Authority* the D.C. Circuit emphasized that the "primary recourse available to non-signatory airlines that object to paying higher fees is signatory status." 479 F.3d at 43. No such recourse is available to the T1/T3 Carriers in order to end the

discrimination that now exists. In addition, prior to the imposition of the Tariff the T1/T3 Carriers “were not given an opportunity to sign up for a 40-year lease, so . . . they were not given an opportunity to have a usable methodology used for a 40-year lease.” (Tubert, 3359:14-17). Nor were they given an opportunity to sign a lease for 15 or 20 years. (Tubert, 3359:19-23). As Southwest's Vice President of Properties testified, Southwest was never offered a lease longer than five years at LAX back in the 1980's, but would have accepted a longer term had it been offered. (Montgomery, 2313:9-2314:2).¹² Indeed, Southwest has leases at other airports as long as 30 years. (*Id.*, 2314:1-6).

Similarly, it is undisputed that new entrant airlines to LAX will not be offered the same favorable lease terms as the long-term carriers there. As Ms. Tubert testified:

Q. If a new entrant carrier comes to LAX tomorrow, will they get the terms including usable space that United Airlines currently pays at terminal 7 or will that new entrant be subject to the same rentable space methodology that the Terminal 1 and 3 airlines are paying?

A. They will be subject to the same rentable space formula that all new space will be subject to including any new space that the long-term tenants would.

Q. But the long-term tenants the majority of their space is subject to the usable formula for determining both base rent and terminal regular expenses, correct?

A. At this point it is, yes.

Q. So the new entrant at LAX is going to be paying terminal charges

¹²Judge Goodwin fully credited the testimony of Mr. Montgomery on this point, and found him to be a "highly credible witness, who had personal knowledge of the negotiation of the 1985 lease between Southwest and LAWA." RD, at 23.

using a different rate-setting formula than what United Airlines is currently paying at LAX; is that true?

A. That's correct. (Tubert, 3386:3-22)

LAWA's use of different lease expiration dates to justify hugely different terminal charges conflicts directly with DOT's long-standing policy of ensuring open and free access to airports, particularly by new entrant carriers. As the joint FAA/OST "Airport Business Practices and Their Impact on Airline Competition Task Force Study" (Ex. LAX-55) observed, "[s]ince access must not be unjustly discriminatory, airports must be sensitive to assuring that a new entrant is accommodated on *terms reasonably similar to an incumbent's and that anti-competitive effects do not result from an airport's action.*" Page vi (emphasis added).

D. LAWA's Huge Increases in T1/T3 Charges will have Profound Negative Economic and Competitive Effects on both the Affected Airlines and Travelers using LAX.

The discrimination that now exists at T1 and T3 is also *unjust* because of the severely negative impact it will have on the T1/T3 Carriers, which as predominantly low-cost carriers rely on low airport costs and a level-playing field with their competitors at the airport to be able to effectively compete under their business model. Indeed, LAWA's CFO, Mr. Pan, acknowledged that airlines "are concerned about what they are paying *and they are also concerned about what others are paying relative to what they're paying.*" (Pan, 2800:18-20; emphasis added).

The new charges will increase the airlines' average cost per enplaned passenger ("CPE") at T1 by \$4.19 (from \$5.70 to \$9.89) and at T3 by \$5.45 (from \$6.15 to

\$11.60). (RD, at 70; Ex. A-1-a, ¶¶ 11, 39). This "represents an increase of better than 73% at T1 and an increase of more than 88% at T3." *Id.* These added costs are enormous from the perspective of the affected airlines. \$4.19 amounts to 5% of the average fare collected by Southwest and US Airways/America West for the 2.2 million short haul passengers they carried during the first 6 months of 2006 on their LAX flights.¹³ Increases of this magnitude would be significant for most businesses, but are staggering for the airline industry where average operating margins are typically less than 10%.¹⁴ In fact, the increased terminal charges will almost double the carriers' current CPE at LAX,¹⁵ and are equivalent to approximately 80% of the T1/T3 carriers' average 2006 net profit per passenger.¹⁶

For low cost carriers such as Southwest to be able to offer low fares it is "absolutely essential" to "have low operating costs." (McGlade, 512:3-6) Southwest's Vice President of Schedule Planning, Pete McGlade, testified: "You can't be a low fare carrier with high costs. And each cost increment that increases creates a situation where fewer passengers will fly, and this can render flights economically unsustainable." (McGlade, 513:6-10; *see also* Kasper, 156:1-157:6). Mr. McGlade added that a \$5 increase "could be a catastrophic impact on the profitability" of Southwest's operation at LAX: "Our system average in fare is \$104. We're considered

¹³*Id.* at ¶ 11.

¹⁴*Id.* at ¶¶ 11, 39.

¹⁵*See* Revised Hubble Decl. Ex. A-2-a ¶ 3.

¹⁶Revised Kasper Rep. Ex. A-1-a ¶ 11 and Fig. 5; (Kasper, 158:1-8).

by many measures the most successful carrier for a long period of time. And our margins right now are in the area of five percent. Five percent of \$104 is about five bucks, six bucks. So in essence, that kind of an increase in cost per passenger puts at risk, in many respects, our profit on a flight.” (McGlade, 515:20-516:2).

In addition, the Vice President of Planning for Alaska Airlines, Donald Garvett, testified that the "huge magnitude of the discriminatory new terminal charges at Terminal 3, coupled with the indispensable nature of LAX to the viability of Alaska's operations, will have a profound negative impact on Alaska's ability to offer services and effectively compete at LAX." (Garvett Supp. Dec., T1/T3 Ex. A-12 ¶ 3).

Further, because the higher charges will apply to airlines not now serving LAX, they will deter the entry of new carriers to the airport. (Kasper, 158:12-159:1). Ultimately, consumers depending on LAX for their travel will suffer from higher fares, reductions in service, and a chilling of airline competition due to the sharply increased costs of serving the airport.

E. Given that LAX has Operated Profitably under the Prior Rental Methodology and Enjoys a Surplus of Hundreds of Millions of Dollars, There is No Justification for Imposing Dramatic and Discriminatory Fee Increases on the T1/T3 Carriers.

Although DOT Policy Statement § 4.1.1 reflects a general desire for airports to be "self-sustaining," this objective applies only if and to the extent that the "circumstances existing at such airport" allow it. There is nothing in DOT's Policy to suggest that the general goal for airports to be self-sustaining in any way "trumps" the prohibition against unjust discrimination. As Judge Goodwin recognized, "[t]he goal of

airport self-sustenance, while enshrined in DOT Policy, must give way when it clashes with the requirement of unjust discrimination. . . . The existence of long-term leases does not permit the Airport to disproportionately obtain revenues on the backs of the carriers without them." RD, at 72.

Moreover, it is clear that LAWA does not need to resort to egregious discrimination against the T1/T3 Carriers in order to be a "self-sustaining" airport. LAWA is already self-sustaining, as it has been consistently profitable since at least 2000 (Kasper, 414:4-8), and recently touted its "strong financial position." (T1/T3 Ex. E-1). For the fiscal year ending June 30, 2006, LAWA reported that it had "increased its total net assets by seven percent to \$2.6 billion, an increase of \$172.9 million over June 30, 2005." (*Id.*) And according to the BOAC President, LAWA in 2006 "posted another solid year of financial results, with net assets continuing to grow." (*Id.*)¹⁷

Furthermore, although Mr. Pan testified that LAWA has \$300 million in unrestricted surplus funds – not including M&O reserves (Pan, 2756:5-11; 2751:13-16, 2757:21-2758:1-4), the actual figure for unrestricted cash reserves is \$566 million. *See* TBIT Ex. 60 at Table 3, Wikel, 1530:19-25.¹⁸ Section 4.2 of the DOT Policy Statement

¹⁷At trial, LAWA argued for the first time that the LAX 2006 profits were illusory because Van Nuys is a reliever airport and its loss in 2006 must be allocated to LAX. But LAWA does not reflect this in its financial statements, and Judge Goodwin concluded "there is no evidence to show that the losses at Van Nuys which are imposed on LAX are reasonably related to the benefits bestowed on LAX." RD, at 75.

¹⁸The T1/T3 Carriers share the Judge's concern that LAWA's "financial data" is not "credible." RD, at 30-31 ("LAWA's entire accounting system is suspect and cannot be relied upon to provide accurate and timely information. Any decisions made on that information must also be suspect"). However, this finding is not essential to the T1/T3 (footnote continued)

provides that "In establishing new fees, and generating revenues from all sources, airport owners and operators should not seek to create revenue surpluses that exceed the amounts to be used for airport system purposes and for other purposes . . . including reasonable reserves and other funds to facilitate financing and to cover contingencies."¹⁹ LAWA's substantial surplus combined with the fact that both LAX and LAWA have been consistently profitable certainly dispels any notion that LAWA needs to increase terminal charges in order to become "self-sustaining."

F. LAWA is Improperly Using the Discriminatory Terminal Charges to Increase its Surplus and Seek Funding for Unapproved Future Capital Projects.

Yet another reason why the discrimination which exists at T1/T3 is *unjust* is the fact that LAWA is using the higher charges at T1/T3 to build a large cash reserve in an effort to impress financial institutions and improve its already strong credit rating and reduce its already low borrowing costs. LAWA has admitted that it plans to pursue as yet unidentified, un-scoped and unapproved airport-wide capital projects at LAX at some undetermined future time. LAWA has disseminated a document entitled "Potential CIP Projects Priority List" (T1/T3 Ex. E-7) which purports to represent a "wish list" of various *potential* capital projects being considered by LAWA, most if not all of which have not yet been approved or had their funding source(s) identified.

Carriers' case, and the Department does not need to reach the same conclusion to find the T1/T3 charges unjustly discriminatory, unreasonable and otherwise unlawful.

¹⁹In *Port Authority*, the Department found a much smaller surplus to be "unacceptably large." Final Dec. at 26.

In fact, LAWA's Ms. Tubert has been quoted as saying that LAWA sought to increase the terminal charges at T1/T3 to "show it has the funds to finance a master plan and other improvements as part of a \$4 billion LAX modernization."²⁰ Further, LAWA's Mr. Pan stated in January 2007 that LAWA intended to use the increased revenues it would receive from the new T1/T3 terminal charges to persuade the capital markets to loan LAWA money to undertake certain unspecified future LAX capital projects. *See Pan, 2775:22-2776:5.*

It should be emphasized that the T1/T3 carriers, by insisting on reasonable fees at LAX, are not opposing airport improvement projects. Nor can LAWA legitimately argue that a rejection of the disputed fees by the DOT will in any way jeopardize future capital projects. Such projects have not yet been formally proposed, much less evaluated through established procedures that require a thorough vetting and identification of appropriate funding sources (which typically may include bonding of various types, federal grants, passenger facility charges, or voluntary airline contributions). In fact, the Department's Policy makes it abundantly clear that an airport's adherence to reasonable fees does not in any way jeopardize future capital projects, as the Policy prohibits the inclusion of the cost of facilities not yet built and operating in the rate base for purposes of setting fees to users.²¹

²⁰*L.A. Council gives OK to rent increase at 3 terminals*, Daily Breeze (Jan. 13, 2007), Ex. E-16.

²¹Using new fees to help finance unapproved future projects violates Section 2.4.4 of the DOT Policy, which only allows inclusion "in the rate base amounts needed to fund debt service and other reserves and to meet cash flow requirements as specified in financing (footnote continued)

II. LAWA’S APPLICATION OF THE RENTABLE SPACE FORMULA IS UNREASONABLE.

Judge Goodwin properly rejected LAWA's use of the rentable space methodology at Terminals 1 and as "unreasonable." RD, at 9. LAWA’s use of the “rentable space” formula at T1/T3 violates the Department’s pronouncement that:

Under compensatory use and lease agreements, *airlines typically pay only for the facilities and services they actually use*, leaving the airport to assume the financial risks and rewards from non-airline facilities. For example, with regard to an airport gate, an airline will pay a rental rate that will recover its allocated cost.²²

In addition, a leading commentator who analyzed the characteristics of airport charging systems has made a similar observation:

Under a compensatory system, *an airline pays only the actual cost for the facilities and services it uses* [A]s an example, an airline paying a compensatory terminal rent would pay a per square foot rate for the space it actually leases in the terminal. *The cost for unleased areas, such as public circulation space or janitorial storage, would be paid for by the airport proprietor from non airline revenues.*²³

LAWA nevertheless insists that it can force airline tenants to pay for public area space – without any type of financial offset or mitigation – because that is what LAWA believes a commercial building owner might do:

agreements or covenants (*for facilities in use*)” (Emphasis added)

²²“Airport Business Practices and their Impact on Airline Competition” FAA/OST Task Force Study T1/T3 Ex. E-21 (LAX 055), at 8 (emphasis added).

²³Rise J. Peters, *Northwest Airlines v. Count of Kent, Michigan: More Than You Ever Wanted to Know About Airport Rate Setting, Part One*, 22 Transp. L.J. 291, 1994 (emphasis added).

[A]lthough prior leases at LAX did not specifically allow LAWA to charge any rent to "public" areas of the Terminals – "common areas," that practice was inconsistent with normal commercial practices. Normal commercial practices permit a landlord (LAWA) to recover rent for all space in a building, not just space specifically leased by tenants.

12/18/06 Staff Rep. 11, at 3 (Ex. B-7, at JC-00171). Indeed, although LAWA labels its new "rentable space" methodology a "*commercial compensatory system*," it should more properly be termed a "*commercial landlord compensatory system*." But LAWA is not a commercial landlord; rather, it is a monopolist in control of a public-use airport that is essential for airlines seeking to provide effective service to the Los Angeles area. *See* RD, at 66 ("LAWA is not a commercial owner of space," and "LAWA's behavior as a commercial owner of space is in violation of the DOT Policy"; "LAWA's self-characterization as a commercial owner of space does not have widespread acceptance in the industry and is unreasonable and violates general fairness").

The Department need not decide whether use of the rentable space formula may be acceptable in circumstances not present here. The critical question in this case is whether LAWA's new terminal charges at T1/T3 – which combine (i) the application of a rentable space formula, (ii) imposed selectively on one group of airlines²⁴, (iii) without revenue sharing or any other form of financial mitigation, (iv)

²⁴As the Judge found, because "several carriers had expired leases while other carriers had [continuing] leases," LAWA's attempt to unilaterally impose the rentable space formula on the T1/T3 Carriers was unjustly discriminatory. RD, at 55 ("the unilateral imposition of the rentable space methodology on any carriers is a violation of the letter and intent of the DOT Policy and is therefore unjustly discriminatory and unreasonable").

with the use of fair market value to set rates, (v) by an airport monopolist that is already profitable with hundreds of millions of dollars in surplus funds on hand – are reasonable. The answer, as the Judge found, is an emphatic "no."

This is not a situation where the airport and the airlines have agreed to a rentable space formula combined with a financial offset or other mitigating provision, such as the commonly-used "revenue sharing" approach, where the airport shares concessions and parking revenues with the airlines. *See* Montgomery, 2299:14-25; Eaton, 3251:13-21. Indeed, none of LAWA's witnesses was able to identify any other U.S. airport that applied a rentable methodology in the same way that LAWA is now doing at Terminals 1 and 3, and the Judge properly rejected LAWA's argument that its fee charging methodology is widely in use at other airports. RD, at 61-63, 68. LAWA's application of the rentable space formula at T1/T3 also ignores the obvious fact that airlines are not like ordinary commercial building tenants, who can respond to an abusive landlord's excessive charges by moving to another building.

It is well recognized by courts that LAX airport is a public utility. *See, e.g., City of Los Angeles v. Dannenbrink*, 234 Cal. App. 2d 642, 645 (1965) (describing LAX as "a public utility"); *Stagg v. Municipal Court*, 2 Cal. App. 3d 318, 322 (1969) ("A municipally owned airport is classed as a public utility"); *Air Cal., Inc. v. City and County of San Francisco*, 865 F.2d 1112, 1117 (9th Cir. 1989) (the "California courts have . . . classified a municipally owned airport as a public utility"). Apparently ignorant of these authorities – which may well explain much of the disconnect between LAWA's actions and the applicable law – the two senior LAWA officials who testified

at the hearing (Ms. Tubert and Mr. Pan) both denied that LAX was a public utility. *See* Tubert, 3442:15-16 ("We do not call it a public utility"); and Pan, 2741:1-2742:10 ("No one that I know of . . . has referred to the airport as a utility").

But since LAWA effectively holds monopoly power over airlines that seek access to LAX (Ex. A-1-a ¶¶ 17, 22-29; RD, at 65), it must be restrained from abusing that power. LAWA falls squarely within the traditional definition of a public utility, and the charges imposed on airlines at LAX should be subject to the same restraints that traditionally protect customers from pricing abuses by public utilities. Such restraints are critical here because access to LAX is essential for an airline to effectively serve the Los Angeles Basin. Ex. A-9 ¶ 4, Ex. A-10; McGlade, 495:25-500:7; Ex. A-1-a, ¶ 26; RD, at 38. As Dan Kasper, Complainant's expert, testified (without rebuttal from any expert offered by LAWA):

[T]he airlines do not have an option an effective alternative to the use of LAX. So they are in a position where they are dealing with a firm that provides an essential facility, they have no alternative – effective alternative but to use that and this firm that is providing that is, in fact, a monopoly or at a minimum a firm with very substantial market power. (Kasper, 159:24-160:6; *see also* RD, at 64.)

Where, as here, an airport monopolist unilaterally imposes substantially higher charges based on a new, rentable space methodology – with no financial offset or other mitigating measure – there is the very real danger that the airport is abusing its monopoly power and requiring airlines to pay excessive and unreasonable fees.

Finally, it is highly disingenuous for LAWA to assert that use of the rentable space formula is necessary to avoid "cross-subsidizing" the T1/T3 Carriers by "paying"

for the public use spaces in the terminals. The source of funds for such payments has not been LAWA but, rather, revenues that LAWA receives from airport concessions and parking entities. Significantly, the vast majority of such revenues would never exist but for the airlines bringing passengers into the airport. Cushine, 3133:3-6; Montgomery, 2300:23-25.²⁵ Thus, LAWA has neither been “paying” for the common space from its own funds nor “cross-subsidizing” the airlines at LAX – it has instead simply been using a portion of the revenues generated *by airline passengers* at the airport to cover those costs (a process which has allowed LAX to remain profitable).

III. LAWA’S USE OF FAIR MARKET VALUE IS UNREASONABLE.

The Department should affirm Judge Goodwin's rejection of the use of fair market value to set terminal charges at T1/T3. RD, at 58. LAWA’s use of fair market value to set the base rent at those terminals violates the requirement that the fee-setting methodology be based on the airport’s actual costs. *LAX II*, Order 97-12-31 (Dec. 23, 1997), at *16. Because it results in terminal "base rent" that is two to five times higher than LAWA's fully allocated costs, it is clear that the FMV method does not result in fees that are cost-based. *See* RD, at 56 ("if market rent is greater than fully allocated costs, then LAWA by definition is recovering an amount greater than its costs").

²⁵According to a 1995 study, LAX has annual economic impact of \$60 billion, which is generated by aviation activity on or near the airport. (T1/T3 Ex. F-25; Pan, 2747:20-2749:7)

Although Policy Statement sections 2.2 and 2.5.1 – which require fees to be cost-based – refer to landing fees, the Department has acknowledged their application to terminal charges as well. *See Port Authority, Final Dec., supra*, at 25; RD, at 13 ("a reasonable methodology for setting fees must be based on costs unless otherwise agreed"). In *LAX I*,²⁶ the Department stated that "[h]istoric cost is the simplest, most direct, and easiest-to-verify measure of cost." During the 1990's DOT twice ruled it was unlawful for LAX to use "fair market value" to set *landing* charges. *LAX I*, Order 95-6-36 (June 30, 1995), at *16; *LAX II, supra*, at *1. In *LAX II*, the Department stated:

Among other things, the charge cannot be justified as compensation for the airport's opportunity costs in using its land for airport facilities, since the City made a commitment to continue using LAX as an airport and the airport's overall revenues compensate the City for using the land as an airport. There is no economic policy reason for allowing the use of fair market value, because the City needs no additional incentive to use its property at LAX as an airport, for the airport provides significant economic benefits to the Los Angeles area. (*Id.* at *1, 10)

The D.C. Circuit affirmed the DOT's ruling in *City of Los Angeles v. DOT*, 165 F.3d 972 (1999).²⁷ Even though the prior two LAX decisions involved landing charges, they are fully applicable to LAWA's use of fair market value to calculate the terminal charges at T1/T3. Not only does DOT consider the same Policy Statement provisions

²⁶Order 95-6-36 (June 30, 1995), at *17.

²⁷Regulatory agencies have abandoned use of fair market value as a means of valuing capital investments by public utilities due to the difficulties in calculating fair market value. *See Duquesne Light Co. v. Barasch*, 488 U.S. 299, 308-09 (1989).

when analyzing terminal charges and landing fees (*Port Authority*, Final Dec., at 25), but the D.C. Circuit held that it was arbitrary and capricious for DOT to require that charges by airports for use of the airfield be based on historic costs while allowing charges for non-airfield facilities to be based on "any reasonable methodology," including fair market value. *ATA v. DOT*, 119 F.3d 38, 42-43 (D.C. Cir. 1997).

LAWA's purported "lost opportunity" from leasing airport hold rooms and other airline space to the carriers rather than concessionaires does not represent an actual cost incurred by LAW A to provide the space to the carriers. Judge Goodwin correctly concluded that the "use of opportunity costs" to set base rent "would violate the letter and spirit of federal laws governing airport use." RD at 57. It is "unworkable, untenable, and most importantly, unlawful." *Id.* at 58; *see also id.* at 57 (use of opportunity costs "conflicts with and fatally undermines the core purposes of airports. Airports are not typical properties. They are invested with public functions. They are to serve and benefit the traveling public. They are subject to extensive regulatory oversight.")

LAWA's unilateral imposition of base rent at T1/T3 using LAW A's subjective opinion of what constitutes "fair market value" for the terminal and underlying land also represents an abuse of its monopoly power over airlines that have no alternative to LAX in order to effectively serve the LAX market. *See* Section II, *supra*. In addition, Judge Goodwin properly rejected LAW A's claim that its FMV determinations were reasonable where, as here, they were unilaterally set by LAW A's staff. RD, at 56-57 ("Absent a meeting of the minds, there is no FMV. If LAW A submits its appraisal to

the air carrier tenants and the air carriers do not sign off, no FMV has been established"). Finally, as the Judge also found, the "evidence suggests that market rent as a basis for assessing terminal space costs is rarely used at other airports, and even then is combined with give-backs to air carriers." RD, at 58. "This evidence strongly suggests that LAWA's market-rent scheme of cost recovery is unreasonable." *Id.*

IV. LAWA'S NEW M&O METHODOLOGY IS UNREASONABLE.

Judge Goodwin's finding that "LAWA's new M&O methodology²⁸ for the T1/T3 Carriers is unreasonable, unjustified, and unjustly discriminatory" (RD, at 9) should be affirmed for several reasons. First, although LAWA is trying to impose somewhat higher M&O fees at T2/T4-8, it is using the more burdensome "rentable space" formula to allocate the M&O expenses to the T1/T3 Carriers, but the less onerous "usable space" formula to allocate M&O to the T2/T4-8 Carriers. As the Judge stated, this produces inexplicable results:

LAWA's revised allocation plan would place about \$17 million of about \$33 million in increased security costs attributed to the terminal cost center, or more than half of these cost increases, in just two terminals, T1 and T3. This allocation is implausible on its face. That two of the nine terminals at LAX would be responsible for more than half of total terminal security expenses without reliable explanation defies logic. (RD, at 54)

Significantly, disapproval of the disputed M&O charges in this proceeding will in no way interfere with LAWA's recovery of any legitimate security or other maintenance

²⁸Under the Tariff that applies to Terminals 1 and 3, LAWA refers to what was previously known as "M&O" expenses as "Terminal Regular Expenses." However, LAWA still uses the term "M&O" expenses with regard to Terminals 2, 4, 5, 6, 7 and 8.

and operating costs from tenant carriers. However, such fees must be established and applied in a manner that is reasonable and not unjustly discriminatory. If, following this proceeding, LAWA is willing to engage in good faith negotiations with the T1/T3 Carriers regarding the terms of a new lease that comply with the airport's obligations under federal law and policy, any additional security or other M&O expenses at LAX can be satisfactorily addressed as part of that process.

Second, it is unreasonable for LAWA to subject the T1/T3 Carriers to a massive increase in M&O fees given the current “strong financial position” of LAX, including an unrestricted cash surplus of hundreds of millions of dollars. Third, as set forth above LAWA is improperly using the fee increases at T1/T3 to attract financing for future, unapproved airport capital projects. Fourth, as Judge Goodwin found, “the conduct of LAWA since 2005 in dealing with the airlines pursuant to the lease negotiations has been a complete failure to enter into good faith negotiations.” RD, at 68. Fifth, as the Judge concluded, the new M&O methodology is “extreme and radical,” and “comparable to no other methodology in the industry. It is not designed to, nor does it fairly, cover cost, and it has no other uses properly applicable to airport-fee setting schemes.” *Id.* at 54.

V. THE “WRITTEN AGREEMENT” EXCEPTION OF 49 U.S.C. § 47129(e)(1) DOES NOT APPLY.

Judge Goodwin properly found that the T1/T3 Carriers’ new and increased M&O fees are not a “fee imposed pursuant to a written agreement with air carriers using the facilities of an airport,” as set forth in 49 U.S.C. § 47129(e)(1). RD, at 10. Although the T1/T3 Carriers agreed to honor the financial terms and conditions of their

expired leases on a month-by-month basis in order to continue operating at LAX while they negotiated with LAWA for a new lease, they clearly did not agree to the increased M&O charges which LAWA has only recently imposed for all of 2006 on a retroactive basis. To the contrary, the T1/T3 Carriers strongly objected to the new M&O charges.

LAWA's retroactive 2006 M&O charges were not a mere rate increase or an annual reconciliation of charges as was the customary practice at LAX over many years. Rather, LAWA substituted an entirely new methodology to compute the M&O charges – specifically, it replaced a long-utilized 15% surcharge for indirect and some purported direct M&O expenses with new M&O charges that more than triple the 15% surcharge and include new expense categories of roadway access and airport security activities. LAWA's expert, Mr. Cushine, was forced to admit that a new and different "charging methodology" was used to impose the increased M&O fees retroactively applied for 2006. (Cushine, 3149:20) In addition, LAWA's CFO, Mr. Pan, acknowledged that the retroactive increase was neither a "reconciliation" nor a "true-up" of the M&O costs actually incurred by LAWA pursuant to a preexisting M&O fee-setting methodology. (Pan, 2785:24-2786:14) *See* RD, at 43 ("While the prior reconciliations were in the nature of adjustments to charges, these constitute 'a dramatic change in the allocation' of M&O costs") (citing 10 Tr. 2004-06).

It is disingenuous in the extreme for LAWA to maintain that the T1/T3 Carriers consented to such an unprecedented and controversial fee-setting methodology in a "written agreement" (or otherwise). Significantly, LAWA never produced at trial language in any written agreement whereby the T1/T3 Carriers agreed

to the new charging methodology for M&O fees. *Compare Delta Air Lines, Inc. v. Lehigh-Northampton Airport Authority*, OST-95-80, Order 95-5-8, at 16 (DOT declined to consider airline challenge to certain fees because a signed agreement "specifie[d] in detail the schedule and methodology used for calculating the rates and charges").

REFUNDS OWED TO THE T1/T3 CARRIERS

Judge Goodwin concluded that all of the fee increases imposed on T1/T3 were unlawful and should be vacated with appropriate refunds made. RD, at 77. For each Complainant, the amount of the refund should reflect (1) the additional sum the Carrier paid in terminal rents in 2007 (through the effective date of the Department's decision) over and above what it would have paid under the prior charging methodology, plus (2) interest at the federal government rate. LAWA must be ordered to rescind and refund the increased terminal charges (1) for base rent components that reflect use of the "rentable space" and FMV formulas, and (2) for Terminal Regular Expenses (or M&O) components that reflect the use of the "rentable space" formula and include the new allocations for security, access and indirect administrative costs. The retroactive M&O increase must also be rescinded and refunded.

It is appropriate for the DOT to "determine the amount of the fee that must be refunded to the complainants in a supplemental proceeding," *Port Authority*, Final Dec., at 28, and LAWA has agreed to such a procedure, LAWA Reply Br. to ALJ, at 30, n. 32. Accordingly, Complaints reserve the right to supplement their request for a refund following the Department's decision.

CONCLUSION

LAWA's attempt to reinvent itself as a private commercial landlord is fundamentally at odds with LAX's status as a *public-use* airport that is subject to long-standing federal prohibitions against charging unreasonable and unjustly discriminatory fees to airline users. LAWA's imposition of hundreds of millions of dollars in discriminatory terminal rents on the T1/T3 Carriers – for a period "virtually open-ended in its duration" (RD, at 59), and, based solely on lease expiration dates and not on any actual cost differential that exists at the respective terminals – violates the prohibition in federal law against unjust discrimination. The combination of *magnitude plus duration* of the increased charges to the T1/T3 Carriers, coupled with the absence of linkage to any cost differential, compels the finding that the discrimination here is indeed *unjust*. In addition, under the particular circumstances here, LAWA's use of the rentable space and fair market value formulas in unilaterally imposed terminal rents "unlike any other in the industry" (RD, at 68), by a monopolist airport operator that has accumulated hundreds of millions of dollars in surplus funds, has resulted in charges far in excess of the costs of the facilities actually used by the carriers, and thus are unreasonable, unnecessary and not cost-based.

If allowed to stand, LAWA's new leasing policy and terminal charges at T1/T3 will disadvantage new entrant carriers and airlines with expired leases not only at LAX but likely at many other airports throughout the country. Seeing LAWA's ability to raise prices to captive airline tenants whose leases have expired, without any legitimate cost basis or consideration of discriminatory impact, other airports will no doubt be

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