

BEFORE THE
DEPARTMENT OF TRANSPORTATION
WASHINGTON, DC

LOVE FIELD SERVICE
INTERPRETATION PROCEEDING

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Docket OST-98-4363

REPLY COMMENTS OF THE DALLAS-FORT WORTH INTERNATIONAL AIRPORT
BOARD

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Pursuant to Order 98-9-5, the Dallas/Fort Worth International Airport ("DFW Airport") submits its reply comments on the questions to be decided by the Department in the above-captioned proceeding.

Question 1: Enforcement of the Bond Ordinance is a Valid Exercise of Dallas' Proprietary Rights as a Multi-Airport Operator

The majority of the parties filing comments agree that enforcement of the Bond Ordinance is a valid exercise of Dallas' proprietary rights as a multi-airport operator — these parties include DFW Airport, Fort Worth, ACI/AAAE, San Francisco, American, and the Love Field Citizens Action Committee. DFW Airport in its opening comments pointed out that the proper statement of this first question is whether the proprietary rights exception in 49 U.S.C. §41713(b)(3) to the Transportation Code's preemption provision permits a multi-airport owner to fulfill its contractual commitment to its co-owner of one airport by enforcing traffic distribution rules that limit operations at the second airport it owns. We demonstrated in our opening comments that enforcement of the Bond Ordinance obligations by Dallas to limit Love Field flights to promote DFW Airport service is a valid exercise of

Dallas' proprietary powers as a multi-airport operator. Dallas owns Love Field and is the majority owner of DFW Airport. See DFW Airport Comments, pp. 4, 16.

ACI/AAAE filing comments on behalf of U.S. airports cautioned the Department that "this proceeding has the potential to bar airports exercising control over multi-airport systems from making practical and appropriate decisions -- based on reasonable and permissible local judgments -- regarding the allocation of airport uses and users among available facilities within the management of local proprietors." ACI/AAAE Memorandum, pp. 1-2.

In essence, ACI/AAAE concurs with DFW Airport's position that "the Deregulation Act evidenced no intent by Congress to generally bar a multi-airport proprietor from making the sort of decisions they had historically made regarding which of a number of airports would be available to which user groups." Id., p. 5. The City and County of San Francisco also filed individual comments in support of ACI/AAAE's position.

Dallas, Legend, Continental and Southwest, while arguing preemption of the Bond Ordinance, also acknowledge an airport operator's proprietary rights. However, they seek to limit the exercise of such rights to an airport's efforts to control noise or groundside congestion. Dallas Comments, p. 21-22; Continental Comments, p. 5-6; Southwest Comments, p. 21-23; Legend Comments, p. 88-89. Arguably, it is predictable that the airlines seek to restrict Dallas' exercise of its proprietary rights. Dallas, on the other hand, is seeking assurance and clarification of what proprietary powers it actually possesses.

Despite these assertions to the contrary, the exercise of proprietary rights is not limited to noise and groundside congestion situations, especially in the case of a multi-airport operator such as

Dallas. The appellate courts in City of Houston^{1/} and Western Airlines^{1/} have recognized that a multi-airport proprietor's rights include the prerogative to impose reasonable traffic distribution rules among its commonly-owned airports.

In Western Airlines, the Port Authority's LaGuardia perimeter rule had nothing to do with noise. The court held that its stated purpose was "to reduce ground congestion and maintain LaGuardia as a short and medium haul airport by diverting longer-haul traffic to Kennedy and Newark." 658 F.Supp at 953 (emphasis added). There was nothing nefarious about the Port Authority's goal of "diverting" long-haul traffic to its other commonly-owned airports, just as there is nothing objectionable with Dallas' obligation under the Bond Ordinance to limit Love Field flights and to shift all long-haul traffic to the DFW International Airport.

Even more on point is City of Houston in which the Washington National perimeter rule was upheld because it would help accomplish the airport proprietor's goal of "setting up an orderly plan for the development of National and Dulles..." 679 F.2d at 1195. While Dallas and others try to distinguish City of Houston because the airport proprietor was the FAA, the Second Circuit court "held, as an independent ground, that the FAA's proprietary interest was sufficient to justify the rule." Western Airlines, supra, at 957.

^{1/} City of Houston v. F.A.A., 679 F.2d 1184 (5th Cir. 1982).

^{2/} Western Airlines v. Port Auth. of N.Y. and N.J., 658 F. Supp. 952 (S.D.N.Y. 1986), aff'd, 817 F.2d 222 (2d Cir. 1987), cert. denied, 485 U.S. 1006 (1988).

Indeed, this Department on a number of occasions has stated in clear and unambiguous language that a multi-airport proprietor's rights are not restricted solely to noise and ground congestion concerns. The Department's brief to the Court of Appeals in City of Houston stated: "In view of the important interests of the FAA in assuring an appropriate balance of service between its two airports and in preserving the short and medium haul characteristics of National, the imposition of a perimeter rule would fit securely within the proprietor exemption..." *See* FAA's Brief at 23; City of Houston, *supra*. Contrary to Dallas' views, the Department's statements and the City of Houston and Western Airlines cases do support the proposition that "Dallas can restrict air carriers from using Love Field" to assure the economic success of the regional airport it owns with Fort Worth, to assure an appropriate balance of flights between Love Field and DFW, and to honor its commitments to Fort Worth under the Bond Ordinance. Cf. Dallas Comments, p. 24.^{1/}

^{3/} Even Legend recognizes that an airport's commercial success is a valid ground for imposing a perimeter rule: "The Washington National perimeter rule was imposed as a means of enabling the financial viability of Washington Dulles, the FAA's other, underused and unpopular airport." Legend Comments, p. 90.

Subsequently, the Solicitor General's amicus brief to the Supreme Court in Western Airlines, on behalf of the Department, stated the law as follows: "In a multiple-airport context, imposing restrictions that reduce congestion at a busy airport in order to encourage use of a less crowded airport may be a reasonable way to relieve congestion." Id. at 6. The Solicitor General goes on to opine that an airport proprietor's powers are much broader than "noise regulation only" citing approvingly legislative history stating that proprietary rights encompassed "the normal exercise of proprietor's powers to determine the level and nature of service to be provided at airports." Id. at 9. The CAB and FAA determined in 1964 that Love Field was inadequate to the task of meeting the Dallas/Fort Worth area's aviation needs and that the area should be served through a "single airport." CAB Order E-21341 (Sept. 30, 1964). In this context traffic distribution rules to limit Love Field to short-haul flights and to "divert" long-haul traffic to DFW Airport were and are an appropriate response by the airport proprietor.^{1/}

The efforts by Dallas, Continental and Legend to limit proprietor's rights to noise and groundside congestion cases appears to have their roots in inapplicable cases such as National Helicopter^{1/} and City and County of San Francisco.^{1/} These cases reflect attempts to restrict services at a single airport by the operator of that facility; they do not deal with efforts by a multi-airport operator to impose traffic distribution rules that assign traffic to the different airports under its control. These cases are simply not on point for analysis of Dallas' proprietary rights in the context

^{4/} See also Love Field Citizens Action Committee Comments, pp. 1-3.

^{5/} National Helicopter Corp. v. City of New York, 137 F.3d 81 (2nd Cir. 1998).

^{6/} City & County of San Francisco v. F.A.A., 942 F.2d 1391 (9th Cir. 1991).

of Love Field where Dallas also has majority ownership of DFW Airport.^{1/}

^{1/} Contrary to Legend's protestations to the contrary, Dallas is a multi-airport operator; it does own and control Love and DFW. Legend Comments, p. 88. See DFW Airport Comments., p. 16.

Dallas, Continental, Legend, and Southwest pay homage to the generally accepted standard for the exercise of proprietary rights set by the court in British Airways Board v. Port Authority of New York.^{1/} Dallas Comments, p. 22; Southwest Comments, p. 21; Legend Comments, p. 89; Continental Comments, pp. 6-7. Simply stated, to avoid preemption, the exercise of proprietary power must be "reasonable, non-arbitrary, and non-discriminatory...[that] avoid even the appearance of irrational or arbitrary action." British Airways Board v. Port Authority of New York, 564 F.2d 1002, 1011 (2d Cir. 1977). We concur that this is the appropriate benchmark and are confident that enforcement of the Bond Ordinance by Dallas would meet this standard.

Clearly, the Bond Ordinance limits on interstate Love Field flights are reasonable. The Court of Appeals concluded in New England Legal Foundation^{1/} that a "reasonable" fee -- and hence a "reasonable" rule -- was one "established which is founded upon a principled, non-arbitrary basis." Id. at 169. The Cities' decision to build the DFW Airport and concentrate most interstate services there was "founded upon a principled, non-arbitrary basis:" it was a determined attempt to comply with the CAB's 1964 decision that the Dallas/Fort Worth area be served through a single regional airport. See, CAB Order E-21341. The CAB's decision after a 12-year proceeding and a voluminous record can hardly be challenged as other than a reasoned administrative decision. The CAB strongly endorsed the Cities' decision to build the DFW Regional Airport and transfer all interstate flights to

^{8/} British Airways Board v. Port Authority, 558 F.2d 75 (2nd Cir. 1977).

^{9/} New England Legal Foundation v. Mass. Port Auth., 883 F.2d 157(1st Cir. 1989).

the new facility when it terminated its Dallas/Fort Worth Regional Airport Investigation in Docket 13959. CAB Order No. 73-9-82 (1973).

The Bond Ordinance limitations on interstate flights at Love Field, as implemented by the Cities, are not arbitrary in any way. To comply with the CAB's directive, to assure DFW Airport's financial success and to prevent undue congestion at Love Field, the initial service dichotomy for Love Field between CAB certificated interstate and unregulated intrastate/general aviation flights was sensible. The five-state perimeter (Texas and the four contiguous states) as implemented since passage of the 1979 Wright Amendment is no more arbitrary than the 1,000 or 1,500 mile Washington National or LaGuardia perimeters upheld by the Courts of Appeals in City of Houston and Western Airlines, respectively. Destinations in the four states contiguous to Texas, ranging from 437 miles to the east and 580 miles to the west, represent reasonable bounds for a Love Field short-haul service "perimeter." In fact, this Love Field "perimeter" restriction has already passed judicial scrutiny by the court in Continental v. DOT.^{10/} These limits have also been observed scrupulously by all concerned for the past twenty years -- clear evidence of their reasonableness and acceptance by the airlines, and the cities concerned.

Nor can the Bond Ordinance limits be found discriminatory. As with the La Guardia and Washington National perimeter rules, service is available to the community through another airport controlled by the airport proprietor. In this case, DFW Airport -- a superior, world class facility -- is available for service to Dallas from any U.S. city beyond the five-state perimeter. These flights from long-haul destinations are more appropriate for the DFW Airport, not Love Field; as Dallas'

^{10/} Continental Airlines, Inc. v. Department of Transportation, 843 F.2d 1444 (D.C. Cir. 1988).

"close-in" airport, Love Field should be limited to short-haul flights as it is under the Bond Ordinance.^{11/}

Southwest, in particular, argues that the Bond Ordinance perimeter would burden interstate commerce, thus negating any valid exercise of proprietor's rights. Southwest Comments, p. 24. But City of Houston and Western Airlines clearly establish that this is not so. Interstate commerce is not burdened so long as Dallas can be served through DFW Airport. The imposition of traffic distribution rules by a multi-airport operator that assigns long-haul flights to one airport under its control is not an impermissible burden on interstate commerce as long as unrestricted service is available at one of its airports to serve the city. Western Airlines, *supra*, at 226. See also FAA Rulemaking on Washington National Perimeter Rule, 46 Fed. Reg. at 58036 ("the FAA has long recognized that an airport proprietor with control of two or more airports serving the same area can take reasonable action to determine the nature of service provided to one airport so long as the proprietor's other airport(s) remains available to accommodate fully the other types of operations.")

Finally, some argue that Dallas' enforcement of the Bond Ordinance would violate Dallas' grant assurances given in exchange for federal airport development funds. Continental Comments, pp. 9-10; Legend Comments, p. 92; Dallas Comments, p. 22. See 49 U.S.C. § 47122. The grant

^{11/} Southwest argues that the commuter exception if imposed by a local airport operator would be unjustly discriminatory. But the Wright Amendment, not the Bond Ordinance, imposes the commuter exception. As enforced by the Cities the Bond Ordinance imposes a simple perimeter rule: short-haul flights within the five contiguous states go to Love Field; all other flights go to DFW Airport.

assurance issue was not one of the "federal law issues" raised by the Department in Order 98-8-29, apparently because the Department recognized it was superfluous. The valid exercise of an airport proprietor's rights clearly would not violate any grant assurance and especially Assurance 22, which provides that an airport sponsor will make its airport available on "fair and reasonable terms, and without unjust discrimination." As a multi-airport operator, Dallas does not violate this assurance so long as the other airport it owns, DFW Airport, is available for all types and kinds of service, which it is. New England Legal Foundation, *supra*, at 165.

The FAA recently addressed the relationship between the exercise of proprietary powers and the grant assurances in its Arapahoe County^{12/} decision. See Appendix 17 to DFW Airport Comments. The FAA stated that the Arapahoe County Airport's ban on scheduled service would not violate the grant assurances if it was "permitted under the proprietor's exemption only if it were reasonable, non-arbitrary and non-discriminatory." Director's Decision at 30. While the FAA found that Arapahoe's restriction did not meet this standard, the FAA decision points out that a multiple airport operator can impose restrictions on air traffic, such as a perimeter rule, that "could assure...scheduled service" between the city at issue "and any point in the United States." Id. at 30. The FAA was restating the obvious: a valid multi-airport operator's perimeter rule will not violate any sponsor grant assurance.

^{12/} Centennial Express Airlines, Inc. v. Arapahoe County Public Airport Authority, Docket No. 16-98-05 (Director's Determination (1998)).

Question 2: The Wright and Shelby Amendments do not Preempt the Exercise of Dallas' Proprietary Rights at Love Field

In DFW Airport's opening comments, DFW Airport, supported by American and Fort Worth, argued that the Wright and Shelby Amendments contain prohibitions on conduct of the Department and the carriers, not airport proprietors. Moreover, the Amendments do not contain any federally-guaranteed mandates to fly from Love Field to any points in the United States which conflict with and, accordingly, would preempt Dallas' exercise of its proprietary rights to restrict service from Love Field. The Amendments do not contain any express preemption language. Nor is there any language in the legislative history of either Amendment that would lead to a finding of implied preemption. To the contrary, the Conference Report on the Wright Amendment demonstrates that such proprietary rights were preserved:

The conferees state that the preemption and proprietary rights provisions of the Federal Aviation Act, sections 105(a) and (b), respectively, apply to the authority to serve Love Field on interstate flights authorized by the amendment.

H.R. Conf. Rep. No. 96-716, at 26 (1979). Thus, Dallas' enforcement of the Bond Ordinance restrictions on interstate service from Love Field is not inconsistent with the Wright Amendment and preemption of that right should not be implied.

These arguments were thoroughly thrashed out by DFW Airport in its opening comments (at pp. 23-33) and those arguments provide sufficient response to the comments submitted by Continental,^{1/} Legend^{1/} and Dallas,^{1/} each of which argue that Dallas' proprietary right to limit Love

^{13/} Continental couches its comments on Question 2 in terms of conflict preemption. Continental Comments, p. 12. The absence of an actual conflict between federal and state law and the fact that Dallas' exercise of its proprietary powers would not pose an obstacle to the accomplishment

Field service was in fact preempted by Federal law. Thus, they will not be repeated at length here.

However, Southwest does present a new implied preemption argument that merits some response.

Southwest argues that preemption exists "[a]t least with respect to the geographical scope of service described in subsection (c) of the Wright and Shelby Amendments because "[u]nlike subsections (a) and (b) of the Amendments, which forbid certain actions by federal authorities . . . subsection(c) constitutes an affirmative grant of authority." Southwest Comments, p. 26. As this statement demonstrates, Southwest's preemption argument, at best, applies only to flights that come within the scope of subsection (c)'s exemption for certain flights in the seven-state Love Field service area. It does not apply either to interstate flights to and from points beyond that geographic area or to flights with commuter aircraft conducted under Section 29(a)'s commuter exemption.

The DFW Airport agrees with Southwest that subsections (a) and (b) contain prohibitions on the powers of the federal agencies, but subsection (c) is merely one of the three exceptions to those prohibitions. As stated in subsection (c):

(c) Subsections (a) and (b) shall not apply with respect to, and it is found consistent with the public convenience and necessity to authorize, transportation of individuals,

and execution of Congressional objectives is specifically addressed at pages 31-32 of DFW Airport's opening Comments. Also see generally pp. 25-29.

^{14/} Legend's argument that Dallas is prohibited from placing restrictions on Love Field is two fold: (1) it is argued that Congress and the FAA have exclusive, plenary authority over air carrier rates, routes, and services, and nothing in the Wright and Shelby Amendments give local control over Love Field operations; and (2) such restrictions are inconsistent with Dallas' grant assurances. Legend Comments, pp. 93-94. DFW Airport has amply demonstrated at pp. 25-29 of its opening comments that Dallas has the right to restrict operations at Love Field without interference from federal regulatory agencies. The grant assurance issue is discussed at pages 8-9 above.

^{15/} Dallas' preemption arguments are, for the most part, similar to those offered by Continental, which are addressed in footnote 13 above. However, Dallas also claims that Congress rejection of a version of the Shelby Amendment that would have given the Dallas City Council authority to prohibit certain flights using reconfigured aircraft at Love Field evidences an intent to limit Dallas' exercise of its proprietary powers. Dallas Comments, p. 31. The Conference Report, however, does not explain or in any manner discuss Congress' reasons for deciding not to adopt this language. Accordingly, this action cannot properly be construed as proof of broad congressional intent to restrict Dallas' proprietary powers.

by air, on a flight between Love Field, Texas, and one or more points within the States of Louisiana, Arkansas, Oklahoma, New Mexico, and Texas by an air carrier, if (1) such air carrier does not offer or provide any through service or ticketing with another air carrier or foreign air carrier, and (2) such air carrier does not offer for sale transportation to or from, and the flight or aircraft does not serve, any point which is outside any such State. Nothing in this subsection shall be construed to give authority not otherwise provided by law to the Secretary of Transportation, the Civil Aeronautics Board, any other officer or employee of the United States, or any other person. (Emphasis added)

Thus, if subsection (c) constitutes any “grant of authority” then it is only in the sense that air transportation from Love Field to the contiguous states is “found consistent with the public convenience and necessity” — a condition precedent to the authorization of flights by issuance of certificates by the Department. Subsection (c) is referring to the authority inherent in section 401(d) of the ADA; the Wright Amendment does not itself create authority for a federal agency to prescribe the exact service which could be provided from Love Field. Rather than establishing a mandate for an airline to fly from Love Field, subsection(c) says that the prohibition on interstate transportation from Love Field specified in the Wright Amendment will not apply to air transportation to the contiguous states, and that certificates for such transportation may be issued when found to be consistent with the public convenience and necessity. As the Conference Committee Report (quoted by Southwest) says: “the conferees intend that the Board will consider only whether the applicant is fit, willing and able to perform . . . and whether such transportation is within the scope of authority granted by this legislation.” Southwest Comments, p. 27.

Southwest relies on excerpts from CAB Order 79-9-192 (September 28, 1979) to argue that Congress understood, at the time the Wright Amendment was passed, that the Cities could not use their proprietary powers “in effect, [to] veto certification of Southwest at Love Field.” Southwest Comments, pp. 27-28. In the sentence immediately following that quoted by Southwest, however,

the CAB stated as follows with respect to Dallas' proprietary powers:

Second, our action granting Southwest's AME application does not prevent DFW from exercising whatever legitimate proprietary rights it has. The issue of the extent to which DFW's proprietary rights may be exercised is under consideration in the other two Love Field cases, and we will reserve discussion of the point until that opinion.

CAB Order 79-9-192, p. 9. In short, the Department did not in the Southwest Order conclude that Dallas' proprietary powers were preempted by any Congressional action.

The Wright Amendment — which merely places limits on the certification of certain air transportation — is not in conflict with the exercise of legitimate proprietary rights or specifically with the mutual obligations of the Bond Ordinance. The *exceptions* to the prohibitions imposed by the Wright Amendment do not require or sanction air carriers to engage in conduct prohibited by the airport proprietor. Likewise, the imposition by Dallas of limitations that prevent an air carrier from exercising their full authority under the CAB's grant of certificate authority does not constitute a “veto” of the certification action. Carriers' certificate authority as limited by the Wright Amendment and the Cities' rights as proprietors can and should coexist. The Department described the relationship in its Order 98-7-6 of July 8, 1998:

Some of the objectors argue that American, in particular, cannot operate interstate service to or from Love Field because of a contractual agreement that it has entered into, and thus, the Department should deny its applications. This argument fails to take into account that the Department does not -- and may not -- award specific city-by-city authorizations for domestic air service, and the certificates incorporate only the restrictions imposed by federal statute on airline operating authority. Air carriers are often constrained in undertaking operations at various airports -- e.g., because of unavailability of facilities or services or because of lack of convenient take-off and landing slots (such as at slot-controlled airports). The

existence of such constraints does not, however, dictate that the carriers' underlying Federal rights to serve that point should be modified or restricted. (p. 6).

Thus, the fact that a carrier has broad certificate authority to fly does not mean that Dallas cannot prohibit particular service in the valid exercise of its proprietary powers. If certification had such a preemptive effect then not only Dallas' restrictions relating to Love Field, but all of the various perimeter rules upheld by the courts, as discussed in DFW Airport's opening comments, would be improper exercises of veto power over the CAB's (now the Department's) certification decisions. This, of course, is not the case. Dallas, like other multi-airport owners, is not preempted in the exercise of its proprietary rights from imposing terms of service that are more restrictive than the Wright and Shelby Amendment exceptions.

Question 3: The Shelby Amendment does not Authorize Long-Haul Service from Love Field

The third issue raised by the Department is whether a carrier may engage in long-haul service from Love Field to any city in the United States using jet aircraft with a passenger capacity of 56 or fewer seats. Of the ten parties filing comments in this proceeding, the majority who take a position on this issue^{16/} agree that the Shelby Amendment does not authorize long-haul service under the current statutory scheme. Only two -- Legend and Continental -- have argued otherwise. Not surprisingly, those are the two air carriers that currently have plans to offer such long-haul service from Love Field if the Department finds such service permissible under the Shelby Amendment.

^{16/} American, Fort Worth, and DFW Airport — the other commenters, Dallas included, have not taken a position on

this issue.

As a threshold matter, DFW Airport contends that if the preceding question is answered consistent with our analysis, then there is no need for the Department to consider this question. Even if the question is reached, however, as DFW Airport pointed out in its opening comments, the Wright Amendment's commuter exception did not authorize long-haul flights. That conclusion was based on the Department's finding in Order 85-12-81 that the commuter exemption must be read consistent with Love Field's congressionally directed short-haul mission as well as the Court of Appeals' affirmation of that conclusion in Continental v. DOT, *supra*. The Shelby Amendment allowed reconfigured aircraft to operate under the commuter exception, but did not change the character of "commuter" flights under the Wright Amendment.

Legend initially argues that the Department decided in the 1996 Dalfort Aviation opinion letter that "any plane" originally designed to hold 56 passengers or fewer, even a regional jet, could fly from Love Field to any destination. Legend Comments, p. 95. Legend, however, has misinterpreted the Dalfort Aviation opinion letter. Because the Department opined in that letter that designed capacity rather than reconfigured capacity was the controlling factor in determining whether an aircraft fell within the Wright Amendment's commuter exemption, the Department never reached the question whether regional jets or reconfigured jets with 56 or fewer seats could fly anywhere from Love Field under the commuter exemption. See DFW Airport Comments, pp. 39-40.

Moreover, Legend totally ignores the factual basis in the opinion for the Department's conclusion that would itself argue against long-haul flights under the commuter exemption; i.e., that aircraft designed for 56 or fewer passengers had a range that precluded long-haul service from Love Field. Dalfort Opinion, pp. 3-4. As stated by the Department, the reconfigured B-737, B-727, and DC-9 aircraft that Dalfort wished to fly from Love Field failed to qualify under the commuter exemp-

tion not only because they were designed to hold more than 56 passengers but because they "have a greater range than the typical 56-seat aircraft, inconsistent with Congress' desire to limit Love Field service to short-haul service." Id. at p.4.

Thus, the Dalfort Aviation opinion letter was not an endorsement of service from Love Field "to any destination" provided that the aircraft used was designed for 56 or fewer passengers, as Legend suggests. The letter only addressed the relationship between seating capacity and qualifications for the commuter exemption, which qualification Legend's reconfigured aircraft at the time could not satisfy. Consistent with the Department's decision in the Love Field Amendment Proceeding, Order 85-12-81, as affirmed by the Court in Continental Air Lines, Inc. v. Department of Transportation, 843 F.2d 1444 (D.C. Cir. 1988) ("Continental"), the Department adopted a definition that allowed flights with those commuter aircraft that have a short-haul range consistent with the purpose of the Love Field Amendment.

Legend next argues that the Department agreed in its brief in the Dalfort appeal, Astrea Aviation Servs., Inc. v. Department of Transportation, No. 96-60802 ("Astrea") that long-haul service from Love Field with regional jets is permitted. Legend Comments, p. 95. Again, Legend is reading a few words in the Department's brief out of context. DFW Airport would direct the Department's attention to pages 20 and 21 in the same brief, where the General Counsel rejected Dalfort's contention that Congress' endorsed the use of Love Field for long-haul service and acknowledged that the commuter exemption was limited to aircraft providing short-haul service from Love Field. As stated by the Department:

Dalfort's assumption is contrary to the practical impact expected of the commuter aircraft exemption at the time of the amendment's enactment. Given the types of aircraft that then satisfied the 56-seat limitation . . . Congress would have expected

a 56-passenger capacity limitation in practice to have limited Love Field service at that time to short-haul turboprop aircraft.

Legend and the Department cannot have it both ways. If the commuter exemption is limited to short-haul service from Love Field then regional jets providing long-haul service obviously cannot fall within the scope of the exemption. Moreover, it was the use of reconfigured large jets from Love Field, not the use of regional jets, that was at issue in the Dalfort appeal. Dicta offered by the Department's General Counsel in a brief addressing another subject may not override the law on this subject as interpreted by the Department in the 1985 Love Field Amendment Proceeding as affirmed by the D.C. Circuit in the Continental^{17/} case.

The same can be said of Legend's claim of support from the wording of the Department's agreement last year to dismiss Legend's appeal of the Astrea opinion once the agency determined that the issue was allegedly moot after the passage of the Shelby Amendment. Legend Comments, p. 95. Such action on the part of the Department's General Counsel does not overrule the formal agency Order issued by the Department in the earlier Love Field Amendment Proceeding. Apparently, the Department itself does not view the General Counsel's actions in Astrea as determinative on the short-haul nature of the commuter exemption or it would not have requested comments on this issue in this Interpretation Proceeding. If the short-haul issue had been conclusively determined in that ex parte fashion, this opportunity to submit comments addressing the permissive scope of the Shelby Amendment on flights under the commuter exemption would be a sham - a meaningless exercise

^{17/} Infra, at p. 10.

conducted to give the appearance that the Department will not make up its mind until it objectively considers the views of all parties on this matter. We would not attribute such an improper motive to the Department.

Continental's contribution regarding this issue is the argument that, because Congress was aware of the long-haul service proposed by Legend when it enacted the Shelby Amendment, it necessarily approved such service with the amended statutory language. Continental Comments, pp. 14-15. The wording of the Shelby Amendment, however, does not expressly authorize long-haul service. To the contrary, it says nothing regarding the short-haul/long-haul service issue. Nor is the issue mentioned in the discussion of the Shelby Amendment in the Conference Report. Indeed, Continental has not identified any Congressional language affirmatively approving such service.

The Department should not imply a reversal of a long standing statutory interpretation adopted by both this agency and the Court in the Continental case unless Congress has unmistakably indicated an intent to change the status quo. Sea-Land Serv. v. United States, 874 F.2d 169, 172-73 (3rd Cir. 1989); aff'd, 919 F.2d 888 (1990), cert denied, 500 U.S. 941 (1991); Arai v. Tachibana, 778 F. Supp. 1535, 1543 (D. Hawaii 1991). The fact that Congress did not see fit, when it passed the Shelby Amendment overruling the Dalfort Opinion, to add language expressly disapproving the prior short-haul limitations on Love Field service, as set forth in Continental, suggests that Congress did not intend to alter the law in that respect. See id. "This omission is of pivotal interpretive significance; for. . . it is well settled that amendments by implication (like repeals by implication) are disfavored." National Resources Defense Council v. Hodel, 865 F.2d 288, 318 (D.C. Cir. 1988), citing United States v. Welden, 377 U.S. 95, 108 n.12 (1963).

Question 4: Federal Aviation Law does not Preclude a Major Carrier from Binding Itself

Through its Use Agreements with the DFW Airport Board Not to Exercise the Authority Granted by its Certificate to Operate Flights from Love Field that are Consistent with the Wright and Shelby Amendments

In its opening comments, DFW Airport Board^{18/} argued that federal aviation law does not preclude enforcement of the DFW Use Agreement's provision by which a signatory carrier agrees to operate all its Dallas/Fort Worth area flights through the DFW International Airport. The overwhelming majority of the responding parties — Southwest, Dallas, Fort Worth, ACI/AAAE, San Francisco, Greater Orlando Aviation Authority and Love Field Citizens Action Committee — agree with DFW Airport's position.^{19/} First, the Use Agreements do not trigger federal preemption because they are private contractual agreements even to the extent that they incorporate Bond Ordinance obligations. Second, the Use Agreements constitute valid arms-length agreements; the signatory carriers agreed to limit exercise of their federally-granted authority in exchange for valuable economic concessions from DFW Airport. In a deregulated environment, federal law should not and does not prohibit such a contractual undertaking. See DFW Airport Comments, pp. 43-44.

ACI/AAAE maintains that "this right to enter into contracts [that an airline will not exercise a federal right it holds] is fundamental." ACI/AAAE Comments, p. 7. In an analogous situation ACI/AAAE points out that in the Aircraft Noise and Capacity Act of 1990, airports and airlines are

^{18/} In this Section, for the sake of clarity, DFW Airport will be referred to as "the Airport Board."

^{19/} Even American agrees with this position provided that the Bond Ordinance is a valid exercise of Dallas' proprietary powers restricting all airlines' use at Love Field.

allowed to enter into an agreement to restrict Stage 3 aircraft types although airport restrictions on Stage 3 aircraft are otherwise prohibited. Id. at p. 7.

Southwest's position on this issue is straight-forward: "We know of no provision of federal law which would invalidate the voluntary commitments made by those carriers who have chosen to bind themselves through use agreements with the DFW Airport Board not to exercise authority to operate flights from Love Field." Southwest Comments, pp. 2-3. Southwest correctly observes that at DFW Airport, airlines that do not wish to undertake the financial and other obligations of a "signatory" carrier may nonetheless serve the airport as a "non-signatory" carrier. Id.

American has agreed with the City of Fort Worth and the Airport Board that the covenants in Section 9.5 of the Bond Ordinance, which restrict scheduled interstate service at Love Field, are enforceable. All three parties are in complete agreement that Dallas acted within its proprietary powers and rights when it contracted and covenanted with Fort Worth to limit Love Field when the two cities, acting pursuant to a CAB Order and with the CAB's and FAA's concurrence, formed their joint venture to finance, build, and operate DFW Airport. American, Dallas and the Airport Board each believe that the provisions of the Bond Ordinance limiting interstate and international traffic at Love Field are enforceable and should be enforced. The only point of difference between the Airport Board and American concerns the enforceability of the Use Agreement. As explained in subsequent paragraphs, the Airport Board contends that the Use Agreement, which incorporated the Bond Ordinance, is binding upon the parties regardless of whether the Bond Ordinance is enforceable as an ordinance; once the Bond Ordinance was incorporated into the Use Agreement, it lost its "statute rank" and became a contractual term like any other. As a contract term, the Bond Ordinance became an expression of the parties' intent for the signatory airlines to use DFW Airport for all of its

certificated air-carrier services, and the signatory airlines are bound by that agreement. By virtue of American's initial comments, the Airport Board presumes that American does not share this position. See American Comments, pp. 50-72.

Continental, along with American, argue that the Use Agreement requirement that all Dallas/Fort Worth area service be provided through DFW Airport is preempted. In their view, this does not present a simple breach of contract case, because the Use Agreement refers to the Bond Ordinance—an “outside source.” Continental Comments, p. 23; American Comments, pp. 56-57. Thus, the argument goes, American Airlines v. Wolens^{1/} does not apply and the entire contractual arrangement stands or falls with the Bond Ordinance. The critical assumption in this argument is that the Bond Ordinance is an outside source. This assumption is incorrect.

^{20/} 513 U.S. 219 (1995)

It is well established that parties may choose to use parts of a statute to define their relationship without bringing the full force of the statute to bear.^{1/} When a contract is made with reference to the performance of certain acts prescribed by ordinance, the ordinance becomes a part of the agreement.^{1/} Once incorporated into an agreement by reference, the statute or ordinance “does not have ‘statute rank’; rather, it is merely a part of the contract, a term like any other.”^{1/} Further, only the statute’s terms apply, not judicial determinations regarding the statute and its application.^{1/} The reason is that once a statute is incorporated into a contract, the intention of the parties is paramount and effect should be given to the parties’ intention even if it is contrary to what would

^{21/} Craddock Internat’l Inc. v. W.K.P. Wilson & Son, Inc., 116 F.3d 1095, 1107-8 (5th Cir. 1997).

^{22/} Overton v. City of Houston, 564 S.W.2d 400, 403 (Tex.Civ.App.—Houston [1st Dist.] 1978, *writ ref’d n.r.e.*).

^{23/} Craddock, 116 F.3d at 1107 (reversing trial court’s interpretation that incorporation of statute “activated” statute—once incorporated, it is a term like any other); *Seguros “Illimani” S.A. v. M/V Popi P*, 929 F.2d 89, 92 (2d Cir. 1991); *Croft & Scully Co. v. M/V Skulptor Vuchetich*, 664 F.2d 1277, 1280 (5th Cir. 1982); *Pannell v. United States Lines Co.*, 263 F.2d 497, 498 (2d Cir. 1959); *Toshiba Internat’l Corp. v. M/V “Sea-Land Express”*, 841 F.Supp. 123, 125 (S.D.N.Y. 1994).

^{24/} Craddock, 116 F.3d at 1107.

control if the statute were applicable.^{1/}

The Airport Board and the signatory airlines to the Use Agreement chose to use parts of the Bond Ordinance to define their relationship, making the Bond Ordinance part of the Use Agreement. Once the Bond Ordinance was incorporated into the Use Agreement, it lost its “statute rank” and became a part of the agreement, a term like any other. Thus, there is no “outside source” that must be referred to in order to determine the parties' intentions. Questions about the Bond Ordinance's effect as an ordinance does effect the Bond Ordinance as an expression of the parties' intentions. The Airport Board and the signatory airlines unquestionably intended for all of signatory airlines' certificated air carrier services to be transferred to DFW Airport so that the signatory airlines would not be providing any such services at another Dallas-Fort Worth area airport that would be competitive with or in opposition to the optimum development of DFW Airport.

^{25/} Croft & Scully Co., 664 F.2d at 1280; Pannell, 263 F.2d at 498 (stating that parties normally would not have been able to reduce liability by describing shipment inconsistent with statute; but where statute applies as incorporated terms, then parties are free to modify it).

Specifically, Section 3.2 of the Restated Use Agreement (signed by Continental, American and others) provides that the airline agrees it “shall conduct its Certificated Air Carrier Services serving the Dallas-Fort Worth area *to, from and at the Airport, to the extent required by the terms of the 1968 Regional Airport Concurrent Bond Ordinance.*”^{1/} Section 9.5 of the 1968 Regional Airport Concurrent Bond Ordinance provides, beginning in the second paragraph:

^{26/} Appendix 23 (emphasis added).

A....[I]n order to promote, by voluntary agreement, the full use of the Regional Airport at the earliest practicable date by commercial air carriers, the Board shall be authorized to establish policies and to make uniformly applicable and non-discriminatory agreements with air carriers regarding the instances, if any, in which the above power granted to the Board will or will not be exercised, and no limitations on such covenant shall be promulgated or its application in specific instances waived if the result thereof would be to violate such agreements. **And in no event, by agreement with air carriers or otherwise, shall limitations or waivers of such covenant allowing a commencement or resumption of Certificated Air Carrier Services at any other airport or airports be adopted** if the result thereof would be the reduction in Pledged Revenues below the amount required to satisfy the provisions of Section 9.4 hereof, **unless the City** (or Cities in the case of more than one airport) **shall also pledge to the payment of all Bonds**, by appropriate official action, **such part of the revenues from the airport or airports to which such services are to be transferred, resumed or originally commenced, as will justly compensate the Regional Airport** (at rates then in effect thereat for similar services), **for the loss of such services and the gross Revenues therefrom.** [emphasis added].

B. In addition to the covenant of the Cities contained in paragraph A, next above, regarding the transfer of Certificated Air Carrier Services, the Cities further agree that they will through every legal and reasonable means promote the optimum development of the lands and Facilities comprising the Regional Airport at the earliest practicable date, thus to assure the receipt of Gross Revenues therefrom to the maximum extent possible, and **neither the Cities nor the Board will undertake with regard to the Regional Airport, Love Field, GSIA, Meacham Field or Redbird, any action, implement any policy, or enter into any agreement or contract which by its or their nature would be competitive with or in**

opposition to the optimum development of the Regional Airport and the use of its lands and Facilities at the earliest practicable date; and none of the airports of the Cities shall be put to or developed for any use which by the nature thereof the optimum use and development of the Regional Airport, including its air and land space, at the earliest practicable date will be impaired, diminished, reduced or destroyed. It is provided, however, that nothing in this paragraph shall be construed to prohibit the promotion and full development of the operation of reasonable Aircraft uses (other than Certificated Air Carrier Services) at Love Field, Redbird and Meacham Field, or Aircraft operations of any type at GSIA if the same shall ever be made a part of the Regional Airport. Otherwise, Aircraft uses at GSIA shall not be permitted after the Regional Airport becomes operational. [emphasis added].

The 1968 Regional Airport Concurrent Bond Ordinance also provides, at Article 2G, the following definition of Certificated Air Carrier Services (emphasis added):

“CERTIFICATED AIR CARRIER SERVICES” mean aircraft operations of the following types when operating on a regular and continuing basis, to-wit:

- (1) **interstate services conducted by commercial air carriers according to published flight schedules and holding certificates of public convenience and necessity or similar evidences of authority issued by the Civil Aeronautics Board of the United States of America or any successor agency thereto;**
- (2) services conducted by foreign air carriers according to published flight schedules holding permits or similar evidences of authority issued by the Civil Aeronautics Board or any successor agency thereto or by any other

agency or department of the United States of America; and

(3) intrastate services conducted by commercial air carriers according to published flight schedules and holding certificates of public convenience and necessity or similar evidences of authority issued by the Texas Aeronautics Commission of the State of Texas or by any successor agency.

It is evident by the emphasized portions of the agreement, including the provisions of the Bond Ordinance incorporated into the agreement, that the Airport Board was authorized to enter into agreements with air carriers to transfer their certificated services to DFW Airport. The Airport Board, however, was precluded from entering into any agreement that would allow any airline to resume services at any other airport unless arrangements were made for revenues acquired by the competing airport to compensate DFW Airport for its lost revenues. By signing the agreement, the signatory airlines expressly agreed, pursuant to these provisions, to transfer all certificated air carrier services to DFW Airport and not undertake any action that would be competitive with or in opposition to the optimum development of DFW Airport.

Likewise, the Use Agreement does not trigger ADA preemption because it is a private contractual obligation. In American Airlines, Inc. v. Wolens, 513 U.S. 219 (1995), even though the Supreme Court noted that plaintiffs' actions for common law breach of contract directly involved "routes, rates, and services" of the airline, those claims were not preempted by the ADA because terms and conditions of a contract are "privately ordered obligations" not amounting to a State's prohibited enactment or enforcement of any law, rule, regulation or other provision having the force and effect of law. Id. at 228-29. The Court further stated: "We do not read ADA's preemption

clause. . . to shelter airlines from suits alleging no violation of state-imposed obligations, but seeking recovery solely for the airline's breach of its own self-imposed undertakings. . . . A remedy confined to a contract's terms simply holds parties to their agreements. . . ." Id. at 229. Because the Use Agreements at issue in this proceeding are "self-imposed contractual undertakings" by the major airlines using airports in the Dallas or Fort Worth area, Wolens controls.

To buttress its position, American argues that it was "forced" to sign the Use Agreements and relocate to DFW Airport, implying that the arrangement is unfavorable to American. American Comments, p. 49. But, as noted, the Airport Board also has arrangements with non-signatory airlines to use DFW Airport. As Southwest pointed out, American could have elected to be a non-signatory airline.²⁷ Signatory airlines, however, receive substantial benefits — discounted landing fees, favorable rental rates, discounted fuel, participation in a capital trust account, and the right to approve all capital improvements at DFW Airport. Specifically, American, as with other signatory airlines, receives a 15% reduction on landing fees, which have yielded a benefit to American of approximately \$49,906,832 over the last five years. Non-signatory airlines do not receive any reduction.

Further, by being a signatory airline, American was able to sign a long-term lease and receive a concession credit. For example, American's rental rate is offset with the concession revenue based on the percentage of enplanements at the airport. Thus, if American has 70% of the enplanements, then 70% of the concessions are offset from its rent. Consequently, American actually has negative rent. It pays no terminal rent, and the excess concession credits are applied to its landing fees, which

²⁷/ Southwest Comments, pp. 29-30. This discussion equally applies to all signatory airlines, including Continental.

further reduces American's landing fees. The concession credit alone has yielded American \$52,861,104 over the last five years. In addition to these benefits, American and other signatories are allowed to participate in DFW's fueling consortium. This permits American to purchase its fuel at DFW at a discount.

Further, American, like other signatory airlines, enjoys some measure of influence over DFW Airport's capital improvements. To illustrate, American is allowed to participate in DFW's Capital Trust Account. This account consists of a portion of the revenues generated by DFW Airport, which are designated for signatory airlines to use for capital improvements at the signatory airlines' direction. Only signatory airlines have authority to use these funds to make capital improvements at DFW Airport. Lastly, American, as a signatory airline, has the contractual right to approve all capital improvements at DFW Airport. The Airport Board cannot issue revenue bonds without first obtaining majority-in-interest ("MII") approval. This means that in order for the Airport Board to make capital improvements, the majority of the signatory airlines must approve the capital improvement, and a combination of the signatory airlines representing 75% of the enplanements at DFW Airport must approve the capital improvements. Based upon the current percentages of enplanements at DFW Airport, American Airlines must approve all joint revenue, bond-funded capital projects at DFW Airport.^{1/}

^{28/} After having received and accepted significant benefits derived from the Use Agreement, American is estopped

from contending that §3.2 of the Use Agreement would be void and unenforceable on the grounds that the signatory airlines contracted not to operate flights from Love Field, as allowed by the Wright and Shelby Amendments. The principle of *quasi estoppel* precludes a party from asserting, to another's disadvantage, a right inconsistent with a position it has previously taken. *Enochs v. Brown*, 872 S.W.2d 312, 317 (Tex. App.-Austin 1984, no writ); *Steubner Realty 19, Ltd. v. Cravens Rd., Ltd.*, 817 S.W.2d 160, 164 (Tex. App.--Houston [14th Dist.] 1991, no writ).

In exchange for all these benefits, signatory airlines agree among other things to use DFW Airport exclusively for all their certificated air-carrier services serving the Dallas-Fort Worth area. Continental and American, however, now desire to continue to receive the benefits of a signatory airline but also receive the benefits enjoyed by non-signatory airlines. American and Continental want to continue using DFW Airport at the reduced rates provided to signatory airlines and possess some authority over decisions at DFW Airport, while at the same time, being unfettered to fly out of any airport in the area. The airlines argue that only if the Bond Ordinance, which was expressly incorporated into the Use Agreements, is enforceable against non-signatory airlines, should the Use Agreement be enforced against the signatory airlines. This argument wholly ignores the contractual undertakings of the parties.

American argues that if Section 9.5 of the Bond Ordinance is preempted, then it should be treated as if Section 9.5 does not exist, hence removing American's requirement to comply with those "non-existent" and "void" terms under Section 3.2 of the Use Agreement. However, as previously discussed, if the Bond Ordinance is pre-empted because it is an improper restriction on rates, routes or services imposed by the City of Dallas and/or Fort Worth, it is only invalidated as an **ordinance**. It is still enforceable as a contract term.^{4/}

American's reliance on Skydiving Center v. St. Mary's City Airport Comm., 823 F.Supp. 1273 (D. Md. 1993) is misplaced. In that case, the Skydiving Center agreed to "comply with all federal, state or local laws, county or local ordinance, rules or regulations, now or hereafter enforced,

^{29/} See n. 23, *supra*.

which may be applicable to the operation of its business at the Airport.” Agreeing to whatever laws, statutes or ordinances that may be applicable is far different from expressly incorporating a specific ordinance into an agreement as an expression of the parties’ intention. The former simply states that a party will be a good, law abiding citizen; the latter expressly provides that a specific ordinance is a part of the agreement and its provisions contractually binding on the parties.

It is also argued that Section 9.5 of the Bond Ordinance only requires legally permissible steps for the orderly, efficient and effective phase-out at Love Field and transfer of all certificated air-carrier services to DFW Airport. American Comments, p. 56. This position adds nothing for two reasons. First, it wholly ignores that at the time the Bond Ordinance was passed, the CAB -- the federal agency in charge of regulating certificated air-carrier services -- was requiring Dallas and Fort Worth to build DFW Airport and serve the area exclusively through that airport. CAB Order E-21341 (Sept. 30, 1964). Second, it ignores that a private agreement between American and the Airport Board is legally permissible under Wolens. Thus, the Airport Board’s actions are not inconsistent with the Bond Ordinance.

It is further argued that the Airport Board’s attempt to enforce the Use Agreement solely against signatory airlines runs afoul of federal law prohibiting an airport operator from discriminating against an air carrier in the use of its facilities where those facilities have been federally funded. The federal obligation to abide by grant assurances referred to by American prohibits an airport operator from discriminating against air carriers in the use of its own facilities. In this case, the Airport Board is not discriminating against American, Continental or any other airline in the use of DFW Airport’s facilities. Thus, these arguments have no merit.

There are also claims that enforcement of the Use Agreement provisions violates federal law prohibitions against a grant of exclusive rights for the use of any airport. American argues that Dallas made assurances that it would “permit no exclusive right for the use of Love Field . . .”. American Comments, p.59. This argument misses the mark. Neither Dallas, Fort Worth nor the Airport Board is granting exclusive rights to any airline to exclusively use any airport. There are several airlines using Love Field, just as there are numerous airlines using DFW Airport. American’s contention that if it is required to honor its contractual obligation somehow amounts to Dallas, Fort Worth or the Airport Board granting exclusive rights for use of an airport is ludicrous. These airports are open to any airline that has not voluntarily ceded its opportunity to use them.

Lastly, it is argued that parties cannot avoid federal discrimination laws by means of a private contract between themselves, if it contravenes statutory policy. The United States Supreme Court held in Wolens, however, that airlines may contractually agree to limited their rates, routes and services by agreement. Further, this argument ignores that an airport owner’s proprietary rights are expressly recognized in the ADA, as fully discussed in the Airport Board’s comments to the First Question. Consequently, the Use Agreements are expressly permitted by the ADA and do not contravene any ADA statutory policy.

QUESTION 5: The Wright Amendment Prohibits the Offering of Connecting Service to Points Beyond the Seven-State Service Area even when the Love Field Leg is Operated with Regional Jets

The final question posed by the Department is whether an airline may offer connecting service from Love Field using aircraft with 56 or fewer seats to points outside the seven-state Love Field service area if a city within that area is used as a connecting point. Once again, Continental and Legend are the only parties to argue that such long-haul service should be allowed. It is significant

that even Southwest, as well as American, Dallas, Fort Worth, and the DFW Airport, believes that Continental's advertisements offering through flights from Love Field to the world evade the prohibition against holding out, advertising, or promoting Love Field service to points beyond the Love Field service area.^{30/} Surely, as Southwest has argued, Congress did not intend to allow carriers that fly regional jets with 56 or fewer seats from Love Field to offer long-haul connecting service while at the same time preventing Southwest, which flies large jets within the Love Field service area, from engaging in such sales practices. As stated by Southwest, "The Department should not attribute such an unfair and discriminatory motive to Congress." Southwest Comments, p.32.

Continental and Legend have both argued that they may offer such service because regional jets with 56 or fewer seats fall within the commuter aircraft exemption and, accordingly, "can operate to any destination, without restriction." Legend, p. 98; Continental, p. 17. Thus, they argue, if there are no restrictions on where such aircraft may fly there can not be any restrictions on through-ticketing or advertising for flights with such aircraft. DFW Airport explained the fallacy of these claims in its opening comments. See DFW Airport Comments, pp. 48-50.

Continental further argues that it would be "nonsensical" to allow non-stop long-haul flights with regional jets and, at the same time, prohibit through flights using the same aircraft. Id., p. 18. As discussed in DFW Airport's initial comments at page 33 and above at pages 10-11, DFW Airport does not accept the premise that a carrier may provide long-haul service with regional jets from Love Field to points outside the Love Field service area under the commuter exemption. Nor does DFW

^{30/} ACI/AAAE, Love Field Citizens Action Committee, and San Francisco do not take a position on this issue.

Airport agree that it would be "nonsensical" -- should the Department rule contrary to the position expressed by all commenters except Legend and Continental-- to allow regional jets to provide such non-stop long-haul service and at the same time to prohibit such service on connecting flights with large jets. Such a distinction would be the direct outgrowth of Congress' decision to restrict long-haul travel at Love Field and maintain Love Field as a "short-haul" facility.

More important, the argument must fail because it is based upon an inaccurate description of the service that Continental and Legend intend to offer. Neither airline plans to transport passengers between Love Field and points throughout the country with regional jets holding 56 or fewer passengers. For example, Continental will be transporting its passengers between Love Field and Houston on regional jets where they will switch to large jets for the remainder of their flight. In short, the destination city will be served by large jet aircraft.

Continental quotes from the Department's decision in the Love Field Amendment Proceeding, Order 85-12-81, in support of its claim that its advertised through service and ticketing are permissible. Continental Comments, pp. 17-18. The reliance upon that decision is perplexing since the Department in its 1985 Order expressly ruled that a carrier may not hold out, display, or sell transportation from Love Field to destinations beyond the Love Field service area. Based upon language from the Conference Report on the Wright Amendment, the Department concluded, in language directly applicable here, that:

Carriers could not evade the Amendment's restrictions by providing flights, for example, between Love Field and Houston and then continuing the flights between Houston and points outside the five state area. . . In our view, an air carrier providing interstate service within the authorized four-state service area may provide intrastate service from Love Field. . . However, the carrier cannot offer, promote or sell through service and fares or tickets between Love Field and points outside the authorized service area using another Texas city as the connecting point.

Order 85-12-81, pp. 13-14. See also pp. 11-12. Although the number of states to which the Department is not prohibited from certificating carriers for Love Field service has been expanded by the Shelby Amendment, the underlying principle has not been changed. Even carriers using aircraft with 56 or fewer seats are not permitted to hold-out and advertise connecting long-haul service from Love Field to points outside the seven-state area if a city within that area is used as a connecting point.

Conclusion

DFW Airport's position on the five questions at issue may be summarized as follows. The Department should conclude that the 1968 Bond Ordinance is a reasonable and valid exercise of Dallas' proprietary powers under 49 U.S.C. §41713(b)(3). As a multi-airport operator, Dallas can properly impose traffic distribution rules that limit interstate flights at Love Field so long as the DFW Airport, in which it is the majority owner, is open for all types of interstate flights. The Wright and Shelby Amendments do not preempt Dallas' proprietary rights. The Amendments are principally prohibitions on federal actions by this Department, not federally-guaranteed mandates that conflict with the Cities' proprietary rights.

The Wright or Shelby Amendments do not authorize long-haul jet service under Section 29(a)'s commuter airline exception. The Department and the federal courts have previously held that Congress' short-haul objective for Love Field precludes long-haul service with jet aircraft under the Wright Amendment. All the Shelby Amendment did with respect to the commuter airline exception was to allow "reconfigured" jets with 56 or fewer seats to operate under that provision. It did not overrule Continental, supra.

The Use Agreements voluntarily entered into between the DFW Airport Board and American, Continental and other certificated carriers serving the DFW Airport do not violate any federal aviation law. The Use Agreements are private contracts enforceable under state law. Under the Supreme Court's Wolens opinion, they are not subject to federal preemption, even to the extent that the Use Agreements seek to enforce the Bond Ordinance obligations. Such obligations become "self imposed contractual undertakings," not impermissible local rules. Moreover, in a deregulated environment, no federal law should be read to bar an airline from agreeing not to exercise part of its federal certificate authority in exchange for valuable consideration. In any case, the Use Agreements' requirement that signatory carriers operate all their Dallas-Fort Worth area services through DFW Airport is not preempted because it is a valid exercise of Dallas' proprietary powers as a multi-airport operator to impose traffic distribution rules for the two airports, Love Field and DFW Airport, that it owns.

Under the Wright and Shelby Amendments, moreover, an airline may not offer connecting service from Love Field to points outside the seven-state area using aircraft with 56 or fewer seats by using a city within Texas or the seven-state area as a connecting point. This question was settled by the Department by its ruling in Order 85-12-81. So long as the flight from the connecting point is on a large jet, the use of a regional jet (for example, on the Love Field-Houston leg of the trip) does not change the Department's prior decision banning the offering of such service.

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October 2, 1998

CERTIFICATE OF SERVICE

I hereby certify that I have this 2nd day of October, 1998 served a copy of the foregoing document by first class mail on all persons on the attached service list.

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