THE TERM "CONCESSIONS" IN THE DOT ACDBE REGULATION (49 CFR Part 23) SHOULD BE UNDERSTOOD TO REFER ONLY TO BUSINESSES THAT SERVE THE TRAVELING PUBLIC

Based on the legislative and regulatory history, it is clear to ACI-NA, that the term "concessions" in the U.S. Department of Transportation (DOT) regulations (49 CFR Part 23) refers only to businesses that serve the traveling public. On behalf of our members, we are seeking DOT confirmation of that understanding.

Under the DOT Airport Concessions Disadvantaged Business Enterprise (ACDBE) regulation (49 CFR Part 23), a "concession" covered by the rule is defined as "A business, located on an airport subject to this part, that is engaged in the sale of consumer goods or services to the public under an agreement with the recipient [i.e., a Federally-assisted airport], another concessionaire, or the owner or lessee of a terminal, if other than the recipient" (49 CFR 23.3 definition of "concession," para. (1)).

The remainder of the concessions definition goes on to list various types of businesses that either are or are not within the scope of this general definition. For example, a hotel located anywhere on airport property is considered to be a concession (49 CFR 23.3 definition of "concession, para. (3)). So is a management contractor who runs a parking facility on the airport. Likewise, a web-based or other electronic business in a terminal that passengers can access at the terminal or a business that provides advertising to passengers at the airport is considered to be a concession. Car dealerships that provide vehicles or other products to car rental companies serving airport passengers and other purveyors of goods and services to retail establishments "in the airport" are also considered to fall within the definition of a concession. If a taxi operator, limousine dispatcher, or a car rental company has a counter or ticket seller or dispatcher on airport, it too is considered to be a concession even though its main facility (e.g., an off-airport rental car lot) may be elsewhere. All these examples are found in 49 CFR 23.3(2) and (3). On the other hand, aeronautical service (e.g., fixed base operators or flight schools) and certain other activities (e.g., industrial plants, farm leases) are not considered to be concessions (49 CFR 23.3(5) and (6).

Looking at the section 23.3 definition of "concession," *all the specific sorts of businesses listed as constituting concessions have an important characteristic in common: each and every one is a business that offers goods and services to passengers or others passing through an airport for travel-related purposes (or providers of goods or services to such businesses).* Terminal retail stores or restaurants, hotels, advertising, desks or agents for ground car rentals and other ground transportation businesses, web-based companies with kiosks in terminals, parking lots, etc. all

focus on a single customer base: people getting ready to board planes, people who have just disembarked from a plane, or family members and others accompanying or meeting them.

This is not surprising, since this has been the concept of concessions since the beginnings of what is now the DOT DBE/ACDBE program. In the very first iteration of Part 23, DOT stated that "…both construction contracts for the runway and lease agreements for concessionaires in the airport terminal fall under the requirements of the regulation (45 FR 21176; March 31, 1980; emphasis added). The Department went on to state that "The airport concessionaire is…the most typical lessee covered by the regulation. Other lessees include providers of food and ground transportation services to passengers or store owners renting space on airport concourses and providers of services to airport concourses." (Id.) The next DOT statement on the subject, a guidance piece issued in July 1980, distinguished between aeronautical activities (e.g., lease agreements with airlines in their normal passenger- or freight-carrying capacities) with businesses that provide services to the facility or the public on the facility, specifically "a business occupying a traditional 'concessionaire' position at an airport" (45 FR 45283; July 3, 1980).

These provisions of DOT rules, focusing on consumer-oriented businesses in terminals, were already in place before Congress took action to require an ACDBE program by statute. The statutory provision, offered as a floor amendment by Rep. Cardiss Collins, with the support of Rep. Norman Mineta and the concurrence of Rep. Newt Gingrich, relates to "business[es]' at an airport which sell food, beverages, printed materials, or other consumer products to the public…." These businesses are what we now call ACDBEs. Rep. Collins' amendment became section 109(h) of Public Law 110-223, the 1987 reauthorization act. Note the emphasis on what can fairly be viewed as traditional concessions, such as food, beverage, and printed materials stores.

Rep. Collins expanded on this emphasis in the floor statements supporting her amendment:

> *My amendment provides the statutory authority for this [already existing DOT regulation] by requiring that minority and women-owned firms share in at least 10 percent of the revenues generated by businesses that sell food, beverages, printed materials, and other consumer products.*
>
> *As airports continue to expand and grow across the country, more and more opportunities are becoming available for businesses that sell food, beverages, and printed materials, or other consumer products. This represents a significant potential for the creation of jobs and additional revenues for small firms. I believe that there should be at least a minimum level of commitment to these small minority and women-owned firms.*
>
> *To date, this commitment simply has not been made in view of increased business opportunities at airports…My amendment would open up business opportunities to minorities and females…Leasing opportunities, such as those for concessions for airports…[and] DOT recipients should be obliged to ensure that minority businesses have a fair share…. (133 Congressional Record 25986-87; October 1, 1987).*

Rep. (later DOT Secretary) Mineta added that "The provision of food and retail service *to airline passengers* in terminals is an area where opportunities for DBEs should be encouraged." (Id., emphasis added) Another supporter, Rep. Richardson, said that

> *the amendment increases the set-aside for minority-operated concessions—food, magazines, et cetera. This . . . is especially important if we are truly interested in helping small minority- and women-owned businesses. As all of who travel extensively already know, airport concessions have a captive market. An airport concession, unless poorly managed, is a sure way to a successful business…Currently, only a limited number of firms have the majority of concessions throughout the country. If the marketplace is not to replace this oligopoly, then we in Congress are justified in opening the concession business to different groups. (Id.)*

It is unmistakably clear from these statements that those involved in the creation of the statutory basis of the ACDBE program intended that it apply to the traditional sorts of business we see in airport terminals – food and beverage, news and gifts, retail etc.

DOT took a number of years to issue a final regulation implementing this statute. In addition to citing portions of the statements of Rep. Collins and Rep. Mineta noted above, the preamble to the rule noted that service providers like "car rental agencies, FBOs, telephone services, secretarial services, advertising, lockers, televisions, baggage carts, ground transportation, flight schools, insurance, and hotels, and motels" had been considered concessions under the original Part 23 program (57 FR 18402; April 30, 1992). Except for FBOs and flights schools, which were excluded from the rule's definition of concessions (along with other aeronautical activities), all of these were, again businesses that served passengers and other members of the traveling public. In Appendix A to this final rule, DOT listed the types of businesses that are frequently operated as concessions. This Appendix (see Id. at 18414) listed 32 specific types of concessions[1], every one of which was a business that served the traveling public on the airport.

A subsequent notice of proposed rulemaking (NPRM) intended to clarify the role of management contracts and car rental companies under the concessions rule, but did not affect the basic definition of "concession" described above (see 56 FR 52050 ff; October 6, 1993). Further clarifications were proposed in a supplemental notice of proposed rulemaking (SNPRM), such as excluding long distance telephone services from the concessions definition, since such services were not typically located at the airport (62 FR 29578; May 30, 1997). However, when the Department published a final rule based on this SNPRM (which moved the DBE program into a

---

2 - The listed businesses were food and beverage, book stores, auto rental, banks, hotels and motels, insurance machines and counters, gift/novelty/souvenir shops, newsstands, shoe shine stands, barber shops, automobile parking, jewelry stores, liquor stores, travel agencies, drug stores, pastries and baked goods, luggage cart rental, coin-operated TVs, game rooms, luggage and leather goods stores, candy/nut/confectionary stores, toy stores, beauty shops, vending machines, coin-operated lockers, florists, advertising, taxicab, limousines, duty free shops, pay telephones, gambling machines, and other \concessions. While this appendix does not appear in the current Part 23, given changes in way that size standards are now expressed, it shows how the Department, in the regulatory issuance closest in time to the enactment of the statute, viewed the proper scope of concessions covered by its rule.

new 49 CFR Part 26), the Department did not finalize changes to the ACDBE program, which remained governed by the existing provisions of Part 23 (64 FR 5124; February 2, 1999).

The Department proposed additional changes to Part 23 in a new SNPRM dated September 8, 2000 (65 FR 54455). In addition to proposing definitional language for "concession" that is nearly identical to the present regulatory text, the SNPRM included an appendix that, like its predecessor, listed size standards for various types of concessions, all of which are businesses that serve the traveling public at airports. The preamble also sought comment on the following matter:

> *One issue of which we have become aware concerns businesses that may occupy a portion of airport property, serve the public in general, but do not focus on serving passengers who use airport for air transportation. For example, an airport may lease space on its property, perhaps some miles from the terminal, for a supermarket or other retail establishment that serves the local population but is not, except perhaps incidentally, used by persons who go to the terminal to catch a flight. We seek comment on whether we should exclude such businesses from the definition of concession. We might do so, for example, by changing this definition to refer to businesses that "primarily serve the traveling public on the airport.*

The Department also noted, in the context of a discussion of advertising firms, that

> *Placing advertising signs and other media in public portions of an airport (e.g., the terminal, the roadways leading to the terminal) is analogous to other businesses that we view as concessions. A firm typically pays to lease space from the airport and places objects in airport buildings and grounds that are directed at the traveling public.* (Id.)

This statement underlines the common understanding, consistent with the language and history of the concessions provisions of Part 23, that concessions are viewed as businesses directed at the traveling public.

In the final rule based on this NPRM (70 FR 14501; March 22, 2005), the Department agreed with this viewpoint:

> *Concession businesses must serve the public on the airport. Airport and ACDBE trade associations, one business, and nine airports supported the consequent concept that businesses on airport property that do not primarily serve travelers should not be counted as concessions…We agree that businesses that do not primarily serve the public should not be viewed as concessions.*

This response, while explicitly agreeing with the comments suggesting that businesses on airport property that do not primarily serve travelers should not be counted as concessions, did not adopt regulatory text language specifically clarifying that such businesses did not fall under the concessions definition.

It may well be that such an explicit clarification was deemed to be unnecessary. As shown in this paper, the entire legislative and regulatory history of the concessions provision focuses exclusively on businesses that serve the traveling public on the airport. There is not even a hint of any intent, by Congress or DOT, to encompass within the definition of concessions businesses that, while physically located on airport property, have little or nothing to do with service to members of the traveling public.

Many types of businesses not catering primarily to travelers could reasonably locate on airport property, especially at airports with sprawling campuses. It is easy to imagine a Super Wal-Mart, Home Depot, out-patient surgical center, medical office building, law firm or financial consultancy office, water park, sports field complex, etc. at a location somewhere on the property of such airports, some distance from the facilities used by travelers. (Other potential uses of airport property, such as a server farm or solar panel array, would probably fall within the concession definition's exception for "industrial plants.")

While an air traveler might occasionally visit such businesses, they would draw all or almost all of their visitors from the surrounding community, just as a similar businesses would that were located nowhere near an airport. Their relationship to the airport is simply that of a tenant on a piece of land that the airport happens to own, analogous to the tenant's relationship to any randomly chosen landlord, and having no significant relationship to the airport's transportation functions. To attempt to treat such a business as a concession – merely on a literal exegesis of the words "located on the airport" and "engaged in the sale of consumer goods or services to the public," without consideration of the intent or context of those words – would lead to a significant distortion of not only the meaning of the statute and regulation but of the structure of the ACDBE program. Airports that retain the services of leasing agents, property managers and/or commercial brokers to lease commercial space on property owned by the airport do not receive gross revenues reports from the individual tenants. The lease rates are based on a square footage charge and/or net lease rate so gross revenue reports from the individual businesses are not available.

For example, including the gross revenues of that Super Wal-Mart in the denominator for the airport's non-car rental ACDBE goal would artificially inflate that figure, while providing little if anything in the way of opportunities for ACDBE participation. This would have the likely effect either of causing the airport's goal achievements to be artificially lowered in percentage terms or incentivizing the airport to set a lower goal than consideration of actual concession business would warrant. It would also include types of businesses that otherwise would not be involved with the ACDBE program.

Fortunately, the statute, existing regulations, and official DOT/FAA guidance issuances have not purported to extend the scope of the concessions definition to businesses that have little or no connection to serving the traveling public. This is as it should be, and we believe that reinforcing this sound understanding of the ACDBE program would benefit all participants in the program.