U.S. Department
of Transportation
Office of the Secretary
of Transportation

GENERAL COUNSEL

400 Seventh St., S.W.
Washington, D.C. 20590

JANUARY 16, 2009

Certified Mail – Return Receipt Requested

Glenn P. Wicks, Esq.
The Wicks Group PLLC
1215 17th St., NW
Summer Square, Fourth Floor
Washington, D.C. 20036

Re: Branson Airport's Airport Facility Charge Request

Dear Mr. Wicks:

This letter is in response to the written request of Branson Airport LLC (Company), operator of Branson Regional Airport (Airport), dated May 30, 2008, for a letter from my office which would authorize air carriers to separately list an Airport-assessed airport facility charge ("AFC"), planned to start at $12.50 per passenger, from their advertised fares for air transportation to and from the Airport. The Company, which plans to open for operations in the spring of 2009, met with Department staff, following which it submitted further written arguments in support of its request on November 11, 2008.

After reviewing the Company's request and supporting arguments and documentation, we have determined that we must deny the request. As explained below, we permit air carriers to state separately from the base fare only those fees and charges imposed by governmental entities. Because we find that the Company will be operating the Airport as a private entity, and not as a political subdivision, we conclude that the AFC is not a government-imposed charge and therefore may not be advertised separately from the fare for air transportation. Permitting an air carrier to separate the AFC from the advertised fare would be inconsistent with the Department's full fare advertising rule set forth in 14 CFR § 399.84 and its more than 20 years of enforcement case precedent, and thus unfair to consumers, and would be anticompetitive.

On the basis of the facts and information provided, we also conclude that the Company may assess an AFC. The two pertinent statutes -- the Anti-Head Tax Act (AHTA) and the Passenger Facility Charge (PFC) law -- do not appear to affect the ability of the Company to charge an AFC, because the Company is a private entity. More specifically, the Company is not a State or political subdivision of a State, subject to the AHTA prohibitions, including those against political subdivision-imposed charges on individuals traveling in air commerce. Additionally, the Company is not an "eligible agency" for purposes of assuring that any charges on individuals traveling in air commerce conform to the PFC program.

I. Branson's planned AFC does not violate the Anti-Head Tax Act and the PFC Program is not applicable.

Based on the information provided to the Department, it appears that, the Company may assess an AFC on airline passengers at the Airport. The AHTA (codified at 49 U.S.C. § 40116(b))[1] and PFC program (codified at 49 U.S.C. § 40117)[2] do not appear to be applicable

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[1] The Anti-Head Tax Act provides, in pertinent part:

49 U.S.C. § 40116. State Taxation.

(a) DEFINITION.—In this section, "State" includes the District of Columbia, a territory or possession of the United States, and a political authority of at least 2 States.

(b) PROHIBITIONS.—Except as provided in . . . . section 40117 [the PFC program] of this title, a State, a political subdivision of a State, and any person that has purchased or leased an airport under section 47134 of this title [the FAA Pilot Program on Private Ownership of Airports] may not levy or collect a tax, fee, head charge, or other charge on—

(1) an individual traveling in air commerce;
(2) the transportation of an individual traveling in air commerce;
(3) the sale of air transportation; or
(4) the gross receipts from that air commerce or transportation.

49 U.S.C. § 47102. Definitions.

In this subchapter,

(19) "public agency" means—
(A) a State or political subdivision of a State;
(B) a tax-supported organization; or
(C) an Indian tribe or pueblo.

[2] The Passenger Facility Charge program provides, in pertinent part:

49 U.S.C.§ 40117. Passenger facility fees

(a) DEFINITIONS.--In this section, the following definitions apply:

(1) AIRPORT, COMMERCIAL SERVICE AIRPORT, and PUBLIC AGENCY.--The terms "airport", "commercial service airport", and "public agency" have the meaning those terms have under section 47102.

(2) ELIGIBLE AGENCY.--The term "eligible agency" means a public agency that controls a commercial service airport.

(5) PASSENGER FACILITY FEE.—The term "passenger facility fee" means a fee imposed under this section.

(b) GENERAL AUTHORITY.—(1) The Secretary of Transportation may authorize under this section an eligible agency to impose a passenger facility fee of $1, $2, or $3 on each paying passenger of an air carrier or foreign air carrier boarding an aircraft at an airport the agency controls to finance an eligible airport-related project. . .

to the Company, because those provisions apply only to a State, a political subdivision of a State, or a person that has leased an airport under the FAA Pilot Program on Private Ownership of Airports (49 U.S.C. § 47134).

The Company, of course, is neither a State nor a person participating in the pilot airport privatization program. Thus, the question is whether the Company is a "political subdivision" of Missouri, subject to the AHTA and the PFC program. Although the AFC has features of a "head charge," the AHTA does not prevent the Company (as opposed to a State or political subdivision) from imposing the AFC if the Company does not constitute a "political subdivision" of Missouri. Similarly, if the Company is not a "political subdivision," the PFC program does not apply.

The Anti-Head Tax Act

The AHTA prohibits direct and indirect charges on airline passengers by States or political subdivisions of States. 49 U.S.C. § 40116(b)(1). In enacting the AHTA in 1973, Congress recognized that airline passengers pay Federal ticket taxes on their purchases of airline tickets. 26 U.S.C. § 4261. These taxes are deposited into the Airport and Airway Trust Fund, and Congress appropriates a portion of the Trust Fund to airport development programs. 26 U.S.C. § 9502. At the time, Congress believed that subjecting passengers to double taxation would prove inequitable and unduly burden airlines. Thus, the Senate stated in its Report accompanying the AHTA: "This bill prohibits any *government agency* other than the United States from establishing or levying a passenger head tax or use tax on the carriage of persons in air transportation. This prohibition will ensure that passengers and air carriers will be taxed at a uniform rate -- by the United States -- and that local 'head' taxes will not be permitted to inhibit the flow of interstate commerce and the growth and development of air transportation." S. Rep. 93-12, Airport Development Acceleration Act of 1973, 1973 U.S.C.C.A.N. 1434 at 1435 (emphasis added). Congress thus prohibited a "State" or its "political subdivision" from assessing a tax, fee, head charge, or other charge on an individual traveling in air commerce.[3] The AHTA does not preclude an airport operator that is not a State, political subdivision, or person leasing or purchasing an airport

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(2) A State, political subdivision of a State, or authority of a State or political subdivision that is not the eligible agency may not regulate or prohibit the imposition or collection of a passenger facility fee or the use of the passenger facility revenue.

(4) In lieu of authorizing a fee under paragraph (1), the Secretary may authorize under this section an eligible agency to impose a passenger facility fee of $4.00 or $4.50 on each paying passenger [under conditions prescribed in the statute].

[3] For a discussion of the history of the AHTA, *see Tinicum Township Privilege Fee Proceeding*, OST Order 2008-3-18, pp. 17-20 (Docket OST 2007-29341). In 1996, to conform to the provisions of the FAA pilot program on airport privatization, 49 U.S.C. § 47134, Congress extended the AHTA prohibition to a person that purchased or leased an airport under the privatization program.

under the FAA pilot program on airport privatization, from imposing head charges, directly or indirectly, on airline passengers.[4]

The Passenger Facility Charge Program

In 1990, Congress added a significant exception to the AHTA by permitting a "public agency" controlling a commercial service airport to charge a regulated per-passenger fee (PFC) for certain airport uses. 49 U.S.C. § 40117. The FAA must approve both the level and duration of the fee, as well as the eligibility of any projects that would be financed by the PFC. At airports imposing PFCs, airport-airline agreements must not limit an airport's ability to use PFCs and must provide for competitive gate access. 14 CFR Part 158. Only an airport controlled by a "public agency" -- defined as a State or "political subdivision" of a State -- may impose a PFC. 49 U.S.C. § 47102(19). The PFC program does not apply to a private airport operator.

"Political Subdivision" Analysis

Neither the AHTA nor the PFC program defines "political subdivision." Moreover, the question of what circumstances, if any, a privately-funded, for-profit company operating an airport may constitute a "political subdivision" under the Federal aviation laws presents an issue of first impression for us.

The Facts

Our determination that the Company does not appear to be a "political subdivision" of the State of Missouri is based on the following information, provided by the Company.

- The Company was created as a for-profit, limited liability company organized in Delaware. It is owned and controlled by its members, AFCO Branson Investors (ABI, a special purpose entity with 13 investors, which contributed $5,350,000 in cash) and GEP, Inc. (a development firm holding a large golfing/residential/resort project on which the Airport is located, and which contributed the undeveloped land for the Airport). Certain investors in ABI own Aviation Facilities Company, Inc. (AFCO), a national developer of airport facilities and a one percent owner of ABI. The Company is governed by a five-person membership board. The Company retained AFCO as the exclusive developer of the Airport's land. Other members contributed $20 million for the Airport.

- The Company successfully petitioned the Missouri Courts for the creation of Development District (TDD) under State law. At the time of the TDD's creation in 2003, the Company was the owner of record of all the real property (approximately 900 acres) in the proposed District and the only "qualified voter" in the District, as

[4] We do not discuss whether the $12.50 contemplated amount of the AFC would be "reasonable" under 49 U.S.C. Section 47129, nor for that matter whether the Department would take jurisdiction over a complaint filed under that statute.

defined in the Missouri Transportation Development District Act.[5] The County Court Order certifying the creation of the TDD found that the commercial airport to be constructed by the TDD will be a public improvement for the public good in Taney County. The Court Order authorized the Company to elect a five-member board of directors. The directors would be restricted to TDD real property owners or representatives; and each owner would receive one vote per acre owned. The TDD directors would contract with a private entity regarding Airport funding and operation. The Court Order further authorized the TDD to issue tax-exempt bonds to fund the Airport, which would be primarily paid through revenues received under a lease and operating agreement between the TDD and Airport operator. If deemed necessary by the TDD board, the bonds may also be paid by the proceeds of a one-percent sales tax imposed by the TDD for up to a 20 year period, pursuant to Section 238.235 RSMo.

- Subsequent to the formation of the TDD, the Company deeded 422.55 acres of the property to the County, which leased that land to the TDD for the "public purpose" of developing and operating an Airport.[6] The TDD subleased that property to the Company for a 50 year term (June 1, 2007-June 1, 2057) to construct, manage and maintain the Airport and Branson Creek Boulevard.[7] The TDD issued $114 million in tax-exempt bonds to finance or reimburse the Company's costs of acquiring, constructing and equipping the Airport and certain road improvements and related infrastructure, as well as to fund capitalized interest, reserve funds, and bond issuance costs.[8]

- The bonds were backed solely by the Company and were non-recourse to the TDD, the County, or the State. The bond holders have no recourse against the TDD if the Company cannot repay the bonds. Neither the County nor the TDD will share in any profits realized from the Company's operation of the Airport

- As part of the transaction, the Company agreed to act as the TDD's "agent" for purposes of constructing the Airport. The Company remains responsible for

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[5] Mo. Rev. Stat. §§ 238.200 – 238.275 (2008); December 16, 2003 Petitioner's Amended Motion for Certification of Creation of the Branson, Missouri Regional Airport Transportation Development District (December 16, 2003); Circuit Court of Taney County, Missouri Final Order and Judgment Certifying Creation of the Branson, Missouri Regional Airport Transportation Development District, Case No. 03CV786038 (December 17, 2003).

[6] Airport Lease between Taney County, Missouri and The Branson, Missouri, Regional Transportation Development District (June 1, 2007).

[7] Operating Lease Agreement between The Branson, Missouri, Regional Airport Transportation Development District and Branson Airport, LLC (June 1, 2007).

[8] Bond Issuance Documents, The Branson, Missouri, Regional Airport Transportation Development District Airport Revenue Bonds Series 2007A ($9,835,000) (Non-AMT) and Series 2007B (AMT) ($103,960,000) (Official Statement).

enforcing the construction contracts and surety bonds, and could change the Airport Project, subject to a cost cap and overall size.

- During the 50-year lease period, the County has no responsibility for the Airport's operation, maintenance, or associated expenses. It will not share in the profits generated at the Airport, and receives only nominal rent from the TDD. The bond indenture requires the Company to keep the Airport in substantially safe repair and in compliance with all laws regarding the construction, occupancy, and maintenance of the facilities, to obtain the necessary permits and licenses, to pay all necessary taxes, and to pay the utilities and insurance for the Airport.

- The Company (as it does with respect to the TDD) indemnifies the County, holds it harmless, and agrees to pay any and all costs arising out of the various agreements. Accordingly, the County has no financial obligation to repay the Airport debt or any liability for the bonds. Additionally, the Company indemnifies the County for liabilities arising out of the County's ownership of the Airport.

- To avoid "double dipping," at the suggestion of counsel (given the benefits from the tax exempt bonds), the Company will not take tax deductions for the depreciation of Airport assets. The Company will not, however, claim a deduction as a tax-supported agency, either.

- The Operating Lease between the TDD and the Company requires the Company to keep the Airport in safe repair, make all necessary repairs and replacements, and operate the Airport in a sound and economic manner, in accordance with applicable zoning laws. The Company is obligated to pay the Airport's operating expenses. Only in the event that the Company neglects to perform these duties may the TDD or the bond trustee step in to perform them. Moreover, the Company agrees to comply with applicable Federal and State laws pertaining to the operation of the Airport.

- The Company agreed to operate the Airport in a financially autonomous manner. It will not be dependent on any public subsidy and anticipates charging airlines market-based fees to access the Airport.

- Branson Land LLC (an affiliate of the Company) controls the remaining 500 acres of the TDD, to be developed in a manner that will not adversely affect the generation of Airport revenues.

- The bond indenture directs that, if the TDD imposes a sales tax in accordance with the Missouri Revised State Statutes, the tax proceeds must be deposited into the revenue fund, as established in the bond indenture.

- The Official Statement to the bond issuance provides that the City and Company agreed to a Pay for Performance Agreement, under which the City will provide the Company with an incentive fee of $8.24 per deplaned passenger (subject to a $2

million annual cap over a 30 year period), subject to the City's annual appropriations of the funds.

Analysis

As stated above, the question of whether a privately-funded airport operator may constitute a "political subdivision" for purposes of the AHTA and PFC program presents an issue of first impression for the Department. In each particular case, the proper test applied by the Department will depend on the specific issue presented. Here, given the purpose of the AHTA to avoid unauthorized double taxation, we find very useful guidance in a Treasury Department regulation, *Interest upon obligations of a State, territory, etc.*, addressing the tax-exempt nature of interest on obligations of the States or political subdivisions. That regulation states as follows:

> The term "political subdivision" for purposes of this section denotes any division of any State or local governmental unit which is a municipal corporation or which has been delegated the right to exercise part of the sovereign power of the unit. 26 CFR 1.103-1(b).

The Supreme Court also considered the meaning of "political subdivision" in analyzing whether a gas utility district was a "political subdivision" for purposes of National Labor Relations Act jurisdiction. There, the Court upheld the National Labor Relations Board's definition of "political subdivision" (albeit for purposes of the labor laws) as an entity either:

> (1) created directly by the State, so as to constitute departments or administrative arms of the government, or
> (2) administered by individuals who are responsible to public officials or to the general electorate. *NLRB v. Natural Gas Utility District of Hawkins County, Tenn.*, 402 U.S. 600, 604-05 (1971).

Under either test, we believe, based on the information provided to us, that the Company does not constitute a "political subdivision" of Missouri.

On the issue of whether a State or local governmental unit has "delegated the right to exercise part of the sovereign powers of the unit," 26 CFR § 1.103-1(b), the Courts view (1) the power to tax, (2) the power of eminent domain, and (3) the police power as the generally acknowledged "sovereign powers." *See, e.g., Texas Learning Technology Group v. Commissioner Internal Revenue*, 958 F. 2d 122, 124 (5th Cir. 1992) (finding that an unincorporated association of school districts did not constitute a "political subdivision," because it did not have the power to tax, the power of eminent domain, or the power to issue government bonds).

The case of *Philadelphia National Bank v. United States*, 666 F.2d 834, 839 (3rd Cir. 1981), *cert. denied*, 457 U.S. 1105 (1982), is instructive. There the plaintiff bank sought a tax refund from the IRS, arguing that because Temple University, a private non-profit

corporation, was a Pennsylvania "political subdivision," the bank need not pay taxes on the interest it received from the school's loan repayments. The plaintiff noted that the State had passed special legislation to "incorporate" Temple into its educational system, permitted the school to issue bonds in the name of the Commonwealth (although without pledging the State's credit), controlled a significant minority of Temple's board, and provided appropriations to Temple with countervailing obligations on the part of the university to cap tuition rates and issue annual reports to the Commonwealth. The Court held that, "although the university has close ties with and is dependent upon the state, a delegation of essential governmental power did not take place." *Id.* at 835. Discussing the "three sovereign attributes [of] the power to tax, the power of eminent domain, and the police power," the court held that Temple exercised none of them -- with the possible exception of minimal "police powers" given its responsibility for providing a campus police force. "With such a minimal grant of police power, and with no eminent domain or taxing power, Temple cannot be said to be a political subdivision." *Id.* at 840. The court also stated that even if the school's work of providing higher education is the performance of a governmental, public function, this is insufficient, without a delegation of sovereign powers, to transform a private corporation into an arm of the state. It noted that, in any event, Temple met only part of the demand for higher education. *Id.* at 839.

Similarly, the information which the Company has provided to the Department indicates that the State of Missouri has not delegated any of its "sovereign powers" to the Company (as opposed to the TDD, which is a political subdivision), because the Company is not authorized on its own to tax the citizens of Missouri, acquire property through eminent domain proceedings, or exercise the State's police powers.

Whether the entity's activities are exercised for a "public purpose" also has been an important factor in the judicial decisions characterizing an entity as a "political subdivision." Where an entity exercises some sovereign functions, was formed by the State, and functions for a public purpose, it may be considered a "political subdivision" for purposes of the Treasury regulation. *See Commissioner of Internal Revenue v. Shamberg's Estate*, 144 F.2d 998, at 1005 (2d Cir. 1944), *cert. denied*, 323 U.S. 792 (1945) (finding the Port Authority of New York and New Jersey a "political subdivision" because it was established for a "public purpose," to exercise the power of eminent domain, and to construct and operate toll bridges and tunnels). *See also Commissioner of Internal Revenue v. White's Estate*, 144 F.2d 1029 (2d Cir. 1944), *cert. denied*, 323 U.S. 792 (1945) (finding the Triborough Bridge Authority to be a "political subdivision," because it was established as a "public benefit corporation" to issue bridge construction finance bonds).

We conclude, under these tests, and based on the information provided by the Company, that the Company is not a "political subdivision." The Company was not created by the State for a public purpose, but was created as a for-profit, limited liability company. The Company is responsible for construction, operation, and maintenance of the Airport under a 50-year lease from the TDD. The Company has the financial interest in the profitability of the Airport, plans to impose an AFC on air transportation passengers, and alone will share in any profits generated by the Airport. The Company has also assumed financial risks by undertaking the

obligation to repay the bonds issued by the TDD. Additionally, the Company will indemnify both the TDD and the County for many financial contingencies.

In providing this guidance, we do not minimize the importance of the Company's agreement to act as the County's "agent" in constructing the airport. Indeed, the concept of "agency" indicates some action by the Company on behalf of the County, which clearly is a political subdivision of the State of Missouri. Moreover, the Petition and subsequent Court papers evidence that the Airport project serves a "public purpose," supporting the TDD's formation, and that the TDD was to procure the Company to further the project. However, such "agency" does not convert the Company into a political subdivision itself. For example, project oversight contractors routinely monitor the progress of Government-funded projects, but that does not necessarily convert these private companies into "political subdivisions" of the State issuing the contract, with separate authority to tax, acquire property by eminent domain, or exercise police powers. As the court stated in *Old Colony Trust Company v. United States*, 438 F.2d 684, 686 n.3 (1st Cir. 1971), "A governmental connection alone is not sufficient to make an organization a 'political subdivision.'" (Citation omitted.) We similarly do not minimize the importance of the Pay for Performance program, as another possible indication that the Company is acting on the City's behalf. However, there is no evidence that the City would exert any control over the Company in connection with the Pay for Performance program, or that as a result of the program, the Company is acting as the City (or on its behalf). Here again, that the City will pay the Company (subject to appropriations) for bringing people into Branson does not equate to a delegation by the City of its "sovereign powers."

In this regard, we must issue a cautionary note. The Company, as owner of 500 of the approximately 922 acres of property within the TDD, exercises majority control of the TDD (a "political subdivision" of Missouri) through its voting power and may potentially exert this power by electing a TDD board that will impose a one percent retail sales tax within the District. Under Missouri State law as we understand it, the TDD board must proceed by initially adopting a resolution, submitting to the qualified voters of the TDD a proposal to authorize the board to impose such a tax and, upon the majority vote of qualified voters, make the resolution effective. The Company has the majority of qualified votes within the TDD. Accordingly, should the TDD in the future act to impose a retail sales tax in the District (or exercise other "sovereign powers" delegated to the TDD), we may inquire as to whether the Company's majority voting power or other factors indicate such a close relationship between the Company and the TDD that, *for purposes of the Federal aviation laws only* (and without interfering in any way with the laws of the State of Missouri), the Company must be considered a political subdivision.

Due to the current arms-length relationship between the Company and the TDD, and the autonomy enjoyed by the Company, we do not consider the Company to be a "political subdivision" for purposes of preventing the imposition of the AFC at the Airport.

Accordingly, based on the information you provided us and our review of the AHTA and PFC provisions, certain regulations, and federal case law, it appears to us that the Company is not a "political subdivision" of the State of Missouri. Thus, we believe -- again, based

only on the information we received from the Company and subject to additional information we might receive -- that the Company's planned AFC does not violate the AHTA and may be assessed without regard to the amount, or other provisions, contained in the PFC program.

II. Granting Branson's request that airlines be permitted to separately list the Airport's AFC in their fare advertisements would not be in the public interest.

The air carriers that would be serving the Airport and ticket agents selling their services are subject to the advertising requirements of Part 399 of the Department's rules. To ensure that consumers are not deceived and are given accurate and complete fare information on which to base their airline travel plans, 14 CFR § 399.84 requires that advertisements specifying airfares and tour package prices with an air component state the full price to be paid by the consumer. Under long-standing enforcement case precedent, the Department has allowed taxes and fees collected by carriers and ticket agents, such as PFCs and departure taxes, to be stated separately from the base fare in advertisements, so long as such taxes and fees are levied by a government entity, are not *ad valorem* in nature, are collected on a per-passenger basis, and their existence and amounts are clearly indicated in an advertisement so that the consumer can determine the full fare to be paid.[9] (With respect to internet fare listings, the Department has permitted taxes and fees that may properly be stated separately from the base fare, and their amounts, to be stated through a prominent hyperlink placed proximately to the fare.) Government-imposed taxes and fees that are assessed on an *ad valorem* basis, *i.e.,* as a percentage of the fare price, as well as any carrier-imposed charges, must be included in the base advertised fare. Fare advertisements that include only general statements regarding the existence of additional taxes and fees do not allow consumers to calculate the full fare to be paid and, therefore, do not comply with section 399.84 or the Department's enforcement case precedent. Violations of section 399.84 also constitute "unfair or deceptive practices" in violation of 49 U.S.C. § 41712.[10] Nothing that the Airport has presented persuades us to change this long-standing policy.

The Company argues that permitting disclosure of its AFC in the manner it proposed is consistent with section 399.84, will not cause consumer confusion, and is convenient and familiar to consumers. We disagree. The Company's arguments are based largely on its presupposition that disclosure alone is the linchpin to the Department's full fare advertising policy. Thus, the Company argues that because consumers are used to PFCs being separately stated, no deception would occur by separately stating the AFCs, which it argues are akin to PFCs and would be accorded equal disclosure. While conspicuous disclosure is a key factor without which the Department's policy of permitting certain fees to be separately disclosed would fail, the Company's arguments ignore the fact the Department has permitted only government-imposed taxes and fees to be broken out and stated separately from the

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[9] *See* Department notices entitled "Disclosure of Air Fare Variations: Web vs. Other Sources, Surcharges that May be Listed Separately in Advertisements," dated November 4, 2004; "Disclosure of Additional Fees, Charges and Restrictions on Air Fares in Advertisements, Including 'Free' Airfares," dated September 4, 2003; and "Prohibition on Deceptive Practices in the Marketing of Airfares to the Public Using the Internet," dated January 18, 2001 available at: http://airconsumer.ost.dot.gov/rules/guidance.htm.

[10] *See, e.g., British Airways, PLC, Violations of 49 U.S.C. § 41712 and 14 CFR 399.84*, Order 2003-6-29.

government-imposed taxes and fees to be broken out and stated separately from the advertised fare. What consumers are familiar with is that these taxes and fees are government-imposed or -approved and thus subject to government-imposed limits and restrictions that vary only within a narrow range determined by the government. Allowing the privately-determined AFCs to be treated the same as PFCs would run the danger of misleading consumers about not only the amount of the total fare, since the Company's proposed AFC is currently three to four times the amount of the government-imposed PFC fees with no restrictions imposed on raising the AFC amount at any time, but about the nature and use of the AFCs, since it would appear that they are imposed by the government to be used for airport improvements when that is not the case.[11] Therefore, even if the amount of the AFC were the same as the amount of the PFCs, our analysis would not change.

The Company's argument that, absent the approval of its request, air carriers transporting passengers to the Airport will be at a competitive disadvantage when compared to those air carriers transporting passengers to other airports serving the city of Branson, is seriously misplaced. We must balance the public interest in the level playing field sought by our enforcement policy against the Company's private interest in obtaining an advantage that it apparently feels is justified by the interest in encouraging private investment in airports. While the Department wishes to encourage private investment in all facets of air transportation, including airport expansion, and it is excited about and commends Branson Airport for its work to date, government encouragement should not come unnecessarily at the expense of consumers or competition. As the only private airport in the country, the Company has voluntarily decided to take itself out of the federal regulatory regime, including that which was set up to permit the imposition of PFCs. This is its decision to make. However, once it has made that decision it cannot have it both ways by now requesting the benefits of that regulatory system without incurring its regulatory costs and burdens. In our opinion, such a result would be anti-competitive and against the public interest.[12]

The Company also argues that approval of its request will not cause enforcement problems for the Department since, unlike *ad valorem* taxes, the AFC is easily verifiable by the Department since it is established by the airport, not by the air carriers. The Airport misreads our concern about the AFC. The problems presented by its request stem not from potential enforcement issues, but from the fact that the relief requested would be unfair and deceptive and an unfair method of competition.

The Company argues further that authorizing the AFC to be treated as a PFC does not present a threat of abuse in the future because it would be approved by the Department and would be extremely limited in scope due to the unique nature of the Airport as the only privately-

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[11] Branson's reference to our May 19, 2008, Notice dealing with checked baggage fees is inapposite. Baggage charges can vary by passenger and unlike Branson's proposed AFC's would not be uniformly imposed on every passenger originating at the Branson Airport.

[12] Branson's argument that denying its request would put the airport at a competitive disadvantage because carriers serving it could not advertise one-way fares based on a round trip purchase is misplaced. We allow this practice subject to restrictions. It certainly isn't the only way carriers can and do promote their fare offerings and its usefulness doesn't outweigh the anti-competitive nature of Branson's request.

funded airport in the country. It argues that the AFC is analogous to the traditional airport funding mechanisms of PFCs and AIP funds. Therefore, it urges the Department to take this opportunity to encourage the development of privately funded commercial airports by approving its request. While we encourage the development of privately funded airports, such support does not justify the approval of the Company's request. As we stated in our 2004 enforcement policy letter cited by the Company, "we will no longer allow the separate listing of 'government-approved' surcharges in fare advertising."[13] As we stated above, the Airport has voluntarily decided to take itself out of the federal regulatory regime set up to permit the imposition of PFCs and AIP funding. Once it has made that decision, it cannot have it both ways by now requesting the benefits of that regulatory system without incurring its regulatory costs and burdens

If you have any questions about this matter, please contact me or William Wagner of my staff at (202) 366-9342.

Sincerely,

Samuel Podberesky
Assistant General Counsel for
Aviation Enforcement and Proceedings

[13] *Disclosure of Air Fare Variations: Web vs. Other Sources, Surcharges that May be Listed Separately in Advertisements*, dated November 4, 2004.