**UNITED STATES DEPARTMENT OF TRANSPORTATION**
**FEDERAL AVIATION ADMINISTRATION**
**WASHINGTON, DC**

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| **Air Transport Association of America, Inc. D/B/A Airlines For America, Alaska Airlines, Inc., American Airlines, Inc., Atlas Air, Inc., FedEx Express Airlines, Hawaiian Airlines, Inc., JetBlue Airways Inc., Southwest Airlines Co., United Airlines, Inc., United Parcel Service Co., and Air Canada,** |
| **Complainants** |
| **v.** |
| **Port of Portland, Oregon,** |
| **Respondent** |

**Docket No. 16-16-04**

## ASSOCIATE ADMINISTRATOR FOR AIRPORTS

## FINAL AGENCY DECISION

## I. INTRODUCTION

This matter is before the Federal Aviation Administration Associate Administrator for Airports on an appeal filed by the Air Transport Association of America, Inc., d/b/a Airlines for America, Alaska Airlines, Inc., American Airlines, Inc., Atlas Air., Inc., FedEx Express Airlines, Hawaiian Airlines, Inc., JetBlue Airways, Inc., Southwest Airlines Co., United Airlines, Inc., United Parcel Service Co., and Air Canada (Complainants). The appeal challenges the findings of a Director's Determination issued on August 17, 2017. [FAA Exhibit 2, Item 1].

The issue on appeal is whether the Port of Portland, which operates Portland International Airport, violates certain Federal obligations, including grant assurances and statutes, when it uses airport revenue to pay its combined sewer/stormwater/water bill to the City of Portland. The issue arises because the combined bill breaks out certain charges that represent the costs of managing stormwater on public property and the cost to the City's utility of participating in a Superfund response group. Complainants assert that because these costs are not incurred on the airport's behalf and do not directly benefit the airport, Federal law prohibits the Port from paying them.

On August 17, 2017, the Director's Determination concluded that the Port's payment of these fees to the City is permissible, and not in violation of 49 USC §§ 47107(b) or 47133, Grant Assurance 25, *Airport Revenues*, or inconsistent with the FAA's *Policy and Procedures Concerning the Use of Airport Revenue* (*Revenue Use Policy*).

In arriving at a final decision on this Appeal, the Associate Administrator re-examined the record, including the Director's Determination, the administrative record, and the pleadings in light of applicable law and policy. Based on this reexamination, the FAA concludes that the Director's Determination is supported by a preponderance of reliable, probative, and substantial evidence, and is consistent with applicable law, precedent, and FAA policy. Therefore, the Director's Determination is affirmed.

## II. PARTIES

### A. The Airport

Portland International Airport (Airport or PDX) is a federally-funded, public access, FAA-designated large-hub airport located in Portland, Oregon, and is owned and operated by the Port of Portland (Port). The Airport consists of approximately 3,000 acres and three runways and is classified as a commercial service airport with 209,731 annual operations during the 12-month period ending December 31, 2013. [FAA Exhibit 1, Item 13].

The Airport is located within the City and within the Multnomah County Drainage District. [FAA Exhibit 1, Item 1, V.28]. The Port has accepted Airport Improvement Program (AIP) grants in the amount of $169 million during the past 12 years for the benefit of the Airport. [FAA Exhibit 1, Item 15].

### B. Complainants

Air Transport Association of America, Inc. d/b/a "Airlines for America" (A4A) is an airline trade association, whose members include Alaska Airlines, American Airlines, Atlas Air, FedEx Express, Hawaiian Airlines, JetBlue, Southwest Airlines, United Airlines, and UPS. [FAA Ex. 1, Item 1]. It lists Air Canada as an associate member airline. The airlines that bring this appeal have, during the relevant time period of this action, operated at the Airport. [FAA Exhibit 1, Item 6, Par. 8-20].

The airlines meet the requirements to bring this action because they are directly and substantially affected by the actions or omissions of the Port, or do business with or pay fees or rentals to the Port. A4A met the requirement to file its Complaint, and hence raise issues on Appeal, because it represents that its airline members are directly and substantially affected by the actions or omissions of the Port. [FAA Exhibit 2, Item 1, Pages 2, and 25].

## III. SUMMARY OF THE DIRECTOR'S DETERMINATION

On August 17, 2017, the Director's Determination concluded that the Port's payment of the Fees to the City, which include the off-site stormwater charges and Superfund charges, are permissible under and not in violation of Grant Assurance 25, *Airport Revenues* or 49 USC §§ 47107(b) or 47133, or inconsistent with the FAA's *Revenue Use Policy*. The Director's findings were based on the following:

1. The Port has been billed for utility fees to the City that properly include off-site stormwater charges and Superfund charges;
2. The Port has permissibly "passed" the utility fees on to, among others, the Airlines through their Port-Air Carrier agreements;
3. The utility fees are operating costs of the Airport as defined in Generally Accepted Accounting Principles (GAAP) included in, but not limited to, OMB Circular A-87;
4. The stormwater charges and Superfund charges are allocated to all ratepayers within the jurisdiction, including the Port, based upon a transparent, uniform, and non-discriminatory rate-setting methodology;
5. The record does not show that the Airport has been disproportionately targeted by the City, a non-sponsor of the Airport, or that the Airport has otherwise been overcharged for these services;
6. The City's utility fees charged to and paid by the Port do not exceed the value of services provided to the Airport;
7. The payment of the utility fees by the Port to the City is not revenue diversion as defined in the *Revenue Use Policy*; and

8. The City has not levied or collected a charge on the gross receipts derived from air commerce or transportation contrary to the provisions of the *Anti-Head Tax Act.* [FAA Exhibit 2, Item 1, Page 25].

## IV. PROCEDURAL HISTORY

On February 10, 2016, Complainants filed a formal Part 16 *Complaint.* [FAA Exhibit 1, Item 1]. On April 15, 2016, the Port filed its *Answer.* [FAA Exhibit 1, Item 6].

On May 25, 2016, Complainants filed a *Reply* [FAA Exhibit 1, Item 9] followed on June 24, 2016, by the Port filing its *Rebuttal.* [FAA Exhibit 1, Item 12].

On August 17, 2017, the Director of the FAA Office of Airport Compliance and Management Analysis, issued a *Director's Determination* (FAA Exhibit 2, Item 1).

On September 14, 2017, Complainants filed a *Notice of Appeal of, and Supporting Brief of, Complainants the Air Transport Association of America, Inc., D/B/A Airlines for America, and Its Member Airlines* to the Director's Determination. [FAA Exhibit 2, Item 2].

On October 4, 2017, the Port filed its *Reply of the Port of Portland to Complainants' Notice of Appeal and Brief.* [FAA Exhibit 2, Item 3].

## V. FACTUAL BACKGROUND ON THE STORMWATER AND SUPERFUND CHARGES

Portland International Airport is located within the jurisdiction of the City of Portland, Oregon ("City") Pursuant to its charter, the City operates water, sewer, and stormwater management utilities, which benefit citizens and businesses, including the Airport. To pay for these services the City bills all ratepayers[1] in the City of Portland. The bill is in the form of a "Combined Sewer/Stormwater/Water Bill" ("Utility Bill"). The Utility Bill is broken down into several component services. At issue in this matter are two components in that bill. One is a component entitled "Stormwater Off-site Drainage" ("Off-site Charge") and the other is entitled "Portland Harbor Superfund" ("Superfund Charge") [FAA Exhibit, Item 1, Exhibit 10].

The Off-Site charge is a charge that the City includes in the bill to cover its costs of managing stormwater on public property. It includes the costs to collect, convey and dispose of stormwater runoff from public property like streets and sidewalks. [FAA Exhibit 1, Item 6, Par 30]. The City charges ratepayers as a function of the amount of impervious area at their site.

The Superfund Charge is a charge that the City includes in the bill to cover its costs of participating in the investigation and cleanup at the Portland Harbor Superfund Site. The City is a potentially responsible party at the Portland Harbor Superfund Site. The City is potentially liable because its sewer and stormwater system has allegedly impacted the Willamette River. The City imposes the Superfund Charge on all ratepayers in the City. This is regardless of whether the ratepayer itself would be or is a potentially responsible party in its own right. [FAA Exhibit 1, Item 6].

In certain areas of the City, stormwater management is also provided by drainage districts that are independent governmental authorities. The airport is located entirely within the Multnomah County Drainage District #1 (Drainage District). Because the Airport either treats is own stormwater on site or otherwise discharges stormwater to the Drainage District, the City

[1] The City Code defines "Ratepayer" to "mean...a person who has the right to possession of a property and: (1) [w]ho causes or permits the discharge of sanitary sewage into the public sewer system, or (2) [w]hose use of the property directly or indirectly benefits from stormwater management services provided by the City." [FAA Exhibit 1, Item 6, Page 17, Footnote 3].

does not charge the Airport for an on-site component, i.e., a component that would capture costs to treat stormwater from the Port's property. The Airport does pay a fee to the Drainage District. [FAA Exhibit 1, Item 6, and Exhibit 2, Item 1].

In September 4, 2012, Complainants sent a letter to the City expressing "concern with the plan to apply the proposed new[2] storm water management fee to PDX," because "the new fee would violate federal law and policy, which restricts the use of airport revenues." [FAA Exhibit 1, Item 1, Page 25].

The City's proposal to assess the disputed charges on the Airport raised concerns among some of the tenant air carriers serving the Airport because the charges would be passed along to the air carriers, as costs of operation, under the Port's agreement with the airlines. In response to these concerns, the Port sought advice from the FAA on whether the disputed charges could be viewed as a cost of airport operation and maintenance, and therefore payable with airport revenue and chargeable to the air carriers under the Port-Air Carrier agreements. [FAA Exhibit 1, Item 6, Exhibit 2, Page 4].

In the summer of 2012, the City of Portland, sought guidance from the FAA. The FAA advised that based upon the information that he had provided, the Port's actions were not contrary to the grant assurances or specific statutes regarding the Federal airport revenue-use rules. [FAA Exhibit 2, Item 1, Page 5]. Subsequently, on September 12, 2012, the Portland City Council passed Ordinance No. 185610, which had the effect of assessing the disputed charges on the Airport. [FAA Exhibit 1, Item 1, Par 29, and Item 6, Page 29].

On or about July 30, 2015, Randall Fiertz, then Director of the FAA Office of Airport Compliance and Management Analysis set forth the FAA's position on the issue. Mr. Fiertz letter stated that

> [b]ased on our review of available information, and reference to Generally Accepted Accounting Principles and Office of Management and Budget Circular A-87, we believe that the City of Portland's storm water management charge is an operating cost of the airport, because it arises as a legal obligation incident to the airport's possessory interest in land necessary for the provision of aeronautical services.

The letter added that

> the storm water management charge is allocated to all ratepayers within the jurisdiction, including the Port of Portland, based upon a transparent, uniform, and non-discriminatory rate-setting methodology," and that "[i]n the absence of any indication that the airport has been disproportionately targeted by the city, a non-sponsor of the airport, or that the airport has otherwise been overcharged for these services (e.g., double billed), we are not prepared to find that the charge exceeds the value of services provided to the airport. [FAA Exhibit 2, Item 1, Page 5].

Similarly, the letter stated that the Superfund fee is imposed on all ratepayers in a nondiscriminatory fashion and did not violate the grant assurances. [FAA Exhibit 2, Item 1, Page 6]. In summary, Complainants object to the Port's payments of the Off-Site Charge and the Superfund Charge primarily because, according to the Complainants, the fees "do not reflect the value of any services the City delivers to PDX in support of its transportation mission." [FAA Exhibit 2, Item 2, Page 1].

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[2] On or around 2012, the City began direct billing ratepayers for the offsite component and the amount increased substantially. Prior to 2012, the Drainage District collected this component on the City's behalf and then transferred the funds back to the City as provided for in an inter-governmental agreement.

## VI. APPEALING THE DIRECTOR'S DETERMINATION

A party adversely affected by the Director's Determination may file an appeal with the Associate Administrator within 30 days after the date of service of the initial determination [14 CFR § 16.33(c)]. The Associate Administrator does not consider new allegations or issues on appeal unless finding good cause to do so [14 CFR § 16.33(f)]. Review by the Associate Administrator is limited to an examination of the Director's Determination and the administrative record upon which such determination was based.

On appeal, the Associate Administrator will consider the issues addressed in any order on a motion for summary judgment using the following analysis: (1) are the findings of fact each supported by a preponderance of reliable, probative, and substantial evidence contained in the record; (2) are conclusions made in accordance with law, precedent, and policy; (3) are questions on appeal substantial; and (4) have any prejudicial errors occurred. [14 CFR 16.33(e)].

## VII. ISSUES ON APPEAL

The Associate Administrator reviewed Complainants' specific arguments on Appeal and identified the following issues to be reviewed on Appeal:

Issue 1 Whether the Director erred in finding that the Fees are capital or operating costs of the Airport.
Issue 2 Whether the Director erred in finding that payment of the Utility Bill did not violate 49 USC § 47107(k)(2).
Issue 3 Whether the Director erred by issuing a Determination that is contrary to recent position that airport revenue diversion applies to a non-sponsor.
Issue 4 Whether the Director erred in failing to consider three expert declarations.
Issue 5 Whether the Director erred in not following prior decisions and finding that the Fees are not unlawful taxes.

## VIII. ANALYSIS AND DISCUSSION

On Appeal, Complainants argue that "the Airport's use of Airport revenue to pay the City's stormwater management and Superfund cleanup charges is unlawful revenue diversion because the charges do not reflect the value of any services the City delivers to PDX in support of its air transportation mission." Complainants assert that "the Director's Determination is defective and must be reversed because (1) its findings of fact are not supported by a preponderance of reliable, probative, and substantial evidence contained in the record; (2) its conclusions of law are not in accordance with law, precedent or policy; (3) the questions on appeal are substantial; and (4) the errors are prejudicial to the Complainants." [FAA Exhibit 2, Item 2, Pages 1-2].

### Issue 1 - Whether the Director erred in finding that the Fees are capital or operating costs of the Airport.

The main element in reviewing Issue 1 is whether the fees are permissible utility costs, and thus a proper operating cost of the airport.

Arguments of the Parties

Complainants take the position that the Airport has its own stormwater management system independent of the City's system. Complainants assert that the City does nothing to manage stormwater on the Airport property and that the Superfund site has no connection to the Airport. Complainants claim the Airport does not actually receive or benefit from the offsite stormwater management or Superfund remediation services. Consequently, Complainants continue, "the Offsite Stormwater Management and Superfund Remediation are operating costs

not of the Airport, but rather of the City of Portland, which does not own or operate the Airport." [FAA Exhibit 2, Item 2, Page 2].

Complainants also challenge the Director's Determination findings that the Fees may be paid with Airport revenue. Complainants claim it is contrary to the requirement in 49 USC § 47107(k)(2)(A), and the *Revenue Use Policy* (§ VI(B)(1)), because payments to third parties, including local municipalities, must "reflect...the value of services and facilities provided to the airport," and assert they do not. [FAA Exhibit 2, Item 2, Page 3]. Complainants take the position that the fees are contrary to the statutory requirement that airport revenues be spent on services or facilities that are "directly and substantially related to the air transportation of passengers or property," as required under 49 USC §§ 47133(a), 47107(b), and Grant Assurance 25. [FAA Exhibit 2, Item 2, Page 4].

In addition, Complainants assert that the Director's Determination is arbitrary and capricious, an abuse of discretion, and otherwise unlawful because it condones the City's violation of the laws against diversion of airport revenue by excusing the payment of the Fees paid on behalf of the Airport by the Port. Complainants claim "no evidence supports the assertion that payment of the Fees is necessary for the City to provide water and sewer services to PDX." They also claim "the Determination's position ignores the fact that, as the FAA has recently affirmed, municipalities such as the City are subject to the law against diversion of airport revenue even though they do not own or operate the airport." [FAA Exhibit 2, Item 2, Page 5]. Further, Complainants argue that the Fees are contrary to the *Revenue Use Policy* provision which prohibits "Impact fees assessed by any governmental body that exceed the value of services or facilities provided to the airport." [FAA Exhibit 2, Item 2, Page 34].

In its Reply to the Appeal, the Port states "that the Stormwater and Superfund Charges are not independent charges," but are legally permissible components of the City's Combined Sewer/Stormwater/Water Bill. The Port claims it is irrelevant that the Stormwater and Superfund Charges appear as separate line items on the Port's utility bill, or that they are allocated among rate payers by formula instead of by meter measurements. The Port states it is self-evident that that the Airport "receives value in exchange for paying the Combined Sewer/Stormwater/Water Bill" and "the Airport receives essential water and sewer services from the City." The Port asserts that if it did not pay the charges, essential City utility services to the Airport could be jeopardized or cut-off." [FAA Exhibit 2, Item 3, Page 9].

Operating Costs

Federal statutes are clear that airport revenue may be used to pay for the operating costs of the airport. 49 USC §§ 47107(b), 47133. The issue at hand is whether the Fees can be considered general operating costs of operating the Airport. As noted in the Director's Determination, FAA Order 5190.6B defines "operating costs" to include "utility costs," and "operating costs," and include "all operating and maintenance expenses...direct personnel, maintenance, equipment, and ***utility*** costs." [FAA Exhibit 2, Item 1, Page 12].

The Director correctly considered FAA's longstanding view that utility costs are a proper operating cost of a federally funded airport. Notably, the Director cited the U.S. Department of Justice Office of Legal Counsel Opinion[3] that stated that operating costs include costs incurred in a business. Additionally, the Director referenced the FAA's *Revenue Use Policy* that specifically allows a sponsor to bill its airport an allocation of its general government expenses and central service costs, both of which are usually off airport expenses. [FAA Exhibit 2, Page 13].

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[3] Department of Justice "Memorandum Opinion for the Acting General Counsel, Department of Transportation" entitled *Application of the Airport and Airway Improvement Act to the Proposed Lease of the Albany County Airport* (Feb. 12, 1991), 1991 WL 499884. [FAA Exhibit 2, Item 1, Page 12].

Complainants have cited no authorities contrary to the principle that utility fees are operating costs. The Port presented the City's ample legal support, by citation to the City's Charter and Code, for its authority to impose the fees in question. The Port provided the City's authority for the proposition, and the Director found, that if the Port did not pay the utility bill, then essential city services could be jeopardized or cut-off. [FAA Exhibit 2, Item 1, Page 17.] We affirm this finding.

The Inclusion of Allocated Costs in the Utility Bill

Accordingly, the Associate Administrator finds that it was reasonable for the Director to find that the City's costs of providing services to its residents and businesses, including the Airport, may include certain line items in the Utility Bill that may be classified as general expenses of running the Utility. Which in this case, took the form of environmental clean-up and management costs that were incurred as a result of the Utility's past operations and the cost of dealing with that portion of stormwater that falls on or flows to public property. Rainwater does not respect property lines and Federal law does not bar a City's Utility from addressing stormwater on a citywide basis and then allocating each ratepayer a share of the cost. In the Director Determination, the Director emphasized that these costs have been allocated in a "reasonable, transparent, and not unjustly discriminatory" methodology. [FAA Exhibit 2, Item 1, Pages 13-14].

In addressing allocation formulas specifically, the *Revenue Use Policy* indicates that such formulas must be "calculated consistently for the airport and other comparable units or costs centers of government." 64 Fed. Reg. 7696, 7720 (Feb. 16, 1999). As noted by the Director, the context of this rule, as addressed in the *Revenue Use Policy* is *intra*-governmental allocations. [FAA Exhibit 2, Item 1, Page 13; 69 Fed. Reg. at 7705]. This would be the case here if, for instance, the City operated both the Utility and the Airport. Nevertheless, we find it persuasive that even in that hypothetical case, the fees would pass muster, in that the fee is uniformly applied -- not only to governmental entities but to the private sector as well.

We find that there is nothing wrong with the City's process of including certain environmental and stormwater costs in the Utility Bill, when these costs all relate to the operation of the Utility, and then allocating these costs to the ratepayers in a fair and transparent way. The Associate Administrator finds that Director extensively discussed this in the Director's Determination. [FAA Exhibit 2, Item 1, Pages 12-15].

Impact Fees

On the issue related to Impact Fees, the Associate Administrator finds that it was not unreasonable for the Director to conclude that "the charges at issue here are not impact fees" within the scope of the *Revenue Use Policy*, and that "the charges are properly characterized as utility charges assessed by the City for services rendered and in accordance with state law." The Director also noted that "the costs of the services rendered do not exceed the value of the services provided to PDX and the Port does not have the ability under local law to avoid paying the fee." [FAA Exhibit 2, Item 1, Page 21].

The Associate Administrator concurs with this determination because there is no evidence on Appeal showing that, as a utility charge, the services rendered in exchange for the Fees exceed the services provided. We also note that the charges have none of the normal indicia of impact fees; they are not project- or payee-specific and they do not cover future impacts that are often speculative.

Summary of Issue 1

The Associate Administrator finds that the Director did not condone the impermissible diversion of airport revenue, but rather, determined that it was lawful for the Port, as a rate

payer, to use airport revenue to pay the Fees. The Director found that the charges are properly characterized as utility charges assessed by the City for services rendered and in accordance with state law. [FAA Exhibit 2, Item 1, Page 21.] The Director did not act capriciously or abuse his discretion, but specifically and logically analyzed the reasons for the finding based on existing statutes and policies. Contrary to Complainants' assertions, there is ample evidence to support the argument that payment of the Fees is necessary for the City to provide water and sewer services to the Airport. [FAA Exhibit 2, Item 3, Page 9].

The Associate Administrator is persuaded by the Port's statement that "the Port is a ratepayer," and "cannot pick and choose which portions of its utility bill it is willing to pay." [FAA Exhibit 2, Item 3, Page 2]. Additionally, the Port acknowledged that the City provides sewer services and denied that the City provides no stormwater services to the Airport. The fact that the Airport also has its own environmental management system, independent of the City's, does not undermine or otherwise make the Fees unreasonable. The Airport can have its own program to mitigate airfield-specific requirements (i.e., deicing, fuel leaks, etc.) while at the same time contributing to the City's larger programs.

Therefore, against this background, the Associate Administrator finds that the Director did not err in finding that the Fees are capital or operating costs (including indirect costs) of the Airport, as permitted by law, [49 USC §§ 47133(a), 47107(b), 47107(k)(2)(A), Grant Assurance 25, and FAA's *Revenue Use Policy*]. The Associate Administrator also rejects Complainants' argument that the Determination was arbitrary and capricious, an abuse of discretion, and otherwise unlawful.

**Issue 2 - Whether the Director erred in finding that payment of the Utility Bill did not violate 49 USC § 47107(k)(2).**

We reject Complainants assertions that payment of the Utility Bill is improper under 49 USC § 47107(k)(2)(A). In subsection (k)(2), Congress provided four principles that were to underlie certain policies and procedures regarding revenue use that the FAA was directed to establish. It is the *Revenue Use Policy* that resulted from Congress' directive. As stated in the Director's Determination, we have found nothing in the *Revenue Use Policy* that would bar an airport from paying its Utility Bills, even when components of the bill include charges for costs that the Utility incurs as part of its business but that are not directly tied to any one ratepayer. [FAA Exhibit 2, Item 1].

However, even if we look at subsection (k)(2) apart from the *Revenue Use Policy* that it underlies, we do not find revenue diversion in this case. Section (k)(2)(A) prohibits:

> the diversion of airport revenues (except as authorized under subsection (b) of this section) through –
> (A) direct payments or indirect payments, other than payments reflecting the value of services and facilities provided to the airport. 49 USC § 47107(k)(2)(A).

The application of this section turns upon the interpretation of the parenthetical (except as authorized...). The Director found that, based on the parenthetical, "airport revenues expended for operating costs of the airport are not necessarily limited by the value of services and facilities associated with the costs under 49 USC § 47107(k)(2)." [FAA Exhibit 2, Item 1, Page 16].

Complaints argue this is in error and the parenthetical only acts to preserve the grandfather rights enumerated in 47107(b). The Port argues that the Director was correct. Under Port's view, because the payment of operating costs is "authorized" by subsection (b), the authority to make such payment is not limited by the need to reflect value. In other words, subsection (k)(2)(A) does not apply to operating costs. [FAA Exhibit 2, Item 3, Page 14].

The Associate Director finds that we need not resolve this issue of statutory interpretation at this time. This is because under either interpretation the payment of the Utility Bill is proper. If it is enough to be an operating cost, then, as discussed above the Director's finding that the bill is an operating costs has been upheld. But, if one needs to additionally demonstrate that payment reflects the value of services provided to the airport, then the standard is likewise still satisfied.

The record reflects that the payment provides value to the Airport. The Airport is located within the City and the off-site charge pays to keep the City's streets and public rights of way dry. Just because the benefits are shared by the entire City does not mean there is no benefit to the Airport, an entity located within the City. The Director found that the "Airport receives fair and reasonable value for and benefits from the payment of the Stormwater and Superfund charges." [FAA Exhibit 2, Item 1, Page 17]. The Director noted that the charges reflect each ratepayer's share of the cost to manage stormwater that is

> necessary to help operate and maintain vehicular access to streets leading to the airport....Airport users, travelers, and employees would not have access to the Airport if the adjacent roads were under water.

The Director also noted that failure to pay the bill could result in a cessation of service. This was the position of the City and was supported by reference to the City Code. We find that the discharge of a bona fide debt results in inherent value to the payee and eliminating the risk of a service cut-off likewise provides ample value or consideration. Finally, we note that the City sets the fees as a function of its costs. [FAA Exhibit 1, Item 6, Exhibit 1, ¶ 8]. And, the services are provided to all entities in the City, *including the Airport*. The *Revenue Use Policy* provides that the "FAA generally considers the cost of providing the services ... to the airport as a reliable indicator of value." 64 Fed. Reg. at 7720. As the City employs a cost-based methodology, applying the principle of the Policy, we find yet another indicator that value is conveyed.

In their appeal, Complainants' caution against those local officials, who instead of raising local taxes, may decide to divert airport revenue to pay City expenses. Complainants warn that in this case "redirecting PDX revenue to fund non-airport municipal needs – stormwater management and environmental remediation, is, unfortunately, attractive to the City..." FAA shares this concern.

However, the normal context for this concern arises where the airport sponsor and the agency seeking to benefit from diversion are the same entity. Thus, City Hall, having direct control of both entities, could ordain the improper transfer of funds to another City department (such as the stormwater utility) or try to justify the transfer through a billing regime that is prejudicial to the airport and fails to reflect value.

In our case, however, we are dealing with two arms-length independent entities and the City is treating the Port no different from how it is treating anyone else. The uniformity and transparency of the City's approach is an intrinsic check. In such circumstances, the concerns that animate the restrictions of subsection (k)(2)(A) are significantly less.

Our conclusion is supported by an analysis of the four provisions of subsection (k)(2) as a whole. It is certainly true that subsection (k)(2)(A), that mandates payments must reflect value, is not expressly limited to those cases in which diversion occurs intra-organization.

However, subsection (k)(2)(D) expressly describes one aspect of this issue presented in this case in that it speaks of compensation to "nonsponsoring governmental bodies." Subsection (k)(2)(D) prohibits:

> Payments to compensate nonsponsoring governmental bodies for lost tax revenues exceeding stated tax rates.

In our case, the City is such a "nonsponsoring governmental body." While, subsection (k)(2)(d) is not controlling since it addresses payments in lieu of taxes, it is, nevertheless, instructive in that it provides a standard of "stated rates." Because the City's stormwater fees are uniformly applied to all entities at a stated rate, the City's regime would appear to satisfy the underlying Congressional concern that airports, when charged, pay "nonsponsoring governmental bodies" the same rate as everyone else.

**Issue 3 - Whether the Director erred by issuing a Determination that is contrary to recent position that airport revenue diversion applies to a non-sponsor.**

On Appeal, Complainants argue that the Director's Determination is inconsistent with the position taken by the FAA in November 2014. Complainants argue that at that time, the FAA stated in the Federal Register Notice that "Congress did not limit FAA's enforcement authority in 49 USC § 47111(f) to just airport sponsors, but rather permitted judicial enforcement to restrain 'any violation' of chapter 471 – that includes the requirements of § 47133 – by any person for a violation."

Complainants add that a violation "encompasses violations by non-sponsors as well as airport sponsors." Complainants also stated that federal law prohibits all state and local governments from diverting airport revenues for any non-aviation related purpose. Complainants claim that "the FAA can order the Port not to divert Airport revenue to the City, and/or go to court to stop the City from requiring the Port to divert revenue to the City." [FAA Exhibit 2, Item 2, Pages 44-46].

The Port disagrees with Complainants arguments on Appeal that the FAA can preempt "the City from charging the Airport those portions of its utility bill intended to recover off-site stormwater and Superfund costs." The Port further disagrees with the references to aviation taxes and notes that the Director's Determination properly concluded that "the circumstances the aviation fuel tax limitation is meant to address are not presented here, which is whether a sponsor may use airport revenue to pay utility charges as operating costs of the airport," and "says nothing about what municipal utility fees can be charged to an airport." [FAA Exhibit 2, Item 3, Pages 3-4].

Complainants' arguments which reference recently affirmed FAA positions regarding aviation fuel taxes is not persuasive in this context. First, Complainants' reference to aviation taxes is misplaced because, as the Director noted, the 2017 Chief Counsel letter "addresses whether proceeds from local taxes on aviation fuel imposed by local governments may be used by a non-sponsor for non-aviation purposes," not whether they can be assessed. [FAA Exhibit 2, Item 1, Page 25]. Complainants are correct that FAA may pursue enforcement action pursuant to 49 USC § 47111 (f) against a non-sponsor State or local government that violates the *Revenue Use Policy* or the limitations in 49 USC § 47133.

However, this statutory provision is not applicable here since the Director concluded that payment of the City imposed Fees was lawful and was not revenue diversion. Moreover, the November 17, 2016 letter refers to "the federal prohibition on the diversion of aviation fuel tax revenue" under 47133, prohibiting state or local governments from diverting aviation fuel tax revenues for non-aviation purposes. [FAA Exhibit 2, Item 2, Page 45].

As reflected in the Director's Determination, the Director did not ignore Complainants' argument that municipalities such as the City are subject to the law against diversion of airport revenue even though they do not own or operate the airport. The Director correctly referenced the distinctions between existing policy and related correspondence in the Determination, and properly found that the payment of the Fees is a permitted use of airport revenue.

In conclusion, Complainants' argument that the Director's Determination is contrary to the FAA's recently affirmed position that the law against airport revenue diversion applies to a non-

sponsor such as the City, is not pertinent to the facts here.[4] Our statutes expressly deal with aviation fuel taxes and mandates how such proceeds can be spent. The statute contains no such limit or constraint on utility bills. Complainants' argument is rejected.

**Issue 4 - Whether the Director erred in failing to consider three expert declarations.**

On Appeal, Complainants argues that "the Director's Determination is arbitrary and capricious because the Director improperly failed to consider the three unopposed expert declarations provided by Complainants to show that the Fees are not operating costs of the Airport, because they are not for services or facilities provided to the Airport." Complainants assert that the Director "summarily and inappropriately [dismissed] 49 pages of detailed, compelling and unrefuted expert testimony, all of which demonstrates why the Fees are not in exchange for actual operating costs incurred by the Airport." [FAA Exhibit 2, Item 2, Page 6].

The Port disagrees with Complainants' arguments, and states it "was reasonable for the Director conclude that the testimony of all three witnesses had little evidentiary value and need not be considered because it was based on their own, erroneous interpretation of the very same statutory and agency policy language that the Director was being asked to interpret." The Port adds the "Director could have given little weight to the witnesses' testimony because each was premised on the same error; that the Airport receives no services in exchange for payment of the Stormwater and Superfund Charges." The Port counters "the Airport indeed receives valuable services from the City in exchange for paying the combined Sewer/Stormwater/Water Bill in general and the Stormwater and Superfund Charges in particular." [FAA Exhibit2, Item 3, Pages 18-19].

A review of the record shows that the Director considered "the expert opinions [provided] by Complainants." The Director noted that the witnesses erred in concluding that all operating costs under 49 USC § 47107 must be spent "at the airport" or must be "directly and substantially related to the transportation of passengers or property at the airport." The Director added "these are incorrect interpretations of the statutes and are not consistent with FAA policy, which authorizes a sponsor to allocate certain off-airport costs to an airport, including general government expenses, provided the costs are not disproportionate." The Director concluded that the witnesses "base their opinions upon the erroneous legal interpretations of 49 USC § 47107(k)(2)(A) and of 49 USC § 47107(b) which requires operating costs to be 'directly and substantially related to the air transportation of passengers or property.'" [FAA Exhibit 2, Item 1, Pages 17-18].

The Associate Administrator notes Complainants refer to the Stern declaration, which acknowledges that "section 13.1(g) of the Bond Ordinance includes costs of utility services" in the definition of 'Costs of Operation and Maintenance'. However, Stern discounts this as "is irrelevant with regard to the Fees," because she argues that the utility services are not provided to the Airport. [FAA Exhibit 2, Item 2, Page 18]. The Associate Administrator counters this in noting that the Port has been clear that utility services are provided to the Airport. [FAA Exhibit 2, Item 3, Page 11]. In the Director's Determination, the Director determined that "the costs of the services rendered do not exceed the value of the services provided to PDX." [FAA Exhibit 2, Item 1, Page 21].

Additionally, on Appeal, Complainants claim that the "statutory meaning could not be any clearer: no expenditures of airport revenues are permitted unless they fund airport capital or operating costs in connection with (1) an 'airport', (2) a 'local airport system', or (3) another 'local facility that is owned or operated by the person or entity that owns or operates the airport' which, like items (1) and (2), 'is directly and substantially related to the air

[4] The same holds true for Complainants' submission of the decision *in Clayton County, Georgia et al. v. FAA*, No. 17-10210 as subsequent supportive legal authority. See FAA Exhibit 2, Item 4.

transportation of passengers or property.' In other words, 'directly and substantially related' is an inherent characteristic of an airport and local airport system, but might not be for another 'local facility that is owned or operated by the person or entity that owns or operates the airport.'" [FAA Exhibit 2, Item 2, Pages 37 and 38].

Complainants incorrectly read the statutory requirements under 49 USC § 47107(b) and misunderstand the statutory requirements under § 47107(k)(2)(A). They mistakenly apply the provision from 47107(b)(1)(C) of "directly and substantially related to the air transportation of passengers or property" as applying to 47107(b)(1)(A) the airport and (B) the local airport system. In affirming the Director's position regarding the correct reading 49 USC § 47107(b), the Associate Administrator underscores the use of semicolons in the applicable provisions indicating independent but related clauses.

Moreover, the Associate Administrator agrees with the Port that if the limitation is what Complainants claim - airport revenue can only be expended on facilities directly and substantially related to air transportation of passengers and cargo - then sponsors could not spend airport revenue on facilities or services related to general aviation.[5] Here the Director found the payment of the Fees is permitted under 47107(k)(2)(A) since it reflects the value of services and facilities provided to the Airport.

The Director reasonably reviewed and discussed the three declarations and found the views inconsistent with FAA policy, and his conduct was neither arbitrary nor capricious, as argued by Complainants. Therefore, the Associate Administrator rejects this argument on Appeal.

**Issue 5- Whether the Director erred in not following prior decisions and finding that the Fees are not unlawful taxes.**

Revenue Diversion

On Appeal, Complainants argued that the Director's Determination "is inconsistent with the federal government's prior decisions regarding airport revenue diversion." Complainants take the position that the "requirement of linkage between fees and airport-generated costs has been the policy of the FAA at least since, In the Matter of Revenue Diversion by the City of Los Angeles at LAX, ONT, Van Nuys and PMD, FAA Docket 16-01-96 (1997)." Complainants claim, "PDX receives no goods or services related to the Fees." [FAA Exhibit 2, Item 2, Page 60].

Complainants cite the DOT Inspector General in its *Audit Report – FAA Oversight is Inadequate to Ensure Proper Use of Los Angeles International Airport Revenue for Police Services and Maximization of Resources,* in support of its allegation. Complainants assert the Audit Report "identified...unsupported charges without adequate documentation for services provided by the Los Angeles Police Department (LAPD)" and that "without adequate documentation or support, it is unclear if these charges were used for the capital or operating costs of LAX." [FAA Exhibit 2, Item 2, Pages 60 and 61].

Complainants also referenced a revenue diversion case involving Dade County, Florida, and asserted that "the FAA determined that the payment of construction-permitting fees for airside airport projects violated 49 USC § 47107 and Grant Assurance 25 because the services added little or no value to the construction projects." [FAA Exhibit 2, Item 2, Pages 60 and 61]. Complainants conclude that the same result is necessitated in this case, "the Offsite Stormwater Management and Superfund Remediation Fees add zero value to PDX and should not be funded by Airport revenues." [FAA Exhibit 2, Item 2, Page 61].

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[5] The Director notes the language "directly and substantially related to the air transportation of passengers or property regarding facilities is not stated after 49 USC § 47107(a) (5) requiring that fixed-base operators similarly using the airport will be subject to the same charges.

In response, the Port notes that the LAX case "concerned the City of Los Angeles, the airport sponsor, using airport revenue to subsidize other non-airport city functions." The Port restated the Director that "the issue in the LAX revenue diversion case was the accountability of airport revenue; accountability is not an issue here." LAX was the classic case of City Hall taking revenue from one City department and transferring it to the other without adequate justification.

In addressing, Complainants' reference to the Dade County case, the Port takes the position that the findings in that case "provide no guidance here" because the City is the "only one providing services, and there is no duplication." [FAA Exhibit 2, Item 3, Page 15]. *Dade County* likewise involved two related departments of the County and not two arms-length entities as in this dispute. In that case, the payment of county impact fees were considered diversion where the fees were meant to pay for impacts that had not yet happened. The Inspector General found the fees to be improperly "speculative" and "before the fact." The *Dade* revenue diversion case also looked at building permit fees at Miami International Airport.

With regard to airside building permits, the Inspector General found that in many cases, but especially for airside permits, there were already multiple layers of onsite review by architects, project engineer and the FAA. The Inspector General determined that the building inspector (for whom the building permit fees applied) did not actually do anything other than review logs at the construction site and otherwise rely upon the daily inspection of the project-engineering firm. FAA thus found airside-building fees improper because "little or no service" was provided to the airport in exchange for the fee. Moreover, these fees were essentially unique to the airport, as only an airport would be required to pay for *airside* building permits. The opinion indicated that landside building permit fees, if properly documented and not duplicative, were allowable.

At the Portland Airport, there is no allegation of a sham fee. The City is incurring costs in operating is stormwater facility and allocating those costs uniformly to all ratepayers within the City's jurisdiction. It is not double charging the Port for any costs related to on-site stormwater since that is taken care of by either the Airport itself or the Drainage District. As the Director explained in the Determination "none of the cases cited by the Complainants deal with the issue of whether airport revenues can be used to pay for utility charges when such charges are assessed by an independent municipal utility in a nondiscriminatory manner on all similarly situated ratepayers. The cases are not relevant in that the costs in those cases were being assessed or imposed by airport sponsors, not third parties." [FAA Exhibit 2, Item 1, Page 18].

As noted by the Port, the Director found that "accountability is not an issue here." In drawing distinctions between the City of Los Angeles' matter, the Director noted that "the Port owns and operates PDX and a separate entity, the City of Portland," which "provides and bills the utility charges." [FAA Exhibit 2, Item 1, Page 20]. The Director stated that the City of Portland maintains a transparent, uniform, and non-discriminatory process for charging all ratepayers, including the Port. The Director also found that the City of Portland does not determine from where the Port obtains the money to pay the fees, and the Port cannot determine how the utility fees will be ultimately used. The Director closed out his review by noting that the City of Portland is billing the Port as one of its ratepayers and the Port pays those bills as provided in the City Code, just as every other ratepayer does in paying its utility bill. [FAA Exhibit 2, Item 1, Page 20].

The arguments presented by Complainants on Appeal rely on comparisons between prior decisions that are not similar with the present circumstance. Nor are they on point with the issue on Appeal, namely, "whether airport revenues can be used to pay for utility charges when such charges are assessed by an independent municipal utility in a nondiscriminatory manner on all similarly situated ratepayers." Importantly, in no case does payment of the Fees at issue here constitute improper use of airport revenue as in the LAX and Dade County matters.

The Associate Administrator finds that the manner in which the Director considered and addressed Complainants' arguments relying on prior cases is reasonable and consistent with law, precedent, and policy, and is persuasive. Therefore, reconsideration of the cases cited did not persuade the Associate Administrator to find that the Director erred in the manner in which he addressed and considered the cases presented by Complainants.

Anti-Head Tax Act

As to the *Anti-Head Tax Act* (AHTA), Complainants on Appeal contend that the Director's Determination "fails to reflect the fact that imposition of the Fees on the airlines at PDX violates the [AHTA], 49 USC § 40116(b)." Complainants argue that the "Offsite Stormwater Management and Superfund Remediation Fees do not qualify under any provision of the AHTA." Complainants' argue this point because "the Fees are not property taxes, net income taxes, franchise taxes, or sale or use taxes on the sale of goods or services." They also are not reasonable rental charges, landing fees or other service charges "for using airport facilities of an airport owned or operated" by the City. Complainants thus assert, "the DD should have concluded that the imposition of the Fees on the airlines at PDX violates the AHTA." [FAA Exhibit 2, Item 2, Pages 61-62]. In its Reply, the Port reiterates its previous position that the "the *Anti-Head Tax Act* is inapplicable because the Stormwater and Superfund Charges are not a tax." [FAA Exhibit 2, Item 3, Page 6].

These arguments by Complainants on Appeal are not persuasive. A review of the Director's Determination shows that the Director did consider whether the fees in question violates the AHTA. The Director specifically stated that "the Stormwater charge and the Superfund charge are for services provided to the Airport in exchange for the Airport's payment of the City billed utility charges." [FAA Exhibit 2, Item 1, Page 24].
A review of the arguments surrounding the nature of the utility fees as discussed in the Director's Determination confirms the Director's conclusion that the Fees are utility charges lawfully imposed by the City of Portland on one of its customers, the Airport. Additionally, the record confirms that payment of the Stormwater Utility bill, inclusive of all its components, is an airport operating cost. Payment of the bill allows the City to provide essential environmental services, including maintaining the serviceability of certain public streets, sidewalks, and other infrastructure that contribute to the access to the Airport by the public and airport users.

There is no evidence of the City levying or collecting a targeted tax, fee, or head charge, or other charge on (1) an individual traveling in air commerce; (2) the transportation of an individual traveling in air commerce; (3) the sale of air transportation; or (4) the gross receipts from that air commerce or transportation. Accordingly, the Associate Administrator finds no violation of the AHTA, and affirms the Director's finding on this matter.

## IX. FINDINGS AND CONCLUSIONS

We find that payment of customary utility fees that do not target the airport, that constitute normal operating costs of any entity operating in the jurisdiction, that convey value upon all of the community, including the airport, and that transparently allocate costs on a reasoned basis do not violate Federal law or obligations as they relate to the FAA. It is possible that there may be other utility bills that the Port pays that reflect a rate base that could include overhead items or costs that may or may not relate to the Airport directly. We encourage the Port and the Complainants, to the extent they consider the bills as improperly derived, to pursue this matter as an issue of state or municipal law. Our order is not intended to settle whether the City's methodology ultimately passes muster under state or local law. FAA however is not prepared to say that payment of

customary stormwater and sewer bills, inclusive of related allocated components, constitutes revenue diversion.

On appeal, the Associate Administrator re-examined the record, including the Director's Determination, the administrative record, and the pleadings. Based on this reexamination, the FAA concludes that the Director's Determination is supported by a preponderance of reliable, probative, and substantial evidence, and is consistent with applicable law, precedent, and the FAA policy. The Associate Administrator finds that Complainants' Appeal does not contain persuasive arguments sufficient to reverse any portion of the Director's Determination finding that the Port is not currently in violation of Grant Assurance 25, *Airport Revenues* or 49 USC §§ 47107(b) or 47133, regarding the payment of Fees to the City. Accordingly, the Associate Administrator affirms the Director's Determination.

## ORDER

**ACCORDINGLY,** it is hereby ORDERED that (1) the Director's Determination is affirmed, and (2) the Appeal is dismissed, pursuant to 14 CFR § 16.33.

## RIGHT OF APPEAL

A party to this decision disclosing a substantial interest in the final decision and order of the Federal Aviation Administration may file a petition for review pursuant to 49 USC § 46110, in the United States Court of Appeals for the District of Columbia Circuit or in the Court of Appeals of the United States for the Circuit in which the person resides or has its principal place of business. The petition must be filed not later than 60 days after a Final Agency Decision has been served on the party. [14 CFR Part 16, § 16.247(a).]

Winsome A. Lenfert
Acting Associate Administrator
for Airports

5/15/18
DATE