New Jersey
Appleseed

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Re: NEC STATION-PATH CONNECTION

NJ Appleseed has been tasked with undertaking legal research regarding an alleged inequity with respect to the operation of the Northeast Corridor (NEC) Newark Airport Train Station located in the South Ward of Newark. That inequity is the inability of South Ward residents to access the New Jersey Transit/Amtrak line at the airport station, thus inhibiting the economic development, both public and private, of the areas immediately adjacent to the station and train tracks. The research described in this memorandum has three primary goals: (1) to better understand the current statutory and administrative framework causing the barrier to use of the airport station by nonairport users or employees; (2) to identify statutory provisions that would need to be amended to permit the station to be used by nonairport passengers, patrons or employees, and whether there are other solutions, such as repayment of the Passenger Facility Charges used to fund the construction of the station and bridge connecting the station to the light monorail system (LRS), and/or use of other airport revenues to expand/improve those facilities (to provide direct access to South Ward residents and others), which would permit the prorating of costs based on a ratio of airport passenger to nonairport passenger use; and (3) to examine whether that barrier constitutes a violation of Title VI of the Civil Rights Act, and if so, how such violation can be remedied.

Statutory and Administrative Framework

I. Introduction

Over the years, there have been three primary sources of federal funding available to finance an airport's capital projects, including airport access projects: airport revenues, Airport Improvement Program ("AIP") grants, and Passenger Facility Charges ("PFCs"). The Aviation Safety and Capacity Expansion Act of 1990, which was signed into law on November 5, 1990, established the PFC program. Charges were first imposed in June 1992, and a version of the

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current statute was enacted in 1994 and is codified at 49 U.S.C. §40177. The statutory framework governing AIP grants was first set forth in the Airport and Airway Improvement Act of 1982, which was repealed in 1994, and re-codified in July of that year as 49 U.S.C. §47101 *et seq*. Airport revenues, including local taxes on aviation fuel or revenues generated by an airport, are governed by 49 U.S.C. §47107(b) and §47133, and the Federal Aviation Administration's ("FAA") "Policy and Procedures Concerning the Use of Airport Revenue" as set forth at 64 Fed. Reg. 7696 (Feb. 16, 1999)(hereinafter "Airport Revenue Use Policy").

Review and evaluation of any application requesting that one of these funding streams be used to fund an airport ground access project must occur in the context of the FAA's mission to "encourage the development of intermodal connections on airport property between aeronautical and other transportation modes and systems to serve air transportation passengers and cargo efficiently and effectively and promote economic development." 49 U.S.C. §47101(a)(5). See also 49 U.S.C. §47101 (g)(1-3)(actions to be taken to carry out the policy set forth in (a)(5) requiring intermodal planning). And each proposed project must be consistent with the development plans for the area surrounding the airport. 49 U.S.C. §47106(a)(1). See Tinicum Twp. v. United States DOT, 685 F.3d 288 (3d Cir. 2012)(FAA's use of a reasonable consistency standard does not render its decision regarding expansion of Philadelphia Int'l Airport arbitrary).

As a general matter, all projects that are eligible under the AIP are also eligible for PFC funding (though gates and related areas not eligible for AIP at larger airports are PFC-eligible under specific provisions). Therefore, future changes to the AIP in regard to project eligibility also apply to the PFC program. See FAA Order 5500.1, Passenger Facility Charge, ch. 1, §4:1-22(d) at 12 (2001).[1] PFC revenue may be used by a public agency to supplement an AIP project, to serve as the matching local share of an AIP project or to pay debt service and financing costs (something for which AIP revenues cannot be used). Ibid. The interplay between the two revenue streams is highlighted by the fact that AIP entitlement funds that are apportioned to large and medium hub primary airports, pursuant to 49 U.S.C. §47114, must be reduced by a certain percentage of the project revenues (based on the level of PFC imposed) received from the PFC. The apportionment for each airport imposing a PFC is recomputed starting in the first fiscal year following the fiscal year in which collections of a PFC commence and for each ensuing fiscal year that the public agency imposes a PFC. Id. at §5:1-28 at 14.

Despite the close eligibility relationship between AIP and PFC funding set forth in 49 U.S.C. §40117(a)(3), PFCs are not federal funds (i.e., they constitute a special form of local

[1] The PFC Update, PFC 75-21, issued in Memorandum form on January 12, 2021 (the "2020 Policy"), specifically cites to this provision in FAA Order 5500.1 and states:

> This PFC Update further clarifies that when using PFC funds, rail line eligibility is now treated differently than when using AIP funds. There is no change to AIP policy on ground access project eligibility, as outlined in Table P-3 of the AIP Handbook.

In this way, the 2020 Policy creates one more difference between the two: some rail access projects that are eligible for PFC funding are not eligible for AIP funding.

airport income) and there exists a slightly different set of requirements that govern PFC use, including any plan to use PFCs to finance airport access improvements. For example, PFC regulations do not require that an applicant (nor the FAA when approving the project) show an alternate financial plan in the event that PFC revenues are not made available. This is in contrast to a public agency that must present a "viable alternate funding source plan" when seeking to use AIP funds. See St. John's United Church of Christ v. FAA, 550 F.3d 1168, 1172 (D.C. 2008), *cert. denied*, 130 S. Ct. 96 (2009). Most notably, projects funded totally with PFC proceeds are not subject to labor minimum wage rates under the Davis-Bacon Act, Disadvantaged Business Enterprise (DBE) requirements, Buy-American Preferences or the Uniform Relocation Assistance and Real Property Acquisition Policy Act requirements, which are applicable to AIP and other federal funds. Order 5500.1, ch. 1, §4:1-22 at 13.

When approaching the question of whether an airport access project is AIP- or PFC-eligible, one must understand that the AIP statute and the PFC provisions are considered permissive, rather than mandatory or prohibitory. That is, if the AIP statute, 49 U.S.C. §47101 *et seq*. or the PFC statute, 49 U.S.C. §40177, does not provide the authority to fund a project or item, then that project cannot be funded employing such revenues. Simply put, the statutes give a public agency the permission to do certain things, but do not require that they be done. Order 5100.38D, Change 1, AIP Handbook, §1-10 (Feb. 2019)(hereinafter, "AIP Handbook"); see also United States v. MacCollum, 426 U.S. 317, 321 (1976) ("The established rule is that the expenditure of public funds is proper only when authorized by Congress, not that public funds may be expended unless prohibited by Congress").

So, what do the relevant statutes authorize? With respect to AIP/PFC projects, the Secretary of Transportation may approve a grant application for an airport development project only if the Secretary receives written assurances that revenues generated "will only be expended for the capital or operating costs of . . . (C) other local facilities owned or operated by the airport owner or operator and directly and substantially related to the air transportation of passengers or property." 49 U.S.C. §47107(b)(1). Similarly, 49 U.S.C. §47133(a) prohibits revenues generated by an airport that is the subject of Federal assistance from being expended "for purposes other than the capital or operating costs of --- . . . (3) any other local facility that is owned or operated by the person or entity that owns or operates the airport that is directly and substantially related to the air transportation of passengers or property." These nearly identical statutory provisions require, with limited exceptions, that all three income streams be used on projects that are located within airport boundaries and primarily serve users who are airport passengers, visitors or workers. Such limited exceptions include acquisition of sufficient property rights to protect airport access when proposed capital expenditure is not within airport limits, and incidental use of the capital project by non-passengers. As a matter of policy, these two restrictions are justified by concerns "that an unlimited ability to use airport revenues to fund ground access projects could direct critical capital from airports to serve local transportation needs that have limited or no relation to airport operations." (Bannard, 2016)

Notwithstanding the effectively identical nature of the statutory standard governing AIP/PFC and other airport revenues, their use to fund ground access projects has resulted in different outcomes, as will be further detailed in Section II, *infra*. Statutory provisions that require "terminal development" projects to include "access roads servicing exclusively airport

traffic that leads directly to or from an airport passenger terminal building," 49 U.S.C. §47102(28)(A)(ii), have led the FAA, as a matter of policy, to require that airport ground access transportation projects, including rail, which are funded by AIP or PFC revenues, must serve only airport passengers. FAA's "Policy Regarding the Eligibility of Airport Ground Access Transportation Projects for Funding Under the Passenger Facility Charge Program," 69 Fed. Reg. 6366, 6368 (Feb. 10, 2004)(hereinafter "Ground Access PFC Use Policy").[2] On the other hand, the FAA, unrestrained by such a statutory definition in which rail access projects must fall with respect to Airport Revenue use requirements, has issued regulatory guidance that permits a prorated share of both the capital and operating costs of rail access to be funded with Airport Revenues when a part of the local facility that is owned and operated by the airport owner or operator is also used by non-passengers. Airport Revenue Use Policy, 64 Fed. Reg. at 7718-7719 (". . . for capital operating costs of those portions of an airport ground access project . . .") This difference -- the ability to prorate costs between passenger and non-passenger use -- has facilitated the development of certain airport rail access projects in ways that cannot be done with a project that is exclusively funded with PFC revenue, such as the LRS and NEC Station at Newark Airport (EWR).

II. Regulatory Requirements Governing PFC/AIP Revenues

Under 49 U.S.C. §40117(a)(3), PFC eligibility for airport ground access transportation projects is identical to AIP eligibility, based on the latest edition of the AIP Handbook. That is, if it is not eligible for AIP revenues, it is not PFC-eligible; though AIP funding priorities do not affect PFC eligibility. See Order 5500.1, ch.4, §2:4-6(b) at 51; 14 C.F.R. §158.15(b).[3] In addition to AIP eligibility, a PFC-funded airport ground access transportation projects, must accomplish one or more PFC program objectives -- typically construed to be capacity preservation or enhancement for access projects, although other objectives may apply, such as enhancement of competition. Additionally, airport ground access projects must be for the exclusive use of "airport patrons and airport employees, be constructed on airport-owned land or

[2] The 2020 Policy explicitly "amends [this] FAA policy previously published in 2004 . . . to make *rail lines* that do not exclusively serve the airport PFC eligible, and provides several methodologies for calculating the PFC-eligible costs." (emphasis added). This policy, however, is limited to rail lines, not rail stations, and is not retroactive. Id. at 14 ("The following policy is applicable only to PFC funding for rail access projects taht serve an exclusive use, on-airport station and then extend to serve off-ariport stations."); Id. at 12 ("[t]his new policy will only affect future project approvals.")

[3] The 2020 Policy does not refer to this section of Order 5500.1 nor the regulation. They both will have to be amended to be consistent with the new policy. Moreover, although the 2020 Policy states that "[u]der this policy, FAA treats rail access projects differently than roads, which is consistent with 49 U.S.C. 40117(a)(3) and (b), 47102(28), 47119(a)," I do not see "consistency" with the language of these provisions which will be discussed *infra*. I do see, however, that Congress in section 123 of the Reauthorization Act of 2018 (Pub. L. 115-254, Oct. 5, 2018) did authorize the FAA to publish this change in policy, 2020 Policy at 4; and that the policy is consistent with "intermodal policy under 49 U.S.C. 47101(b)(5) and (6). Id. at 12.

rights of way acquired or controlled by the public agency, and be connected to the nearest public access facility or point of sufficient capacity." Order 5500.1 ch. 4, §2:4-6(e) at 54.[4] What follows is the statutory and regulatory basis supporting the FAA's policy with respect to PFC funding of airport rail access projects.

As stated in the Preamble to Part 158 of Title 14 C.F.R, the FAA determines the eligibility and justification for ground access projects, no matter the technology proposed (e.g., road, water, light or heavy train), on a case-by case basis after a review of the details of any given proposal. See 56 Fed. Reg. 24254, 24258 (May 29, 1991)(Passenger Facility Charges Final Rule). In addition to AIP eligibility, a PFC-funded ground transportation project must further one or more of the following objectives:

1. preserve or enhance, safety, security or capacity of the national airport transportation system;
2. reduce noise or mitigate noise impacts from an airport; or
3. furnish opportunity for enhanced competition among or between carriers.
(49 U.S.C. 40117(d)(2) as implemented by 14 C.F.R. §158.15(a)).

The Secretary may only approve a project if "the amount and duration of the proposed passenger facility charge will result in revenue . . . that is not more than the amount necessary to finance the specific project." 49 U.S.C. 40117(d)(1). The application must include "adequate justification" for each of the specific projects, 49 U.S.C. 40117(d)(3), which has been held by a court not to require the FAA to engage in a cost-benefit analysis. See Southeast Queens Concerned Neighbors, Inc, v. FAA, 229 F.3d 387, 393 (2d Cir. 2000)("Given the varied nature of the projects anticipated, it is reasonable to assume that Congress intended that the FAA have discretion in deciding whether applications are adequately justified.") In the case of an application to impose a charge of more than $4.00 or $4.50 for "a surface transportation or terminal project," the public agency has to establish that it has made "adequate" provision for financing the airside needs of the airport. 49 U.S.C. 40117(d)(4), as implemented by 14 CFR 158.17(a)(3); and, with respect to any project, a medium or large airport is only eligible for enhanced funding, "if the project will make a significant contribution" to the national air transportation system in one or more specific areas, such as safety and security, competition among carriers, congestion or noise. 14 C.F.R. §158.17(b).

A. AIP eligibility of ground access and intermodal projects

To be eligible for PFC funding, a ground access project must be eligible for AIP funding as a project for "airport development" or "terminal development." 49 U.S.C. §40117(a)(3)(B)&(C); 14 C.F.R. 158.15(b)(1)&(3). An "airport development" means a host of activities undertaken by the sponsor, owner, or operator of a public use airport, including

[4] The 2020 Policy specifically modifies ch. 4, §2:4-6(e) of Order 5500.1, "which currently states that airport ground access projects must be for the exclusive use of airport patrons and airport employees. Under the 2020 Policy, on air-port rail access projects no longer will be treated identically to road access projects, and a portion of a rail access project may be eligible even if the rail project in its entirety serves more than exclusively airport traffic." Id. at 1.

(I) constructing, reconstructing, or improving an airport or purchasing nonrevenue generating capital equipment to be owned by an airport, for the purpose of transferring passengers, cargo, or baggage between the aeronautical and ground transportation modes on airport property. 49 U.S.C. §47102(3).

"Terminal development," pursuant to 49 U.S.C. §47102(28), means

(A) development of--(i) an airport passenger terminal building, including terminal gates; (ii) access roads servicing exclusively airport traffic that leads directly to or from an airport passenger terminal building; and (iii) walkways that lead directly to or from an airport passenger terminal building; and
(B) the cost of a vehicle described in section 47119(a)(1)(B).

49 U.S.C. §47119(a)(1)(B) in turn permits approval of a project for terminal development that is directly related to---

(i) moving passengers and baggage in air commerce within the airport, including vehicles for moving passengers between terminal facilities and between terminal facilities and aircraft(.)

These two definitions are incorporated in Table A-1, of the AIP Handbook, and are further explained as follows: Under "airport development," the FAA notes that the list of projects eligible under this definition is "extensive and is therefore not duplicated. . . . However, this list is reflected throughout this Handbook (most specifically in Chapter 3 and the associated appendices." AIP Handbook, Appendix A, at A-2. Under "terminal development," the following is specified:

Access roads serving exclusively airport traffic that leads directly to or from an airport passenger terminal building. (Note that per FAA policy, the boundaries of this road are the first road or driveway in either direction from the terminal.)

Note that an on-airport road (or the portion of a road) that does not go directly to or from a passenger terminal building is considered *access road* rather than *terminal development.* AIP Handbook, Appendix A, at A-16.

Chapter 3 of the AIP Handbook sets forth the 16 general requirements for project funding, and Appendix P, sets for the documents needed to make eligibility and justification determinations for Roads and Surface Transportation Projects. Specifically, the Handbook specifies Access Rail at, Appendix P, at P-7, and makes clear that "(2) Public train service to an airport must meet the same eligibility criteria as airport access roads. The rail line must be limited to only serve passengers and employees traveling to and from the airport." "Access roads must be located on the airport or within a right-of-way acquired by the sponsor." Id. at P-2; and

(6) The access road must serve exclusively airport traffic. This means that an access road cannot be prorated. In mixed use situations of airport/nonairport use,

> only the portion of the road that is beyond the non-airport access point is allowable. Id. at P-2 to P-3.

This is the statement of FAA law and policy with respect to the eligibility of intermodal airport rail projects for AIP/PFC funding as it stood in October 2020 and, more importantly, at the time the NEC Airport Station and LRS were built.

B. PFC objectives and justification for ground access and intermodal projects

In 2001, the FAA issued Order 5500.1, entitled "Passenger Facility Charges," setting forth the agency's policies with respect to the objectives and justification requirements set forth in statute. With respect to ground access transportation projects, the FAA states the following:

> In that airport ground access projects are typically intended to enhance the capacity of the airport system, the justification should be framed in terms of effect on the airport's capacity. . . . An airport ground access project can be found adequately justified if it has the effect of alleviating a ground access constraint that otherwise would impede or constrain use of the airport by air passengers. Using this method, the public agency must demonstrate that, but for the proposed system, use of the airport would be substantially less, either now or in the future, than it would otherwise be due to ground access constraints. For very costly projects, this standard becomes higher.
>
> Justification can also be determined if the public agency demonstrates that the benefits of the project in terms of reduced time of access to the airport (either for passengers using the project or for all air passengers who benefit from less congested roadways) are reasonable relative to the cost of the project.

Order 5500.1, ch. 4, §2:4-8(b) at 59.

This was further discussed in the FAA's Ground Access PFC Use Policy, which was issued in 69 Fed. Reg. 6366 in 2004. In accordance with §123(e) of the Vision 100--Century of Aviation Reauthorization Act (Pub. L. 108-176, Dec. 12, 2003), the FAA issued this policy regarding the eligibility of airport ground access transportation projects for PFC funding, because there was and continues to be no direct statutory reference to rail transit. The policy explicitly states that it "reflects the FAA's recent experience in approving three major fixed guideway access projects -- the Light Rail System (LRS) at John F. Kennedy International Airport (JFK), the monorail project at Newark International Airport, and the Airport MAX project at Portland International Airport." Id. at 6366-67. The statement also acknowledges that its policy "is subject to refinement" as "different issues are raised during the evaluation of new projects." Id. at 6367.

Notwithstanding that, this policy statement has not been significantly modified since 2004 (despite a Notice of Proposed Policy Amendment and Request for Comment, promulgated

in 81 Fed. Reg. 26611 (May 3, 2016)).[5] Regarding which PFC objectives are typically met by ground access transportation projects, the statement is relatively succinct:

> . . . the objective of preservation or enhancement of capacity of the national air transportation system, in that airport passengers or air cargo customers may be afforded faster and/or more reliable access times to airports, thus reducing total trip times.

69 Fed. Reg. at 6369. When an enhanced PFC level of funding is at issue, public agencies typically prepare a ground access project description and justification to meet the "reduce current or anticipated congestion" significant contribution finding required by regulation. 14 C.F.R. §158.17(b). The analysis is often similar to that offered to satisfy its PFC objective stated above. Most importantly, the FAA notes that a transportation access project must be justified on its own merits; meaning that the PFC objective and significant contribution requirements cannot be imputed to the proposed project just because the access project has been made a condition of the airport project's approval as a matter of state or local law. 69 Fed. Reg. at 6369.

With respect to adequate justification for an intermodal project, public agencies should frame their analysis in terms of the project's effect on capacity. Specifically, "an airport ground access transportation project can be found adequately justified if it has the effect of alleviating a ground access constraint that otherwise would impede or restrain use of the airport by air passengers." Ibid. "At minimum, . . . [the applicant] must demonstrate that a rail project will produce a reasonable stream of congestion reduction or other access benefits to air passengers relative to the scale and cost of the project." Id. at 69 Fed. Reg. at 6370.

Two years later, the FAA issued Bulletin 1: Best Practices--Surface Access to Airports, primarily directed at FAA regional Airports divisions and Airport District Office Staff (hereinafter, "Bulletin 1"). The publication did not address the issue of objectives, significant contribution or justification. Instead, it focused on the need of FAA staff to work with public transit agencies to coordinate, plan and ensure that airport access is connected to a regional transportation system. See also Transportation Research Board, TCRP Report 83: Strategies for Improving Public Transportation Access to Large Airports, (July 2002).

C. Issues re "airport ownership" and exclusive use by "airport passengers"

To be AIP- and PFC-eligible, an airport ground access transportation project must meet the following conditions: "(1) The road or facility may only extend to the nearest public highway or facility of sufficient capacity to accommodate airport traffic; (2) the access road or facility must be located on the airport or within a right-of way acquired by the public agency; and (3) the access road or facility must exclusively serve airport traffic." 69 Fed. Reg. 6367. In this memo, I will focus only on the latter two questions: what qualifies as airport-owned? And what constitutes exclusive use by airport traffic?

As noted in Section I, supra, the statutory standard governing eligibility for funding under

[5] That is until January 12, 2021.

the AIP/PFC programs is "facilities owned or operated by the airport owner or operator" and "directly and substantially related to the air transportation of passengers or property." 49 U.S.C. §47107(b). So, how did the FAA get from this statutory standard to the policy articulated in its 2004 Policy regarding the eligibility of airport ground access transportation projects for funding under the PFC program?

i. Owned or Operated by the Airport Owner or Operator.

Pursuant to the most recent AIP Handbook, issued in 2019, access rails are treated the same as access roads (P-7(d)(1)); and "Access roads must be located on the airport or within a right-of-way acquired by the sponsor. Id. at P-2(a)(5). It appears that this requirement was similarly stated in the earlier AIP Handbook on which the FAA relied in its 2004 Ground Access PFC Use Policy. See Change 1 to FAA Order 5100.38B, paragraph 620a(2). The 2004 Policy further states:

> Moreover, an airport ground access transportation project may extend off the traditional boundaries of an airport (to the nearest off-airport highway or access facility) provided that the right-of-way for the project will be owned and controlled by the public agency for the life of the project and the project is connected to the airport at some point, thus qualifying as an appurtenant area and with the airport boundary under 49 U.S.C. §47102 (2)(A)(ii). To satisfy this eligibility requirement, the public agency must amend its Airport Layout Plan and Exhibit A to show the right-of-way.

Id., 69 Fed. Reg. 6368. To be clear, the FAA's interpretation of the term "airport owner" or "airport operator" rests on the statutory definition of "airport", which includes "an appurtenant area used or intended to be used for airport buildings or other airport facilities or rights of way," 49 U.S.C. §47102(2)(A)(ii), and "requires only that the right-of-way be attached to the airport landing area at some point, but not necessarily along the entire length of the right-of-way." Air Transportation Ass'n of Am. v. FAA, 169 F.3d 1, 14 (D.C. Cir. 1999).

In Air Transportation Ass'n of Am., the court held that the FAA's interpretation that once the public agency (in this case the Port Authority) owned the right-of-way, that strip of land was by definition "airport owned" and thus "within the airport" was "at least reasonable." Ibid. The court further noted that this interpretation "was consistent with the FAA's own regulations and past practice. See, *e.g.*, 56 Fed. Reg. 24,254, 24,258 (1991)(preamble to current regulations, noting that "ground transportation projects are eligible if the public agency acquires the right-of-way"); Applications to Use Passenger Facility Charge Revenue, No. 96-03-U-00-EWR, et al., at 7 (November 6, 1996)[hereinafter, "EWR ROD"](FAA approval for use of PFC funds to construct a transit link between an AMTRAK rail station and the Newark International Airport monorail on to-be-acquired rights-of-way)." Ibid. So, it appears that as early as 1991, when the PFC Final Rule was promulgated, the FAA construed its governing statute to permit a rail access system and/or rapid transit facilities to receive PFC funding if such projects were constructed on rights-of-way acquired by the airport owner, sponsor or operator. And that such interpretation -- rights-of-way are within the airport boundary -- was deemed reasonable by a federal appellate court in 1999.

ii. Exclusive Airport Use

> Pursuant to the most recent AIP Handbook,
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> > Public train service to an airport must meet the same eligibility criteria as airport access roads. The rail line must be limited to only serve passengers and employees traveling to and from the airport.

Id., Appendix P, at P-7(d)(2). Based on this statement, the question remains open whether the rapid transit facility can serve all persons traveling to and from the airport or only persons intending to board a plane (or conversely, those having debarked a plane) or working for an enterprise involving the "air transportation of passengers and property." A review of policy statements and administrative decisions indicates, however, that the FAA considers "passengers and employees" to include all airport visitors, patrons and employees working at the airport.

In the November 1996 Record of Decision, EWR ROD at 7, the FAA notes the following:

> The monorail-NEC project will provide direct public transit accessibility exclusively for *airport passengers, airport visitors, and airport employees* by linking rail transit lines from New York City and north, central and coastal New Jersey to EWR's terminals A, B. and C. (Emphasis added.)

Three years later, in Applications to Use Passenger Facility Charge Revenue, No. 97-04-C-00-JFK, et al. (August 16, 1999)(hereinafter, "JFK ROD"), the FAA faced a challenge with respect to "the high number of airport employees" that would constitute the ridership of the Howard Beach component of the proposed light rail system. In particular, the American Transportation Association "questioned the legal eligibility of spending PFC funds for airport employees who [were] not traveling in air commerce." Id. at 27. The FAA responded that the efficient movement of all airport employees on the rail system could reduce on-airport roadway congestion and benefit air passengers. In this way, "the FAA premised its finding of eligibility on the effect of the LRS on air passengers at JFK, not airport employees." This reasoning indicates that the exclusive use requirement covers all persons who travel to and from the airport regardless of status, because of the impact that removing those persons from the road will have on airport passengers.

This conclusion is borne out by language included in Order 5500.1, FAA's guidance with respect to Passenger Facility Charges issued in 2001. Such publication notes that "airport ground access projects must be for the exclusive use of airport patrons and airport employees." Id., ch. 4, §2:4-6(e) at 54. Similarly, FAA's 2004 Ground Access PFC Use Policy states that the requirement:

> [t]hat the ground access transportation project be for the exclusive use of airport patrons and employees means that the facility can experience no more than incidental use by non-airport users.

Id. at 69 Fed. Reg. 6368. With respect to the use of AIP and PFC funds, Bulletin 1, issued in 2006, continues the dichotomy between airport and non-airport use, lending further support to the notion that the exclusive use restriction includes all travelers to and from the airport, regardless of whether they will be boarding a plane or working for an airline.

Additionally, it should be noted that exclusive airport use does not mean that any use by non-airport travelers must be prevented at all costs. The FAA considers whether techniques that would enable the public agency to prevent non-airport use would be "prohibitively expensive." Ibid. Notwithstanding its willingness to consider this matter on a case by case basis, the FAA is clear that "[i]ncidental use by non-airport users means that through system control procedures, physical alignment, schedules, pricing or for other reasons, routine use by non-airport users in fact constitute only a minor percentage of total system ridership." Ibid. (quoting the AIP Handbook, Order 5100.38B). And as previously noted, if a transit facility is intended to serve both airport and non-airport users, only those physically discrete subsections of the facility that exclusively serve airport users can be funded with AIP or PFC funds--the prohibition against proration.

III. Regulatory Provisions Governing Airport Revenues

Four statutes govern the use of Airport Revenue: the Airport and Airway Improvement Act of 1982; the Airport and Airway Safety and Capacity Expansion Act of 1987; the FAA Authorization Act of 1994; and the Reauthorization Act of 1996. All these statutes are now codified at 49 U.S.C. §47101 *et seq*.; and part of Title V of the Tax Equity and Fiscal Responsibility Act of 1997, now codified at 49 U.S.C. §47107(b) established and continues to govern the general requirements for use of airport revenue. See also 49 U.S.C. §47133(a)(same). Simply put, airport revenue may only be used for capital and operating costs of facilities that are owned or operated by the airport owner or operator and which costs are directly and substantially related to the air transportation of passengers or property. Ibid.

In 1999, FAA promulgated its Airport Revenue Use Policy and specifically addressed the use of airport revenue to fund mass transit airport access projects. Id. at 64 Fed. Reg. 7696, 7718-9. It noted in the preamble to its Final Policy that such policy had been modified in response to public comment. Specifically,

> The Final Policy states that airport revenue may be used for the capital or operating costs of such a project if it can be considered an airport capital project, or *is part of a facility* owned or operated by the airport sponsor and [is] directly and substantially related to air transportation of passengers or property, relying directly on the statutory language of 49 U.S.C. §47107(b). (Emphasis added.)

Id. at 64 Fed. Reg. 7705. The preamble also notes that the FAA had determined (based on its experience with the Bay Area Rapid Transit rail system) that the possibility of incidental use by non-airport passengers did not preclude airport revenues from being used to finance 100 percent of the otherwise eligible cost items; and for purpose of its analysis of non-airport use, the FAA

considered "airport passengers" to include "airport visitors and employees working at the airport." Ibid.

In any event, the actual policy statement reads:

> Airport revenue may be used for the capital or operating costs of *those portions* of an airport ground access project that can be considered an airport capital project, or of that *part of a local facility* that is owned or operated by the airport owner or operator and directly and substantially related to the air transportation of passengers or property, including use by airport visitors and employees.

Id. at 64 Fed. Reg. 7718-19 (emphasis added). Although this policy, consistent with statute, restricts use of Airport Revenues to support only on-airport projects in the same manner as PFC/AIP-funded improvements, the second test permits a prorated share of both the capital and operating costs of ground access to an airport to be funded with airport revenues. (Bannard, 2016).

In Bulletin 1, published in 2006, the FAA expressly noted that a different standard applied to Airport Revenue than to PFC/AIP funding. All ground access facilities (other than those that are an integral part of an airport capital project) would need to be "substantially and directly related to the air transportation of passengers or property. This is somewhat [a] different standard than the one applied to PFC eligibility, which requires that the facilities be exclusively for airport use." Id. at 3. In what way is it different? The answer rests with the fact that standing on its own, this standard permits the use of airport funds for a project that would be used to some degree by non-airport passengers. There is no other statutory provision that restricts use. Nonetheless, the Bulletin notes that use of airport revenue is limited in two ways:

> Airport funds cannot be used for portions of the project that are not necessary for the purpose of serving airport passengers.
>
> Airport funds must be prorated to airport use. I.e., for portions of the project used by both airport and non-airport passengers, airport funds to be used for the project cannot exceed a portion of total project funding greater than the projected percentage of total use of the project by airport passengers.

Id. at 5. Despite the ability to prorate Airport Revenues, Bulletin 1 makes clear that "directly and substantially related to the air transportation of passengers" in the context of a ground access project means that the capital improvement is "intended primarily for the use of airport passengers (air passengers, airport employees, airport visitors)." Id. at 4-5. In other words, the project "is designed and constructed for ground transportation to the airport; *and* is projected to be used primarily by airport passengers." Id. at 5.

IV. Conclusion

In short, partial funding of a ground access project from a non-PFC source does not negate the exclusive use requirement associated with PFC funding delineated above. In order to

employ PFC revenues to fund a component of a transportation system, that component must be exclusive. There is little doubt that this requirement has complicated the ability of an airport operator, who may have wanted to fund its ground access project with PFCs, to also qualify for the expenditure of funds from traditional sources of transit capital unless the project could be easily separated into distinct exclusive and mixed-use components. See Bulletin 1 at 5-8 (advising FAA offices and staff to coordinate airport access needs with other federal, state and local agencies and, implicitly, to understand the factors that could encourage or discourage an airport in pursuing intermodal funding from multiple transit sources). It does not appear that the use of Airport Revenue to fund such ground access transportation systems, which allows proration of covered costs based on airport and non-airport use, has created the same problems. [6]

Amendment of Legislation vs. Repayment and/or Redesign of Bridge and Station

The above statutory and administrative framework has guided the FAA's decision-making regarding the funding of specific rail access projects, and, in turn, those individual decisions have served as the basis (*i.e.*, agency practice) for several of its policy statements. It is my intent to provide a more detailed explanation of how the FAA applied its governing statutes and regulations with respect to PFC eligibility to several light rail system proposals in order to better understand what needs to be changed in order to achieve NAC's goal of permitting the NEC Airport Station to also serve non-airport users. I will explore whether the needed change is a matter of statute? regulation? or simply a change in policy? I will also explore whether such goal may be achieved through innovative design of additional improvements that can be considered newly constructed, distinct components of the transit system; or whether it is more feasible to advocate for repayment of the PFCs previously allocated to the NEC station (and/or bridge connecting to the monorail system), with a mixture of intermodal transit funds and airport revenues that can be prorated.

I. FAA Application of Legislative Scheme to Several Rail Systems

A. Newark International Airport (EWR ROD, 1996)

One of the earliest applications to use passenger facility charge revenue to support an airport light rail access system occurred at EWR. The monorail-NEC project provided for an "automated transit link of approximately 4,400 feet between a new rail station on AMTRAK's NEC and the EWR monorail." EWR ROD at 7. It consisted primarily of four components which probably could have been funded with different revenue streams: construction of a monorail guideway extension between a monorail station at parking lot E and the NEC; construction of a rail station on the NEC; acquisition of rights-of-way to accommodate the monorail system; and realignment of tracts and other improvements necessary to accommodate train service at the rail station. Ibid. In retrospect, what was unique about this project was the fact that the new

[6] The 2020 Policy now expands PFC eligibility to include the on-airport portion of rail lines even if the railway and infrastructure serve stations other than those on the airport using the proration of costs based on the forecast ratio of airport to non-airport ridership as one methodology. Id. at 13.

construction included a rail station on a pre-existing public transit line, rather than new tracks or a connecting facility from a light rail system to a pre-existing rail station. The decision notes:

> The new monorail-NEC station will be constructed on vacant land, north of Haynes Avenue, approximately 2.5 miles west of Newark Penn Station, to provide transfer between the monorail and NEC trains.

Id. at 7-8. This station was found eligible for PFC revenue (despite a challenge by the carriers that this station benefited NJ Transit and not the airport) primarily for two reasons: First, "[t]he FAA notes that the rail station will not serve passengers other than those who will also go to and from the airport. The general public will not be able to use the station as a commuter station or for regular rail travel," id. at 12; and second, equipment used at the station that was movable was not deemed eligible and NJ Transit had agreed to operate the rail portion of the station at its own expense. Id. at 8. [7]

There is no discussion in this agency decision as to whether this proposed project was consistent with local development plans of the surrounding area at the time; and I assume that NAC's plans, or similar development plans, which are now alive, did not exist in the mid-1990s.

B. San Francisco International Airport, SFO (BART Letter 1996)

In a letter dated October 18, 1996, the FAA provided guidance to the San Francisco Airport regarding the eligibility of airport revenues to cover certain capital costs associated with extending mass transit services (i.e., the Bay Area Rapid Transit, BART) to its airport. In its letter, the FAA confirmed that the airport sponsor was able to apply Airport Revenues to pay for the construction of a BART station at the airport, the purchase of certain equipment for that station, the construction of a building linking the BART station to the International Terminal Building, and portions of the "elevated guideway that connect[ed] the BART station to the BART system main line," which were on airport property, or for which "sufficient property interests" were acquired. Id. at 4.

The BART Letter made clear that proration of costs that were only partly airport-related was permissible if Airport Revenues, not AIP funds or PFCs were used. Id. at 5. Specifically, the guidance stated:

> Eligible costs must be based on a reasonable method of proration, such as length of the line included in the BART SFO station as a percentage of the total length of the extension.

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[7] It is interesting to note that the FAA in the 2020 Policy states:

> The legal opinions referenced or cited in the 2004 Policy, such as the PFC Record of Decision, Application No. 96-03-U-00 EWR (Nov. 6, 1996) . . . remain relevant only to the extent they are consistent with the statement of policy that we promulgate today.
> Id. at 12.

Ibid. That is, the BART SFO station, which was located on airport property and "primarily, if not exclusively, would serve airport passengers," was eligible to be fully funded with airport revenues. However, systems that used both the BART extension and the BART main line would have to be prorated.

The BART Letter also made clear that the airport owner or sponsor must own the capital assets funded by the airport revenues, while the public transit entity may operate the rail system and own elements of that system that are not located on airport property. Such is the absolute legal requirement found in 49 U.S.C. §47107(b)(1)(C), which mandates that the airport sponsor hold legal title to any transit-related improvements funded with Airport Revenue (when the sponsor is not operating the transit). In this case, the letter assumed that the facilities constructed and equipment purchased with Airport Revenue would be held by the City and County of San Francisco in fee simple. BART Letter at 4-5.

C. JFK International Airport (JFK ROD, 1999)

It appears that the application to impose a PFC to support the construction of the LRS at JFK occurred in 1997 -- one year after the application filed to support the EWR mass transit project. The FAA first approved the application on February 9, 1998. However, the U.S Court of Appeals for the District of Columbia vacated that decision (in Air Transportation Ass'n of Am., *supra*), and remanded it for further proceedings, resulting in final agency approval in 1999 (and court affirmation in 2000 (Southeast Queens Concerned Neighbors, Inc., *supra*). The proposed project included three distinct components, all of which the FAA found were eligible for PFC funding. In this regard, however, the FAA noted in the ROD "that the PFC eligibility for an airport ground access project is an issue separate from whether other funding sources should be used." JFK ROD at 43. And, for our purposes of contemplating changes to the NEC rail station, the following statement is relevant:

> It is not a statutory requirement that, in general, such [mass transit] projects be funded inter-modally. However, the FAA has noted that, to the extent the LRS may be over-designed to accommodate the possible future use of the LRS by LIRR trains or NTCT subway cars transiting from the LIRR or NYCT systems, PFC funds may not be used for those costs attributable to the over-design.

Ibid. In any event, the three components were: 1) Howard Beach LRS Component -- 3.3 miles connecting NYC subway station to light rail system central terminal, with two stops along the way; 2) Central Terminal Area (CTA) LRS Component -- double loop circulator connecting nine unit terminal buildings and six stations with pedestrian bridges adjacent to each unit terminal; and 3) Jamaica Station to JFK LRS Component -- LRS segment approximately 3.1 miles connecting the LIRR Jamaica Station and NYCT Sutphin Blvd. subway station to the LRS Howard Beach alignment at the Federal Circle station. Id. at 8-13. (With respect to the first component, the FAA noted that any over-designs such as "station length; structural strength; additional controls or control system components needed to accommodate both "on airport" and "off airport" users, and any connecting track (i.e., platform and rail extensions) at Howard Beach

to permit cars to move from subway to LRS" would be considered ineligible for PFC funding. Id. at 9).

There were numerous challenges to this application. The prime challenger was the Air Transportation Association of America (ATA), which made numerous claims including that the proposal was a "disguised regional rail system" and should be funded by rail and intermodal funds rather than airport PFCs. Id. at 17. Other notable claims were that the Jamaica component was not on the airport, and PFCs could not be spent on stations for parking lots and car facilities. Id. at 23. The FAA answered each claim and, as mentioned above, its decision was affirmed by the U.S. Court of Appeals for the Second Circuit in Southeast Queens Concerned Neighbors, Inc., *supra*, 229 F. 3d at 396 (finding, *inter alia*, that information provided by the Port Authority had produced "reasonable forecasts" and agreeing that "the increase of 3.3 million passengers . . . afforded by the LRS over the no build alternative is a credible estimate of the increase in the airport's ground capacity"). For example, the FAA found that, although connectors from parking lots to the monorail were not covered under 14 C.F.R. §158.15(b)(1), the rail station for the parking lot and rental car facility, which would transport people to and from the terminal, would be eligible as part of the larger LRS circulator system. Id. at 28. Fare collection systems were also found not to be eligible for PFC funding, but the FAA declined to extend this finding "to physical connections to the LRS, i.e., stations connecting the LRS and either the subway or the LIRR. Id. at 44.

Most interesting in terms of the issue of "exclusive use," was the FAA's response to the ATA's assertion that the LRS would be used by non-airport patrons, and in fact, that "local riders could use the airport itself as a commuter station." Id. at 25. The argument went as follows: people would park in the airport's long-term parking facilities and use the LRS to connect to the subway or the LIRR without traveling to the terminals. The FAA said that such possibility was "economically unfeasible due to [the] combined cost of the round trip LRS fare and airport parking relative to alternative means of accessing non-LRS transit." Ibid. Nonetheless, the FAA cautioned the Port Authority that any evidence of "more than incidental use" would cause the FAA to revisit the PFC funding authority granted in this decision. Ibid.

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D. Portland International Airport (PDX ROD, 1999)

This application for PFC funding involved the construction of a segment of the Airport Metropolitan Area Express (Airport Max) light rail system, which would extend the system approximately 1.2 miles from the Portland International Center to the PDX terminal. The project had two components: the construction of a station consisting of a covered center platform extending to the doors of the PDX terminal building and the track itself (the "Terminal Segment" project). PDX ROD at 4. The FAA found that because the Airport Max had a "spur configuration" ending with the Terminal Segment and because the Terminal Segment contained no stops other than its end at the terminal, this segment would necessarily be used exclusively by airport passengers and employees and thus, was eligible for PFC funding.

The ROD stated that some or all of the parking mitigation undertaken as a part of this project might not be AIP- or PFC-eligible, though it did mention that removal of ineligible development that impedes eligible development is eligible. Id. at 5.

The owner of the airport, the Port of Portland, also provided information showing that a second rail segment, which would combine with the Terminal Segment to form the Airport Max portion of the light rail system but would also serve a non-airport office area (the "PIC Segment") would be funded with local Airport Revenues outside of the PFC process. Id. at 11-12. Here again, we see that use of Airport Revenue to finance a project that allows non-exclusive use by airport traffic. In this ROD, "the FAA acknowledged that the use of airport revenues to fund an extension of the MAX located on airport property that would not exclusively serve airport passengers was permissible. The [PIC Segment] was found to be directly and substantially related to the air transportation of passengers based on the projection that 65 percent of the ridership of this segment of the MAX would be traveling to or from PDX." (Bannard, 2016)

E. Minneapolis-St. Paul International Airport (MSP Letters, Apr. & Nov. 2000)

In two letters, one written in response to the Metropolitan Airports Commission's request for review of the use of airport revenue in the development of a light rail system at MSP, and the other in response to a challenge to that project launched by Northwest Airlines, the FAA continued to provide guidance with respect to the application of airport revenues to projects that were not expected to be exclusively used by airport passengers, The specific project involved the construction of the Hiawatha Corridor light rail system (LRS), which would extend from downtown Minneapolis through MSP to terminate at the Mall of America. The LRS was planned to be approximately 12 miles in length and connect downtown Minneapolis, the University of Minnesota, South Minneapolis, St. Paul's Highland Park neighborhood, MSP and the Mall. Fifteen stations were planned for development including two at MSP. April MSP Letter at 1.

"The FAA found with respect to MSP that it was permissible for the airport to pay the proportional share of the facilities located on airport property that was equal to the percentage of the airport passenger ridership projections for each of the identified segments of the on-airport LRS. [April MSP Letter at 5-6; Nov. MSP Letter at 4.] The MSP project consisted of several elements, including construction of a tunnel under a portion of the airfield, two stations at the two major terminals at MSP and an at-grade section of the line leading from the airport terminals to the Mall of America. [April MSP Letter at 1.] Projected ridership forecasts indicated that a substantial number of nonairport passengers would use the LRS, but that 51 percent of the passengers using the airport segments of the system would use at least one of the airport stations. [Id. at 5.] However, the FAA's guidance further parsed the Airport Revenue Use Policy in light of the ridership projections and found that the elements of the project were eligible for funding by MSP in varying degrees, based on each element's percentage of airport use. For example, the two stations on airport property were found to serve airport passengers exclusively, and thus the entire cost of the airport stations was deemed to be eligible for funding with airport revenues. [Ibid.] In contrast, only 14 percent of the cost of the portion of the tunnel from the airport boundary to the Lindbergh terminal station was found to be eligible for funding with airport revenues, while 46 percent of the cost of the tunnel and at-grade section between the two terminals was found to be eligible for funding with airport revenues, in each case based on the

ridership projections for each segment of the line developed by the project sponsor. [Id. at 5-6; Nov. MSP Letter at 4.]." (Bannard, 2016.)

F. Washington Dulles International Airport (ROD, 2005, FAA Decision, 2014, MWAA Letter)

The experience with respect to the Dulles Corridor Metrorail Project portrays the complexity of seeking PFC funding for an extensive project that seeks to be part of the regional transportation network, and which is seeking to receive intermodal transportation loans as well as, I surmise, Airport Revenues. At this time, I have not been able to locate the FAA's Final Agency Decision with respect to the Metropolitan Washington Airport's Authority's (MWAA) application to employ PFCs, except as reported in the Federal Register at 81 Fed. Reg. 26613. This summary is therefore based on a previous ROD issued in 2005 regarding compliance with federal environmental policies and objectives, the summary appearing in the Federal Register, and some documents supporting the MWAA's request for loans and credit assistance pursuant to the Transportation Infrastructure Finance and Innovation Act (TIFIA).

The Dulles Corridor Metrorail Project, as described in the 2005 ROD (which was based on the FAA's review and adoption of the Final Environmental Impact Statement (FEIS)), was as follows:

> The median of the airport access highway will be used by the Metrorail system in order to bring mass transit to the Dulles International Airport. On airport property, the rail line will be located either underground or along existing roadways. The station at the main terminal of the airport will be located underground. The project will also provide airport property within the airport buffer zone on land that would not otherwise be used for airport development for a new Metrorail Service & Inspection Yard.

At this point in the process, it appears that the MWAA was seeking to use Airport Revenues to fund certain components of this project. The decision cites to the FAA's Airport Revenue Use Policy to justify approval to use airport property for non-aeronautical uses. ROD at 2.

In March 2014, the MWAA applied for PFC funding to "help fund both an on-airport station and a portion of the on-airport track that would be located immediately adjacent to the station." 81 Fed. Reg. at 26612. Both segments of the tracks would be on airport property and connect to the nearest public transportation facility, but they would not exclusively serve airport patrons and employees because they would not terminate at the airport station; rather, they "would continue to other destinations beyond the airport." Id. at 26612-13. In a final agency decision dated July 11, 2014, the FAA approved portions of the Dulles Airport Metrorail Station project, but deferred consideration of "the track portions of this project (beyond the Airport station footprint." Id. at 26613.

Around the same time, it appears that the MWAA was seeking intermodal transportation funds to finance other components of this extensive project. In a letter dated March 26, 2014

from Andrew Rountree (MWAA) to Duane Callender (TIFIA Joint Program Office), in which the MWAA was seeking an invitation to apply for TIFIA financing, the project was described as:

> [A] 23.1 mile extension of Washington Area Metropolitan Transit Authority['s] 106 mile Metrorail system, from Fairfax County to Dulles International Airport and beyond to Route 772 in eastern Loudoun County.

This letter noted the extensive support behind this project and stated that it "represents a broad-based investment by business, federal, state and local partners." The MWAA sought a TIFIA loan for itself and credit assistance for Fairfax and Loudoun Counties.

This project indicates how decisions are made to fund only certain components of an airport rail access project with PFCs (i.e., a station located at the airport terminal), other components with Airport Revenues that permit proration and yet other components (typically tracks) that are not on airport property and that are not primarily used by airport passengers and employees with other federal, state or local funding.

G. Greater Orlando Aviation Authority (PFC Application, 2014)

In July, 2014, the FAA acted on a proposed application for PFCs submitted by the Greater Orlando Aviation Authority, Application No. 14-17-C-00-MCO. See 79 Fed. Reg. at 69977. The proposed project entailed" "South airport automated people mover system, stations, and associated facilities -- design and construction. Ibid. The FAA partially approved the application. Although the south airport station was planned to be a multi-modal facility on airport property, the FAA stated that "PFC eligibility is limited to that work that is exclusively for airport use." Ibid. Specifically, the FAA determined that three of the four roadway segments requested in the project were ineligible for PFC funding, and certain elements such as concession space and non-aeronautical areas were not PFC eligible. Ibid.

Although there was no mention of whether this project entailed airport rail access, it did note that the station was designed to be a "multi-modal" facility, and I thought that noting the strict application of the "exclusive use" requirement in such a situation was relevant to your understanding of the statutory requirements.

II. Lessons Learned: What would have to change:

In 2016, the FAA issued a notice of proposed policy amendments regarding PFC funding eligibility for certain on-airport ground access projects. See Notice of Proposed Policy Amendment and Request for Comment, 81 Fed. Reg. 26611 (May 3, 2016). At that time, the FAA was considering amending its Ground Access PFC Use Policy, which only permits rail projects to be PFC-funded where the airport terminal is the terminus of the rail line and use of such project necessarily entails exclusive use by airport passengers and employees. The FAA noted that the MWAA's application for PFC funding for tracks (described *supra* I.G) that would not terminate at the airport station but continue to other destinations had prompted the agency to consider whether the exclusive use policy was too limiting.

In its Notice, the FAA acknowledged that "airport rail access projects, . . . are planned, funded, constructed, operated, and used differently from on-airport road projects. By their nature, passenger rail and rail transit aggregate passenger traffic along fixed routes with a limited number of stops, each with their own justification and purpose." Id. at 26612. On the other hand, users of roads have more flexibility and control in determining their route than rail passengers do. Ibid. Accordingly, the FAA questioned the rigid application of its road access policy to rail transit, and noted that such application potentially frustrates the FAA's own objectives regarding inter-modal planning and development, as set forth in 49 U.S.C §47101(b)(5) and (6). Ibid.

Two things to note about this call for comment: The Notice indicated that the FAA was primarily concerned about its inability to fund (with PFCs) rail segments that do not end at a rail station at an airport terminal; not a new airport station constructed on a pre-existing rail line. Second, since 2016, there has been no official change in policy. As I will describe *infra* II.A, I think that is because the FAA has determined that a change in policy without a change in statute specifically authorizing the AIP funding of airport rail transit projects (and ceasing to treat such projects the same manner as road access projects) would be unlawful.[8]

A. Proposed Amendments to Statute

As noted above, if the AIP statute, 49 U.S.C. §47101 *et seq*. or the PFC statute, 49 U.S.C. §40117, does not provide the authority to fund a project or item, then that project cannot be funded employing such revenues. That is the reason I believe that permitting PFCs to be prorated in the same manner as Airport Revenue and/or released from airport ownership requirements requires a change in statute, not just policy.

The first and more comprehensive change of the two that I suggest involves creating a new AIP category of projects for improving or enhancing airport access (including railways, roadways and water shuttle/ferry facilities), pursuant to 49 U.S.C. §47101 *et seq.* This would mean a new definition under 49 U.S.C. §47102 for something called "Intermodal Airport Access," amending 49 U.S.C. §40117(a)(3) to add an additional PFC-eligible airport-related project (which would need to enhance airport access in addition to one of the three current PFC objectives), and the addition of a new section dealing with Airport Access Development Costs (or amending a current section such as 49 U.S.C. §47119 to deal with not just terminal development costs, but also access development costs). This amendment would further the AIP goal of promoting intermodal development and planning, would still require that the development primarily serve airport passengers, would permit proration of costs between airport

[8] So, I am wrong. FAA has decided to undertake a change in policy without any change in statute. Rather, pursuant to authorization by Congress, the FAA has simply stated that with respect to rail access projects eligibility for PFC funding may depart from eligibility for AIP funding. FAA Order 5500.1 will be changed as will 14 C.F.R. §158.15. I anticipate that both changes will be justified pursuant to 49 U.S. C. §47101(b)(5) and (g), which declare it to be a goal of the United States to develop an intermodal transportation system. (Though I still believe that §49 U.S.C. 40117 (Passenger facility charges) should be amended to reflect the departure from AIP funding contemplated in the policy change).

users and non-airport users, and could allow different ownership and/or operational arrangements than currently required.

The second, more modest, proposal would simply amend the definition of "terminal development," 49 U.S.C. §47102(28), to include (A)(iv) transit access facilities that serve airport traffic that leads directly to or from an airport passenger terminal building. This would permit PFCs to be prorated between airport users and non-airport users, but would still require the facility to be owned and/or operated by the airport (including right-of-way rights).

Both would provide an explicit statutory basis for rail access projects, and overcome the "exclusive use" requirement that comes with treating rail transit projects like road access projects, as a matter of policy.[9]

B. Retroactivity

Securing either one of the suggested amendments would no doubt be a big hurdle. However, even if NJIT were able to advocate for and successfully achieve such an amendment, I believe that your efforts would be made further difficult by the need to get Congress to explicitly state that any statutory amendment was intended to be retroactive. It is clear that the FAA does not have the authority to promulgate retroactive rules through regulation unless expressly authorized by Congress. See Bowen v. Georgetown University Hospital, 488 U.S. 204 (1988). Nonetheless, the notion of retroactively changing the permitted use of AIP/PFC funds may give rise to a constitutional due process challenge by the airlines, who could argue that their respective agreements with the Port Authority to impose PFCs for certain purposes would be impaired by a change in permitted use that could be retroactively applied to already constructed facilities.

This is a very complicated issue, and I do not want go off on a tangent at this point of our dialogue regarding NJIT's advocacy options. I just want to make you aware of the issue of "retroactivity." Simply put, settled rules of statutory construction favor prospective rather than retroactive application of new legislation. See Cruz v. Cent. Jersey Landscaping, Inc., 195 N.J. 33, 45 (2008); Nobrega v. Edison Glen Assocs., 167 N.J. 520, 536 (2001); see also Gibbons v. Gibbons, 86 N.J. 515, 522 (1981)("It is a fundamental principle of jurisprudence that retroactive application of new laws involves a high risk of being unfair."). It is established law that a state statute adopted in 2020 would not be able to retroactively change the meaning of previously signed contracts without running afoul of the N.J. Const., Art. 4, §7, ¶3, prohibiting the Legislature from "pass[ing] any law impinging the obligation of contracts or depriving a party of any remedy for enforcing a contract which existed when the contract was made" and Art. 1, §7, cl. 6 of the U.S. Constitution ("No State shall **. . .** pass **. . .** any law impairing the obligation of contracts").

[9] Both of the changes I described in this memorandum assumed the statutory tie between AIP eligibility and PFC eligibility. The FAA has decided to sever that connection between the two with respect to rail access projects; and through a policy change authorized by Congress, it has effected a change to the PFC statute.

The federal constitution, however, contains a direct prohibition on the enactment of state laws that have a retroactive effect of impairing the obligations and rights arising under contracts entered into prior to the enactment of such state laws. No mention is made of the federal government. Consequently, Congress may pass any laws impairing the obligation of contracts, provided, that it shall not thereby take property without due process of law in violation of the Fifth Amendment of the United States Constitution. The Fifth Amendment is thus the only apparent limitation on the power of Congress to enact laws impairing the obligation of contracts. ("No person shall be . . . deprived of life, liberty, or property, without due process of law; . . .") At this time, I cannot assess how serious a threat such a due process challenge would be, especially, in the context of a public contract such as is the case herein. Nonetheless, I will undertake a judicial case analysis of this issue within the context of the FAA/AIP/PFC programs, if you so request in the future.

III. Alternative: Repayment and/or Redesign of the Station and Bridge

A. Extensions and Other Separable Improvements

A review of the case studies described, *supra* at I.A-G, especially the ROD regarding JFK's LRS, indicates that additional improvements to an existing transit facility built with PFC funding, which are physically separable components, do not have to exclusively serve airport traffic. For example, if one were to construct a new overhead walkway/bridge starting from either east or west of the NEC track, which would connect to a new extended portion of the station platform, such new bridge access to the station could serve the public. If funded by nonairport funds, its use would not be restricted in any way to airport users, and if funded by airport revenues, it would still have to serve primarily airport passengers and employees. Regardless of the source of funding, there would have to be a physical barrier between the new extended portion of the platform and the existing platform to preserve the "airport exclusive use" status of the existing NEC Station. Similarly, one would be able to construct an entrance/exit on the east side of the tracks that would connect directly to the monorail system, if a person entering the monorail were physically prevented from proceeding onto the bridge to access the train station (rather than using such new entrance solely to travel to or from the airport). Such component would even be eligible for PFC funding.

These additional, but separable components, would open the NEC station to public use, and a version thereof, would permit connecting the planned PATH terminus to both that station and the monorail system. I, of course, have a limited understanding of whether such improvements are physically or economically feasible. I do suggest, however, that once the Port Authority undertakes any improvements or renovations to the current NEC station and monorail system, such changes must be consistent with current development plans for the area adjacent to the airport, and that is your leverage to force the Port Authority to ensure that such improvements open the NEC Station to the public for transit use, not just access to the airport.

B. Repayment of Bridge and Station

It is my understanding from conversations with Marilyn that the preferred option is to connect the proposed PATH station to the monorail system and the NEC Station by building a

connection to the existing bridge, thus enabling passengers to enter or exit the NEC station as well as the monorail system at a new connecting point; such component would also enable access to the transit system from ground level. By doing so, the existing bridge and NEC would no longer be used exclusively by airport passengers and employees, and it might not even be used primarily by such users. In effect, PFCs that were expended in the late 1990's would, approximately 25 years later, no longer be used for approved purposes.

I have not been able to find any mention of repaying PFC and/or AIP revenues that were employed to construct an airport development or terminal development project in statute, regulation, the AIP Handbook or Order 1500.1 regarding Passenger Facilities Charges. However, there is a process for the FAA to recover funds that are "illegally" diverted or to reduce the amount otherwise payable to the public agency under the AIP program by the amount of PFC revenue that is not used as approved.

49 U.S.C, §47107(m) sets forth the process the FAA may undertake to recover "illegally diverted funds." (This provision is entitled "Project grant application approval conditioned on assurances about airport operations"); subsection §47107(l)(2), requires the FAA to establish policies and procedures to "prohibit, at minimum, the diversion of airport revenues," and subsection §47107(m)(6) requires the FAA to reimburse airports affected by the unlawful diversion the same amount of monies collected from the sponsor responsible for that diversion.

Relevant, but not necessarily directly applicable, definitions include "unallowable cost," "Used or Intended to Be Used," and "Recoveries." In the AIP Handbook, "unallowable cost" means "[t]he cost of an item or activity that is not allowed to be funded with AIP, either by FAA policy, published cost standards, or legal prohibition." Id. at A-16. "Used" means currently in use. Per FAA policy, *intended to be used* means that the use will be realized within the next three to five years. Ibid. The AIP Handbook defines "Recoveries" as follows:

> As adjustments are made to grant amounts based on actual payments, funds may be recovered (deobligated) from existing obligations and reobligated for upward adjustments to existing projects and under certain circumstances may be reobligated for new projects. The amount of recoveries that may be reobligated is controlled by the Office of Management and Budget (OMB) and is communicated to regional offices in the allotment process as a *recovery ceiling*.

Id. at A-13. The AIP Handbook also sets forth the process a sponsor must undertake in the event that payments have been made which exceed the Federal share of the allowable costs, and it is in this context that the word "repay" appears. Id. at Table 5-32(k)(1) at 5-54.

Although it does not appear that FAA policies and procedures contemplate repayment of funds years after a facility has been built (because "unintended uses" for such facility are newly planned), the AIP Handbook does contemplate the "Reopening [of] grants." The Handbook states: "In extraordinary circumstances, a grant can be reopened by the ADO if the ADO finds that the sponsor has either not been reimbursed for allowable costs or has been reimbursed for costs that are not allowable." Id. at ¶5-65 at 5-60. (Emphasis added.) "ADO" means Airports District Office, and is used to reference the FAA Office of Airports office that directly works

with a sponsor. Id. at ¶1-15 at 1-6. Similarly, Order 5500.1 provides that "if the FAA determines a public agency is collecting an excessive amount of PFC revenue or the revenue is not being used as approved, the FAA may reduce the amount of funds otherwise payable to the public agency under the AIP [pursuant to 49 U.S.C. §47114] by the amount . . . not used as approved." Order 5500.1, ch.1, §4:1-22(g) at 13. See also id.. ch. 13, §§13:13-26 to 13-28 at 176 (emphasis added).

It is certain that at the time the Port Authority sought to impose PFCs in order to support the construction of the monorail system and the NEC Station, it certified that it would comply with all provisions regarding the terms and conditions imposed by 14 C.F.R Part 158, including the exclusive use requirement. Violation of this assurance could (and should) result in the FAA taking corrective action, including the reduction of AIP grants otherwise owed the airport. Id. at §15-7 at 192 ("If FAA Airports office becomes aware that the public agency will not or cannot comply with any provision of the PFC regulation, it should pursue corrective actions as prescribed in chapter 13 of this order").

Accordingly, if it is determined that one must use the current bridge and station platform to accommodate NJIT's development plans for the connection to a new PATH station and direct public access to the area adjacent to the NEC station, repayment of the full cost (plus interest) of constructing such structures could be arranged by reducing the funds owed the airport pursuant to the AIP grant program. Furthermore, there is nothing prohibiting the reimbursement of the airport for those "lost AIP monies" with other local, state or federal funds available to support airport transit projects. See, e.g., Transportation Research Board, ACRP Synthesis 1: Innovative Finance and Alternative Sources of Revenue for Airports (2007).

Exploring Whether there is a Civil Rights Violation

You have asked me to also examine whether the Port Authority's decision to employ PFCs to construct the NEC station and bridge to the airport's light rail system constitutes a Title VI Civil Rights Act violation, and if so, how can such a violation be remedied. For the reasons set forth below, I do not believe that "the exclusive airport use" requirement that was attendant to that decision (made over 20 years ago) intentionally nor in effect excludes persons on account of their race. Even if one were able to construct an argument that the use of PFC revenues to construct the EWR rail access project did have and continues to have a disparate effect on a protected class of people, the U.S. Supreme Court has found that there is no private right of action to enforce such disparate impact claims. I would further argue that filing an agency complaint with the FAA alleging discrimination would also be found to be out of time and meritless. Regardless of the technical merit of such claim of discrimination as a matter of law, it remains open whether the "discriminatory impact" or "environmental justice" framework is nonetheless an effective framework for NAC's advocacy in this area. I personally believe that "consistency with current development plans" and "promoting intermodal transit" objectives constitute a better framework to compel the Port Authority to open the NEC station for public use, if they are contemplating any renovation of, improvement or change to the station and light rail system generally.

I. Title VI of the Civil Rights Act of 1964

Title VI of the Civil Rights Act of 1964, codified as 42 U.S.C. §2000d-1 through 2000d-6, prohibits discrimination in federally funded projects, activities or programs, including those at airports. 42 U.S.C. §2000d provides:

> No person in the United States shall, on the ground of race, color or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

In 1987, the Civil Rights Restoration Act (P.L. 100-259, 102 Stat. 28) restored the intent of Title VI and the "broad institution-wide scope and coverage of nondiscrimination statutes to include all programs and activities of Federal-aid recipients [including airport sponsors receiving AIP grants], subrecipients, and contractors." FAA Order 1400.11: Nat'l Policy: Nondiscrimination in Federally-Assisted Programs at the Federal Aviation Administration (August 27, 2013) at 6 (hereinafter, "FAA Nondiscrimination Policy"). The Restoration Act thus extended nondiscrimination mandates to all portions of a recipient's program or facility, including those portions that did not receive federal funding directly. In this way, Title VI's prohibitions reach any agency, such as the Port Authority, that gets federal assistance, even if no federal monies were received for the project or program that is discriminating. (Remember: PFCs are local revenues).

49 U.S.C. §47123 sets forth the nondiscrimination requirement for the FAA's AIP program. It provides that the Secretary of Transportation must "take affirmative action to ensure that *an individual is not excluded because of race*, creed, color, national origin, or sex *from participating in an activity*" carried out with money received under the FAA's AIP grant program (emphasis added). The Secretary is also required to prescribe regulations necessary to carry out this nondiscrimination mandate, which must be "similar to those in effect under Title VI of the Civil Rights Act of 1964 (42 USC 2000d et seq.)." Id. But, as one notes from the language provided above, 49 U.S.C. §47123 also includes sex and creed as bases for discrimination.

> (The following analysis will not cover regulations and agency orders that go to age discrimination, discrimination at educational and research institutions receiving FAA financial assistance, and national origin discrimination against persons with limited-English proficiency, such as Executive Order 13166: Improving Access to Services for Persons With Limited English Proficiency, 65 Fed. Reg. 50121(Aug.11, 2000)).

II. FAA Intentional and Disparate Impact Regulations

49 C.F.R. part 21, entitled "Nondiscrimination in Federally-Assisted Programs of the Department of Transportation -- Effectuation of Title VI of the Civil Rights Act of 1964," is the Department of Transportation's rule for implementing Title VI. Although 49 C.F.R. §21.5(b) sets forth specific discriminatory actions that are in intent or effect prohibited, the regulation also states:

> The enumeration of specific forms of prohibited discrimination in this paragraph does not limit the generality of the prohibition in paragraph (a) of this section.

49 C.F.R. §21.5(b)(5). Notwithstanding this 'open' provision, subsection §21.5(b)(1) states that a recipient under any program to which these regulations apply may not, directly or through contractual or other arrangements, on the grounds of race, color, or national origin:

> (i) Deny a person any service, financial aid, or other benefit provided under the program;
> (ii) Provide a different service or benefit than to others;
> (iii) Subject a person to segregation or separate treatment in any matter related to the person's receipt of a service or other benefit under the program;
> (iv) Restrict a person in any way in the enjoyment of any advantage or privilege enjoyed by others receiving any service, financial aid or benefit under the program;
> (v) Treat a person differently from others when determining whether such person is entitled to receive a service or benefit under the program;
> (vi) Deny a person an opportunity to participate in the program or provide him with a different opportunity than others and
> (vii) Deny a person the opportunity to participate as a member of a planning, advisory, or similar body that is integral to the program.

See 49 C.F.R. §21.5(b)(1). (The above is not the exact text of the statute).

These provisions set forth a host of actions that would require proof of intentional discrimination to deny, restrict or treat a person differently because of their race, none of which I believe are applicable to the situation herein. There is no evidence or reason to believe that the Port Authority chose to finance the NEC Station using PFCs to exclude or treat differently any person because of their race.

In addition, 49 C.F.R. §21.5(b)(2) prohibits a recipient from using criteria or methods of administration (either directly or through contractual or other arrangements) which have the effect of subjecting persons to discrimination because of their race, color, or national origin when deciding the types of services, facilities, benefits, or opportunitites that will be provided under the program. FAA Nondiscrimination Policy at 9. It states:

> A recipient, in determining the types of services, financial aid, or other benefits, or facilities which will be provided under any such program, or the class of person to whom, or the situations in which, such services, financial aid, other benefits, or facilities will be provided under such program, or the class of person to be afforded an opportunity to participate in any such program; may not, directly or through contractual or other arrangements, utilize criteria or methods of administration which have the effect of subjecting persons to discrimination because of their race, color, or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program with respect to individuals of a particular race, color, or national origin.

49 C.F.R. §21.5(b)(2)(emphasis added). See also 49 C.F.R. §21.5(b)(3)("In determining the site or location of facilities, a recipient or applicant may not make selections with the purpose or effect of excluding persons from, denying them the benefits of, . . . or substantially impairing the accomplishment of the objectives of the Act or this part." (Emphasis added.)[10] Subsection §21.5(b)(2) on its face, requires that NJIT would have to prove that the decision to provide a rail station, which could only be used by "airport passengers and employees" not non-airport users had the effect of subjecting persons to discrimination because of their race/color. Again, I simply do not believe that one can argue that the decision to employ PFCs -- an allegedly neutral decision on its face -- had a disparate impact on persons because of their race or color. All minority Newark residents, including those who reside in the South Ward, have always enjoyed access to the NEC Station if they are airport users directly through Newark Penn Station in the same manner as all nonminority Newark residents.

On the other hand, the above regulation notes that the recipient of federal funding may not also utilize criteria or methods of administration that "have the effect of defeating or substantially impairing the accomplishment of the objectives" of the program with respect to individuals of a particular race or color. What are some of the objectives of an airport rail transit project that could be impaired? Review of Appendix C to Part 21 entitled "Application of Part 21 to Certain Federal Financial Assistance of the Department of Transportation; Nondiscrimination on Federally Assisted Projects reveals the following specific objective:

> Employment at obligated airports, including employment by tenants and concessionaires[,] shall be available to all regardless of race, creed, color, sex, or national origin. The sponsor shall coordinate his airport plan with his local transit authority and the Federal Transit Administration to assure public transportation, convenient to the disadvantaged areas of nearby communities to enhance employment opportunities for the disadvantaged and minority population.

Appendix C to Part 21 (a)(1)(ix). First, what must be noted is that the last sentence introduces the notion of "disadvantaged areas of nearby communities," broadening the "protected" class to low-income communities, not just communities of color. (See *infra* III, regarding environmental justice considerations). Again, I believe that the Port Authority would state in response to any allegation of discrimination, that nearby disadvantaged and minority communities have access to the NEC Station and monorail through Newark Penn Station; and, in any event, the decision to fund such facilities with PFCs does not prevent the Port Authority from providing direct access to the monorail to airport employees. I would venture to guess that the Port Authority did not do so in 1996 simply because there was no demand by the South Ward community at the time to provide access to the monorail at its terminus through the NEC Station/bridge or the ground directly; but, of course, you may have other information that would lead you to another conclusion.

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[10] "Site or location of" the NEC Station is not at issue herein. I just wanted you to be aware of the analogous prohibition, including the clause "substantially impairing the accomplishment of the objectives of the Act."

(Please note: There are other orders concerning discrimination that govern DOT/FAA programs, but have no bearing on the above analysis. These include DOT Order 1050.2A, "Standard Title VI Assurances: (April 24, 2013), which provides the standard DOT Title VI grant assurances that must be used in every DOT grant agreement, Federally-assisted contract, or lease agreement;" and Executive Order 12250, entitled Leadership and Coordination of NonDiscrimination Laws, which was issued by President Carter on November 2, 1980. The latter seeks to provide for the consistent and effective implementation of various laws prohibiting discriminatory practices in Federal programs and programs receiving Federal financial assistance under the leadership of the Attorney General.)

III. Environmental Justice regulations

Environmental Justice analysis considers the potential of Federal actions to cause disproportionate and adverse effects on low-income or minority population. Environmental justice regulations and guidelines ensure that no low-income or minority population bears a disproportionate burden of effects resulting from such actions. See Executive Order 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, 59 Fed. Reg. 7629 (Feb. 16, 1994). In this Order, President Clinton directed

> [E]ach Federal agency [to] make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations in the United States and its territories and possessions, ...

Order 12898 further requires that all federal agencies (1) provide for public involvement of low-income or minority populations in their planning processes and (2) undertake demographic analyses, which identify and address potential action impacts on low-income or minority populations that may experience a disproportionately high and adverse human health or environmental effect. DOT Order 5610.2(a), first issued in 1997 and updated in 2017, outlines the DOT's commitment to the principles of environmental justice and presents a detailed program for department-wide implementation. See DOT Order 5610.2(a), Environmental Justice in Minority and Low-Income Populations, 77 Fed. Reg. 27534 (April 15, 1997), updated June 28, 2017. This latter Order states that "compliance with Executive Order 12898 is an ongoing DOT responsibility. DOT will continuously monitor its programs, policies, and activities to ensure that disproportionately high and adverse effects on minority populations and low-income populations are avoided, minimized or mitigated in a manner consistent with this Order and Executive Order 12898." Order 5610.2(a)(5).

Specifically, the FAA's Airport Desk Reference manual incorporates the following definition from the Environmental Protection Agency's (EPA) Office of Environmental Justice to describe its view of what the concept of environmental justice entails:

> The fair treatment and meaningful involvement of all people, regardless of race, color, national origin, or income with respect to the development, implementation and enforcement of environmental laws, regulations and policies. Fair treatment

> means that no group of people, including racial, ethnic, or socio-economic group, should bear a disproportionate share of the negative environmental effects resulting from industrial, municipal, and commercial operations or the execution of Federal, State, local, and tribal programs and policies.

FAA's Environmental Desk Reference for Airport Actions, Ch. 10. Environmental Justice at 1 (October 2007).

It is clear that environmental justice directives and regulations apply to any airport development action funded under the AIP program or an airport action subject to FAA approval. All such actions cause "environmental justice impacts." This framework, however, focuses on negative impacts: "impacts due to aircraft noise, air quality degradation, direct and induced socioeconomic effects, degraded water quality, and effects to cultural or community cohesion, traffic, and history" of the community; not exclusion from the use of such built facilities. Id. at 3. Though environmental justice principles adopted by the FAA require local sponsors to include minority and low-income communities in the planning process, (Ibid. "Required consultation" and "importance of public outreach"). I believe that the framework is not helpful to addressing NJIT's development concerns here: exclusion from use of the airport facility for general public transit use; except insofar as one can compel the Port Authority to include residents of the South Ward in any planning process regarding additional improvement of the NEC Station and monorail system, and require the Port Authority to listen to their concerns.

In short, as an advocacy framework, the environmental justice movement is primarily concerned with the unequal enforcement of environmental, civil rights and public health laws; and the equitable distribution of environmental hazards across society, regardless of imbalances in political, social or economic power. Simply put, the aim of the movement is to prevent and mitigate the disproportionate impact of locally undesirable facilities and hazards generally on politically, socially or economically marginalized populations; not with the unequal distribution of benefits flowing from the development of a facility, that in this case, the community deems beneficial. But see JFK ROD at 50-51 (commentator claiming that Jamaica component alignment was discriminatory to minority neighborhoods, and FAA's response that the issue of environmental justice was explicitly addressed).

Note: Executive Order 13274, Environmental Stewardship and Transportation Infrastructure Project Reviews issued by President Bush did not address environmental justice issues; it prioritized national transportation projects and required interagency environmental planning. Executive Order 13274, 67 Fed. Reg. 59,449 (September 18, 2002).

IV. No Private Right of Action to sue

Even if you were to disagree with my analysis, *supra* II and III, and thought there was a colorable disparate impact claim pursuant to 49 C.F.R. §21.5(b)(2), there is no private right of action under Title VI. What does that mean? No private right of action means that no private party, in contrast to a government agency or Attorney General, has the authority to enforce the disparate impact regulations in a court of law. (The question of whether there is a private right of action under a statute is a different question than whether a party has standing to sue. That

question goes to who can sue -- only an affected party, a beneficiary or no limitation (i.e., anyone); not whether any private party has the right to sue to compel action or other remedy.)

In Alexander v. Sandoval, 532 U.S. 275 (2001), the U.S. Supreme Court held that plaintiffs, residents in a minority community, did not have a private right of action under Title VI for disparate impact discrimination brought to enforce EPA regulations prohibiting the location of a polluting/noisome facility in a minority community that already bore a disproportionate number of such facilities. The Court reasoned that §601 of Title VI of the Civil Rights Act only proscribed intentional discrimination, i.e., conduct taken because of, not simply in spite of, a racially discriminatory impact. For such intentional discrimination, a private party had a remedy in court. On the other hand, §602 of Title VI, which authorized the federal agency to issue regulations to implement the Act, did not independently authorize a private action to enforce such regulations. Notwithstanding its holding that Title VI only prohibited intentional discrimination, the Court stated that it was assuming that the EPA's disparate impact regulations were valid, though it left that question open for another day. Alexander v. Sandoval, *supra* 532 U.S. at 298.

The Alexander v. Sandoval decision also left open the question of whether any agency's disparate impact regulations promulgated under Title VI can be enforced under 42 U.S.C. §1983, which states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . ..

A §1983 lawsuit is a procedural device that creates liability for violations based on other federal laws. It has two prongs: a person, the defendant, acted "under the color of state law;" and a person, the plaintiff was deprived of rights, privileges or immunities guaranteed under federal law or the U.S. Constitution. So, when the court said that plaintiffs could not seek a remedy under Title VI to enforce disparate impact regulations, the question remained open whether they could use 42 U.S.C. §1983 to do the same. Civil rights lawyers all asked, was there an "implied right of action" under §1983?

Soon thereafter, the U.S. Court of Appeals for the Third Circuit, in which New Jersey sits, said no. Starting with South Camden Citizens in Action vs. Dep't of Envtl. Prot., 274 F.3d 771 (3d Cir. 2001), the Third Circuit held that EPA disparate impact regulations do not create a federal right that can be enforced through the statute pursuant to which they were promulgated, i.e., Title VI; and §1983 also cannot be used to enforce them. See A.W. v. Jersey City Public Schools, 486 F.3d 791 (3d Cir. 2007)(in a §1983 suit brought by a former student for violation of IDEA and Rehabilitation Acts, the court reversed the lower court's denial of summary judgment, holding that the alleged violations were not actionable under § 1983.); Three Rivers Center for Indep. Living v. Housing Authority, 382 F.3d 412 (3d. Cir. 2004)(relief was sought for violation of HUD regulations promulgated under the Rehabilitation Act regarding housing for the

handicapped in publicly funded housing developments; the court affirmed the dismissal of the case on the ground there was no private right of action to enforce these regulations under either the Rehabilitation Act or §1983); Pennsylvania Pharmacists Assn. v. Houstoun, 283 F.3d 531 (3d Cir. 2002)(court disallowed a private right of action under §1983 in a suit over Medicaid reimbursement rates for pharmaceuticals, citing South Camden in a footnote for the proposition that a regulation may invoke a private right of action that Congress created through statute, but may not create new right); Barker v. Our Lady of Mount Carmel School, 2016 U.S. Dist. LEXIS 118067 (D.N.J. 2016) (disability discrimination claims brought against a religious school under Rehabilitation Act, ADA and §1983 failed; the court cited South Camden for the position that there is no private right of action to enforce disparate impact regulations under Title VI.)

Similarly, since the Supreme Court decision, courts in other circuits have consistently taken the same position. In Save Our Valley v. Sound Transit, 335 F. 3d 932 (9th Cir. 2003), most relevant to our situation because it involved DOT disparate impact regulations, the federal court held that there was no implied right of action under §1983. Specifically, the court explained that §1983 prohibited the violation of rights not laws; and therefore, plaintiffs could not maintain a private right of action for violation of a DOT disparate impact regulation because such regulations create laws to be complied with by recipients, not rights protecting people affected by those recipients. See also Shakhnes v. Berlin, 689 F, 3d 244 (2d Cir. 2012)(holding that plaintiffs' purported right would be enforceable under 42 U.S.C. §1983 only if the statute itself conferred a specific right upon them, and the regulation merely further defined or fleshed out the content of that right); Peters v. Jenny, 327 F.3d 307 (4th Cir. 2003)("An administrative regulation . . . cannot create an enforceable §1983 interest not already implicit in the enforcing statute."); Wilson v. Collins, 517 F.3d 421 (6th Cir. 2008)(rejecting plaintiff's contention that he could maintain a §1983 action to enforce regulations promulgated pursuant to §602 of Title VI"); Quarrie v. Wells, 2018 U.S. Dist. LEXIS 180718 (D. N. Mex. 2018)(district court stating that not only are the opinions concluding that regulations alone cannot create rights enforceable through §1983 persuasive, but such a result is likely compelled by Alexander v. Sandoval); Selma Housing Development Authority v. Selma Housing Authority, 2005 U.S. Dist. LEXIS 2005 (S.D. Ala. 2005)(the Supreme Court has taken pains to explain that "where the text and structure of a statute provide no indication that Congress intends to create new individual rights, there is no basis for a private suit under §1983."). But see Ford v. Donovan, 891 F. Supp. 2d. 60 (D.D.C. 2012) (as threshold issue, it is not entirely clear whether a violation of HUD regulations at issue here can form a basis for a §1983 claim; while there is 1985 precedent in this Circuit saying yes, there is substantial case law since in other circuits holding that federal regulations do not establish enforceable rights under §1983).

In short, there is no judicial remedy for a private party to enforce DOT's disparate discrimination regulations; minority and disadvantaged communities must seek that remedy from the agency itself.

V. Filing an FAA Complaint with Agency

If a person would like to proceed with a disparate impact complaint under Title VI, it may do so by either filing with the airport sponsor (who must notify the FAA within 15 days of receipt), 49 C.F.R. Part 21, appendix C, (b)(3); or the FAA directly. Pursuant to 49 C.F.R.

§21.11, complaints must be filed within 180 days of the last date of the alleged discrimination, unless the time for filing is extended. The filing date of the complaint is the earlier of: (1) the date it is post-marked or (2) the date it is received by an FAA office. See FAA Order 1400.11, Chapter 8 at 26.

Although the requirement that the complaint be filed within 180 days of the last date of the alleged discrimination embodies a notion of a "continuing violation," I find this requirement problematic to address the situation herein. At best, I think one could argue that the 180 days runs from the last day that the PFCs to build the NEC Station were imposed, not when the decision was made to finance the rail access project solely with PFCs. That means that unless one can be creative and find a new starting date (e.g., such as any new decision to make improvements, modifications or additions to the NEC Station that fails to open the station to public use), this administrative avenue is also unproductive because it is too late.

In addition, a complaint may be filed under 14 C.F.R. part 13 (informal complaints) or 14 C.F.R. part 16 (formal complaints) when it raises other non-civil rights claims, such as violations of other grant assurances.

VI. Conclusion

As shown above, I think the civil rights (i.e., discrimination in effect) and environmental justice framework has limited relevance to NAC's advocacy efforts. I suggest that your focus on "new decisions" with respect to the proposed modernization of the NEC Station and monorail system, and that you seek to compel the Port Authority to consult with and listen to the desires of the South Ward community as it plans the new PATH station terminating at that Station. The community must try to make sure that N.J Transit and the Port Authority make financing decisions with respect to the PATH terminus and NEC station (going forward) that will enable both facilities to be used by the public, not just those members of the public who are users of the airport.

APPENDIX

Constitution:

U.S. Const., Art. I, §10, cl. 6

U.S. Const., Art V

N.J. Const., Art. 4, §7, ¶3

Statutes:

42 U.S.C. §1983

49 U.S.C. §40117 (Passenger Facilities Charges)

49 U.S.C. §40117(a)(3) (PFC projects must be AIP eligible)

49 U.S.C. §40117(d)(3)(adequate justification)

49 U.S.C. §47101 (Policies)

49 U.S.C §47102 (Definitions)

49 U.S.C §47104 (Project Grant Authority)

49 U.S.C. §47106 (Project application approval)

49 U.S.C §47107 (Project application approval, conditioned on written assurances)

49 U.S.C. §47110 (Allowable project costs)

49 U.S.C. §47114 (AIP Air Apportionment)

49 U.S.C. §47119 (Terminal Development costs)

49 U.S.C. §47123 (Nondiscrimination)

49 U.S.C. §47133 (Restriction on Use of Revenue)

49 U.S.C. §48103 (Airport and Airway Trust Fund)

Regulations:

Final Rule: Establish PFC program, 56 Fed. Reg. 24254 (May 29, 1991)

Final Rule: Amend PFC program and create pilot, 70 Fed. Reg. 14928 (March 23, 2005)

14 C.F.R. §158.15 (Project eligibility at PFC levels for $1, $2 or $3)

14 C.F.R. §158.17 (Project eligibility at PFC levels for $4 or $4.50)

14 C.F.R. §158.25 (Applications)

14 C.F.R. §158.27 (Review of Applications)

14 C.F.R. part 13 (Informal Complaints)

14 C.F.R. part 16 (Formal Complaints)

49 C.F.R. §21.11

49 C.F.R. §21.5(b)

49 C.F.R. Part 21, appendix C, (a)(2)(i)-(x)

49 C.F.R. Part 21, appendix C, (b)(3)

Handbooks, Policies and Notices:

Policy and Procedures Concerning the Use of Airport Revenue, 64 Fed. Reg. 7696, 7718-9 (February 16, 1999).

Notice of Policy Regarding the Eligibility of Airport Ground Access Transportation Projects for Funding Under the Passenger Facilities Charge Program, 69 Fed. Reg. 6366 (Feb. 10, 2004).

Notice of Passenger Facility Charge (PFC) Approvals and Disapprovals, 79 Fed. Reg. 69977 (November 24, 2014).

Notice of Proposed Policy Amendment and Request for Comment, 81 Fed. Reg. 26611 (May 3, 2016).

Memorandum, PFC Update, PFC75-21. Eligibility of On-Airport Rail Access Projects (January 12, 2021)

Executive and Agency Orders:

Executive Order 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, 59 Fed. Reg. 7629 (Feb. 11, 1994).

Executive Order 13274, Environmental Stewardship and Transportation Infrastructure Project Reviews, 67 Fed. Reg. 59,449 (September 18, 2002).

Executive Order 12250 (Leadership and Coordination of Nondiscrimination Laws) (Nov. 2, 1980).

Executive Order 13166: Improving Access to Services for Persons With Limited English Proficiency, 65 Fed. Reg. 50121(Aug.11, 2000).

FAA Order 1400.11: Nat'l Policy: Nondiscrimination in Federally-Assisted Programs at the Federal Aviation Administration (August 27, 2013)

DOT Order 1050.2A "Standard Title VI Assurances" (April 24, 2013).

DOT Order 5610.2(a) Environmental Justice in Minority and Low-Income Populations, 77 Fed. Reg. 27534 (April 15, 1997), updated June 28, 2017.

FAA Order 5500.1 Passenger Facility Charge (August 9, 2001).

FAA Order 5100.38D (Change 1) Airport Improvement Program Handbook (February 26, 2019).

Agency Letters:

Letter from Susan Kurland to John Martin regarding expenditures for the construction of a Bay Area Rapid Transit (BART) Station at San Francisco Int'l Airport (SFO), Oct. 18, 1996.

Letter from Nancy Nistler to Nigel Finney requesting review of use of airport revenue for Light Rail System (LRS) at Minneapolis-St. Paul Internat'l Airport (MSP), April 2000.

Letter from David Bennett to Thomas Tinkham regarding use of airport revenue for Light Rail System (LRS) at MSP Airport, November 21, 2000.

Letter from Andrew Rountree (MWAA) to Duane Callender (TIFIA Joint Program Office) at Washington Dulles Airport, March 26, 2014.

Administrative Records of Decision:

ROD for Dulles Corridor Metrorail Project at Washington Dulles Int'l Airport, April 2005.

ROD for PFC Revenue for Light Rail Extension at Portland Internat'l Airport, May 1999.

ROD for PFC Revenue for Light Rail System at JFK Int'l Airport, Aug. 1999.

ROD for PFC Revenue for Monorail-NEC Project at Newark Int'l Airport, Nov. 1996.

Judicial Cases:

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