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Airline Passenger Facility Charges: What Do They Mean for an Ailing Industry

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AIRLINE PASSENGER FACILITY CHARGES: WHAT DO THEY MEAN FOR AN AILING INDUSTRY?

SUZANNE IMES

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A STUDY OF transportation in the United States makes one wonder if some Ancient Mariner has placed a curse on the airline industry and hung an albatross around its neck. Reports indicate that, as of August 20, 1993, the airline industry was \$35 billion in debt.¹ Projections for the future are only cautiously optimistic, warning that a healthy industry, which is able to generate enough revenue to replace aging aircraft and keep fares low enough to stimulate demand, could be several years away.² Other problems face the airline industry as well. As the concentration of airlines has increased in recent years, most analysts predict that the trend will continue. One estimate theorizes that the number of surviving carriers will be no more than five or six.³ Moreover, American airports themselves are experiencing a capacity crisis that affects all countries and has reached epidemic proportions.⁴ Despite the fact that new runways take from four to eight years to complete and new airports take anywhere from ten to fifteen years to finish, no long-term nationwide airport improvement plan has been created to make certain that such projects are developed in the near future.⁵ The poor health of the airline industry and the nation's airports translates into a nationwide transportation problem that "seriously threatens the ability of our carriers to compete in global aviation and, even more important, tends to clog one of the vital engines

¹ *Airlines Still Need Tax, Regulatory Relief, National Commission Concludes*, Daily Tax Rep. (BNA) No. 160, at G-1, G-2 (Aug. 20, 1993) [hereinafter Aug. 1993 Tax Report] (discussing tax and regulatory relief suggested by the National Commission to Ensure a Strong Competitive Airline Industry).

² *On a Wing and a Dime*, ECONOMIST, June 12, 1993, at S10, S16 [hereinafter *On a Wing*].

³ Note, *The Antitrust Implications of Airport Lease Restrictions*, 104 HARV. L. REV. 548 (1990) (discussing barriers to airline entry at airports that lead to concentration in the airline industry).

⁴ J. Donald Reilly, *Regional Airports Needed to Solve Capacity Problems*, AM. CITY & COUNTY, June 1990, at 32 (advocating a "comprehensive study of new airport needs and measures").

⁵ *Id.*

of our domestic economy — commercial air transportation.”⁶

This air transportation crisis was recognized first by President Bush in his transportation policy and then by President Clinton, who appointed the National Commission to Ensure a Strong Competitive Airline Industry (hereinafter National Commission).⁷ Congressional recognition of the transportation problem occurred in 1990 when Congress authorized airports to collect a three dollar maximum head tax on all departing passengers.⁸ This head tax is called a passenger facility charge (hereinafter PFC). Detailed federal regulations govern how airports obtain approval to collect the charge and on which projects the money collected may be spent.⁹ According to the regulations, money raised from PFCs is to be used only for capital airport improvement projects.¹⁰

PFCs, however, are not without opponents, both inside and outside the airline industry. While PFC proponents seem to have secured the continued existence of PFCs,¹¹ opinions clash over how the money collected should be spent and what effect the revenue should have on the airline industry and transportation in the United States.¹² One of the most radical views of how to spend PFC revenue was espoused by the City of Los Angeles during the 1992 elections, when it sought to transfer the funds to the city

⁶ Robert J. Aaronson, *Air Lacks Access to Rightful Funds*, FIN. WORLD, Dec. 1991, at 78.

⁷ See *Congress Mostly Ignores Airline Panel's Call for Tax Relief, Other Major Changes*, Daily Tax Rep. (BNA) No. 177, at J-1 (Sept. 15, 1994) [hereinafter Sept. 1994 Tax Report]; Kevin Kelly, *Midflight Correction? (Regulating the Airline Industry)*, COMMONWEAL, June 18, 1993, at 6.

⁸ 49 U.S.C. § 1513(e), *repealed by* Act of July 5, 1994, Pub. L. No. 103-272, § 7(b), 108 Stat. 1379 (to be codified at 49 U.S.C. § 40117); see also Lawrence L. Knutson, *Passenger Fee System Outlined, Regulations Issued to Launch Program*, DAILY NEWS OF L.A., May 24, 1991, at B4.

⁹ 14 C.F.R. § 158.1 (1991).

¹⁰ *Id.*

¹¹ *Mineta Says Many Endorse Tax Relief to Help Finances of U.S. Airlines*, Daily Tax Rep. (BNA) No. 88, at E-5, G-6 (May 10, 1993) [hereinafter May 1993 Tax Report] (indicating congressional acceptance of PFCs).

¹² See *infra* text accompanying notes 171-204.

treasury to pay for police and firefighter services.¹³ This Comment will offer legal and economic insights into PFCs and suggest how the revenue they generate should be spent.

Part I of this Comment tracks the course of the airline industry from deregulation in 1978 to the present and explores its current status. Part II sets forth the governmental response to the airline crisis and details the law of PFCs. Part II also outlines the response to PFCs by setting out the arguments of PFC proponents and opponents, focusing on Los Angeles and Denver, two cities on the front lines of the PFC revenue battle. Part III analyzes the possible effects of PFCs on the airline industry and transportation in the United States. Finally, this Comment suggests a few areas where PFC revenue would be well spent.

I. DEREGULATION: BEFORE AND AFTER

In 1938, Congress brought airlines into the family of regulatory agencies it had first established with railroads and motor carriers by creating the Civil Aeronautics Board (hereinafter CAB) as an independent federal regulatory agency.¹⁴ The government chose to regulate the airline industry after observing the pre-regulation rise of the railroad barons and recognizing that airplanes were more than a passing fancy.¹⁵ Regulation was the result of foresight — the airlines were more than an experimental toy, they had the potential to become public utilities. In this way, the airline regulation "legislation was promulgated . . . to avoid the deleterious consequences of cutthroat and excessive competition, and thereby enhance economic stability,

¹³ James Rainey, *Funds for Services at Issue in Airport, Sewer Measures*, L.A. TIMES, Oct. 31, 1992, at B3.

¹⁴ Civil Aeronautics Act of 1938, 49 U.S.C. app. §§ 401-722, *repealed by* Federal Aviation Administration Act of 1958, 49 U.S.C. app. §§ 1301-1542, *repealed by* Act of July 5, 1994, Pub. L. No. 103-272, § 7(b), 108 Stat. 1379 (to be codified generally at 49 U.S.C. §§ 40101-40120); *see also* Paul S. Dempsey, *Transportation Deregulation—On a Collision Course?*, 13 TRANSP. L.J. 329 (1984) (examining airline deregulation and its impact on economic decline, safety, pricing, service and carrier liability).

¹⁵ Dempsey, *supra* note 14, at 331.

safety, and the sound growth and development of this young industry."¹⁶

The airline industry remained regulated for forty years. Commentators differ on the success of regulation. Paul Dempsey, a noted expert in transportation law who has served on both the Interstate Commerce Commission and the CAB,¹⁷ asserts that:

[R]egulation brought to the transportation industry the stability essential to its growth and prosperity, thereby enabling the nation to enjoy a high level of safe and dependable service at reasonable rates Transportation enjoyed a generous level of healthy competition without concentration — an economic environment unequalled in almost all other major American industries.¹⁸

Dempsey concedes, however, that the regulated airline industry was not a perfect system. In Dempsey's opinion, among its principal faults were a high level of service competition, empty backhauls, and some regulatory lag.¹⁹ Yet Dempsey asserts that by the mid-1970s the Interstate Commerce Commission had taken aggressive and successful action to eradicate these problems.²⁰

Robert Hardaway, who has written numerous responses to Dempsey's articles, takes a different view of the same circumstances. For example, Hardaway claims that during regulation, with no incentive to reduce costs, the airlines engaged in wasteful and extravagant service competition.²¹ As an example, he cites airlines that offered such frills as gourmet meals and states that the competition culminated in the so-called 'liquor wars,' in which airlines competed by offering free liquor to customers.²² Regardless of how suc-

¹⁶ *Id.* at 335.

¹⁷ *Id.* at 329 (biographical footnote).

¹⁸ *Id.* at 335-36.

¹⁹ *Id.* at 339.

²⁰ *Id.*

²¹ Robert M. Hardaway, *Transportation Deregulation (1976-1984): Turning the Tide*, 14 *TRANSP. L.J.* 101 (1985) (arguing that the tide has turned in favor of deregulation after a period in which airlines fought recession, high fuel prices, and inflation).

²² *Id.*

cessful regulation may or may not have been, its days were numbered by the mid-1970s.

In the late 1970s, President Jimmy Carter appointed economist Alfred Kahn to the position of Chairman of the CAB.²³ Kahn used his position to diminish entry barriers for new carriers and encourage price competition.²⁴ Soon thereafter, Darius Gaskins, a colleague of Kahn, was appointed Chairman of the Interstate Commerce Commission by President Carter.²⁵ It was not long until legislation shored up the deregulatory turn of the tide in the airline industry. Under the auspices of President Carter and Senator Ted Kennedy, Congress passed the Airline Deregulation Act of 1978.²⁶ The Act disbanded the CAB and gave the Department of Transportation (hereinafter DOT) authority to review airline mergers. This authority ended on January 1, 1989, when the airline industry, like all other industries, became subject to the review of the Antitrust Division of the Department of Justice.²⁷

The first few years of deregulation brought many changes to the airline industry. For example, service to small communities deteriorated significantly. During the first year of deregulation, 260 cities lost air service, and during the first two years of deregulation, forty percent of the nation's airports lost service.²⁸ Changes also occurred in airline profits. By 1980, with deregulation in full swing, airlines lost more money than ever before. In that year the airline industry suffered record losses of \$280 million.²⁹ In 1982, worldwide industry losses for the year were \$900 million,

²³ Dempsey, *supra* note 14, at 339.

²⁴ *Id.*

²⁵ *Id.*

²⁶ 49 U.S.C. § 1301, *repealed by* Act of July 5, 1994, Pub. L. No. 103-272, § 7(b), 108 Stat. 1390; *see also* Dempsey, *supra* note 14, at 339.

²⁷ 49 U.S.C. § 1551(a)(7), *repealed by* Act of July 5, 1994, Pub. L. No. 103-272, § 7(b), 108 Stat. 1379 (to be codified generally at 49 U.S.C. §§ 40101-46507); *see also* Donald T. Bliss & Jacob M. Lewis, *Overseeing Competition in the Airline Industry: Will the Transfer to Justice Make a Difference?*, 34 FED. B. NEWS & J. 293, 295 (Sept. 1987) (exploring the difference in airline merger philosophy between DOT and the Department of Justice).

²⁸ Dempsey, *supra* note 14, at 359.

²⁹ *Id.* at 342.

despite the fact that the industry carried seven million more passengers than it had in 1981.³⁰

As with airline regulation, the wisdom of deregulation is debated. Dempsey argues that "[t]he industry's principal problem is excessive rate wars. Deregulation of entry brought a host of new entrants to many heretofore healthy markets. . . . Since transportation is an industry inherently vulnerable to overcapacity, . . . unconstrained entry must necessarily lead to distress-sale pricing in those markets in which competition is excessive."³¹ Conversely, certain statistics indicate that deregulation has worked. The Brookings Institute has calculated that consumers saved roughly \$100 billion in lower fares in the first ten years of deregulation.³² Moreover, airlines are carrying nearly twice as many people with proportionately fewer accidents than before deregulation.³³ When asked why the industry is unhealthy, "[p]roponents of deregulation point to poor management, rising fuel prices and the recession, arguing that deregulation did not contribute appreciably to the . . . industry crisis."³⁴

Regardless of whether deregulation is to blame for the industry's current ills, both deregulation proponents and opponents agree that the airline industry is ailing. Indeed, statisticians paint a grim and undeniable picture of the airlines' ill health. For instance, as of January 1994, the industry had lost more than \$11 billion since 1990.³⁵ Most of the airlines that started up after deregulation in 1978 are now out of business.³⁶ Of the nation's twelve largest carriers, three have failed.³⁷ Moreover, many carriers have been pushed into bankruptcy. Early pioneers like Eastern and

³⁰ *Id.*

³¹ *Id.* at 350 (footnote omitted).

³² *On a Wing, supra* note 2, at S-10 (citing a study by the Brookings Institute).

³³ *Id.*

³⁴ Dempsey, *supra* note 14, at 349 (citation omitted).

³⁵ *Improving Industry Finances Dilute Calls for Policy Changes*, Daily Tax Rep. (BNA) No. 18, at 9 (special supplement) (Jan. 28, 1994) [hereinafter Jan. 1994 Tax Report].

³⁶ Kelly, *supra* note 7, at 6.

³⁷ *Id.*

Pan Am no longer fly, and others, including Continental, TWA, and America West, have sought protection under Chapter 11 bankruptcy laws.³⁸

Signs of hard times in the airline industry are present beyond the balance sheet and the bankruptcy list. For instance, most major airlines have deferred new aircraft orders and are retiring older planes.³⁹ As planes are retired, airline personnel are laid off. As of the summer of 1992, the industry had shed 100,000 jobs.⁴⁰ During the week of September 14, 1993, American Airlines retired eleven DC-10s and cut its work force by 5000 employees.⁴¹ In January 1994, "American Airlines announced yet another round of layoffs, signaling another rough year for the industry."⁴²

Many factors have contributed to the current malaise in the airline industry, including over-expansion, high employee salaries, and labor difficulties. For example, in 1991 and 1992, United, Delta, and American Airlines went on "an aircraft buying binge."⁴³ These airlines bought over 445 aircraft, expanding their fleet capacity by as much as forty-three percent.⁴⁴ For these airlines, over-expansion was a risky gamble that did not pay off. The carriers believed that, as bankrupt airlines went out of business, they would take over the abandoned routes. When the recession drove passengers off planes, however, and the bankrupt carriers did not go out of business, the Big Three were forced to cut prices to fill their new planes.⁴⁵ To make matters worse, airline industry over-expansion was not limited to the air, but occurred on the ground as well, in the form of elabo-

³⁸ *On a Wing*, *supra* note 2, at 510.

³⁹ Richard M. Weintraub, *Airlines Fly Into the Blue; 3rd Quarter Profits Could End 3-Year Nose Dive*, WASH. POST, Sept. 21, 1993, at C1.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² Jan. 1994 Tax Report, *supra* note 35, at 9.

⁴³ Kelly, *supra* note 7, at 6.

⁴⁴ *Id.*

⁴⁵ *Id.*

rate and costly hub and spoke systems.⁴⁶ In one author's appraisal of the industry:

Being over-eager to expand and grab market share has not helped. Highly leveraged takeovers during the boom years of the late 1980s saddled the industry with a huge load of debt. By 1990 the five big airlines in financial trouble (America West, Continental, Eastern, Pan Am and TWA) had substantially increased their long-term debt as a percentage of total capitalisation to an average of over 80%.⁴⁷

High employee salaries and labor difficulties also plague the industry. Salaries and benefits account for up to forty percent of an airline's expenses.⁴⁸ In addition, "[t]ough work rules, akin to those that hamstrung the auto industry during the 1970s, sharply constrict productivity."⁴⁹ Thus, whether or not airline industry revenue losses may be attributed to airline deregulation, the shortage of profits has certainly been exacerbated by carrier over-expansion, high employee salaries, and labor difficulties.

A. HOW THINGS STAND FOR THE INDUSTRY NOW

Airlines did not sit by quietly after the bottom fell out of their industry. Instead, they responded by cutting back on the number of flights offered, from an average of 5.4 departures per day at the beginning of 1987 to 4.5 at the beginning of 1993.⁵⁰ Despite setbacks during the fare wars, the airlines also raised the average price for tickets, hoping to increase revenue even if the actual number of people flying decreased.⁵¹ In addition, the large carriers addressed the problem of over-expansion by scaling back on their plans to

⁴⁶ *Id.* For an explanation of the "hub and spoke" system as well as a synopsis of the problems it creates for airports, see *infra* text accompanying notes 298-301.

⁴⁷ *On a Wing, supra* note 2, at S15.

⁴⁸ Kelly, *supra* note 7, at 6.

⁴⁹ *Id.*

⁵⁰ Weintraub, *supra* note 39, at C1.

⁵¹ *Id.*

buy more airplanes.⁵² Finally, the industry attempted to cut costs through basic belt-tightening procedures.⁵³

Recent reports indicate that the result of these efforts to cut costs and raise fares is beginning to show up in company balance sheets.⁵⁴ For example, the industry enjoyed a "1994 first quarter operating profit of \$137 million."⁵⁵ Specifically, American Airlines' second quarter 1994 net profit of \$153 million was "up from \$47 million during the same period in 1993."⁵⁶ Northwest experienced an even more impressive turnaround. That carrier had a 1994 second quarter net profit of \$71 million compared to a \$136 million loss during the same period in 1993.⁵⁷ This recent upswing, however, is cause for neither rejoicing nor complacency. David A. Swierenga, the Air Transportation Association Vice President for Industry Data, said recent improvements in airline profits do not substantially help airlines meet the cost of long-term needs, including purchasing new aircraft and other modernizations.⁵⁸ Swierenga estimates these modernization costs to be about \$13 billion per year.⁵⁹ As a result, "even with a profit of \$2 billion to \$4 billion from depreciation, the industry would have less than half of what it needs" to purchase new aircraft and otherwise modernize without raising new equity capital or borrowing.⁶⁰ Similarly, Lee Howard, president of Airline Economics International, said that, despite an expected 1994 industry operating profit of \$2.5 billion, "[t]ax relief . . . [is] still needed [W]hen you barely break even in net, the industry is not doing that well."⁶¹

⁵² *On a Wing*, *supra* note 2, at S16.

⁵³ Weintraub, *supra* note 39, at C1.

⁵⁴ *Id.*

⁵⁵ Sept. 1994 Tax Report, *supra* note 7, at J-1.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ Weintraub, *supra* note 39, at C2.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ Sept. 1994 Tax Report, *supra* note 7, at J-1.

B. AIRLINE INDUSTRY PROBLEMS TRANSLATE INTO
NATIONWIDE TRANSPORTATION PROBLEMS

"Never send to know for whom the bell tolls, it tolls for thee."⁶² John Donne's words remind us that nothing exists in isolation. Consequently, a crisis as large as that of the airline industry does not affect only itself. Rather, the airline crisis reverberates throughout the entire economy. The lack of airport capacity in the United States is an excellent illustration of this principle. House Public Works and Transportation Committee Chairman, Norman Mineta

believes the federal government's own failure to invest adequately in the aviation system, including airports, has contributed to the present situation by driving up costs at 'bottleneck' airports. "These 'chokepoints' he said, 'affect more than the financial health and well being of an airport, or of an airline: the effects are felt throughout our entire economy.' "⁶³

Likewise, Samuel Skinner, President Bush's Secretary of Transportation, linked the airline industry crisis to the nation's transportation problem. On March 3, 1990, Skinner asserted that the chronic problems in U.S. transportation are congestion and delay.⁶⁴ That delay takes the form of an ill-structured transportation system and a lack of physical capacity. Twice as many people are flying as were ten years ago, yet only two new airports have been built, including Denver, which was only recently completed. "We have anywhere from \$20 billion to \$30 billion immediate need for airport capacity in the country right now Americans spend more than 2 billion hours annually in travel delays in urban areas. Twenty one airports, Skinner said, now experience more than 20,000 hours of yearly flight delays."⁶⁵

⁶² John Donne, *Devotions Upon Emergent Occasions Meditation*, in 1 THE NORTON ANTHOLOGY OF ENGLISH LITERATURE 1063, 1107 (5th ed. 1986).

⁶³ May 1993 Tax Report, *supra* note 11, at G-6.

⁶⁴ Kathy Lewis, *Bush Transit Policy Shifts Gears; Would Raise Local, State Funding Load; Critics Say President Shirking Federal Role*, Hous. POST, Mar. 9, 1990, at A1.

⁶⁵ *Id.*

Indeed, airport expansion has been largely put on hold in many cities in the last fifteen years, causing major delays that have made air travel more vexing, inefficient, and even hazardous.⁶⁶ In addition, the United States government fears the economic impact of an airline industry too weak to fend off strong foreign competitors such as British Airways.⁶⁷ In this way, the problems of the airline industry, such as lack of airport capacity, are felt throughout the entire transportation system and economy of the United States.

There has been an increasing awareness of the need for improvements in the aviation industry in light of the link between the state of the airline industry and transportation in the United States.⁶⁸ Although perhaps not so visible as bridges near collapse, the neglect of this country's aviation infrastructure over the years is every bit as devastating.⁶⁹ Suggestions have been made for improving aviation infrastructure. For example, regarding lack of airport capacity and the need for expansion and new facilities, the recent wave of military base closings offers some new alternatives for airport sites. Although a new airport may not necessarily be needed at the time of a base shutdown, it has been suggested that these facilities could be preserved as airports to be available for commercial use as demand grows.⁷⁰ Finally, House Public Works and Transportation Committee Chairman Norman Mineta says that the federal government must make it a priority to modernize air traffic control equipment and improve airports to meet air travel demands

⁶⁶ David Hess, *House Approves Head Tax at Airports; Sponsors Say \$3 Charge Will Supplement Funding for Improvements*, DAILY NEWS OF L.A., Aug. 3, 1990, at N10.

⁶⁷ Kelly, *supra* note 7, at 6. Interestingly, the National Commission recommended linking "greater foreign investment [in U.S. airlines] . . . to air service agreements that create better opportunities for U.S. airlines in the global market." Sept. 1994 Tax Report, *supra* note 7, at J-4. As of Sept. 1994, however, the Clinton Administration has met with strong European opposition to increased American carrier competition in their countries. *Id.*

⁶⁸ See, e.g., Reilly, *supra* note 4, at 32.

⁶⁹ Aaronson, *supra* note 6, at 78.

⁷⁰ *Id.*

safely.⁷¹ Mineta has stated that this priority includes ensuring that the airlines in the system are financially able to maintain their fleet.⁷² Thus, the need to bolster the airline industry and ameliorate transportation problems throughout the country by improving aviation infrastructure has been recognized.

II. GOVERNMENT'S RESPONSE TO THE AIRLINE CRISIS

A. THE EXECUTIVE RESPONSE

On March 8, 1990, against the backdrop of airline revenue loss, congestion, and travel delays, President Bush released a transportation policy for the 1990s that went beyond emphasizing toll roads and user fees and relied heavily on increased state and local funding.⁷³ In a general response to the transportation problems in the United States, Samuel Skinner, President Bush's Secretary of Transportation, presented his 129-page report entitled "Moving America: New Directions, New Opportunities."⁷⁴ The report made several recommendations to help ease the transportation problem, including: increased federal research and development funding for aviation capital improvements, air traffic control modernization, and airport grants; increased state and local matching shares and greater flexibility for urban mass transit programs; increased aviation user fees to improve service; increased airport capacity by allowing local PFCs; increased private participation in local transit and airports; increased competition in the airline industry; deregulation; and environmental and safety goals.⁷⁵

The Clinton Administration has also responded to the crisis in the aviation industry. In late April 1993, President

⁷¹ May 1993 Tax Report, *supra* note 11, at G-6.

⁷² *Id.*

⁷³ Lewis, *supra* note 64, at A1 (responding to critics who claimed Bush is shirking the federal responsibility, Bush's "Secretary of Transportation countered that the federal government has assumed too much over the years").

⁷⁴ *Id.* at A13.

⁷⁵ *Id.*

Clinton appointed a committee entitled the National Commission to Ensure a Strong Competitive Airline Industry to study "whether the nation's beleaguered air carriers could benefit from a healthy dose of government authority."⁷⁶ The bipartisan commission was chaired by former Virginia Governor Gerald Baliles and consisted of fifteen voting members, including one airline official, Herbert Kelleher, Chief Executive Officer of Southwest Airlines.⁷⁷ Commission deliberations began on May 24, 1993, and ended in August of that year. The National Commission's report to the President and Congress made recommendations on possible solutions to the problems plaguing the airlines. The report rejected regulation of the airline industry as well as several other proposals, including those that would shut down the major airlines now operating under Chapter 11 bankruptcy protection.⁷⁸ Instead, the National Commission recommended substantial changes in the air traffic control system.⁷⁹ It also approved certain tax proposals benefiting the airlines, such as "[r]olling back the ticket tax from 10 percent to 8 percent and the cargo waybill from 6.25 percent to 5 percent."⁸⁰ The report also recommended "[r]igorous enforcement of existing Airport Improvement Program grant assurance language barring diversion of airport revenues to non-airport purposes . . . [and] continued close scrutiny of airport proposals to collect [PFCs]."⁸¹ The airline industry responded favorably to the Commission's report and is looking to the Clinton Administration to implement many of its recommendations.⁸²

⁷⁶ Kelly, *supra* note 7, at 6.

⁷⁷ May 1993 Tax Report, *supra* note 11, at G-6.

⁷⁸ *Id.*

⁷⁹ Weintraub, *supra* note 39, at C1. The National Commission advocated modernizing air traffic control by replacing the FAA with a private corporation. Despite a favorable response from the Clinton Administration, this proposal has been waylaid by Congressional hearings studying "less drastic alternatives." Sept. 1994 Tax Report, *supra* note 7, at J-3 (quoting unnamed members of the House Aviation Subcommittee).

⁸⁰ Aug. 1993 Tax Report, *supra* note 1, at G-2.

⁸¹ *Id.*

⁸² Weintraub, *supra* note 39, at C1. Note, however, that "[a] year after it called for far-reaching policy changes . . . the national airline commission has found that its

B. THE LEGISLATIVE RESPONSE

The Executive Branch was not the only branch of the government to recognize and respond to the crisis in the aviation industry. Interestingly, in the same month the Commission's report was released, the Aviation Infrastructure Investment Act of 1993, H.R. 2739,⁸³ came before Congress. The bill's very name illustrates Congress' awareness of a transportation problem tied to an ailing airline industry and poor airport facilities. The bill would authorize funds for airport improvement programs over the next three years.⁸⁴ The money would go to improve the infrastructure and management of the nation's airports.⁸⁵

Even before H.R. 2739, the repercussions of the crisis in the air were felt in Congress. Noticing that airport capital requirements were running more than \$2 billion a year higher than the revenues the federal aviation trust fund was collecting, Representative Glenn Anderson (D. Calif.) concluded that "[f]ederal funding alone will not be sufficient to pay for needed airport improvements in the future."⁸⁶ Consequently, on August, 2, 1990, the House voted 405-15 to give local airport authorities the power to levy up to a three dollar head tax on travelers.⁸⁷ Then Secretary of Transportation, Samuel Skinner, called the PFC program "a

primary recommendations have been mostly ignored by Congress." Sept. 1994 Tax Report, *supra* note 7, at J-3. Airline tax relief, for example, never received a congressional hearing in light of improving airline finances and the need to use new revenues to reduce the federal deficit. *Id.*

⁸³ H.R. 2739, 103d Cong., 1st Sess. 15 (1993).

⁸⁴ *Work Remains on Clinton-Backed Bills on Campaign Finance Charges, Other Issues*, Daily Tax Rep. (BNA) No. 161, at F-10 (Aug. 23, 1993) [hereinafter *Activity Report*].

⁸⁵ *Id.* The report stated that the bill would authorize funds totalling \$2.1 billion for fiscal 1994, \$2.16 billion for fiscal 1995 and \$2.2 billion for fiscal 1996. *Id.* "The bill would raise the minimum funds allotted to small airports by \$100,000 to a floor of \$500,000, fund the conversion of 16 military air bases across the country to civilian uses, and prohibit charges passengers pay for using airports—[the PFC]—on unpaid air transportation, such as frequent-flyer tickets." *Id.*

⁸⁶ Hess, *supra* note 66, at N10.

⁸⁷ *Id.* It is interesting to note that "[s]hortly before approving the bill, members voted 252-171 to reject an amendment by Rep. Douglas Bosco (D-Calif.) that would have killed the head tax and instead used the \$7 billion surplus in the federal aviation trust fund to finance airport improvements." *Id.*

major step in the effort to increase airport capacity.⁸⁸ Proponents of PFCs also extol their virtues.⁸⁹ One of the most frequently cited and obvious advantages of using PFCs to finance airport improvement projects is that they increase an airport's revenues in a manner directly proportional to its traffic growth.⁹⁰ Moreover, PFCs can easily be increased or decreased according to funding needs.⁹¹ Finally, PFCs disentangle airport funding needs from the complications and vacillations of the federal budget.⁹²

1. Law of PFCs

The Federal Aviation Act of 1958, as amended by the Aviation Safety and Capacity Expansion Act of 1990, gives the Administrator of the Federal Aviation Administration (hereinafter FAA) the authority to grant a public agency that controls a commercial service airport the power to impose a passenger facility charge.⁹³ Under the terms of the Act, all of the nation's 430 commercial airports are authorized to impose the tax.⁹⁴ The specific details of PFCs are set out in the Code of Federal Regulations.⁹⁵

First, since only the Administrator of the FAA may grant a public agency that controls an airport the authority to impose a PFC,⁹⁶ no agency may impose a PFC without the au-

⁸⁸ Knutson, *supra* note 8, at B4.

⁸⁹ Reilly, *supra* note 4, at 35.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ 49 U.S.C. § 1513(e)(1), *repealed by* Act of July 5, 1994 Pub. L. No. 103-272, § 7(b), 108 Stat. 1379 (subject matter of this section to be codified at 49 U.S.C. § 40117).

⁹⁴ *Id.* § 1513(e); *see also* Hess, *supra* note 66, at N10. There is one qualification, however:

[D]epending on how much money they raise, the 71 largest airports that chose to enact the tax would have to give up a percentage of their share of the annual allotments from the federal airport improvement program. In some cases, those airports could lose all their federal aid. Money not going to the larger airports would be redistributed to the smaller airports that did not impose the tax.

Hess, *supra* note 66, at N10.

⁹⁵ 14 C.F.R. § 158 (1991).

⁹⁶ *Id.* § 158.5.

thorization of the Administrator.⁹⁷ A passenger enplaned at an airport may be charged a PFC of one, two or three dollars.⁹⁸ No air carrier may contract with a public agency that controls an airport to avoid the imposition of PFCs.⁹⁹ The Administrator will make available a list of carriers and routes that have been determined by the DOT to be ineligible for the collection of PFCs.¹⁰⁰ In addition, a public agency in control of an airport may request that PFC collection not be required of certain carriers if the number of passengers they enplane constitutes no more than one percent of the total number of passengers enplaned annually at the airport.¹⁰¹

The use of PFC revenue and any interest earned on the revenue is strictly controlled. The revenue may only be used to finance the allowable costs of approved projects¹⁰² at an airport controlled by a public agency.¹⁰³ "Allowable costs" are defined by the Code as "reasonable and necessary costs of carrying out an approved project including costs incurred prior to and subsequent to the approval to impose a PFC," so long as the cost does not date back before November 5, 1990.¹⁰⁴ Allowable costs also include payments for debt service on bonds.¹⁰⁵ PFC revenue may be used to pay all or part of the allowable cost of an approved project.¹⁰⁶ A public agency may also use a combination of PFC revenue and airport grant funds to finance an approved project.¹⁰⁷

In order for the FAA Administrator to find an airport improvement project eligible for PFC revenue financing, the project must: "(1) [p]reserve or enhance safety, security, or

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.* § 158.7(b).

¹⁰⁰ 14 C.F.R. § 158.9(a).

¹⁰¹ *Id.* § 158.11.

¹⁰² See *infra* text accompanying note 108 for definition of an "approved project."

¹⁰³ 14 C.F.R. § 158.13.

¹⁰⁴ *Id.* § 158.3.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* § 158.13(a).

¹⁰⁷ *Id.* § 158.13(c).

capacity of the national air transportation system; (2) [r]educe noise or mitigate noise impacts resulting from an airport; or (3) [f]urnish opportunities for enhanced competition between or among air carriers."¹⁰⁸ The Regulations provide several examples of approved airport projects, including airport noise compatibility planning measures, certain terminal development, construction of gates and related areas where passengers are enplaned or deplaned, and areas related to baggage handling and movement.¹⁰⁹

The Regulations also specify the consultation and application requirements by which a public agency seeks to obtain approval to impose a PFC and use that revenue on a project. First, before a public agency submits an application to the FAA for authority to impose a PFC and for project approval, it must consult with all air carriers operating at the airport.¹¹⁰ This consultation provision requires that the public agency provide all air carriers operating at the airport with written notice describing the projects being submitted for PFC funding, the PFC amount, the proposed effective and expiration dates of the PFC, the estimated total PFC revenue, and the date and location of a meeting at which the public agency will present the proposed projects to the air carriers.¹¹¹ Moreover, at or before the consultation, the public agency must provide air carriers with a detailed description of the project, an explanation of the need for the project, including the estimated allowable project costs allocated to major project elements, and the anticipated total amount of PFC revenue that will be used as well as the source and amount of other funds, if any, needed to finance the project.¹¹² For their part, the air carriers must provide the agency with written acknowledgment of the receipt of the notice within thirty days.¹¹³ In addition, within thirty days following the meeting, each air carrier must pro-

¹⁰⁸ 14 C.F.R. § 158.15(a)(1)-(3).

¹⁰⁹ *Id.* § 158.15(b)(1)-(6).

¹¹⁰ *Id.* § 158.23(a).

¹¹¹ *Id.* § 158.23(c)(1)-(4).

¹¹² *Id.*

¹¹³ 14 C.F.R. § 158.23(c)(1).

vide the public agency with a written certification of its agreement or disagreement with the proposed project.¹¹⁴ A certification of disagreement must list the reasons for disagreement or it will be void.¹¹⁵ Failure to provide a timely certification will be considered a certification of agreement.¹¹⁶

Next, the application for authority to impose a PFC must include: the name and address of the public agency; the name and telephone number of the official submitting the application; the official name of the airport where the PFC will be imposed; the official name of the airport where the project is proposed; a copy of the airport capital plan for the project to be financed by PFC revenue; a description of the project; the project justification; the amount of the requested PFC; the proposed charge effective and expiration date; a summary of consultation with air carriers at the affected airport, which includes a list of air carriers certifying agreement and disagreement and their reasons why; and a signed statement certifying that the public agency will comply with all assurances made.¹¹⁷ If a public agency is also filing a request not to require certain air carriers to impose the PFC because their passengers make up less than one percent of the airport's passengers, additional information is required in the application.¹¹⁸

If the application for authority to impose a PFC is not accompanied by a concurrent application for project approval, the application must include: a description of alternative methods being considered by the agency to accomplish the objectives of the project; a description of alternative uses of the PFC revenue in the event that the proposed project will not be approved; a timetable for com-

¹¹⁴ *Id.* § 158.23(c)(2).

¹¹⁵ *Id.*

¹¹⁶ *Id.* § 158.23(c)(3).

¹¹⁷ *Id.* § 158.25(b)(1-11, 15).

¹¹⁸ 14 C.F.R. § 158.25(b)(12). A copy of the information provided to the carriers and their comments must be submitted in the application as well as a list of carriers that would not be required to collect a PFC and the agency's reasons for making the exclusionary request.

pletion of project formulation activities and submission of an application for project approval; and a projected date of project implementation and completion.¹¹⁹

If the application for authority to impose a PFC is submitted concurrently with an application for project approval, the project approval application must include all of the information required in the PFC imposition application and a signed certificate stating that all environmental reviews have been completed with respect to the project and that the final FAA airspace study with respect to the project, if one is required, has been completed.¹²⁰

An agency may request an extension of time to submit an application for project approval after the application for authority to impose PFCs has been approved.¹²¹ The time extension will be granted if the public agency has shown good cause for the application delay; the revised schedule for submitting the application is satisfactory; and further collection of PFCs during the time extension will not result in excessive accumulation of revenue.¹²²

Finally, if an application for project approval is submitted after the authority to impose a PFC has been granted, the project approval application must include only the following: the name and address of the public agency, the name and telephone number of the official submitting the application; the official name of the airport where the project is proposed; a copy of the airport capital plan where the PFC-financed project is proposed; a description of the project

¹¹⁹ *Id.* § 158.25(b)(14, 15).

¹²⁰ *Id.* § 158.25(c)(1).

¹²¹ *Id.* § 158.35(a). At least 30 days prior to requesting the extension, the agency must publish a notice of its intent to request an extension in the local newspaper and invite public comments. *Id.* The time extension request must be submitted at least 120 days before the authority to impose PFCs expires and must be accompanied by: a description of the progress on the project application; a revised schedule for submitting the application; an explanation of the delay in submitting the application; a report showing the total amount of PFC revenue collected to date plus interest, the projected amount to be collected during the time extension, and any agency funds used on the project that must be reimbursed; a summary of any further consultation with air carriers at the airport; and a summary of public comment. *Id.*

¹²² 14 C.F.R. § 158.35(a).

proposed; the project justification; the estimated charge expiration date; a copy of information regarding the financing of the project that was presented to the carriers during consultation; a signed statement certifying public agency compliance with assurances; and a signed certification that all environmental reviews have been completed and the final FAA airspace study is completed, if one was required.¹²³

The Regulations establish a process for review by the FAA Administrator of all applications. The Administrator must first review the application for completeness and then advise the public agency by letter that the application is substantially complete.¹²⁴ The Administrator must then publish a notice in the Federal Register stating his intent to rule on the application and inviting public comment.¹²⁵ Anyone interested may file a comment on the application within thirty days after publication of the notice in the Federal Register.¹²⁶ Copies of the comments must be submitted to both the FAA Airports office and the public agency.¹²⁷ The public agency may publish the notice in a newspaper of general circulation in the airport's area and must make available for inspection, upon request, a copy of the application.¹²⁸ The Administrator must reach a final decision on the application no later than 120 days after its receipt.¹²⁹ If the application is not substantially complete, the agency has the opportunity to supplement the application without penalty.¹³⁰

¹²³ *Id.*

¹²⁴ *Id.* § 158.27(a)-(c).

¹²⁵ *Id.* § 158.27(c). The Federal Register notice must include: the name of the public agency and the airport where the PFC is to be imposed; a description of the PFC project, the level of the proposed PFC, the proposed PFC effective and expiration date and the total estimated PFC revenue; the address and telephone number of the FAA Airports office where the application may be inspected; whether the application is substantially complete; and the due dates for public comments. *Id.*

¹²⁶ 14 C.F.R. § 158.27(f).

¹²⁷ *Id.* § 158.27(c).

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.* If the agency decides not to supplement the application, the Administrator may review the application and base his final decision on what was actually submitted. *Id.*

Rules also govern the Administrator's decision on applications for authority to impose PFCs and airport project approval. First, an application to impose a PFC will be approved only after the Administrator determines that: the amount and duration of the PFC will not result in revenue exceeding that necessary to finance the project; the project will achieve Regulation objectives and meet Regulation criteria; the collection process is reasonable and not arbitrary or discriminatory; and the public agency is not in violation of the Airport Noise and Capacity Act of 1990.¹³¹ The Administrator will then notify the public agency in writing of the decision and list the PFC level, total approved PFC revenue, duration of authority and earliest permissible charge effective date.¹³²

Second, an application for project approval will be approved only after the Administrator determines that: the amount and duration of the PFC will not result in excessive revenue; the project will achieve Regulation objectives and meet Regulation criteria; and all requirements pertaining to airspace studies and the National Environmental Policy Act¹³³ have been satisfied.¹³⁴ The Administrator will then give the public agency written notification of the decision that lists the approved project, PFC level, total approved PFC revenue, and any limit on the duration of authority to impose the PFC.¹³⁵

If either application fails to meet its requirements for approval, the Administrator must notify the public agency in writing of the reasons for disapproval.¹³⁶ The public agency

¹³¹ 14 C.F.R. § 158.29(a); Airport Noise and Capacity Act of 1990, 49 U.S.C. § 2151, *repealed by* Act of July 5, 1994, Pub. L. No. 103-272, § 7(b), 108 Stat. 1379 (subject matter of section to be codified generally at 49 U.S.C. §§ 47101-47533). If the public agency has not applied for project approval concurrently with the application for authority to impose a PFC, the Administrator must also determine that there are alternative uses for the PFC revenue in case the proposed project is not approved. 14 C.F.R. § 158.29(c).

¹³² *Id.* § 158.29(a).

¹³³ 42 U.S.C. § 4321 (1988 & Supp. V 1993).

¹³⁴ 14 C.F.R. § 158.29(b).

¹³⁵ *Id.*

¹³⁶ *Id.* § 158.29(c).

may reapply by following the same procedures as it followed originally.¹³⁷ The Administrator must publish a monthly notice of all PFC approvals and disapprovals in the Federal Register.¹³⁸

An agency that has commenced an approved project may impose a PFC until the charge expiration date is reached; until the total PFC revenue collected plus interest equals the allowable cost of the approved project; until the authority to collect the PFC is terminated by the Administrator; or if the agency is found to be in violation of the Airport Noise and Capacity Act of 1990.¹³⁹ If an agency has not implemented the approved project, it may not impose a PFC beyond the lesser of two years after project approval or five years after the charge effective date.¹⁴⁰ If, in the Administrator's judgment, the public agency has not made sufficient progress toward implementing the approved project, PFC termination proceedings may begin.¹⁴¹ Moreover, the authority to impose a PFC will automatically expire after a specified time period.¹⁴²

After notification to carriers, a public agency may, without approval by the FAA, decrease the PFC level collected from each passenger, decrease the total PFC revenue, or increase the total PFC revenue by fifteen per cent or less.¹⁴³ Furthermore, if there is no carrier disagreement, an approved PFC may be amended to increase the level collected from each passenger, increase the total approved PFC revenue by more than fifteen percent, materially alter the scope of an approved project, or establish a new group of exempt carriers, unless the FAA Administrator notifies the agency

¹³⁷ *Id.*

¹³⁸ *Id.* § 158.29(d).

¹³⁹ 14 C.F.R. § 158.31(a)-(d).

¹⁴⁰ *Id.* § 158.33(a).

¹⁴¹ *Id.* § 158.33(c).

¹⁴² *Id.* This time period is three years after the charge effective date unless: an application for project approval is pending before the FAA; a project approval application has been approved; or a time extension to submit an application for project approval has been granted. Otherwise, the time period is five years after the charge effective date unless the agency has obtained project approval. *Id.*

¹⁴³ 14 C.F.R. § 158.37(a).

otherwise.¹⁴⁴ In the event of carrier disagreement, the agency may request that the Administrator approve the proposed amendment.¹⁴⁵

In the event that collected PFC revenue, plus interest, exceeds the allowable cost of a project, provisions have been made for excess funds.¹⁴⁶ The funds will be used for approved projects or retirement of outstanding PFC-financed bonds.¹⁴⁷ Within thirty days of expiration or termination of the authority to impose PFCs, the agency must present a plan to the FAA for using accumulated PFC revenue. If the agency fails to submit a plan or if the plan is unacceptable to the FAA, the Administrator offsets federal airport grant program apportioned funds.¹⁴⁸

After approval of the application for authority to impose a PFC, the agency notifies the air carriers that they are required to collect PFCs.¹⁴⁹ Each carrier then notifies its agents of the collection requirement.¹⁵⁰ The air carriers are responsible for PFC funds from the time of collection to remittance.¹⁵¹ The agents must note as a separate item on each ticket the total amount of PFCs the passenger will pay and the airports for which the PFCs are collected.¹⁵² Restrictions are placed on the amount of PFCs that may be collected on each passenger's complete itinerary.¹⁵³

PFC revenue funds are collected by the carriers and must be accounted for by them, although PFC revenue may be commingled with the carriers' other sources of revenue.¹⁵⁴ The PFC revenue is regarded as trust funds held by the car-

¹⁴⁴ *Id.* § 158.37(b)(1).

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* § 158.39(a).

¹⁴⁷ *Id.*

¹⁴⁸ 14 C.F.R. § 158.39(d).

¹⁴⁹ *Id.* § 158.43(a).

¹⁵⁰ *Id.*

¹⁵¹ *Id.* § 158.45(a)(1).

¹⁵² *Id.* § 158.45(b).

¹⁵³ 14 C.F.R. § 158.45(c). For each one-way trip on an itinerary, air carriers may only collect a PFC from a passenger for the first two airports where PFCs are imposed. For each round trip, a PFC may only be collected for enplanements at the first and last two enplaning airports where PFCs are imposed. *Id.*

¹⁵⁴ *Id.* § 158.49(b).

riers for the public agencies, in which the carriers have a possessory but not an equitable interest.¹⁵⁵ PFCs must be remitted to the agency monthly.¹⁵⁶ As compensation for collecting, handling, and remitting the PFC revenue, the air carriers receive twelve cents of each PFC remitted on or before June 28, 1994, and eight cents of each PFC remitted thereafter, as well as any interest earned on PFC revenue between the time of collection and remittance.¹⁵⁷

The Regulations also require extensive reporting between the carrier and the agency.¹⁵⁸ The public agency provides quarterly reports to the collecting carriers, which include PFC revenue received from the carriers, interest earned, expenditures, and the amount committed for use on approved projects.¹⁵⁹ The public agency must keep remitted PFC revenue either separately or with other agency airport capital funds in an interest bearing account.¹⁶⁰ The agency must maintain an accounting record for each PFC funded approved project that identifies the PFC revenue received, the amount of interest earned, and the amounts used on each project.¹⁶¹ The agency must also provide for an annual audit of its PFC account.¹⁶²

For their part, each collecting carrier files a quarterly report with the public agency, which includes the total PFC revenue collected, the total PFC revenue refunded to passengers, and reimbursement of expenses for collecting and handling.¹⁶³ Collecting carriers must maintain an accounting record for the public agency that identifies the airport where passengers were enplaned and establishes the amount of collected, remitted and refunded PFC reve-

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* § 158.51.

¹⁵⁷ 14 C.F.R. § 158.53.

¹⁵⁸ *Id.* § 158.63(a).

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* § 158.67(a).

¹⁶¹ *Id.* § 158.67(b).

¹⁶² 14 C.F.R. § 158.67(c).

¹⁶³ *Id.* § 158.65.

nue.¹⁶⁴ Any carrier that collects more than \$50,000 in PFCs annually must have an annual audit of its PFC account.¹⁶⁵

Collecting PFC revenue may affect other federal funding at an airport. For example, if the FAA Administrator determines that PFC revenue is excessive or not being properly used, the Administrator may reduce the amount of federal airport grant funds to the airport.¹⁶⁶ In addition, federal funds apportioned to an agency under the Airport and Airway Improvement Act of 1982¹⁶⁷ are automatically reduced if that airport enplanes more than 0.25 per cent of the total annual United States enplanements and the public agency imposes a PFC at that airport.¹⁶⁸

It is also noteworthy that an airport's failure to comply with the Airport Noise and Capacity Act of 1990 will terminate its eligibility for grant funds and authority to impose PFCs.¹⁶⁹ Termination of PFCs because of an airport's violation of the Noise Act is the result of Congressional findings that:

[A]viation noise management is crucial to the continued increase in airport capacity; community noise concerns have led to uncoordinated and inconsistent restrictions on aviation which could impede the national air transportation system; a noise policy must be implemented at the national level; local interest in aviation noise management shall be considered in determining the national interest; community concerns can be alleviated through the use of new technology aircraft and the use of revenues, including those available from [PFCs]; . . . and revenues derived from a [PFC] may be applied to noise management and increased airport capacity.¹⁷⁰

¹⁶⁴ *Id.* § 158.69(a).

¹⁶⁵ *Id.* § 158.69(b).

¹⁶⁶ *Id.* § 158.87(a).

¹⁶⁷ 49 U.S.C. § 2201, *repealed by* Act of July 5, 1994, Pub. L. No. 103-272, § 7(b), 108 Stat. 1379 (subject matter of section to be codified generally at 49 U.S.C. §§ 47101-47533).

¹⁶⁸ 14 C.F.R. § 158.93.

¹⁶⁹ 14 C.F.R. § 161.501.

¹⁷⁰ 49 U.S.C. § 2151, *repealed by* Act of July 5, 1994, Pub. L. No. 103-272, § 7(b), 108 Stat. 1379 (subject matter of section to be codified generally at 49 U.S.C. §§ 47101-47533).

2. *The Response to PFCs.*

In general, the United States government has responded favorably to PFCs while the airline industry has urged their repeal. House Public Works and Transportation Committee Chairman Norman Mineta said that "since 1990, PFCs have proven themselves to be a major source of capital financing at airports."¹⁷¹ Transportation Subcommittee Chairman Bob Carr, however, favors either repealing or modifying the law that allows airports to collect PFCs because he is concerned that PFCs make significantly less money available for the aviation programs that his committee oversees.¹⁷² Carr said that now, with almost all airlines losing large sums of money, "we should take a very serious look at repealing [the law that allows PFCs]."¹⁷³ At the very least, Carr suggests that PFC-financed projects should be approved by the FAA only if all the airlines at the affected airports support them.¹⁷⁴

Mineta supports the law as written, asserting that it is enough that the FAA vigorously scrutinize PFC applications to ascertain whether the projects meet the criteria spelled out by law.¹⁷⁵ Mineta even advocates one step more than the law currently allows, arguing that airports should use PFCs for ground access projects such as rail systems in addition to on site airport expansion.¹⁷⁶

The airline industry has sharply criticized the law allowing airport imposition of PFCs and has urged its repeal.¹⁷⁷ In fact, top executives in the airline industry asked the members of President Clinton's Commission studying the airline industry to repeal the airports' authority to col-

¹⁷¹ May 1993 Tax Report, *supra* note 11, at G-6.

¹⁷² *Airlines Seek Relief from Ticket Tax, Question Energy Tax at House Hearing*, Daily Tax Rep. (BNA) No. 46, at G-9 (Mar. 11, 1993) [hereinafter Mar. 1993 Tax Report] (discussing airline industry's desire for tax relief).

¹⁷³ *Id.* at G-10.

¹⁷⁴ *Id.*

¹⁷⁵ May 1993 Tax Report, *supra* note 11, at G-6.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

lect PFCs.¹⁷⁸ The airlines oppose PFCs because, in order to remain competitive, airlines themselves sometimes elect to pay the PFC fees.¹⁷⁹ In 1991, this choice cost the industry \$1.2 billion.¹⁸⁰ For instance, airline officials at Dallas-Fort Worth International Airport (DFW) were concerned about the proposed PFCs because they feared that they would be unable to pass the PFC cost along to passengers as Congress intended and instead be forced to absorb the extra costs in order to stay competitive.¹⁸¹ Patricia Goldman, USAir's senior vice president for corporate relations, expressed the same concerns, citing PFCs "as an example of an enormous number of regulations that have significant costs attached and significantly impact our bottom line."¹⁸² Taking the position of the airline industry, Darryl Wyland, senior vice president of the American Automobile Association, said his organization "continues to oppose the entire concept of PFCs as an excessive tax burden on air travelers and a financial burden on airlines."¹⁸³

Although the airline industry lost its bid to repeal the law authorizing PFCs when Clinton's commission studying the industry recommended continued close scrutiny of airport proposals to collect PFCs, one concession was made.¹⁸⁴ One major complaint of the airline industry had been the collection of PFCs from travelers with frequent-flier tickets. The DOT had argued, in support of the collection, that the fee benefits all users of the airport alike and should therefore apply to all users.¹⁸⁵ Supporting the DOT assertion is the fact that frequent fliers must pay customs and immigra-

¹⁷⁸ *Airline Commission Urged to Recommend Tax, Regulatory Relief for U.S. Carriers*, Daily Tax Rep. (BNA) No. 106, at G-3 (June 4, 1993) [hereinafter June 1993 Tax Report].

¹⁷⁹ Martin Tolchin, *Government Turns Attention to Ailing Airlines*, DAILY NEWS OF L.A., Dec. 28, 1992, at B4.

¹⁸⁰ *Id.*

¹⁸¹ *Dallas-Fort Worth Airport Wants Fee For New Runways Departing Passengers Might Face \$3 Charge*, Hous. Post, July 4, 1993, at A31 [hereinafter *DFW Airport Wants Fee*].

¹⁸² Tolchin, *supra* note 179, at B4.

¹⁸³ Aug. 1993 Tax Report, *supra* note 1, at G-2.

¹⁸⁴ *Id.*

¹⁸⁵ *Travel Can Be Taxing, US Airports Sock Passengers*, CONSUMER REP. TRAVEL LETTER, Oct. 1992, at 109 [hereinafter *Travel Can Be Taxing*].

tion fees on international travel.¹⁸⁶ The airlines challenged the DOT's position, claiming that frequent-flier trips should be free of PFCs and ticket charges.¹⁸⁷ The industry will likely prevail on this point since the Aviation Infrastructure Investment Act of 1993¹⁸⁸ would prohibit the collection of PFCs on unpaid air transportation, such as frequent-flier tickets.¹⁸⁹

Individual airports have responded in overwhelming numbers to the law authorizing PFCs. Savannah, Georgia, was the first airport to receive approval to impose PFCs under the new program.¹⁹⁰ The Savannah Airport Commission was authorized to charge each departing passenger three dollars.¹⁹¹ The FAA has said that the Savannah Airport hopes to raise \$3 million a year to finance \$39.5 million in improvements, including a new passenger terminal, a new aircraft parking apron, taxiways, and new entrance and service roads.¹⁹² As of March 1992, New York, Chicago, Baltimore, Phoenix, Las Vegas, Cleveland, Denver, and Honolulu had either passed, or were considering, PFCs.¹⁹³ By July 1992, sixty airports had applied to the DOT for permission to impose a head tax on passengers passing through, and twenty-five had received approval to do so.¹⁹⁴ As of this same date, the largest dollar amount approved for PFC funding was \$2.3 billion toward the construction of Denver's new airport. The largest amounts awaiting approval were \$6.4 billion for John F. Kennedy, La Guardia, and Newark airports and \$1.6 billion for a variety of projects at Detroit Metro.¹⁹⁵ Amazingly, as of October

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ See H.R. 2739, 103d Cong., 1st Sess. 15 (1993).

¹⁸⁹ *Activity Report*, *supra* note 84, at F-10.

¹⁹⁰ *First Air Passenger Fee OK'd*, Hous. Post, Feb. 1, 1992, at C2.

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ Thomas Turcol, *Council Panel Oks Airport Tax*, PHILA. INQUIRER, Mar. 5, 1992, at B2.

¹⁹⁴ See *Travel Can Be Taxing*, *supra* note 185.

¹⁹⁵ *Id.*

1993, more than 145 airports had received approval to collect approximately \$8.2 billion in PFCs.¹⁹⁶

Since the law authorizing PFCs became effective in 1990, many airports have successfully applied for and collected PFCs for approved airport improvement projects. For example, in Chicago, a proposed PFC on departing passengers at O'Hare and Midway airports is expected to generate \$90 million a year to help pay to move military units from O'Hare and increase the size of the airport.¹⁹⁷ A \$3 PFC on departing passengers at Philadelphia International Airport took effect in July 1992.¹⁹⁸ The PFC is designed to raise an estimated \$65 million over three years to help fund airport improvements.¹⁹⁹ The airport has announced a \$279 million building program to make the facility easier for both people and airplanes to use. The project calls for a new \$214 million runway, an \$8 million commuter-airline terminal and a \$57 million renovation of USAir's aging facilities.²⁰⁰ Federal funds and bonds issued by the city and paid off with revenue from the airlines and airport concessionaires would make up the difference between total airport improvement costs and the revenue expected to be raised by PFCs.²⁰¹ Philadelphia Councilwoman Happy Fernandez has praised the PFC program as "a reasonable way to provide a capital improvement budget for the cash-starved city," allowing Philadelphia to do what other airports are doing.²⁰² Fernandez believes that PFCs are the perfect solution to airport funding problems, being both painless to consumers and profitable for airports.²⁰³ In her view, "if

¹⁹⁶ *FAA Okays Extension of Passenger Fee at Seattle-Tacoma International Airport*, U.S. Dep't Transp., News Release, Oct. 25, 1993, available at 1993 WL 436370 (D.O.T.).

¹⁹⁷ Gary Washburn, *City Weighs Plan to Create More Room at O'Hare*, CHI. TRIB., Oct. 23, 1992, at 1.

¹⁹⁸ Turcol, *supra* note 193, at B2.

¹⁹⁹ *Id.*

²⁰⁰ Tom Belden, *Plan Calls for Airport Upgrades The \$279 Million Project, Announced by US Air and the City, Would Add a Runway and Commuter-Airline Terminal*, PHILA. INQUIRER, Feb. 25, 1993, at A1.

²⁰¹ *Id.*

²⁰² Turcol, *supra* note 193, at B2.

²⁰³ *Id.*

people have enough money to fly, an extra \$3 won't make that much of a difference."²⁰⁴

Aviation officials in cities without PFCs are giving them serious consideration. John Solomon, deputy director for Houston's aviation department, views the possible collection of PFCs favorably, saying "it would give us the vehicle to accumulate funds to use for development purposes without having to go through the federal bureaucracy to obtain them."²⁰⁵ Solomon said that a \$1 tax for each passenger leaving Houston could generate about \$8 million annually for Houston Intercontinental Airport and about \$4 million annually for Hobby Airport.²⁰⁶ In Dallas, DFW officials had been opposed to PFCs since they had sufficient federal funding and airline support for airport improvement projects.²⁰⁷ In August 1993, however, DFW applied to the FAA for authority to impose a \$3 PFC on departing passengers.²⁰⁸ Vernell Sturns, the airport's executive director, said the PFC will raise about \$60 million a year and should be needed for "probably no more than three years to help pay the \$315 million for the east runway."²⁰⁹

C. THE PRIVATE SECTOR RESPONSE: PFC BATTLES IN LOS ANGELES AND DENVER

1. *Los Angeles*

In the wake of the Los Angeles riots, city officials began searching for funds with which to rebuild their ravaged city and provide more police and fire service to its citizens. The city faced a budget deficit and only received aid from Congress over heavy opposition, which included "no" votes by members from Orange County and Long Beach, Califor-

²⁰⁴ *Id.*

²⁰⁵ Lewis, *supra* note 64, at A13.

²⁰⁶ *Id.*

²⁰⁷ *DFW Airport Wants Fee*, *supra* note 181, at A31.

²⁰⁸ *DFW Proposes Passengers Help Foot Bill for New Runway*, Hous. Post, Aug. 29, 1993, at A22.

²⁰⁹ *Id.*

nia.²¹⁰ The Bush Administration responded to the city's dilemma by sending Vice President Dan Quayle to meet with Mayor Tom Bradley to discuss the possibility of selling Los Angeles International Airport (LAX) to raise the money to rebuild the riot-torn city.²¹¹ The sale of the airport to a private operator would have raised more than \$1 billion, but the city's response to President Bush's proposal was hostile. Many argued that selling a long term asset to finance a one-time expense is not sound business judgment.²¹²

City Councilwoman Ruth Galanter, whose district included the airport, advocated an easier solution to finding funds. "We don't have to sell the airport . . . [A]ll the President has to do is sign an order giving us greater access to the airport's revenue."²¹³ Galanter proposed a measure to the City Council to allow the city to use airport revenue, including money collected from PFCs, to provide additional police, firefighters and paramedics for the city.²¹⁴ In May, 1992, the city passed Galanter's proposal and voted unanimously to draft a city charter amendment that would permit airport revenue to be spent throughout the city for general services.²¹⁵ The amendment was placed on the ballot in November, 1992, as Proposition K.

Proposition K proposed to amend the city charter in order to allow airport funds to be placed in the city's treasury. Proposition K also proposed to include provisions to preserve some surplus revenue for use at the airports.²¹⁶ Since World War II, the city charter had required that all funds raised at the city-owned airports be used at the airport for maintenance and operations.²¹⁷ Galanter said the city charter restrictions were approved when the financial success of

²¹⁰ James Flanigan, *Public Ownership: Change is in the Air*, L.A. TIMES, May 20, 1992, at D1.

²¹¹ *Id.*

²¹² *Id.*

²¹³ *LA Officials Criticize Plan to Sell Airport*, S.F. CHRON., May 16, 1992, at A16.

²¹⁴ Rainey, *supra* note 13, at B3.

²¹⁵ James Rainey, *Study Says City Would Gain by Keeping LAX*, L.A. TIMES, May 28, 1992, at A1.

²¹⁶ Rainey, *supra* note 13, at B3.

²¹⁷ *Id.*

LAX was uncertain.²¹⁸ Now that the airport's stability is assured, Galanter argued that the city should be able to benefit from its investment in the airport.²¹⁹ She then introduced another proposal to the city council to restrict the use of airport revenue to hiring more police, firefighters, and paramedics.²²⁰ Galanter estimated that the revenue diversion would allow the city to hire 800 police officers, 108 paramedics, and 60 firefighters.²²¹

Proposition K proponents described the measure as a logical way for residents to benefit from the airport's cash surplus, which was more than \$25 million in 1991 and was projected to grow by as much as \$70 million a year.²²² Proponents also argued that diversion of funds from the airport to the city treasury would provide much needed money for city services while keeping the airport and its base value in public hands.²²³

City officials were among the proponents of Proposition K. They backed the proposition because of their dissatisfaction with the city's inability to recapture more money from the semi-independent airport agency due to FAA restrictions.²²⁴ It is no wonder that city officials have turned an envious eye toward LAX. The airport took in \$215 million in 1991 from automobile parking, sales of food, drink, and magazines, and from airline fees for landing and cargo.²²⁵ After expenses of \$187 million for maintenance and other purposes, LAX showed a surplus of \$27 million.²²⁶ The possibility of PFC revenue only made the idea of diverting money from the airport more appealing.

The airline industry led the opposition to the diversion of revenue from the airport to the city treasury. Opponents

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ Rainey, *supra* note 13, at B3.

²²² *Id.*

²²³ Rainey, *supra* note 215, at A1.

²²⁴ See Flanigan, *supra* note 210, at D1.

²²⁵ *Id.*

²²⁶ *Id.*

argued that passage of Proposition K would drive up prices at the airport on everything from airline tickets to airport food concessions and would diminish airport maintenance and improvements.²²⁷ Roger Cohen, Vice President for Government Affairs of the Air Transportation Association, said "the airport is the one thing in the city that works It has been run like a business and at no taxpayer expense. Proposition K represents the final blow in politicization of the airport."²²⁸ Cohen feared that, under Proposition K, city officials would use their power to review Airport Commission decisions to increase terminal rents, concession fees, and airline landing charges in order to bolster the funds in the city treasury. These costs would, of course, have to be passed on to consumers, thereby possibly decreasing the number of airline patrons.²²⁹

Proposition K was the costliest campaign of the four ballot measures in the November, 1992, election.²³⁰ One airline trade association spent \$241,000 to defeat the measure.²³¹ Airline officials spent \$256,000 to defeat Proposition K, six times the budget for "the Yes on K" campaign.²³² City Councilwoman Ruth Galanter accused the airlines' campaign of "trying to distract voters from the primary issue — that airports are public facilities and the public should decide how to spend the revenue."²³³

Proposition K prevailed, but with just over fifty percent of the vote.²³⁴ The passing of Proposition K, however, was just the first step toward diverting airport funds. The 1990 law authorizing airports to impose PFCs specifically prohibits

²²⁷ Rainey, *supra* note 13, at B3.

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ James Rainey, *911 Tax Leading; Proposition N Falling Short*, L.A. TIMES, Nov. 4, 1992, at A3.

²³¹ *Id.*

²³² Rainey, *supra* note 13, at B3.

²³³ *Id.*

²³⁴ James Rainey, *Police Plan Loses But Officials Are Upbeat*, L.A. TIMES, Nov. 5, 1992, at B1.

the use of airport money for non-aviation purposes.²³⁵ Thus, even after passage of Proposition K, at least two other changes would be needed: revisions in federal law that requires airport revenues to be spent at airports and modifications of bonds sold to build LAX, which include the same restrictions.²³⁶ The city's negotiations with the FAA and Congress to change the prohibitions in the 1990 PFC law to allow airport revenue to be used for city purposes have recently proved unsuccessful. In response to Proposition K's passage, Congressional legislation reauthorizing the federal airport grant program contained a provision requiring the "Transportation Department to issue rules that prohibit revenue diversion for non-airport purposes."²³⁷

2. *Denver*

Denver is another city in which PFCs have had a tremendous impact. Unlike in Los Angeles, PFCs in Denver have not been the object of an avaricious battle for their use, but they have been the focal point of what could be an economic disaster.

When the federal government authorized the collection of PFCs, Denver city officials saw an opportunity to build a new, modern airport without using a penny of local taxes. The new airport "would be as close as one gets to a free lunch" and would be financed entirely by the passengers of airlines that would use it.²³⁸ Economic planners envisaged the new airport as a panacea for a region that had been suffering a depression for five years. Economists reasoned that the airport would be a modern day version of the nineteenth century rail crossroad that would attract new companies, financial centers, and trade, thereby reducing the

²³⁵ 49 U.S.C. app. § 1513(e)(2)(B), *repealed by* Act of July 5, 1994, Pub. L. 103-272, § 7(b), 108 Stat. 1379 (subject matter of this section to be codified generally at 49 U.S.C. § 40117).

²³⁶ Rainey, *supra* note 215, at A1.

²³⁷ Sept. 1994 Tax Report, *supra* note 7, at J5.

²³⁸ Mike McPhee, *Continental Bankruptcy Threatens Hopes for New Denver Airport*, WASH. POST, Dec. 9, 1990, at H2.

region's dependence on oil and mineral exploration.²³⁹ In addition, the new airport promised an estimated 25,000 to 30,000 jobs.²⁴⁰

Relying on the newly authorized PFCs, construction began in 1989 on the new \$2.3 billion Denver International Airport, designed to be seven times larger than the existing Stapleton International Airport. The airport, which is "[s]et on fifty-three square miles [and includes] five runways and a state-of-the-art automated baggage handling system, . . . quickly became the largest public works project in America."²⁴¹ So caught up were city officials, however, in the ability to spend PFC revenue to benefit the local economy that they failed to notice the obvious. The crisis of the airline industry had taken its toll on Denver's existing airport, as it had on the airports of every other city in the nation. Air traffic into Stapleton had declined twenty percent in just four years.²⁴² Moreover, one of five concourses at Stapleton had been shut down for lack of use.²⁴³ Despite these figures, construction began as planned.

Major airline cooperation is critical for the new airport's success since it is financed entirely by PFCs on resident airlines' tickets. PFCs at Denver will be at least \$19 per passenger.²⁴⁴ This dollar figure is enough to make many airlines balk. Indeed, airport costs are so high that "Continental has nearly pulled out of Denver as a hub, reducing its flights from 180 a day to about twenty-two."²⁴⁵ Unless major airlines are financially able to commit to Denver International Airport, the first new airport in the United States in fifteen years, and one financed entirely by PFCs, will be a lesson in caution rather than how to appropriate PFC revenue.

²³⁹ *Id.*

²⁴⁰ *Id.*

²⁴¹ Peter S. Greenberg, *Denver's White Elephant May Finally Manage to Fly*, *MIAMI HERALD*, Nov. 27, 1994, at 5F.

²⁴² McPhee, *supra* note 238, at H2.

²⁴³ *Id.*

²⁴⁴ Greenberg, *supra* note 241, at 5F.

²⁴⁵ *Id.*

D. THE JUDICIAL RESPONSE

In early 1994, one appellate court interpreted the regulations regarding PFCs. In *Northwest Airlines, Inc. v. FAA*,²⁴⁶ Northwest sought review of the FAA's decision to approve the airport's application to collect PFCs. Northwest argued three claims. First, Northwest asserted that the FAA should have considered the negative effect of a PFC on Northwest's ability to compete with other airlines at hubs that do not impose PFCs. In support, Northwest cited the "PFC statute [that] directs the FAA to approve PFCs only for eligible airport-related projects which will — (i) preserve or enhance capacity, safety, or security . . . (ii) reduce noise . . . or (iii) furnish opportunities for enhanced competition between or among air carriers."²⁴⁷ The court adopted the FAA reading of the statute that allows the FAA to approve any project that meets at least one of the three criteria.²⁴⁸

Next, Northwest argued that the FAA should not approve alternative projects or, in the alternative, that the FAA should not have approved this PFC application because the airport failed to consult with the airline regarding the alternative project before submitting its application. The court found that FAA approval for alternative uses was intended by Congress because the "regulations require that airport authorities . . . before seeking authority to use the PFC funds must provide the FAA with a description of alternative PFC-eligible uses."²⁴⁹ The court agreed with Northwest, however, on its last claim and found that the airport violated regulations requiring consultation before submission of an application.²⁵⁰ Thus, at least one appellate court has strictly construed the regulations governing PFC collection.

Most of the decisions that have addressed the Federal Aviation and Administration Act,²⁵¹ however, have focused

²⁴⁶ 14 F.3d 64 (D.C. Cir. 1994).

²⁴⁷ *Id.* at 68.

²⁴⁸ *Id.* at 69.

²⁴⁹ *Id.* at 71.

²⁵⁰ *Id.* at 72.

²⁵¹ 49 U.S.C. § 1513, *repealed by* Act of July 5, 1994, Pub. L. 103-272, § 7(b), 108 Stat. 1379 (subject matter to be codified at 49 U.S.C. §§ 40101-40120).

on section 1513(a) rather than section 1513(e), which granted airport agencies the authority to impose PFCs.²⁵² Section 1513(a) of the FAA Act is called the Anti-Head Tax Act (hereinafter AHTA).²⁵³ The AHTA prohibits local and state taxes "on persons traveling in air commerce or on the carriage of persons traveling in air commerce or on the sale of air transportation."²⁵⁴ An exception is created, however, for collecting "reasonable rental charges, landing fees, and other service charges from aircraft operators for the use of airport facilities."²⁵⁵ The AHTA was originally enacted in 1973 in response to a decision by the Supreme Court in *Evansville-Vanderburgh Airport Authority District v. Delta Airlines*.²⁵⁶ In *Evansville* the Court held that neither the Commerce Clause nor the Airport and Airway Development Act of 1970²⁵⁷ precluded the imposition of state and local head taxes on air travellers.²⁵⁸ Two years before the *Evansville* decision, Congress had passed both the Airport and Airway Development Act and the Airport and Airway Revenue Act of 1970²⁵⁹ to improve air transportation.²⁶⁰ The 1970 acts sought to finance airport improvements through the Airport and Airway Trust Fund, which accumulated funds by levying various federal taxes on air users.²⁶¹ Thus, after *Evansville*, Congress enacted the AHTA out of concern over resentment against state and local head taxes in light of the federal government's existing collection of taxes from air

²⁵² *Salem Transp. Co. of N.J., Inc. v. Port Auth.*, 611 F. Supp. 254, 256 (S.D.N.Y. 1985).

²⁵³ 49 U.S.C. § 1513(a), *repealed by* Act of July 5, 1994, Pub. L. No. 103-272, § 7(b), 108 Stat. 1379 (subject matter of this section to be codified generally at 49 U.S.C. § 40116).

²⁵⁴ *Id.*

²⁵⁵ *Id.* § 1513(b).

²⁵⁶ 405 U.S. 707 (1972).

²⁵⁷ Pub. L. No. 91-258, 84 Stat. 219 (codified as amended in scattered sections of 49 U.S.C.).

²⁵⁸ *Id.* at 721.

²⁵⁹ Pub. L. No. 91-258, 84 Stat. 236 (codified as amended in scattered sections of 4 U.S.C., 23 U.S.C., 26 U.S.C. and 49 U.S.C.).

²⁶⁰ *City & County of Denver v. Continental Air Lines, Inc.*, 712 F. Supp. 834, 837 (D. Colo. 1989).

²⁶¹ *Id.*

users.²⁶² The AHTA ensured that double taxation on air users did not occur.²⁶³ As an immediate result of the AHTA, a local Philadelphia passenger head tax of two dollars was declared constitutionally invalid.²⁶⁴

The AHTA recently has been invoked by airlines to contest airport allocation of user fees. In *Northwest Airlines, Inc. v. County of Kent, Michigan*²⁶⁵ seven airlines alleged that the airport's failure to allocate airfield costs to airport concessionaires overcharged them in violation of the AHTA. The Supreme Court stated that the prohibition on local head taxes is modified by a savings clause in the act that permits "reasonable rental charges . . . from aircraft operators for the use of airport facilities."²⁶⁶ The Court used the *Evansville* reasonableness standard: "a levy is reasonable if . . . it (1) is based on some fair approximation of use of the facilities, (2) is not excessive in relation to the benefits conferred, and (3) does not discriminate against interstate commerce."²⁶⁷ The airport's allocation scheme of charging the concessionaires market value rental for terminal space but no airfield costs and charging the airlines cost-based rental for terminal space and airfield costs was found reasonable under the *Evansville* test.²⁶⁸ Thus, the AHTA requires reasonableness, not perfection, when airports allocate user fees to their tenants.

Approximately five years earlier, in *Denver v. Continental Air Lines*,²⁶⁹ the airport was allowed to use income derived from rental charges and fees on its tenant restaurants, gift shops, and rental car outlets to help finance its replacement airport for Stapleton. The AHTA did not apply to the tenant concessionaires because air passengers were not "required to park in the parking lot, rent a car, eat at a

²⁶² *Id.* at 837-38.

²⁶³ *Id.* at 838.

²⁶⁴ *Allegheny Airlines, Inc. v. City of Philadelphia*, 309 A.2d 157, 159 (Pa. 1973).

²⁶⁵ 114 S. Ct. 855 (1994).

²⁶⁶ *Id.* at 862.

²⁶⁷ *Id.* at 864.

²⁶⁸ *Id.* at 864-66.

²⁶⁹ 712 F. Supp. 834 (D. Colo. 1989).

restaurant or buy a magazine."²⁷⁰ The AHTA did, however, prohibit Denver from assessing resident Stapleton airlines higher rental charges to finance its new airport. Because the AHTA prohibits local taxation of air passengers except where the charges are necessary to operate existing airport facilities,²⁷¹ Denver was not permitted to locally tax air commerce in order to finance an airport facility that was not yet built.²⁷² The addition of section 1513(e), which granted airport agencies the authority to impose PFCs, has been a means for airports like Denver to finance capital improvements and new facilities without running afoul of the prohibitions against state and local taxation of air passengers engaged in air transportation.

III. EFFECTS OF PFCs ON THE AIRLINE INDUSTRY AND TRANSPORTATION IN THE UNITED STATES

Since PFCs now appear to be a permanent feature of air travel, the remaining question is how PFCs will affect the airline industry and United States transportation. Barring a successful lobbying effort by Los Angeles that would allow PFC revenue to be used for purposes unrelated to airport improvement projects, three major problem areas currently exist in which PFC revenue could play a major role. These problem areas are airline competition, airline concentration, and airport capacity.

A. COMPETITION

Lack of competition among individual airlines at airports and on specific routes is causing stagnation in the airline industry. Many analysts recommend that the industry open up to new carriers and allow competition and free market forces to breathe new life into the ailing industry. The chief obstacle to new carrier competition in the airline in-

²⁷⁰ *Id.* at 838.

²⁷¹ *Id.* at 839.

²⁷² *Id.* at 839-40.

dustry is the exclusive use, long term lease agreement with a majority in interest (hereinafter MII) clause between an airline and an airport.²⁷³ The long term lease agreements are rewards that individual airlines receive from airports for helping fund most airport construction. Airlines view the long term lease agreements as a return on their investment.²⁷⁴ Not only do the leases have long lease periods, but the agreements place restrictions on other airport facility leasing. In addition, these leases usually contain MII clauses that give the airline substantial control over competition from other airlines at any particular airport. MII clauses give airlines power that ranges from the right to veto expansion at an airport, to the right to approve large capital projects, to the ability to adjust landing fees or terminal rental fees, to the right to approve bond sales to raise capital for new construction.²⁷⁵

Before deregulation, the CAB controlled airline routes and fares at all airports and thus curtailed the possibility of airlines abusing their restrictive lease provisions and squeezing out competitors.²⁷⁶ Deregulation, however, removed CAB restraints and opened the door for incumbent airlines to use their restrictive lease provisions to immunize themselves from competition.²⁷⁷ Specifically, incumbent airlines used their restrictive lease agreements to acquire exclusive, long term use of boarding gates and take-off and landing slots at airports.²⁷⁸ This monopoly of airport facilities makes it impossible for new carriers to launch competing services at incumbent controlled airports and drive prices down.²⁷⁹ Instead of simply raising ticket prices to supracompetitive levels, incumbent airlines may choose to sell landing slots at high premiums since they are free to

²⁷³ See Note, *supra* note 3, at 548.

²⁷⁴ *Id.* at 561.

²⁷⁵ *Id.* at 549-50.

²⁷⁶ *Id.* at 550.

²⁷⁷ *Id.*

²⁷⁸ See *On a Wing*, *supra* note 2, at S10.

²⁷⁹ *Id.*

own, buy, or sell take-off and landing slots.²⁸⁰ Rather than selling a slot, some incumbents opt to sublease at exorbitant costs.²⁸¹ No matter how the incumbents decide to maximize profits and minimize competition at airport facilities, the incumbents next use the MII clauses in their restrictive lease agreements to veto airport expansion, thus forestalling the ability of new carriers to set up berths in the expanded airport.²⁸²

The result of these agreements is that incumbent airline anticompetitive pricing is preserved. Studies indicate that airlines controlling a substantial share of an airport's facilities will charge higher prices per mile to and from that airport than they charge at airports where they do not control a substantial amount of facilities.²⁸³ In fact, fares from fifteen airports that are dominated by one or two established airlines were found to be twenty percent higher than those fares from airports with more competitor carriers.²⁸⁴

Exclusive use lease agreements with MII clauses are extremely widespread among our nation's airports. As of 1990, fifty-five airports in the United States functioned with MII clauses.²⁸⁵ This figure includes fifteen of the twenty-seven largest United States airports.²⁸⁶ To make matters worse for airline competition, most of the leases at these airports are for exclusive use over a twenty to thirty year period.²⁸⁷ Currently, more than half of all leased airport gates are covered by agreements that will not expire for more than a decade. Some leases will not expire until the year 2015.²⁸⁸

²⁸⁰ Paul S. Dempsey, *Antitrust Law and Policy in Transportation: Monopoly Is the Name of the Game*, 21 GA. L. REV. 505, 594 (1987) (arguing that the DOT's willingness to approve airline mergers will result in airline monopolies).

²⁸¹ See Note, *supra* note 3, at 562.

²⁸² *Id.* at 552.

²⁸³ *Id.* at 551-52.

²⁸⁴ See *On a Wing*, *supra* note 2, at S10.

²⁸⁵ See Note, *supra* note 3, at 551.

²⁸⁶ *Id.*

²⁸⁷ *Id.*

²⁸⁸ *Id.*

The competition barrier against new carriers is almost insurmountable. One airline controls at least sixty percent of the enplanements at twenty-two United States airports.²⁸⁹ At fourteen large airports, two airlines control as much as eighty-five percent of all airline enplanements.²⁹⁰ The result for prospective competitor airlines is harsh. Sixty-eight percent of our leading airports have no terminal space available for new entrants.²⁹¹ The message for potential new carriers and consumers is clear: "the infrastructure at the nation's most attractive hubs has by now been locked up by the megacarriers and can only be secured at exorbitant prices or through expensive litigation."²⁹²

Despite the prospective benefits of lower prices for consumers, more carriers with better service and a healthy, competitive airline industry, the major airlines are not willing to relinquish exclusive use lease agreements. Major airlines offer three basic defenses for the restrictive leases:

First, incumbent airlines argue that the leases result from arm's-length negotiations with the airport and therefore are not anticompetitive. Second, they argue that the leases ensure them a return on their investment in the airport facility and that a rule allowing airports to raise rental fees to subsidize expansion would allow new entrants to be "free riders" on the incumbents' initial investment. Third, airlines argue that the hub system is efficient and that a reallocation of gates would reduce efficiency.²⁹³

Despite the unwillingness of incumbent airlines to abandon restrictive lease agreements, PFCs may offer a solution to the problem of how to increase new carrier competition with established airlines.

Under the PFC application system, no incumbent airline has flat veto power over proposed airport capital projects. Once PFC revenue collection is approved by the FAA, each

²⁸⁹ *Id.*

²⁹⁰ *Id.*

²⁹¹ Dempsey, *supra* note 280, at 594.

²⁹² *Id.* at 595.

²⁹³ See Note, *supra* note 3, at 561 (citations omitted).

airline at an airport must collect and remit the tax. Available PFC revenue will make airport expansion projects possible despite incumbent airline recalcitrance. This added capacity at newly expanded airports built with PFC revenue will spur competition among the airlines.²⁹⁴ With PFC revenue, airports will no longer be dependent upon individual airlines to approve and finance capital projects. As such, exclusive use lease agreements will not be necessary to reward airlines for investing in new airport facilities. In the words of former United States Secretary of Transportation Samuel Skinner, PFC revenue would allow new airlines to enter the market by barring exclusive long term lease arrangements in airports that are paid for by the fees.²⁹⁵

B. CONCENTRATION

The current lack of competition in the airline industry by new carriers, which has been exacerbated by incumbent airlines, has fueled another problem area in air travel: concentration. Single airline concentration at individual airports is the result of two features of United States air travel — lack of competition between established and new carriers and deregulation. The preceding section discussed how the incumbent airlines have used long term exclusive use lease arrangements to preserve their monopoly at individual airports and ensure anticompetitive pricing.²⁹⁶ Since airline passengers generally desire round trip tickets between two cities and since there are rarely more than a few airlines that compete on any given route, concentration in any one geographical area is usually extremely high.²⁹⁷ This lack of competition by new carriers creates a concentration of a few incumbent airlines at individual airports, resulting in less choice and higher ticket prices for the consumer.

The hub system is another tool that has increased single airline concentration at airports. The hub system brings

²⁹⁴ Knutson, *supra* note 8, at B4.

²⁹⁵ *Id.*

²⁹⁶ See *supra* text accompanying notes 273-95.

²⁹⁷ Bliss & Lewis, *supra* note 27, at 296.

passengers from smaller cities to a central airport along "spokes." Passengers having the same final destination are collected at the central airport or hub and then routed to their destination.²⁹⁸ Deregulation of the airline industry and the demise of CAB control over routes facilitated the development of the hub system. The airlines argue that the hub system is cost efficient and, in order to create an effective hub, individual airline control of a substantial number of gates and facilities at specific airports is required.²⁹⁹ Unfortunately, the hub system has caused inefficient use of airport facilities and has directly led to specific airline concentration at airports.³⁰⁰ Combination of the hub system and exclusive use, long term lease agreements has resulted in single airline control, over-boarding gates, landing and take-off slots, and airport over-expansion.³⁰¹

In addition to the effects of lack of competition on concentration, deregulation has also spawned increased airline concentration at individual airports. In 1984, after the demise of the CAB, federal responsibility for overseeing the economic structure of the airline industry was allocated to the DOT.³⁰² Under the Deregulation Act, airline mergers and acquisitions must pass DOT's review process and meet with the agency's ultimate approval.³⁰³ The review process is heavily weighted in favor of merger and acquisition approval. For example, the agency must approve a proposed merger or acquisition unless it finds that the transfer would not be "consistent with the public interest," or would have certain anticompetitive effects.³⁰⁴ Despite the anticompetition proviso, the policy almost amounts to a presumption of

²⁹⁸ See Note, *supra* note 3, at 550.

²⁹⁹ *Id.* at 550-51.

³⁰⁰ *Id.* at 551.

³⁰¹ *Id.*

³⁰² 49 U.S.C. § 1378(b), *repealed by* Act of July 5, 1994 Pub. L. 103-272, § 7(b), 108 Stat. 1379 (subject matter of this section to be codified generally at 49 U.S.C. §§ 41101-42112); see also Bliss & Lewis, *supra* note 27, at 293.

³⁰³ 49 U.S.C. § 1378(b), *repealed by* Act of July 5, 1994, Pub. L. 103-272, § 7(b), 108 Stat. 1379 (subject matter of this section to be codified generally at 49 U.S.C. §§ 41101-42112).

³⁰⁴ See Bliss & Lewis, *supra* note 27, at 293 (citation omitted).

agency approval of any proposed airline merger or acquisition. In fact, this DOT policy contributed significantly to the substantial consolidation of the aviation industry after the demise of the CAB.³⁰⁵

The DOT's policy favoring airline transfer approval is significant because of the industry's enormous economic losses and the number of carrier bankruptcies that have resulted. Airline mergers and carrier acquisitions are a natural byproduct of these bankruptcies for several reasons:

First, carrier management perceives that when the dust settles in the Darwinian marketplace, only the strong will survive, and the largest members will dominate the industry. Second, acquisition of a rival is often a less expensive means of growing than gradually opening up new markets through internal expansion. . . . Third, the candy store is open; the antitrust mood in Washington, D.C., has not been more permissive in this century than it is now. . . . Fourth, the psychology of the stampede is to join or be trampled by the hooves of the charging beasts.³⁰⁶

In this way, the economic tailspin of the airline industry has led to an increased number of carrier bankruptcies that have, in turn, fueled the industry's "urge to merge."³⁰⁷ The liberal approval policy of airline mergers and acquisitions espoused by DOT has been, in effect, a key accomplice in the rise of single airline concentration at individual airports.

Airline concentration is dangerous for the industry and the air traveler because it locks up the carrier market share at airports. It also drives ticket prices up and increases the probability of distress sale pricing, a phenomenon to which the airline industry is more susceptible than most because it markets a product that is, in effect, instantly perishable.³⁰⁸ Airline concentration is a very real problem. Reports indicate that since deregulation began in 1978, the aviation in-

³⁰⁵ *Id.* "In 1984, the four largest U.S. airlines constituted 54% of the U.S. market . . . and the top ten airlines constituted 73.3%." *Id.*

³⁰⁶ Dempsey, *supra* note 280, at 599.

³⁰⁷ *Id.*

³⁰⁸ *Id.* at 589.

dustry has grown increasingly more concentrated.³⁰⁹ These reports are supported by the fact that the market share of the top ten airlines, as measured by domestic revenue passenger miles, has grown from seventy-eight percent in 1984 to ninety-four percent in 1989.³¹⁰

In addition to enhancing competition between established and new carriers, PFC revenue may offer the solution to the problem of airline concentration. Airports that receive approval for PFC collection may use the revenue to expand their facilities without the financial help of the resident, incumbent airlines. Without airport indebtedness to individual airlines, restrictive lease agreements will not be made. New carriers can enter the airport's geographical market and offer competitive fares and routes. Single airline concentration at airports and in geographical regions will be reduced. New carriers, however, will have to guard against attempted takeovers through mergers and acquisitions by the larger airlines. This task will be difficult in light of the liberal policy for approval of airline transfers. It is possible, though, that the jolt the industry feels from new carrier competition, combined with the recent gains achieved by the airlines through basic belt tightening, will keep younger and weaker airlines out of bankruptcy and safe from takeover.

C. CAPACITY

As single airline concentration was engendered by the anticompetitive nature of the aviation industry, so too was one final problem area: airport capacity. The air travel infrastructure of the United States is seriously constrained. In 1990, twenty-two major airports in the United States reported that they were suffering from lack of capacity.³¹¹ The consequence of airline overcrowding at airports is significant to the quality of transportation in the United States. In 1990, the twenty-two airports that reported a lack

³⁰⁹ See Note, *supra* note 3, at 548.

³¹⁰ *Id.*

³¹¹ Reilly, *supra* note 4, at 32.

of capacity exceeded 20,000 hours annually of airline flight delays.³¹² Unfortunately, relief does not seem imminent. By 1997, estimates predict that the number of airports exceeding 50,000 hours of delay will more than triple. Moreover, the number of airports predicted to have between 50,000 and 100,000 hours of airline aircraft delay will be as many as fourteen.³¹³ Aircraft delay is not simply a frustration and an inconvenience to air travelers. Rather, it is a tremendous monetary loss to airlines and the economy. The cost of delays to the airlines in 1990 was approximately three billion dollars.³¹⁴ If, as expected, the number of hours of delay increases, so too will the losses in the billions of dollars to the airlines and the United States economy.

Here again, PFCs offer a solution to the problem of airport overcrowding and the costs of aircraft delay. Revenue from PFCs could be used to cover the costs of building and maintaining new airport facilities, allowing airports to grow in concert with economic need. Without PFCs, the only other means of increasing airport capacity, given what would be the continued existence of restrictive leases with MII clauses, would be the use of money in the Airport and Airways Trust Fund.³¹⁵

The money in the Airport and Airways Trust Fund is generated by a series of airline industry taxes, which include a tax on passenger tickets and a fuel tax.³¹⁶ The fund consists of an average interest earning balance of more than fifteen billion dollars, at least five billion dollars of which is uncommitted surplus.³¹⁷ This surplus could conceivably be used to solve the airport capacity problem. It has been suggested that Congress create a revolving loan fund for airports by depositing a single lump sum from the surplus or by a series of annual fund appropriations.³¹⁸ The problem with this

³¹² *Id.*

³¹³ *Id.*

³¹⁴ *Id.*

³¹⁵ 26 U.S.C. § 9502 (Supp. V 1993).

³¹⁶ *Id.*

³¹⁷ Mar. 1993 Tax Report, *supra* note 172, at G-10.

³¹⁸ Reilly, *supra* note 4, at 35.

suggestion and any other suggestion for using trust fund money for airport capacity purposes is that the money does not flow directly to the intended purpose. Instead, the airline taxes flow into the Treasury.³¹⁹ The Treasury then funnels the airline taxes into the Aviation Trust Fund for future spending by the FAA.³²⁰ The FAA, however, cannot reach the money until it is appropriated by Congress, which happens only after expenditures are authorized through the congressional budget process.³²¹ The congressional budget process, in turn, can only happen after an executive branch budget process that involves the FAA, the office of the Secretary of Transportation, the Office of Management and Budget, and the White House.³²² In contrast to this lengthy appropriations process, PFC revenue is directly channeled to the airport capital project for which it is approved and is a much more expedient means to fund airport expansion and increase capacity.

D. THE REST OF THE STORY

The preceding sections have identified the problem areas of the air transportation industry. As discussed, PFCs could easily play a large role in alleviating each of these difficulties. There remain two additional areas in which PFC revenue could play a role. These areas are noise control and safety.

1. Noise Control

The Airport Noise and Capacity Act of 1990³²³ was passed in response to recent concern over airport noise.³²⁴ The Act calls for the creation of a national noise policy that

³¹⁹ Aaronson, *supra* note 6, at 78.

³²⁰ *Id.*

³²¹ *Id.*

³²² *Id.*

³²³ 49 U.S.C. § 2101, *repealed by* Act of July 5, 1994, Pub. L. No. 103-272, § 7(b), 108 Stat. 1379 (subject matter of this section to be codified generally at 49 U.S.C. §§ 47101-47533).

³²⁴ See Pamela B. Stein, Comment, *The Price of Success: Mitigation and Litigation in Airport Growth*, 57 J. AIR L. & COM. 513, 537 (1991).

would coordinate the independent policies of individual airports.³²⁵ The Act emphasizes regulations and approval policies that depend upon the type of aircraft employed at an airport and the level of noise created by that aircraft.³²⁶ Failure to meet any of the regulations may result in airport ineligibility for PFC collection.³²⁷ Although withholding PFC eligibility is an effective means of enforcing noise control policies, it eliminates the creation of needed additional capacity through PFC revenue at airports that fail to meet the Act's regulations. Many airports may fail to meet these regulations as they grow, attract more flights and larger aircraft, and require longer or additional runways.³²⁸ Moreover, local laws often require aircraft noise abatement procedures that tend to reduce the existing, limited airport capacity. These procedures are nothing more than restrictions that prevent the use of certain airport approach and departure paths, limit the number of aircraft operations or the hours of operation, or require preferential runway use or period rotation of alternate runways.³²⁹

In order to "maintain current airport capacity and to remove roadblocks to new construction a comprehensive national noise program must be fashioned."³³⁰ This program must do more than remove eligibility for PFCs if certain noise regulations are not met. It must recognize that PFC revenue is crucial to solve the airport capacity crisis affecting air travel and reconcile noise control with airport growth.

2. *Safety*

In short, as long as the airline industry remains unhealthy, serious questions arise regarding the safety of air

³²⁵ 49 U.S.C. § 2101, *repealed by* Act of July 5, 1994, Pub. L. No. 103-272, § 7(b), 108 Stat. 1379 (subject matter of this section to be codified generally at 49 U.S.C. §§ 47101-47533).

³²⁶ *Id.*

³²⁷ *Id.*

³²⁸ Stein, *supra* note 324, at 555.

³²⁹ Reilly, *supra* note 4, at 34.

³³⁰ *Id.*

travel. These questions arise because of the obvious danger of poor or nonexistent profits creating a tendency by management to curtail costs that could take the form of significantly diminished maintenance work.³³¹ At least while the industry is suffering from massive economic losses, a certain percentage of airport-allocated PFC revenue could be set aside to ensure a basic level of air safety for the traveling public. Even after airlines begin to realize a continued profit, PFC revenue used for safety purposes could be a permanent fixture of the service airports provide to air travelers.

IV. CONCLUSION

Given the many valuable airport uses to which PFC revenue may be put, it is imperative for improved air travel in the United States and the health of the airline industry that PFC revenue not be diverted for extraneous, city uses. As one commentator states, "[t]he traveling public deserves a safe, efficient, and healthy airline industry providing an adequate level of service at a reasonable price."³³² PFCs used exclusively for airport and airline purposes may be the means to accomplish this goal and the magic that lifts the curse and the albatross from the neck of the airline industry.

³³¹ Dempsey, *supra* note 14, at 352.

³³² Dempsey, *supra* note 280, at 590.

