The Near Failure of Air Charter Regulation: The Case for More Experimentation in Public Policy

Jaap Kamp
THE NEAR FUTURE OF AIR CHARTER REGULATION: THE CASE FOR MORE EXPERIMENTATION IN PUBLIC POLICY

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While the air transport industry is adjusting to escalating fuel prices and continuing inflation, its regulatory environment is undergoing changes that will have significant impact on air transport in the near future. Both in the United States and overseas, new charter concepts are being introduced that should replace the traditional but problematical "prior affinity" concept. In this article a case is made for controlled experimentation with relatively liberal charter concepts. Regulators should, therefore, develop a legal framework that provides adequate flexibility in times of changing economic and marketing conditions.

In October 1974, the Civil Aeronautics Board (CAB) introduced minimum charter rate "guidelines" across the North Atlantic. The guidelines constituted a significant reversal of the CAB charter policy during the late sixties and early seventies. During that period the CAB had sought to develop charter services and to limit "its intervention in the rate regulation area so the public could be served at prices settled in the competitive marketplace." The guidelines were challenged by the Department of Justice and others in court, and finally vacated by the CAB on February 11, 1975. In this article, the author argues that governments should refrain from imposing minimum charter rates, not only on legal grounds, but also on practical and economic considerations.

I. INTRODUCTION

The purpose of this article is to review and analyze several re-


cent changes in air charter regulation and to suggest some courses of regulatory action for the future. The paper begins with a brief discussion of some recent developments on the North Atlantic route that have shaped the present regulatory climate for charters. While there is a call for liberalized charter regulations, notably within the United States, several governments and carriers want to contain further growth of charter services and advocate the introduction of minimal charter rates.

The second section of this article analyzes new charter concepts such as the Advance Booking Charter, the Travel Group Charter, and the One-stop Inclusive Tour Charter. These charter concepts should be viewed as new products that deserve to be testmarketed on a more liberal basis than the Civil Aeronautics Board has allowed.

In the third part of the paper the disadvantages of minimum charter rates are set forth on legal, economic, and practical grounds, and a case is made for controlled experimentation with liberal charter concepts. To enable such experimentation in international aviation, governments and carriers should take a fresh approach to the problem of protecting scheduled services. Governments should begin with designating routes on which a minimum level of essential scheduled service has to be maintained (so-called ES-routes). Scheduled carriers serving these ES-routes should receive limited protection, preferably in the form of direct subsidies if ES-routes are unprofitable. Excess traffic on ES-routes and traffic on non ES-routes should have an opportunity to be carried by a wide variety of services, ranging from supersonic scheduled services to charters or a no-frills skybus. As long as scheduled or non-scheduled carriers view it as feasible to provide one or more services at a profit they should be allowed to provide them, at least on an experimental and temporary basis.

A. Recent Developments in Air Transport

During 1974, the North Atlantic route (here defined as the market between the United States and Canada on the one side and Western Europe on the other) was served by 29 scheduled carriers and some 20 supplemental or charter-only carriers. The route is generally considered the most competitive market in the international airline industry because it is served by so many carriers which
charge the lowest fares when compared to fares on other international routes. The market is also thought of as one of the most innovative of the industry with service improvements, whether technologically induced or marketing oriented, often having been introduced for the first time on this route.\(^2\)

Since the mid-sixties, the North Atlantic market has been characterized by a tremendous growth in transatlantic charter traffic. In 1965, the 470,000 charter passengers accounted for 12.8 percent of all transatlantic passengers. Nearly one million charter passengers were carried in 1968; over three million were carried during 1973.\(^3\) Scheduled traffic has also grown in these years, although at a slower rate than charter traffic. In 1965, 3,200,000 passengers were carried on scheduled services; in 1973, the total was 8,544,000.\(^4\) By 1973, one out of every four passengers across the North Atlantic was on a charter service. These numbers indicate a substantial increase in the charter versus scheduled competition.

During the seventies, it became apparent that heavy competition, fuel price increases, inflationary pressures, and other circumstances put a heavy burden on the industry, especially on the U.S. international scheduled carriers.\(^5\) Pan American World Airways and Trans World Airlines incurred such heavy losses on their international routes that they formally petitioned the Civil Aeronautics Board under section 406 of the Federal Aviation Act of 1958\(^6\) for temporary and final subsidy rates for their international operations. Substantial fare increases (caused by the dollar devaluation, fuel cost increases, and world-wide inflation) do not offset the increased costs to carriers. The fare increases of more than twenty-five to

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\(^4\) Id. at 30.

\(^5\) Between July, 1973 and September, 1974 the average cost per gallon on North Atlantic operations increased from 13.7 to 37.0 cents per gallon. CAB, Press Release 74-230 (Oct. 24, 1974).

\(^6\) See also CAB Order No. 74-9-62, (1974) in which the Board dismissed TWA's petition for temporary and final subsidy without prejudice. TWA's petition did not contain information on the carrier's domestic operations and was deemed to be deficient under section 406 of the Federal Aviation Act. Pan Am, according to the Board, "has not established that it has such an immediate and critical need for subsidy support as to warrant the establishment of a temporary subsidy rate." Pan Am's petition for a final subsidy was assigned for hearing before an administrative law judge of the Board.
forty percent between early 1973 and November, 1974 do raise the question whether air transport is pricing itself out of the market, especially for pleasure travel.

The changes in the industry's environment seem to bring the industry into a continuing state of shock. The new pressures that have been put on the industry require an accelerated review of the U.S. international aviation policy. For this purpose an interdepartmental review committee headed by Robert H. Binder of the Department of Transportation officially started the preparations for a new policy in January, 1975. The subjects for review include the viability of Bermuda principles and the ex post facto review of capacity offered, the international rate making structure, the relationship between charter and scheduled services, pooling, national interest routes, and the government's method of bilateral negotiations. Completion of inter-agency review is expected soon, after which a revised Presidential Statement on International Aviation Policy (similar to the Statements of 1963 and 1970) may be at hand.

B. Charter Regulation Experiences Drastic Overhauling

During the seventies, the regulatory climate for charter services is undergoing dramatic changes which may seriously determine the future of this relatively new kind of service as well as its counterpart, the scheduled service. A chronology of the most important events related to charter regulations begins in 1972, with the introduction of the Travel Group Charter (TGC) by the CAB. Simultaneously, the member governments of the European Civil Aviation Conference (ECAC) introduced the Advance Booking Charter (ABC). Both ABC and TGC are similar concepts that are publicly available (as opposed to affinity charters); both require reservations and payments to be made more than 60 days before departure.

In June, 1973, the CAB authorized the member carriers of the National Air Carrier Association (NACA) to engage in discussions in an attempt to agree upon minimum rate levels on North Atlantic routes. Later in 1973 this authorization was extended to all U.S.


and foreign carriers providing North Atlantic charter services. Since then the efforts of carriers to reach a unanimous agreement have failed.\textsuperscript{10} In the fall of 1974, however, the CAB attempted to realize what the carriers were unable and unwilling to do by themselves. On October 18, the Board issued a Policy Statement establishing general guidelines for suspension and investigation of trans-Atlantic charter tariffs, setting forth minimum levels below which tariffs will be regarded as prima facie unreasonable, absent adequate economic justification, and thus subject to suspension and investigation.\textsuperscript{11}

Shortly thereafter, the Board issued two closely related notices of proposed rule making, one of which would authorize a new type of charter—the one-stop inclusive tour charter (OTC)—and the other which would terminate the existing “prior affinity” charter rules.\textsuperscript{12} The two proposals evoked an unexpectedly large number of reactions among interest groups and different segments of the public. The proposal to terminate affinity charters was heavily criticized by existing affinity organizations and their members, as well as by the supplemental air carriers. These reactions forced the Board not to “terminate the sale of affinity charters on March 31, 1975, as previously proposed, or anytime during the year 1975.”\textsuperscript{13} With this decision the Board temporarily left undecided the future of affinity charters.

During the winter months of 1974-1975, intensive discussions were held among member airlines of the International Air Transport Association (IATA). The discussions centered around the introduction of a new transAtlantic Advance Purchase Excursion fare (APEX) and the level of IATA's 22-45 day excursion fares which were generally supposed to be the fares most competitive with charter tariffs. Late in January, 1975, IATA airlines adopted the APEX fare to compete with charters, although its level is generally twenty to thirty percent above charter fares.\textsuperscript{14} The APEX formula is com-

\textsuperscript{10} Wall Street Journal, Sept. 25, 1974, at 14, col. 2.
\textsuperscript{13} 40 Fed. Reg. 5371 (1975).
\textsuperscript{14} Wall Street Journal, Jan. 28, 1975, at 4, col. ___.
parable with Travel Group or Advance Booking Charters (TGC/ABC) in that reservations and payments for this fare must be made more than sixty days before departure. If the passenger cancels, he will be penalized with a no-refund charge of ten percent of the fare or fifty dollars, whichever is higher.

A final development that should be mentioned briefly relates to governmental activities at the bilateral level that deal with charter services, charter landing rights, and the status of carriers that are allowed to perform charter services. After the United States had reached a rather innovative Memorandum of Understanding on Civil Aviation Charter Services with Belgium in October, 1972, the U.S. government concluded the first series of Nonscheduled Air Service Agreements with Yugoslavia (September, 1973), Canada (May, 1974), and Jordan (September, 1974). These agreements provided a whole new regime in the area of non-scheduled air service and set forth in considerable detail the rights of the two countries with respect to charter services.

II. THE PROBLEM FOR THE REGULATOR: CREATING NEW CHARTER CONCEPTS

The charter developments that have been referred to are frequently interrelated with each other as they are often the result of structural changes within the air transport industry. One of these changes in the industry, at least on a route such as the North Atlantic, is a shift in travel purposes by passengers. Immediate post-war expectations on the North Atlantic reflected a major emphasis on travel for business purposes. For governments and airlines this emphasis was translated in the continued promotion and protection of the scheduled system: carefully defined routes would be served on a regular and frequent basis, generally available to a segment of the public that was willing and able to put up the relatively high prices for the services provided.


With the post-war rise in incomes, increased transnational communication and integration, and the cost-saving opportunities of aviation technology, a general trend has emerged in which passengers traveling for non-business purposes clearly outweigh those traveling for business purposes. Recreational travel (for vacations or sightseeing) and travel to visit friends and relatives led to what the CAB recently called the "irresistible and understandable public demand for low-cost air transportation, much of it on charter services."\(^{17}\)

During the sixties and early seventies, the regulatory climate was relatively favorable to the expansion of charter competition. Between 1963 and 1972, transatlantic authority had been granted to twenty-three European charter carriers and six U.S. supplemental carriers. In the Presidential Statement of International Air Transportation Policy of the United States (1970) charter services were further recognized, notwithstanding a proviso, to avoid a substantial impairment of scheduled services. In an assessment of transatlantic charter competition during this period, the economist Lucile Keyes states that "there is no doubt that there would have been far stronger resistance to charter expansion . . . , if general economic conditions had been less favorable and there had been an accompanying drop-off in scheduled traffic."\(^{18}\) Now that we have arrived at a time in which general economic conditions are apparently unfavorable, the question of whether charter services should be expanded, and if so, to what extent, is more urgent than ever.\(^{19}\)

The regulator in the United States is confronted with the preservation of an "air transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national de-

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\(^{17}\) One of the classic sentences with which the CAB introduced the Travel Group Charter, 37 Fed. Reg. 20808 (1972). For the shift from business travel to non-business travel, see generally CAB STAFF STUDY, AIR TRAVEL IN THE SEVENTIES, THE ECONOMIC POTENTIAL (1972).


\(^{19}\) The economic climate for the airline industry is obviously not too rosy in view of the fuel price increases, the adjustment problems of wide-body jets, economic recession in the U.S., and a zero traffic growth. Despite these grave circumstances, this author maintains an optimistic view that fuel and wide-body problems will be resolved, that the U.S. recession is temporary, and that traffic growth will resume in the near future.
This obligation does not refer to the preservation of a "scheduled system" or of the "scheduled carriers." Nor does it say that charter services should be promoted or that the public should receive air transportation at the lowest possible prices. What it does imply is that the CAB should maintain a certain degree of air transport service, even if the free market forces do not provide for it. For this purpose the status of a "certificated carrier" has been created; its entry in aviation is restricted and its competition is deliberately reduced.

At the international level, the departure from open and free competition is reinforced by such non-economic considerations as national defense, prestige, and uneconomic protection of national carriers in view of foreign competition. As is generally known, these considerations are complex and contribute heavily to the politicization of international air transport.21

To discuss the problems of charter regulation in this context is a hazardous operation since the charter concept touches some of the key principles in transportation and particularly in aviation. With the historical emphasis on scheduled traffic and services, the problem of charters has been one of "containment" through both private (IATA) and public regulation. As long as the charter concept could be defined clearly and the de facto development of charters did not run too much ahead of the de jure development, regulatory problems could be kept to a minimum. During the last decade, however, charters have increased in popularity; simultaneously, the original charter concept has been more or less eroded and become practically synonymous with "low-cost air transportation."

For the moment, two questions seem highly pertinent to the status quo and the future of air charter regulation. First, should new charter concepts be designed, and, if so, to what extent should they be liberalized or restricted in view of the potential impairment of scheduled services? Secondly, in the area of charter rate making, should governments or regulatory agencies encourage or discourage

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21 Several authors have treated these issues in detail, see, e.g., M. Straszheim, The International Airline Industry (1969); H. Wassenerbergh, Aspects of Air Law and Civil Air Policy in the Seventies (1970); W. O'Connor, Economic Regulation of the World's Airlines—A Political Analysis (1971).
cartellization among charter carriers and should they set minimum rates for charter traffic?

The first question is presently under consideration of both Congress and the Board; the second is of major concern to the CAB, justice, state, and transportation departments, and a number of ECAC governments. Preliminary answers to the questions can be expected in the near future, assuming that the legislators' and regulators' pace in decision-making is positively correlated with the importance of the problems.

A. A New Charter Concept: The Travel Group Charter

The problems with affinity charters are well-known. In the words of the CAB, the rules of such charters (1) "tend to discriminate against members of the public who do not belong to qualified organizations with a membership large enough to successfully mount a charter program” and (2) have “proven to be extremely difficult to enforce."22 The initial answer to the discrimination and enforcement problems was the introduction of the advance booking concept—in the form of the Travel Group Charter (TGC) in the United States and the Advanced Booking Charter (ABC) in the ECAC countries.

The abolition of affinity requirements required a completely new formula to distinguish charter services from scheduled services. Supplemental carriers and governments have found a method for distinction in the advance booking principle although the legislative history of charters does not reveal a direct basis for this principle. In addition to the advance booking feature, the most significant distinction consists of the requirement that the TGC or ABC organizer composes a group of at least forty passengers who shall leave and return on the same flights. The trip is to last a minimum of seven days (ten days in some areas, e.g., transatlantic trips).

For the individual traveler the TGC or ABC is publicly available via advertisements, travel agents, announcements in magazines, etc. The publication of a series of departure dates even gives TGC's or ABC's a flavor of regularity. Before one supposes that the advance booking flights are fully comparable to scheduled services, however, one should read the whole TGC advertisement and the individual passenger contract. The TGC fare depends on the number

of participants that ultimately sign up (the advertised fare being based on the sale of all seats and therefore the lowest possible). If a TGC passenger cancels his trip, he is subjected to a complex system of no-refund penalties and assignment possibilities. If the TGC organizer does not succeed in the formation of a group of sufficient size (minimum forty passengers) at least sixty days before departure, the flight must be canceled.

The first year of operation of TGC's and ABC's (1973) was a complete failure. During that year, 235 TGC and 555 ABC flights were flown, representing only three and three-tenths percent of all international charter flights to or from the United States. The CAB realized that the poor 1973 experience of TGC's was mainly the result of severe legal and marketing constraints on the industry and the potential TGC travelers; to use the words of the CAB, 1973 TGC's were "virtually unmarketable." In August, 1974, the CAB adopted a modified TGC regulation liberalizing several of the earlier restrictions. The deadline for filing the list of original participants by the organizer was reduced from ninety to sixty days prior to the scheduled departure date. A TGC can now be filed when at least ninety percent (previously one-hundred percent) of the contracted seats have been sold to participants. Up to fifteen percent of the original participants may assign their seats to the general public without losing the prepaid fare (forbidden before the liberalization).

Despite these relaxations, the TGC remains a curiosity in air transport, as well as in marketing and legal construction. Its operational features as a new product are further complicated by the differences between it and European originating ABC's. The TGC restriction that is most disturbing to operators is the pro rata aspect of its price. TGC fares depend on the final number of participants. Although minimum fares are advertised (assuming that the maximum number of participants will be obtained), the fine print in the TGC announcement and the contract refer to a possible higher fare (up to a maximum of twenty percent) "if not all seats are sold."

According to the Board, the TGC regime is constructed on the

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23 Supra note 3, at 20.
25 Id. at 1.
basic premise that a group of individuals undertakes a joint obligation to charter an aircraft, accepting limited mutual risks of pro rata price fluctuations.\textsuperscript{26} The TGC charterer is thus not an entrepreneur who bears the risk of losses due to insufficient participation; this risk bearing feature is reserved for the charter participants themselves. The approach taken by ECAC members is to offer ABC's to the public at a fixed price, which involves the charterer as the risk-taker for unsold seats. TGC's originating in Europe may be marketed under this fixed price concept.\textsuperscript{27} Needless to say, U.S. supplemental carriers and charter operators will continue their efforts to remove most of the TGC's artificial restrictions. The pro rata pricing concept is a prime target not only because European ABC's do not have this requirement but even more so because it is a highly unrealistic proposition in today's mass marketing of consumer products. Potential travelers, like most consumers, want to know in advance what a product will cost.\textsuperscript{28} The few cases in which "ex post" pricing takes place (e.g., car repairs) must have a very practical and compelling justification. Even then the pricing procedure is not without problems. Nowhere do advertisements say: "Our product will cost more if we sell less today!" Explanation of the pro rata requirement combined with the complicated cancellation provisions, for both the charter organizer and the TGC participant, take up most of the TGC advertisement or announcement. The latter is more a form of "legal Spielerei" than the promotion of an original or attractive product.

The TGC was adopted on an experimental basis expiring December 31, 1975. In a recent notice of proposed rule making, the

\textsuperscript{26} Id. at 5.

\textsuperscript{27} Canadian and U.S. authorities and representatives of the 20 member states of ECAC worked out a "Declaration of Agreed Principles" on charter flights over the North Atlantic in Ottawa, October 19-21, 1972. The Ottawa accord has been the basis for bilateral Memoranda of Understanding in which each party accepts as charterworthy transatlantic traffic originated in the territory of the other party and organized and operated pursuant to the "advance charter" (TGC or ABC) rules of that party. See, e.g., Dept. of State Press Release 1973—113 (Apr. 16, 1973). (Memorandum of Understanding between the United States and Germany.) For the text of the Ottawa Declaration of Agreed Principles, see 68 DEPT. OF STATE BULL. 20 (1973).

\textsuperscript{28} In a current consumer research study of attitudes toward charter travel the author found that 90 percent of the respondents (passengers and visitors of travel agencies in the Mid-West) consider it extremely or very important to them that they know the exact fare when making reservations for a trip to Europe.
CAB tentatively concluded to make the TGC a charter concept of indefinite duration. The Board stated that TGC's can become a viable form of charter transportation, particularly under the liberalized rules of August, 1974. Since the diversionary impact of TGC's on scheduled services has been nil, the CAB did not find it necessary to consider the new concept further as an experiment. In its explanatory statement, the CAB remains cautious, however, and makes it clear that

if we ultimately determine in this proceeding to make the duration of the TGC rule indefinite, we shall of course stand ready to adjust our charter rules, including the TGC rule, in such a manner as may become necessary to avoid undue diversionary impact on scheduled service.

B. Termination of the Prior Affinity Charter Concept

The introduction of TGC's proved to be only one solution to the affinity charter problem. In two notices of proposed rule making the Board announced that it intends to further redesign charter services. One of the proposed rules intended to completely terminate existing prior affinity charter rules by March 31, 1975. In its proposal, the Board offered the same two arguments that led to the adoption of TGC rules: prior affinity charter rules are discriminatory, and they are difficult to enforce. Since the vast majority of charter traffic consists of affinity charters (roughly eighty percent of transatlantic charter passengers in 1973) the Board faces a severe dilemma. The agency wants to discard a product that, on one hand, is extremely popular with large segments of the public, especially those who have long been the lawful user of the affinity concept. On the other hand, the affinity concept is unpopular with those people who do not belong to the right affinity groups. It is also an unpopular concept among those parties that depend on its


\[30\] Id.

\[31\] Supra note 12.

\[32\] Correspondence received by the Board contained 265 pieces from groups and 13,719 from consumers opposing the termination of affinity charters. Among the correspondence received from consumers a substantial amount resulted from campaigns by the British American Club of Northern California, the Continental Club of Kirkland, Wash., and the Trans-Atlantic Brides and Parents Association. See Comments of the CAB's Office of the Consumer Advocate on EDR-237C, No. 24908, at 2-9 (CAB, Dec. 20, 1974).
enforcement, such as the scheduled airlines, most tour operators, and travel agents.

If the affinity problem is to be solved in a manner that will satisfy all parties concerned, the Congress and the Board have to create new and workable charter concepts. Congress may take steps in this direction by considering a Low-Cost Air Transportation Bill introduced by Senators Cannon and Kennedy. The bill would retain affinity charters until Congress decides that they should be phased out. At the same time, the bill would authorize one-stop inclusive tour charters and replace Travel Group Charters with substantially liberalized Advance Booking Charters.

The Board can make a substantial contribution to solving the affinity problem by announcing and enacting the new rules in a well coordinated time-schedule to replace gradually the existing rules. This is extremely important in the mass tourism industry in which contractual arrangements are frequently made as far as two or three years in advance. It is apparent that the phasing out of affinity charters has suffered from both a lack of acceptable alternatives and an inadequate timing. The first suspension of affinity charters was announced by the Board in November, 1972 by Advance Notice of Proposed Rule Making EDR-237. At that time, the Board had just enacted the TGC whose rules would prove to be "virtually unmarketable." As a result the Board had to improve the marketability of TGC's, leaving affinity charters intact. The proposed rule making of October 30, 1974, would terminate the affinity charters by March 31, 1975. Under the pressure of Congressional action

34 Section C infra.
35 The proposed ABC's in S. 421 would reduce the advance booking deadline to one month before departure. Charter organizers would have the risk of unsold seats so that these can be marketed at a fixed price. In its present form the Bill allows the charter organizer to sell up to 25 percent of the seats at any time prior to the departure date. Acceptance of this provision would substantially erode the advance booking notion. A better solution seems to introduce a no-refund charge (e.g., 10 or 25 percent of the fare) in case of cancellation. This amount should (partially) cover the loss from cancelled seats. If the organizer becomes the risk-taker of the ABC he may also account for some cancellations in advance and spread their cost over all seats. In this way, it is not necessary to provide for a cancellation insurance, while the enforcement problem of the 25 percent last-month-seats is avoided.
36 See text accompanying note 24, supra.
and the many comments filed against the proposed termination, the Board decided recently that the affinity charters would not be terminated during the year 1975. The CAB once again recognized that one or more adequate substitute forms of charter have to be authorized before the affinity charters can be abolished.

C. The One-Stop Inclusive Tour Charter

As mentioned earlier, the Board simultaneously introduced its proposed termination of affinity charters with a proposal for a new charter formula, the One-stop Inclusive Tour Charter (OTC). The OCT would be, according to the Board, "something of a hybrid" between the TGC and the Inclusive Tour Charter (ITC).

The ITC is a legislative product of the sixties that has never gotten off the ground, despite its "real promise both domestically and internationally as the instrumentality most likely to accomplish significant expansion of pleasure air travel." ITC flights must be at least seven days in duration and include three overnight stops at least fifty miles apart. In addition, the total tour price must not be less than 110 percent of the lowest scheduled airline fare. Evidence before the Senate Aviation Subcommittee demonstrates that the ITC form of travel has failed to fulfill the role envisioned by the CAB and Congress. Between 1968 and 1972, an annual average of 630 ITC flights was performed. In 1972, it was estimated that not more than 160,000 passengers were carried on ITCs. By any air transport standard, this can only be described as a "drop in the bucket." ITC regulations should carry most of the blame for this performance.

With the proposed OTC, the Board hopes to overcome the marketing problems inherent in the three-stop requirement of existing ITC's. The OTC is not, however, merely a liberalized version of the ITC. It is a new regulatory invention embodying the following restrictions:

1. An all-inclusive tour will be offered by a tour operator at a fixed price which may not be less than the prescribed minimum. The price must include overnight lodging, breakfast

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39 Id. at 2.
plus one meal per day, and transfer to and from transportation terminals.

2. A list of the prospective passengers, including all participants who have made full payment for the OTC, must be filed with the CAB no later than thirty days prior to the flight date.

3. The tour must have a minimum duration of seven days in North American markets (unless the return trip takes place on Sunday or Monday), and ten days for international OTC's.

4. No substitutions or additions may be made to the list of passengers after this list has been filed with the Board.

5. For all OTC's other than North American the same minimum price rules are applicable as with ITCs, i.e., 110 percent of the scheduled fare. For North American OTC's a minimum per diem amount of $25 must be added to the pro rata charter price.

6. Each authorized carrier is prohibited from contracting more than one-fourth of one percent of the number of passengers carried in the relevant market on domestic scheduled service during the most recent twelve-month period. The CAB provides detailed instructions on how this number is accounted for.

The strongest attack against the Board's proposed OTC comes from within the regulatory agency itself. The CAB's Office of the Consumer Advocate has commented as follows:

The Office fully concurs in the Board's basic desire to provide low-cost vacation package tours on a charter basis which are not encumbered with a three-stop requirement. The basic thrust which the Board has taken in the direction of a one-stop inclusive tour charter (OTC) concept surely will be welcomed by consumers. Unfortunately, very few consumers will ever be able to make use of the type of charter program proposed.

Serious internal differences of opinion and purpose seem to have found their way into the present proposal. As a result, the proposal displays a series of apparent serious imbalances. In the OTC proposal, as with the Travel Group Charter regulations, the idea was good; the execution poor.42

Many of the OTC restrictions seem artificial and costly, and ap-

42 Comments of the CAB's Office of the Consumer Advocate on EDR-281, No. 27135, at 1 (CAB, Nov. 27, 1974) (emphasis added).
pear to create marketing problems similar to those created by the
TGC. The required breakfast and one meal per day are disturbing
limitations on a vacationer's personal freedom. Rail passes or car
rentals may not constitute part of the minimum per diem price be-
cause this might encourage individual travel. The minimum stay
requirement of ten days for international OTC's frustrates efficient
and cost-saving back-to-back operations by air carriers. The seven-
day minimum in North America eliminates OTC's to such short-
stay resorts as Las Vegas, Orlando, and national parks, and to pop-
ular tourist cities such as New York, Washington, and San Fran-
cisco.

The Board's minimum price proposal poses several questions,
aside from the principal objections that can be made against mini-
imum price regulation. The minimum amount of $25 per day does
not account for decreasing costs with a longer stay; the amount is
too high per se for what many segments of the travel industry are
capable and willing to offer. If the minimum price is higher than the
necessary cost to the industry the tour operator will all but start price
competition, which leads to waste and frustration of consumer
choice. In its comments on the OTC, the Justice Department notes
that Las Vegas charters from the east coast contain land packages
for as low as $7 per day. Interference with this "market determined
price would be competitively unwarranted and inflationary."34

The proposed OTC's would be restricted by quotas of one-fourth
of one percent of the scheduled service over the preceding twelve-
month period. Apart from the administrative and enforcement prob-
lems of quotas, the proposed amount (one fourth of one percent)
would preclude any substantial OTC development among U.S.
cities and resorts, sightseeing areas, etc. Furthermore, it is doubtful
that the CAB can legally restrict the volume of scheduled carriers'
on-route charters between points named in the certificates issued
pursuant to Section 401 of the Federal Aviation Act.44 The sched-
uled carriers derive from their certificates the right to carry all tra-
ffic between points named in those certificates.45

34 Comments of the United States Department of Justice on EDR-281, No.
27135, at 13 (CAB, Dec. 30, 1974).
34 Cite to Aviation Act § 401.
45 See Comments of United Air Lines, Inc., on EDR-281, No. 27135, at 12
(CAB, Dec. 11, 1974).
Is the OTC formula appropriate as a replacement for the affinity concept? To answer this question, it is necessary to restate briefly what the affinity concept has meant to large segments of the public. Basically, it has been a low-cost, point-to-point form of transportation, marketed via cost-saving club magazines and word-of-mouth advertising; its most important feature other than the reduced fare, is a low "service" level that implies high load factors, infrequent scheduling, and modest inflight-service. It should be noted that affinity charters neither included advance booking requirements (although in practice most reservations and payments are made several weeks or months before departure) nor prescribed land arrangements. The OTC and TGC rules have advance booking requirements of sixty and thirty days, respectively.

It is presently impossible to say whether the consumer will commit himself more than one or two months in advance in order to achieve the OTC and TGC savings. The industry simply does not yet know what the consumer's attitudes are towards advance booking, paying, the risk of cancellation losses, etc.

Although the advance purchase requirement was so easily conceived by regulators and some members of the industry, an adequate understanding will require time, experimentation, and adequate marketing. This new aspect of both OTC's and TGC's (combined with all other new requirements and restrictions) prescribes the need for experimentation on a more liberalized basis than now proposed by the CAB. An OTC with a fifteen-day instead of thirty day deadline may seem too "diversionary;" all other restrictions, however, should preclude "substantial impairment." In that sense,

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46 The advance notice of proposed rule making, 36 Fed. Reg. 2514 (1971), contained a proposal for a "Non-Affinity Charter" that would have enabled any group of 50 or more persons to form a charter group at least six months prior to flight departure. Since then a significant part of the diversion debate has focused on the appropriate lead time. In its TGC rule of Sept. 27, 1972. 37 Fed. Reg. 20808 (1972), the Board reduced the lead time to three months. By mid-1973 it became clear that this period (in addition to other restrictions) was too long to fit into consumers' commitment patterns. The Board reduced the period to 60 days in its TGC modification regulation of August 12, 1974. 39 Fed. Reg. 29345 (1972) Historians may be interested to know that Member Timm dissented to the enactment of TGC's by stating: "The risks to the scheduled system are far beyond the permissible parameters of experimentation. The reduction of the advance purchase time from six to three months was done with no rational justification in the face of factual surveys showing that even six months might be too short a period." SPR-61 at 1 (Sept. 27, 1972) (dissenting opinion of Timm).
to relax the advance booking limit from thirty to fifteen days (or from sixty to forty-five or thirty days with TGC's) would seem to be only a marginal liberalization, other restrictions remaining equal. A great advantage would be created allowing the OTC's and TGC's to be brought much more in line with the affinity concept which did not contain any advance booking requirement.

III. CHARTER RATE DISCUSSIONS AND MINIMUM RATE GUIDELINES

A. Carrier Discussions Fail

Since mid-1973, scheduled and supplemental carriers flying the North Atlantic have been trying to agree on minimum charter rates. The first discussions, authorized by the Board on June 19, 1973, resulted only in the conclusion that it would be extremely difficult to unite the opposed interests of individual carriers and carrier groups. The Board's approval of the discussion of a minimum level of rates was based on "the intense and often destructive competition among charter operators producing a downward spiral of charter rates unrelated to the costs of providing the service." Another concern of the Board was, and still is, the high degree of competition between charter and scheduled services for a significant segment of the North Atlantic travel market. As is generally known, the scheduled carriers are forced to establish relatively low discount fares that have a depressing effect on carrier earnings. Furthermore, the IATA-fare structure is extremely complex, including a high "normal" economy fare and several low promotional fares. Of the latter, the best known is the 22-46 day excursion fare.

The first discussions among carriers, which broke down in July, 1973, led the Board to "inject an element of stability into the charter rate situation." The agency issued in September, 1973, a notice of proposed rule making to amend its policy statements, which would establish minimum rate guidelines for charter service between

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47 For the order authorizing rate making discussions, see supra note 8; for a brief history of the rate making discussions, see Policy Statement on Minimum Charter Rate Levels, 39 Fed. Reg. 38092 (1974).


49 Round trip economy fares New York-London for 1975 are $584 (winter season), $626 (shoulder season) and $764 (peak season). The 22-45 day excursion fares are $363, $393, and $493 respectively. The new 22-45 day APEX-fare amounts to $295 (winter), $309 (shoulder), and $399 (peak season).
the United States and Europe. The Board hoped, however, that the carriers would be able to negotiate an acceptable minimum rate level among themselves.

B. A Government-Imposed Charter Floor

Since September, 1973, fuel shortages and inflation worsened the problems of carriers. In the minimum rate level discussions, carriers reached only a tentative agreement in September, 1974, an agreement opposed by three U.S. supplementals and two foreign charter-only carriers. Notwithstanding opposition from several directions, the Board finalized its proposal to establish minimum charter rate guidelines and adopted a definitive Policy Statement on October 18, 1974. According to the Statement, the Board would "evaluate tariff rates against the standards set forth" in its statement. Tariff filings not conforming to these standards must be accompanied by a full and adequate justification. The Board's Statement subsequently provides the carriers with minimum rates exclusively based on season and aircraft seating capacity.

The objections to the Board's minimum rate level policy can be categorized. First, there are protests from carriers who question the specific level of the rates. Supplemental carriers claim that the rates are too high; scheduled carriers consider the levels too low. Both groups challenge the specific cost data and methodology used by the CAB. By entering the area of cost determination, the CAB has provided ample opportunity for long debates over what reasonable rates should be. Are seating capacity and seasonal patterns enough criteria to determine seat-mile costs? What about lower rates for charters originating in Europe? How should one account for the difference between an east cost and west cost originating charter? In what way can a solution be found to the eternal debate between average or marginal cost pricing?

Secondly, the Board's minimum rate level policy has been questioned from a legal viewpoint. In Moss v. CAB, an order of the CAB outlined a fare formula for domestic airlines and permitted tariff filings implementing that formula to be filed without suspension.

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52 39 Fed. Reg. 38092 (1974); see also text, supra notes 9-11.
53 430 F.2d 891 (D.C. Cir. 1970).
The court held the order to be invalid and tariffs filed by airlines based thereon were unlawful. The court considered the fare formula and its application "agency rate making," which, according to sections 1002(d) and 1002(e) of the Federal Aviation Act, would require public notice and hearings. With the establishment of charter rate guidelines, the Board comes very close to rate making, and it is not surprising that the Policy Statement has been challenged.

A recent motion by the Department of Justice for stay and petition for reconsideration of the Board's Policy Statement was denied. The CAB took the view that its action was not illegal and stated that its policy provides no more than "specific guidelines for the purpose of evaluating existing and proposed charter rates." The Board further clarified its policy by saying:

Stated differently, by establishing guidelines, the Board has merely made it known that it does not intend to review rates which are filed above that level. Conversely, rates filed below that level will be scrutinized both against industry data and that provided in the particular carrier's justification. It is, of course, patent that the Board has authority to suspend and investigate any North Atlantic charter rate it deems unreasonable under the usual statutory and evidentiary criteria, whether Policy Statement guidelines exist or not.

No rights of any person are affected by the promulgation of the Policy Statement and, as its terms indicate, the guideline rates are not in any sense "legally prescribed" so as to require the procedural steps incidental to Board "prescribed" rates for domestic air transportation service. The provisions of section 1002(j) clearly do not grant the Board prescription power over the reasonableness of rates in foreign air transportation, and the Board has not sought to exercise such power in promulgating the Statement.

As expected, the Justice Department and several other groups (supplemental carriers, tour operators and the Aviation Consumer Action Project) filed a petition for review of the Board's Policy Statement in the U.S. Court of Appeals in Washington, D.C. After the court had stayed application of the guidelines, the Board vacated its Policy Statement in February, 1975. The Board said that it

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56 Id.
could not implement the guidelines for the 1975 season since most charter contracts for the season had already been concluded and that interference with these contracts at a time so close to the season would cause undue interruption. The Board indicated, however, that the possibility of charter rate minima should be further explored and that it may take steps to this end again in the future.

C. A Future Charter Floor Ought to be Avoided

In its original statement to implement its guidelines the Board recognizes that it has historically limited its intervention in the rate regulation area in order to develop charter services. In this manner the public could be served at prices set in the competitive market place. However, as the CAB sees it:

[W]ith the sharp recent increases in operating costs, due in part to fuel and other inflationary cost forces, this approach is no longer viable and a more detailed regulatory environment appears warranted, at least for a temporary period.

It is regrettable that the Board does not elaborate on why fare setting in the free market place is "no longer viable," although it does summarily refer to escalating fuel costs, inflation, organized competition with scheduled services, and the proposition of European aviation agencies to establish minimum charter rates. Most of the Board's explanation is devoted to the methodology in setting the minimum level, an issue that guarantees disagreements among airlines. Since the Board and several ECAC members still seem to be alarmed by the absence of a charter price floor, it seems appropriate to warn against the consequences of such a price floor.

First, one of the few competitive instruments in North Atlantic air transport would be removed. Charter rate discussions and mandatory or near-mandatory minimum levels would lead to a further cartellization of an industry that provides a relative luxury, i.e., recreational long distance travel. As long as this product is voluntarily

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59 Id.
61 ECAC countries recently urged the CAB for "an internationally acceptable relationship between scheduled fares and charter prices." To establish this, ECAC wants "application of charter price control surveillance on both sides of the Atlantic." See ECAC Calls Meeting on North Atlantic Charter Floor, Travel Agent, March 10, 1975, at 1.
offered by so many industry members while others are anxiously looking for entry (e.g., Laker's skytrain proposal and other applicants in the current Transatlantic Route Proceeding) there is no need to "protect" the industry and the public against price wars or service deterioration.

Some governments and most members of the scheduled industry will argue that the open charter rate situation will lead to wasteful competition, public subsidization, or bankruptcies. The answer to this should be found—aside from the application of economic efficiency criteria—in the nature of the product that is being offered. Charter travel is, as mentioned before, a relative luxury for the consumer; it is not a utility or a basic consumer need for which government interference may be required to take advantage of a natural monopoly situation or to protect the public against industry abuses. Furthermore, charter travel is a product that is still relatively new and untested in the market place. Consumers' desires may change over time; new untapped markets may be disclosed. Individual members of the industry should have the opportunity to respond to the challenges of a relatively unknown market. If price is clearly the instrument that will allow this response in the case of charters, it should not be set aside by the government or a charter cartel.

It is unavoidable to associate minimum charter rates with the arrival of a new sort of IATA for charter services. IATA's worth is disputed, notwithstanding its many positive contributions to the development of a sound international scheduled system. The organization has achieved a workable international environment and, therefore, is essential to international aviation. IATA's accomplishments are achieved, however, at a cost; price competition is totally absent and there is too much "service competition." The latter has contributed substantially to the excess costs of over-capacity, fancy in-flight service, too many retail outlets, etc. charters have accounted for most of the upheavals within the IATA rate making machinery. The threat of charter fares led to the introduction of IATA group fares in 1962 and 1966. These fares were a failure; the answer that would have a significant impact came with the in-

troduction of low promotional excursion fares in 1969 and 1971. Recently, the introduction of the advance purchase charters (TGC and ABC) provoked the debate within IATA to counteract with the APEX fare. This fare is now the lowest IATA fare available to passengers who do not want to use charter services. If the future stimulus of competitive charter fares is eliminated, the chances are greatly decreased that IATA would feel the need to be on the alert.

There are good reasons for supporting the scheduled services of IATA because a "collective demand" exists for these services. This demand arises from the desire of a community to have a certain minimum amount of service. If a collective demand is recognized, the required protection can and should be provided by direct government subsidy rather than by entry restriction and internal subsidization. If the protection of scheduled services has to be extended by setting minimum charter rates to keep scheduled rates high enough, a serious question also rises as to who receives the benefits and who carries the losses caused by the interference with spontaneous market forces. Consumers will be turned away because the price is kept above the level of what they are willing or able to pay. Some suppliers of charter services will survive in a market in which they should disappear.

In the area of protected scheduled service, the service may be maintained at costs that would not be acceptable economically and politically if properly determined and published. To cope with this problem, both governments and scheduled airlines need to acquire a flexible attitude and a willingness to change service levels if circumstances change. To undergo these mental changes should not be impossible although it may be more difficult for scheduled industry members who acquire "service myopia" and for government officials who do not have the resources, expertise, or political courage to anticipate changes in collective demand over the years.

IV. THE CASE FOR CONTROLLED EXPERIMENTATION WITH LIBERALIZATION

What conclusions should be drawn from the foregoing discus-

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64 The term "collective demand" is used in: British Air Transport in the Seventies, at 57 (1969).
sion? All-party satisfying solutions must be excluded because of the opposing views and interests of different interest groups. To make things worse, there is even significant disagreement among members of the same trade group, be they scheduled or charter carriers as well as among members of the executive branch. The general public, for its part, seems to find the matter too complex to follow and, not surprisingly, is apathetic towards a relatively luxury industry such as air transport. Proposals from members of Congress have to compete with more urgent economic and political matters and may therefore meet unavoidable delays. The absence of consensus within the industry carries with it the eventual danger of more government intervention or a prolonged state of general inconclusiveness. If no consensus is achieved, political compromises may be sought resulting in a lack of creativity and solutions that do not suit any of the parties involved.

A. The Air Transport Industry Has Matured But Its Products Are Young and Alive

Post-war economic and technological progress has basically altered the regulatory environment for air transport. In the thirties and forties, a young and inexperienced industry apparently had to be “put in order.” The airline industry of the seventies, however, is reaching the first signs of maturity, characterized by reduced growth and increased concentration. At such a stage in the industry life cycle, products and prices can be and should be differentiated according to the needs of consumers and the opportunities offered by the producers. The regulator should stimulate competition and should not restrain the potential differentiation of products and prices.

In this article a case is made for a controlled experimentation of new and relatively liberal charter services. Concerted or overt dis-

E.g., Pan Am opposes minimum charter rate guidelines on the grounds that flights with aircraft of less than 230 seats have a minimum per seat mile level that is almost 25 per cent higher than for flights with aircraft of more than 229 seats. This gives a competitive advantage to carriers that operate stretched DC-8 aircraft, primarily the supplementals. Pan Am’s charter operations are virtually all in B-707 aircraft. See for Pan Am’s remarks to remove “The Threat of Restraint of Price Competition,” Comments of Pan American World Airways, Inc. on EDR-237C and EDR-281, Nos. 27135 and 24908 (CAB, ).

As far as departments of government are concerned, the Department of Transportation encouraged minimum rate discussion and guidelines; the Department of Justice clearly did not.
cussions of charter rates and the setting of minimum levels by gov-
ernments are condemned. With respect to the creation of new char-
ter concepts, the marketplace should have a chance to reflect over
time the more significant changes that have occurred—the trend
from business to non-business travel, the introduction of larger air-
craft, the willingness of producers and consumers to offer and de-
mand low-fare/low-service air travel. With respect to tourism, a
sharply decreased role for the "transportation function" should be
realized. In the travel trade, it is the destination that is sold, i.e., the
beach, the resort, or the sightseeing place. The destination combin-
ed with hotels, car rental, and other amenities determines the cost
and value to the consumer. In this conceptual product, air transport
fulfills a role of minor importance both psychologically and eco-
nomically. It will be difficult, but essential, for management of
scheduled airlines which are accustomed to catering to business
travelers, to adjust to this phenomenon.

B. Experimentation Can Be Stimulated By the Regulator

"Controlled" experiments in liberalization of regulations are ad-
visable for several reasons. The air transport industry is regulated
by necessity; complete deregulation seems neither economically de-
sirable nor politically obtainable. The argument for more charter
experimentation rests on the relatively new premise that the regula-
tor is capable of backwards intervention in case the experiment gets
out of control. For example, if the TGC or ABC is offered success-
fully to the public on a thirty-day advance booking basis and it can
be demonstrated that serious diversion from scheduled traffic oc-
curs, the regulator should consider establishing a forty-five or sixty
day advance booking minimum. The recent TGC experience and
OTC proposal leave the impression that the CAB follows the oppo-
site policy and wants to relax its charter rules only if they have been
proven unrealistic and unworkable.

66 Pillai, supra note 47, at 49-50.
67 See, e.g., Statement of Robert H. Binder, Deputy Assistant Secretary for
Policy, Plans, and International Affairs, Department of Transportation, Hearings
on S. 455 and S. 1739 (Inclusive Tour Charter Transportation), 93rd Cong., 1st
Sess. 137 (1973): "This program of liberalizing inclusive tour charter travel in
a controlled way with immediate experimental application, should provide the
necessary factual basis and experience upon which the further development of
U.S. domestic charter travel can be undertaken at minimum risk of impairing
vital scheduled services."
One may object to a liberal and experimental manner of regulation because it would create additional and costly regulatory proceedings and, more important, because charter liberalization increases the probability of significant deterioration of the scheduled system. As far as additional regulatory proceedings are concerned, the additional costs may be offset by the gains to the industry and the public. Regulated industries generally show inflexibilities in the marketplace with lags in price changes, product development, and the foreclosure of entry opportunities; the regulated firms are not free to implement innovations, test the market, or otherwise experiment with consumer demand. As a result, the regulatory agency should take more responsibility for experimentation and testmarketing, functions that are common practice in today's economy, notably within larger firms operating in popular consumer markets.

The case against experimentation with liberal formulas for the sake of scheduled services protection goes back to an old theme and does not have to be repeated here. This article has tried to indicate that air travel for business purposes may have peaked while travel for personal and vacation purposes is still on the rise. Travel for non-business purposes is highly cost oriented and less service oriented; in a trade-off between a relatively high scheduled fare with low load factors and high scheduling frequency, versus a low price/service combination, the vacation-minded customer will probably choose the latter. He is willing to accept a low price combined with high load factors and some inconvenience in departure and arrival times. In short, the vacationing consumer is not willing to pay for high frequencies with relatively low load factors.

It is useful to mention that the common carrier principle—and its regulation resulting in service competition—have been designed and developed in a period when air transport served mainly business purposes with a keen awareness for national and regional economic development. For the time being, this era seems to have come to a standstill. In addition, new and cheaper ways of communication (for example, the vastly improved transatlantic telephone and telex service) will make further inroads on air travel for business purposes.

The holiday or personal market seems less saturated. Sunshine or sightseeing cannot be technologically transferred, at least not in
a satisfactory way. Moreover, improved communication by television and movies stimulates a desire to travel instead of reducing it. Visits to relatives or friends will become more and more a common good, easy to delay or postpone in times of economic hardship, but irreplaceable from a social and technological viewpoint. If these developments lead to an increased demand for charter-like operations, the airline industry as a whole should be responsive.

C. The Protection of the Scheduled Industry

A few comments can be made that may ease the fear that the "scheduled system" (and its carriers) may be seriously impaired. With new charter opportunities, the market should not be exclusively reserved for supplemental or charter-only carriers. Scheduled airlines can and should enter the new charter markets, thereby relying on their brand names and familiarity with the public. During the TGC rule making procedure, diversion estimates were presented that did not take into account the fact that scheduled airlines may provide the new service themselves. The proposed OTC seems to be an excellent opportunity for scheduled carriers and it will enable regulator and industry members to determine the importance of a long-time reputation for safety and dependability. This is not so obvious for the supplemental carriers who have always operated in the dark under the flag of tour operators that have generally only local exposure.

In the international arena, it should be recognized that scheduled and non-scheduled carriers are competing for the same traffic. Since non-scheduled carriers compete with scheduled services on in-route markets, it can be argued that scheduled carriers should have competitive opportunities in the off-route markets. This subject is ready for multilateral or bilateral discussion between those countries that

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68 It should be noted that United Airlines flew 53.2% of the total passengers carried on the domestic civilian charters of the U.S. trunk carriers during 1972, 1973 and through the month of September, 1974. The airline claims to be a leader among the scheduled airlines in developing and serving the market for charter transportation. Comments of United Air Lines, Inc. on EDR-281, No. 27135, at 3 (CAB, Dec. 11, 1974).

have developed substantial charter traffic. Presently, the United States has opted to negotiate charter agreements at a bilateral level to fill the non-scheduled holes that are the legacy of the Chicago Convention.70

It will be difficult, however, to separate the charter negotiations from existing bilaterals that deal with scheduled services. One solution to define the carriers' roles would be to let carriers specialize in catering to business travelers, vacation travelers, or group travelers. These specializations can be based on the definition of holiday routes and non-holiday routes, or on a distinction between highly developed, semi-developed, or undeveloped routes. In such a realignment of routes and roles of carriers, the scheduled carriers should approach the diversion or impairment problem with less vigor than in the past. Government and airlines could begin with establishing routes that require "essential scheduled services" (ES-routes). The ES-routes may have to be guaranteed by direct government subsidies, or, less preferably, by pooling agreements or by imposing entry restrictions and limitations on charter traffic. Routes that do not have an ES-status should have a chance to receive a wide variety of services: supersonic, scheduled, charter, skybus, shuttle.

In determining the competitive roles between scheduled and non-scheduled carriers, the parties may provide a sort of grandfather right to the scheduled carriers granting them priority to receive route authority to provide a sufficient number of service/price variations. Additional carriers should be allowed to enter the market in case the existing array of services is unsatisfactory. Since the carriers would be allowed to provide the variety of services that they consider most profitable, the distinctions between scheduled and non-scheduled carriers would disappear, at least on the routes that do not have ES-status. ES-routes would be reserved for scheduled carriers under limited protected conditions.

PUBLIC AIR LAW IN TRANSITION

With proposals to liberalize charter regulations and to review the present scheduled-non-scheduled system of air transport, aviation law will undergo dramatic changes. Practitioners and students of international aviation policy formerly focused on the interpreta-

70 Supra note 15.
tion of the Chicago Convention and the application of Bermuda principles. In the field of economic regulation, entry and rate of return criteria received considerable attention. During the second half of the seventies, law and policymakers should be highly sensitive to the developments in the marketplace. More than ever, the regulator and aviation lawyer should be concerned with the impact of new laws or regulations on all interest groups, i.e., on the individual carriers, the industry as a whole, and, last but not least, the different segments of the public.

In generating new charter concepts, it is essential to have an understanding of consumer behavior, marketing opportunities and limitations, and an ability to anticipate industry reactions to new concepts. The days are over in which adequate aviation regulation is in the public interest if merely a certain philosophy is followed or regulators give in to political compromise. The characteristics and desires of the marketplace must have a chance to manifest themselves in rule making procedures and regulatory creations, especially when legal definitions of new products such as charters are at stake.