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Reason

Using the Revenues from Airport Pricing

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Federal officials have begun, at last, to look, seriously, at the possibility of using some form of airport pricing to allocate capacity and reduce congestion at the delay-plagued New York airports. The most commonly discussed alternative is congestion pricing, under which traditional weight-based landing fees could be supplemented or replaced by prices for landings and/or take offs, which would vary directly with the demand at particular times of day. The other alternative is slot auctions, which can produce very similar economic effects but for which clear legal authority is not readily apparent.

Either approach may well produce more airport revenues than traditional landing fee systems, which raises the question of what use would be made of the net new revenue. That issue is affected by existing federal controls on the uses of airport revenues. But it is more complicated in the case of the three New York airports (LaGuardia, Kennedy, and Newark), since the Port Authority of New York and NewJersey (PA) has a legal exemption from one of those federal controls, which allows the PA to use airport revenue for non-airport purposes. This special circumstance serves to increase already high airline concerns about becoming a “cash cow” as a result of paying higher prices at congested airports.

A Primer on Airport Revenues

It’s worth spending a moment to review the kinds of fees that airlines pay, today, for the right to use airport facilities. In general, today’s airport fees and charges to airlines fall into two categories:

1. Landing fees are, most often, based on proportionate shares of the aggregate landing (or take-off) weights of all commercial aircraft. Those proportionate shares are then applied to the airport’s aggregate cost of providing, constructing, and maintaining facilities, denominated in $ per 1000 pounds of weight per take-off (or landing). For airports using a “residual cost” system, the fees are calculated based on the costs that are left after all other airport revenues are subtracted from all airport costs. That remainder is the basis of the

landing fee calculation. Alternatively, many airports (including the PA airports) operate under a "compensatory" charging methodology where each airport cost center is deemed to be independent and fees are set for each cost center, separately. As a practical matter, many airports operate with a hybrid of the two.

2. Rents are charged to airlines and other companies for the facilities they occupy on an exclusive or preferential basis, or an allocated proportion of facilities they share. This would apply to everything from ticket counters and baggage systems, to office space, and to entire buildings, such as passenger and cargo terminals, warehouse and maintenance facilities.

With prices at sufficient levels, incentives make much more efficient use of scarce airport and airspace capacity.

While rents tend to reflect market prices for those facilities, landing fees are based on accounting cost, narrowly defined, allocated by weight, such that larger aircraft pay bigger fees, per operation, and smaller aircraft pay less. To the extent that landing fees are large enough to influence behavior—an open question, thus far—this creates incentives for a grossly inefficient airline fleet mix, at least from the perspective of the use of scare airspace and airport capacity.[1] Historically, a weight-based fee was an appropriate surrogate for the additional demands placed on other elements of the airport infrastructure by larger capacity aircraft. Additional passengers translated into needs for larger hold rooms, additional ticket counters, larger capacity baggage systems, more parking spaces, additional curb frontage, etc. In an era of increasing congestion, a weight-based fee structure seems to have outlived its usefulness.

Hence, the extensive research on market-based mechanisms, ranging from peak-period differentials in landing fees to full-scale congestion pricing or slot auctions. With these latter approaches, two things happen, together: with prices at sufficient levels, incentives are created to reduce levels of operation and to operate the remaining slots with a mix of aircraft sizes and types that makes much more efficient use of scarce airport and airspace capacity.

LEGAL AUTHORITY FOR PRICING

The Federal Aviation Administration has legal responsibility for the safe and efficient use of navigable airspace and, separately, for certain aspects of airport operations.(see the Appendix for further legal details in support of this section). The FAA was given authority by Congress in 2003 to set temporary operating limits on "severely congested airports." This makes it clear that FAA can set hourly limits on the number of operations (landings and takeoffs), but the legislation does not explicitly give the agency the power to allocate those limited numbers of slots.

More specifically, although FAA has written of possible plans under which it might regulate aircraft size or service, allocate capacity, or require up-gauging (substitution of larger-capacity aircraft for smaller ones), the agency does not have legal authority to do any of these things. Nor does it have the authority to set rates for using airports. And the FAA appears to acknowledge this.

Airports, by contrast, have the right, obligation, and necessity to set up and manage pricing systems for the use of their facilities. Prior to airline deregulation (1978), there was little federal attention to airport pricing. But since then, beginning with 1982 legislation on airport grants, the federal government has increasingly attempted to constrain how airports can charge. The 1982 legislation provided that airports that accept federal airport improvement (AIP) grants must ensure that all airport revenues "be expended for the capital or operating costs of the airport." In addition, a series of court cases has developed case law that requires airport charges to be "reasonable" and not "unjustly discriminatory." Neither of those terms has ever been clearly defined. And where the U.S. DOT and the FAA have said that airport charges must be based on costs, they have almost always meant narrowly defined accounting costs, rather than true economic costs as economists use the term.

The requirement that airport revenues be expended for the capital or operating costs of the airport" has become known as the proscription on "revenue diver-

sion." It exists in federal law, federal regulation, and in the grant assurances that each airport must sign in order to receive AIP grants or be permitted to levy a passenger facility charge (PFC). The point here is that, with a very few exceptions, the Port Authority being one of those, no airport revenues may be used "off airport."

That has been interpreted by FAA to mean that an airport may not earn an excess of revenues over expenses—profit—unless there is an approved plan to re-invest all of those net revenues in the airport or, for a multi-airport system, on one of the other airports in the system. For those airports like the ones operated by the PA or by the port authorities of Boston, Seattle, Portland, Oakland and a few others that have claimed "grandfathered" exemptions from the revenue-diversion proscription, they can do almost anything they want with their net revenues.[2]

So, in general, the standards that govern airport pricing remain those that are set in statute:

1. Airport charges must be "reasonable."
2. Airport charges may not be "unjustly discriminatory."
3. Airports may not "divert" revenues: revenues must be used on the airport for the benefit of the airport's customers.

This actually gives DOT and FAA enormous latitude to allow an entirely new pricing regime by airports, were they so inclined.[3]

POSSIBLE USES OF AIRPORT PRICING REVENUES

Along with the broad-based requirement that airport charges must be "cost-based" and not "unjustly discriminatory," the Port Authority's grandfathered exemption from the "revenue diversion" prohibition lies at the very heart of the problem of implementing a congestion pricing regime That exemption allows the rest of the PA's operations to be subsidized by the net revenues of its airports, and the PA's consolidated financings do not allow the separation of airport revenues from other PA revenues pledged to bondholders. Hence, the airlines make the case that allowing the Port Authority to generate increased net revenues through congestion charges would simply encourage more revenue diversion to other parts of the agency and to the local governments that extract rents from the airports (also unprecedented in the United States). And, without some new agreements, they may well be right.

Thus, one of the key questions in the airport pricing debate it is: "What should happen to the money?" There are several possible answers.[4]

Before considering them, we should first note that the expected revenues from airport pricing may not be as large as people think. Confronted with the option of paying for access, some of the demand will dissipate, and the remainder may be willing to pay less than anticipated. This is especially true at an airport like JFK where some carriers, especially some international carriers, serve that airport because their prestige is furthered by offering flights to the United States, especially though JFK. That is true, even when they may be losing money by flying the route.

There are continuing complaints from many airlines that they are currently operating into JFK without making money, because they think their network needs "require" a presence in New York. If the price of entry gets too high, they may simply decide it's not worth it and not play the game.

On the other hand, for significantly over-scheduled airports like those in the New York metropolitan area,

the magnitude of the market-clearing prices could be substantial.

Now let's consider alternative uses of incremental revenue. If the proceeds from a new charging regime were significant, they could be used to credit the airlines that operate at the airport or to offset the costs that become part of the base on which charges are calculated. For example, at JFK alone, there are approximately $200 million in annual costs of facility operations and allocated Port Authority debt service that are part of the flight fee calculation. Incremental revenue from congestion pricing could be used to pay off the allocated share of PA debt service or, indeed, the entire annual cost that is translated into the annual flight fee. Doing this might not produce dramatic additional revenues but it would serve to re-allocate the relative shares that each flight would have to pay. This would be with a step toward recognizing the desire of some airlines that any pricing plan be "revenue-neutral."

Second, if the choice is to apply new revenues to incremental costs, only, there is more than enough in the way of the capital needs of any of the PA airports to absorb net new revenues generated by pricing. The current PA capital plan includes several billion dollars of new capital needs across the airport system, through 2015. And there are some $1 billion of investment needs to maintain a state of good repair over that same period. Finally, there are several billion dollars in additional investments that are clearly needed but not in the plan. Net incremental revenues could be applied directly to some or all of these capital costs.

While there may be objections that much of this work is already in the current capital plan and, therefore, should not be paid for with net new revenues, it should be noted that all of the capital used for any of these programs would be reflected in future airport charges that would have to be higher than today's levels. None of the debt service for these investments is included in the base used to calculate today's landing fees or rents.

And that is exactly the point: in both of these instances, these kinds of expenses can be reasonably interpreted as "costs," and satisfy the other requirement that, under existing statutory and judicial guidance, airports may use their revenues "for airport purposes," only. Thus, all of these expenditures are well within anyone's definition of "reasonable."

Logically, any funding generated above the cost of operating the airport and paying for accumulated debt service should be re-invested in the modernization, expansion, enhancement, and re-configuration of the very congested airport that has had to implement congestion pricing. After making all feasible investments to enhance that airport's capacity, the next priority should be the capacity expansion needs of the other airports in the PA's system.

But, there is another overriding reason why proposals for new pricing schemes are regarded with concern: the physical plant at these airports as now configured cannot readily handle any system that involves large scale re-allocations of operating rights from one airline to another, from one airport location to another. That's partly a reflection of "unit-terminal" configuration of the terminal facilities, whereby airlines control entire terminal buildings or groups of buildings.

And, especially if a pricing system were to succeed in up-gauging the average aircraft size (i.e., increasing the average number of seats per departure) at the three New York airports, several of the 15 terminals in use at the three airports may be unable to accommodate some of those aircraft. Depending on the specific terminal, gates are often not interchangeable. At LaGuardia, as noted in a number of responses to FAA's proposed congestion management rule, the Central Terminal (LGA's principal operation) simply could not be made to work, without major re-construction. Many gates cannot accommodate larger-gauge aircraft. Taxi-lanes that are narrower than ideal restrict accessibility to interior gates, especially for larger aircraft, and the terminal has limited gate, ramp, security-screening, ticket counter, and baggage system capacity. A sizable number of passenger hold rooms are undersized for serving larger aircraft. This is also true, albeit to a lesser degree, at the other LGA terminals. At JFK, the newer terminals 1, 4, 5, and 8 are more able to accommodate larger aircraft but the older ones will have

more difficulty. At EWR, the three terminals are more flexible but the inner gates are less able to handle some of the larger aircraft.

Moreover, in managing the operations of the airports, the Port Authority's terminal leasing practices might have to change. Instead of renting out space and leaving the use of that space—gates, bridges, hold rooms, ticket counters, baggage systems, etc.—to the airlines, the PA would have to consider managing the terminals real-time, including something closer to the real-time allocation of space. Of course, incremental pricing proceeds could be used to buy out some of the existing leases. And that could also mean that the Port Authority might have to find an entirely new way to get the airlines to pay for the services they receive, much more like specific charges for specific services, which is closer to what the European airports do--or Phoenix.

The Phoenix example is an interesting one because it is one of the very few major airports that have no airport/airline use and lease agreements, in the traditional sense. Rather, the Phoenix fee structure is based on a series of separate charges for a wide variety of facilities and services (derived annually and enacted by an ordinance of the local legislative body), the aggregate of which is calculated not to exceed the amount of aggregated costs.

This is not an issue of residual versus compensatory rate structures. The Port Authority has always had a compensatory rate structure. That's the main reason there is any net revenue, at all, to be shared with the rest of the PA and the cities of Newark and New York.[5]

The point here is that an airport doesn't need to have a use and lease agreement, at all. Airlines historically have insisted on it, and it has benefits to the Port Authority as well, since it enshrines the PA's compensatory rate structure, reducing risk to the organization.

In terms of implementing new arrangements with the airlines, this can also be done through their terminal leases, but only when those leases—with widely varying expiration dates—actually come to their expiration. As noted previously, the PA's traditional system of facility leasing—different from its underlying use and lease agreement—usually calls for leasing out the premises (a typical approach in specific terminal locations at U.S. airports) and allowing the airlines to do almost anything within those premises. But such a system makes it difficult for the airport operator to move airline operations around, either on a real time basis or within a few months , without major dislocations and cost.

One small example of this is that very few U.S. airports have what their worldwide counterparts have, routinely: integrated baggage systems. That means that, if an airline wanted to or was forced to use a gate in a different part of the terminal, not in its leasehold, the problems of loading and off loading baggage would be significant. The same applies to ticket counters, hold rooms, etc., and that doesn't even get to the issue of the capacity of a given gate to accommodate aircraft of different size groups.

So, while the underlying structures of use and lease agreements and facility leases make new economic regimes possible, a number of things would have to be put in place— for, to, and at the PA—to make any of this happen.

SAFEGUARDING PRICING REVENUES

Many aviation people would have trouble with any suggestion that additional revenues might be used to pay for current or future airport costs at Port Authority airports. Given the PA's right to "divert" revenues to many non-aviation activities, airlines would argue (correctly, I think) that this puts them in the position of being an even more generous cash cow for the PA and the departments and programs that depend on net aviation revenues.

That is why the first feature of any realistic approach in this area should be a true "lockbox," into which net pricing proceeds would be deposited and from which, ideally, funds would be dedicated, exclusively, for meaningful capacity expansion projects. To make that possible, any such structure would have to ensure that lockbox funds are not diverted to any other purpose. (Without such a segregation and re-use policy, the result, simply, would be to raise the cost of providing air services at the airports without any connection between the added charges and passenger facilitation, increasing capacity, and reducing delays.)

With such a lockbox in place - one that is explicitly not grandfathered for revenue diversion— it may even be possible to bring the airlines on board , especially if there is a gesture in the direction of reducing other costs. And those costs are, relative to other U.S. airports, rather high. As noted above, doing this would reduce the net proceeds from pricing, but that might be an acceptable trade-off for the airlines. Thus, the pricing system might substitute for some or all existing landing fees.

DOT and FAA could help with a formal determination that capacity expansion and debt service are all covered by any "reasonable" definition of cost, and do not constitute "revenue diversion."

In the longer term, as similar issues arise at many more airports, Congress and DOT/FAA need to set standards for situations where FAA is forced to make a finding that the airspace/runway configuration around an airport has reached its operational capacity. Such standards could also address any "social goals" that a national aviation system is deemed by Congress to require, including any requirements for new entrant access, small communities, and general aviation, for example. Congress would have to determine why scarce aviation resources at such airports should be used for such purposes, especially if alternative access for those services is readily available, nearby.

With approaches such as these, the PA should not have to re-open the underlying airport/airline use and lease agreements. Negotiations still in progress—especially the terminal and facility leases - would have a new model on which to build.

Certainly, the PA and the cities of New York and Newark would have to agree on one or more special arrangements to deal with any of the solutions that produce incremental revenues. Since each of the city leases is premised on a sharing of gross revenues, incremental revenues would ordinarily be subject to sharing a percentage with the cities. The cities of Newark and New York would have to agree that these kinds of revenues, to the extent that they exceeded "ordinary" revenues, could be treated differently.

To be sure, the representatives of the federal government also have their eyes on the money. The approach embodied in many federal pronouncements on the subject would set the stage for the federal government to extract major revenues from the region's airlines, raising further their cost of doing business at already high-priced airports, with no prospect of their seeing the benefit of those funds.[6] That process would likely preclude the airport operator from having access to any of the funding which it will need to be able to make the improvements necessitated by the imposition of a rational access management program.

The funding—which would either go into the Avia-

tion Trust Fund or be subject to annual appropriation—would be highly unlikely to be re-connected with congestion-relief efforts at the airports generating the funds. The airlines and their passengers, who would have to pay the incremental charges, would pay more and see no benefit.

A number of my friends in Congress and the federal bureaucracy would argue that the funding should go to FAA. They might even agree (although not likely) to a requirement that the additional resource be treated as incremental and used, exclusively, to improve aeronautical access to that airport or metropolitan area where they had been generated.

In the real world of Washington appropriations, however, the proceeds would, almost certainly, disappear into the appropriations morass. They would supplant other funding that Congress has historically appropriated to FAA from the General Fund. As Congress became used to including the new funding stream in the base, it would become just another piece of the general funding of FAA. This funding stream would permanently displace any General Fund contribution, much in the way that Customs, Immigration, and Agriculture user fees have, over time, displaced General Fund appropriations for those departments and functions.

Therefore, communities should insist that any proceeds from airport pricing be used, not only for system capacity, in general,—as some have suggested—but for use at the airport at which the charges will be imposed (or other airports in that airport system).

CONCLUSION

Congestion pricing in some form would be the most productive solution to the rampant over-scheduling and delays that characterize our congested airports, today. Until it is implemented, near-term congestion will only get worse, because the airlines want to be on the ground with the most flights in their base schedules when FAA moves to impose a “voluntary” schedule reduction on the incumbents.

But could pricing happen soon? Unfortunately, DOT and FAA have made it even more difficult for airports and airlines to accept pricing by “suggesting” an hourly operations limit of only 80-81 operations per hour at JFK. On the face of it, with JFK having two sets of reasonably spaced, parallel runways, a determination that puts the hourly capacity at the same level as that of LGA (which has only two, intersecting runways) seems inconceivably low. That would also put the effective hourly capacity well below previous periods, where similar levels of hourly operations did not produce the levels of congestion and delay being experienced, today.

The PA objects to this approach because they believe (and I agree)that imposing a control and price regime, now, will take all the pressure off the feds and the airlines to do the things they need to do before they clamp a lid on operations. And, the FAA’s capacity numbers are absurdly low. Once the capacity regime is in place, it will be notoriously hard to change it.

But, in addition, the Port Authority’s ability to use airport funds for non-aviation projects has become as

much a strait-jacket as a benefit: they don't want to upset a system that has worked well for the 85+ years of their existence. And playing a much more hands-on role in the management of airports would probably require a wholesale re-do of their facility leasing structure, thus exposing them to considerably greater risk vis-à-vis the ups and downs of the aviation business.

Nevertheless, there is reason to hope that the PA could see enough advantages in such a system to be worth taking the risk. It would not need to give up anything it now has, and it would gain additional funds for capacity expansion projects beyond what it can project from current sources.

Given the underlying history and statutory base, using the existing airport charging structure makes the solution achievable, but not easy. With the right kind of management and support from DOT, FAA and the Port Authority, all of this is eminently "do-able." There are solutions here that are possible to achieve with some leadership and some new thinking. It's time to get on with them.

ABOUT THE AUTHOR

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APPENDIX: THE LEGAL BASIS FOR AIRPORT PRICING

With the mandated sunset of the federal High Density Rule, the question is "What kind of authority does FAA have?" In its Notice of Proposed Rulemaking for LaGuardia Airport, FAA cites "broad authority under 49 U.S.C. 40103 to regulate the use of the navigable airspace of the United States." According to the NPRM,

> *[t]his section authorizes the FAA to develop plans and policy for the use of navigable airspace and to assign the use that the FAA deems necessary for its safe and efficient utilization. It further directs the FAA to prescribe air traffic rules and regulations governing the efficient utilization of the navigable airspace. The FAA interprets its broad statutory authority to ensure the efficient use of the navigable airspace to encompass management of the nationwide system of air commerce and air traffic control.*[7]

There is little argument with FAA's assertion that it has the statutory charge of ensuring the safety and efficiency of airspace operations. In fact, in 2003, Congress gave FAA the authority[8] to establish temporary operating limitations for "severely congested airports to reduce over-scheduling and flight delays during peak hours."[9] It is clear that FAA regulates flight patterns, take-offs and landings. It also exercises related authority for the safe operation of airports. It follows, then, that FAA has the authority to determine and enforce operational limits on how many operations constitute

a safe, manageable number in a given time period, and therefore, the number of operations it will agree to handle.

It does not follow, however, that FAA has the authority to impose a system for allocating and/or re-allocating the operational "slots" that are created by its operating limits. Indeed, there is considerable question, especially given the language of AIR-21 and the limited language in Vision-100, noted above (where Congress refused to go beyond "temporary operating limitations"), as to whether DOT or FAA (or anyone else for that matter) has any authority, at all, to regulate aircraft size and service, to allocate capacity, to allocate or withdraw operating rights, to set rates, or, indeed, to impose any social criteria, at all, on allocation mechanisms that favor or protect specific markets, or to impose operating or economic sanctions for meeting or failure to meet an administrative aircraft "up-gauging" regime.

FAA seems to think that, too. It cites very direct statutory authority for the limitations it proposes to set on operating levels but it is much vaguer in identifying the roots of any authority to move beyond that. If, as FAA acknowledges, it needs explicit congressional action to move to an allocation regime based on economic value, it is equally hard to see the basis for any other allocation mechanism, either. Perhaps that is why the LGA NPRM had no explicit re-allocation mechanism proposed for three years after the effective date of the proposed rule, when FAA proposed to begin withdrawal of Operating Authorizations (or slots). This authority is especially questionable with the explicit sunset of the HDR, mandated by Congress.

Having said that, it seems equally clear that airports already have the right but also the obligation and the necessity to set pricing regimes for their facilities and services.

This would be an easy call were it not for the history of federal attempts to regulate airport rates and charges.

Essentially, that history starts with little significant airport charging regulation, well into the late 70's and early 80's. To be sure, there was little reason for complaint: regulated airlines passed along the increases in

airport charges that were reflected in their annual landing fees. Airports, as local government entities, charged what they needed to cover their operating and debt service costs (including required reserves and coverage) and set their charging regimes through airport/airline use and lease agreements. These were required by debt rating agencies because airports received little revenue beyond landing fees and rents, which meant that they had no credit beyond that of the airlines' promises to pay airport debt service. In turn, the agreements usually gave the airlines a veto power over most airport investments at most airports. Thus, airports and airlines were symbiotic partners in airport infrastructure.

When airline deregulation and some serious competition coincided with the expiration of many of the older use/lease agreements, airline costs and charges emerged as an issue, for the first time.

When a few municipalities tried to levy head taxes on airport passengers, Congress enacted the Anti-head Tax Act. Airlines went to court to overturn airport charges. The result was a Supreme Court decision (Grand Rapids case) ruling only that airport charges must be "reasonable:"

> *... a levy is reasonable under Evansville 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. 405 U. S., at 716-717.*[10]

That, in turn, implies the exercise of some judgment on the part of reviewers of airline complaints, and the airlines didn't like the fact that they were losing too many of the complaints. So, in 1994, they were able to convince Congress to include in the regular FAA reauthorization a requirement that DOT/FAA issue a rates and charges policy that included a definition of "reasonable."

DOT/FAA's stated policy was and has been that charges could only be considered "reasonable" if they equaled cost. And, not economic cost but accounting cost; there is no provision for return on investment or land value appreciation or other elements that have long been accepted, even in utility accounting. FAA tried a couple of times to set such a policy, officially, but the sections related to these issues were largely vacated by the Court of Appeals in 1997 and have not been re-issued.

This leaves DOT and FAA with the statutory guidance of these statutes: the Anti-Head Tax Act (AHTA), 49 U.S.C. § 40116(e)(2) (1994) (providing that a political subdivision of a State may levy or collect "reasonable ... landing fees"); and the Airport and Airway Improvement Act (AIAA) of September 3, 1982 (49 U.S.C. 2215) requiring that "all revenues generated by the airport . . . be expended for the capital or operating costs of the airport . . . ." (49 U. S. C. App. § 2210(a)(12), and the 1994 Reauthorization (codified as s. 47129), along with two major cases before the Supreme Court. One is also left to read tea leaves, piecing together various pronouncements from within various departmental decisions resolving airline complaints.

Thus, the only guidance for DOT and FAA is the generalized requirement for reasonableness, along with a prohibition on charges that may be deemed "unjustly discriminatory." This also gives them enormous latitude in interpreting fee structures that have been brought to them in complaints. So, even though other policy statements have indicated a willingness to consider congestion pricing regimes in a favorable light, DOT and FAA have elsewhere suggested that they might find that a fee structure that changes the status quo so that certain categories of aircraft find their charges increased could

well be considered discriminatory.

In the rule that accompanied the Record of Decision that finally, after 30 years, permitted the construction of an additional runway at Boston, FAA required that the Massachusetts Port Authority create a congestion charge, but one that could only be implemented within a very narrow range of circumstances. And, one of those requirements was that such charges had to be implemented as part of the overall charging system, which had to be "revenue neutral:" again, the revenues in aggregate could not exceed costs.

So, the combination of "reasonableness" and "no unjust discrimination" has provided the department the cover of "judgment" that needs to be attached to each of those criteria to strike down airport charging regimes that have come before it, when they seek to deviate from the tried and true formula of weight-based fees. And, that is true, even though airports really are not required to have any such regime to begin with, so long as the aggregate revenues collected from aeronautical charges do not exceed aggregate aeronautical costs, at least according to FAA policies and pronouncements, thus far.

That also means that, in at least some of the issues we've discussed, it would not take an act of Congress—while that would do it, I see no understanding or inclination on Congress's part—or even a modification to rule or policy to change some of the options available.

ENDNOTES

1. Of course, taken to its extreme, an airport that becomes more and more reliant on smaller planes will see its rate per 1000 pounds escalate. With a fixed cost to be allocated, the rate must rise as the aggregate weight declines.

2. In general, the constraints on revenue usage have been interpreted by DOT and FAA, by the DOT IG, and by the Congress with incredible rigidity and silly things have resulted. For example, airports that, as good neighbors, have spent a couple of dollars fixing up a neighboring ball field have been told to get the money back from the community. Airports found to have "diverted" revenues have been threatened with a loss of all grants-in-aid from the Department of Transportation. And, perhaps most amazing in the various examples of revenue diversion: while private airport contractors can earn a return on their assets when they get paid for performing an airport service or building an airport facility, a private airport owner cannot. The situation was made even worse by the language of the privatization pilot program which explicitly allows private owners to earn a return, thereby seeming to reinforce the notion that a return would not be allowed outside that program.

3. It is important to distinguish, again, between landing fees and rents and the long-standing difference in the standards that apply to each. The FAA requirement that total revenues not exceed aggregated costs applies, primarily, to the landing fees. Rents, on the other hand, reflect the market and the demand for such space. Rents can vary widely from one airport to another and even with a given airport, depending on the age, quality and use of a facility. The landing fees and the rents at the Port Authority's three major airports differ significantly. At LGA, for example, there are four terminals with four different kinds of rental agreements, ranging from long term land leases where an airline finances and develops its own terminal, to the Central terminal, where the airport operator leases individual gates, hold rooms, loading bridges, ticket counters, baggage belts, etc. At the Central terminal, airlines operate with leases that are—theoretically, at least—cancellable on 30 days notice. But major renovations will require a negotiation with all of the individual airlines that have rented space in that terminal. At JFK, all the passenger terminals are subject to long-term leases with individual airlines, except for Terminal 4 where there is a private, third party terminal operator that deals with the many airlines that operate there. At EWR, each of the terminal leases is somewhat different, and in fact, there is a blurring of the line typically drawn between landing fees and rents.

4. See also my comments, written for the City of New York, Comments of the City of New York In the matter of: Congestion Management Rule for LaGuardia Airport, FAA Docket No: FAA-2006-25709.

5. The European example is not very helpful, here. Charging systems look, at first, like compensatory systems but, in fact, regulators base their decisions on treating airport revenues as a single till, equivalent to what U.S. policy would call a residual structure. The only difference is that the Europeans permit a rate of return, whereas the United States does not.

   In addition, many of the European fees are per passenger fees, a practice that is expressly prohibited by the Anti-Head Tax Act, but for the exception that is the Passenger Facility charge, which can only be used for capital programs.

6. Economists would argue that the mere fact that the airlines would have to pay a premium that reflected the real value of landing and take-off rights would be sufficient to impose some discipline on the process by which flights and aircraft types are scheduled. From that perspective, one could, literally, burn the incremental revenue and the goal would have been achieved. In the real world, however,

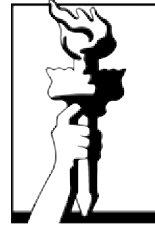
this is totally unrealistic. Hence the importance of answers to questions that arise over the use of whatever proceeds may materialize.

7. *Federal Register*, Vol. 71, No. 167 (August 29, 2006), Part III Department of Transportation, Federal Aviation Administration, 14 CFR Part 93, Congestion Management Rule for LaGuardia Airport: Proposed Rule, pp 51360-1.

8. The Century of Aviation Reauthorization Act (Vision-100).

9. See Vision-100 Conference report 108-240,141.

10. North West Airlines v. County of Kent, Mich. (92-97), 510 U.S. 355 (1994).



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