

**In the
Supreme Court of Ohio**

EPIC AVIATION, LLC,	:	
	:	
Appellant,	:	Case No. 2014-1691
	:	
v.	:	On appeal from the
	:	Ohio Board of Tax Appeals
JOSEPH W. TESTA,	:	
TAX COMMISSIONER OF OHIO,	:	BTA Case No. 2012-A-1557
	:	
Appellee.	:	

**MERIT BRIEF OF APPELLEE,
JOSEPH W. TESTA, TAX COMMISSIONER OF OHIO**

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INTRODUCTION

The Ohio Board of Tax Appeals (“BTA” or “Board”) properly concluded that AirNet Systems, Inc. (“AirNet”) does not qualify as a “public utility,” under this Court’s well-established understanding of R.C. 5739.01(P). The relevant inquiry in this case is whether AirNet is subject to economic regulations that “control the relation between the business and the public as its customers,” and, as a result, “special regulation and control” by the government. *See Castle Aviation, Inc. v. Wilkins*, 109 Ohio St.3d 290, 2006-Ohio-2420, ¶¶ 27-29. Having undertaken that analysis, the Board reached a determination that was consistent both with case law and the legislative intent behind R.C. 5739.01(P).

Appellant, Epic Aviation, LLC (“Epic”), has filed a refund claim on behalf of AirNet. AirNet is an all-cargo air taxi operator that provides an assortment of “expedited and specialized transportation solutions” for its customers. *See* Commissioner’s Statutory Transcript, Nov. 2, 2012 (“Stat. Tr.”) at 1, 74. Like many businesses, AirNet devised a business model for its operations, determining such items as the size of its aircraft, frequency of air routes, and types of cargo transported. *See, e.g.*, BTA Hearing Transcript, Nov. 18, 2013 (“Hr. Tr.”) at 25-59, 69-71, 77-79, 161-64. And, like other domestic air carriers, AirNet’s operations were regulated by a number of governmental agencies. Stat. Tr. at 2-4, 85-89; *see also* Hr. Tr. at 52-55. In realizing its business model, AirNet made conscious business decisions that subjected it to certain regulations, yet freeing it from others. Indeed, these decisions were driven by whether those regulations would hinder AirNet’s ability to offer its desired services in as “flexible and fluid” a manner that it desired. *See* Hr. Tr. at 55.

An air carrier may qualify as a “public utility” under R.C. 5739.01(P) if it obtains a certificate of public convenience and necessity. That certificate certifies that the carrier is “fit,

willing, and able to provide the transportation to be authorized by the certificate and to comply” with certain regulations. *See* BTA Exhibit (“Ex.”)¹ 5 (49 U.S.C. § 41102). To obtain that certificate, a carrier must undergo a rigorous “economic and fitness review.” Hr. Tr. at 143-44, 157, 166. While certain types of carriers are required to obtain a certificate of public convenience and necessity, any carrier is free to obtain one. In AirNet’s case, AirNet chose to operate as an air taxi operator (*i.e.*, operating certain smaller aircraft, with more limited passenger options) – enabling it to forego obtaining a certificate of public convenience and necessity, and to avoid having to undergo the accompanying “economic and fitness and review.” *Id.* at 139-49.

This Court’s decision in *Castle Aviation* controls the outcome of this case. In *Castle Aviation*, this Court explained that “many different criteria [] can be used to determine whether an entity qualifies as a public utility.” 2006-Ohio-2420, ¶ 27. It stressed, however, that “one of the most important criteria, if not the most important, . . . is *special regulation and control by a governmental regulatory agency.*” *Id.* (emphasis added). In *Castle Aviation*, this Court found no evidence that the taxpayer was subject to any *non-safety* regulations governing its “business operations.” *Id.* ¶¶ 28-29. Despite being subject to “various regulations, *e.g.*, safety or environmental regulations, in order for the business to operate,” the taxpayer was *not* subject to regulations that “control the relation *between the business and the public as its customers.*” *Id.* ¶ 29 (emphasis added).

Applying the *Castle Aviation* holding here, this Court must conclude that AirNet was not subject to a degree of governmental “special regulation and control,” and thus does not qualify as a “public utility.” AirNet’s decision to become certified as an air taxi operator enabled AirNet to

¹ At the hearing before the Board, Epic’s exhibits were identified as “A” through “C,” and the Commissioner’s exhibits were identified as “1” through “29.” *See* Hr. Tr. at 170-73.

largely avoid economic regulations – most notably, by avoiding the requirement to obtain a certificate of public convenience and necessity. Moreover, Epic failed to demonstrate that AirNet was subject to any statute or regulation that grants the general public “a legal right to demand or receive its service.” *See* Stat. Tr. at 11. As a result, unlike a “public utility,” AirNet was free to make business decisions that are generally free from economic regulations. Indeed, AirNet was free to set its rates and terms of service, consistent with its business model, and was free to enter into various contracts with customers, as it saw fit. Moreover, aside from its voluntarily-entered contractual obligations, AirNet was free to cease its business, without having to obtain outside approval to do so.

AirNet claims to provide services benefiting the general public and in the public interest, but these have no bearing on whether AirNet qualifies as a “public utility.” Indeed, this Court has expressly rejected “the assertion that any business that simply claims that its services are open to the public can be categorized as a public utility.” *Castle Aviation*, 2006-Ohio-2420, ¶ 29. Again, the relevant inquiry here is whether AirNet is subject to “special regulation and control” by the government. *Id.* ¶¶ 27-29. Epic has simply failed to demonstrate that.

Accordingly, Epic’s refund claim should be denied, and this Court should affirm the Board’s determination that AirNet did not qualify as a “public utility” under R.C. 5739.01(P).

STATEMENT OF THE CASE AND FACTS

AirNet operates a large, all-cargo air-taxi service. *See* Stat. Tr. at 1. During the period at issue in this appeal (January 1, 2006, through April 30, 2009), AirNet purchased jet fuel from Epic, who collected and remitted sales tax on those purchases. *Id.* at 1, 20-51. Epic later filed a refund claim, per R.C. 5739.07, to recover \$1,727,790.27 in tax on behalf of AirNet. *Id.* at 1.

AirNet's operations

AirNet provides “expedited and specialized transportation solutions” to its customers. *Id.* at 1, 74. AirNet’s business is comprised primarily of two segments – (1) “Bank Services” and (2) “Express Services.” *Id.* at 74-76; *see also* Hr. Tr. at 36-37. During the period at issue, Bank Services comprised approximately 70 percent of AirNet’s business. Hr. Tr. at 76, 81. These services involved transporting canceled checks for more than 100 major financial institutions throughout the United States. *Id.* at 37-39; *see also* Stat. Tr. at 74. Express Services accounted for approximately 30 percent of AirNet’s business. Hr. Tr. at 87. These services involved a broad range of customers and items, but tended to focus on the life sciences industry, for shipment of such items as “radio pharmaceuticals, diagnostic specimens, blood products, umbilical cord blood, clinical trial, vaccines and human tissues and organs.” *Id.* at 45-46; *see also* Stat. Tr. at 74-75. AirNet also provided expedited transportation services of “dangerous goods that many other air carriers cannot, or will not, handle,” such as explosives, chemicals, and other hazardous materials. Stat. Tr. at 75-76.

AirNet focused primarily upon its Bank Services, because “that business helped drive the network” and “financed” much of its operations. Hr. Tr. at 82. For its Bank Services customers, AirNet devised standardized pricing schedules, charging on a per-pound basis. *Id.* at 77-78. AirNet’s pricing scheme included the ability to adjust prices as appropriate through fuel

surcharges, so as “to protect [AirNet’s] business model and protect the banks.” *Id.* at 78. At times, however, AirNet agreed to deviate from its pricing schedules and instead enter into pricing contracts with individual banks, depending on AirNet’s ability to cover its “fixed costs” and “enjoy greater margins.” *Id.* at 77-81.

As for its Express Services, AirNet wanted to become “a super expedited-type system, like a Federal Express, or UPS.” Hr. Tr. at 23. Unlike those companies, which were “large and cumbersome,” and were limited to a single deadline time for receiving shipments, AirNet sought to provide additional flexibility by offering its customers up to three sets of deadlines. *Id.* As a result, AirNet “tend[ed] to be a little pricier,” due to its “specialized service.” *Id.* at 94.

Federal aviation regulation schemes

Like all other entities within the domestic aviation industry, AirNet’s operations were regulated by a number of governmental agencies, including the U.S. Department of Transportation (“DOT”), the Federal Aviation Administration (“FAA”), and the Transportation Security Administration (“TSA”). Stat. Tr. at 2-4, 85-89; *see also* Hr. Tr. at 52-55.

Generally speaking, as to air taxi operators like AirNet, the DOT’s Office of the Secretary of Transportation enforces “economic regulations,” and the FAA enforces “safety regulations.” Hr. Tr. at 138-39. Indeed, Title 49 of the United States Code provides that any entity seeking to provide air transportation service must obtain: (1) “safety authority,” in the form of air carrier certificate from the FAA, and (2) “economic authority,” in the form of a certificate authorizing air transportation from the DOT. Stat. Tr. at 2-4.

To obtain safety authority from the FAA, an air carrier must receive a certificate authorizing operations under Part 121 or Part 135 of Title 14 of the Code of Federal Regulations (“CFR”), depending upon the type of operation conducted and the size of aircraft used. *See* 14

C.F.R. § 119.1(a),(b). Part 121 generally prescribes safety requirements for air carriers conducting scheduled or nonscheduled operations with aircraft containing more than 30 passenger seats. Stat. Tr. at 3; *see generally* 14 C.F.R. pt. 121. Part 135 generally prescribes safety requirements for air taxi operators (like AirNet) and other scheduled passenger-carrying or on-demand operation of aircraft containing fewer than 30 seats and a limited payload capacity. Stat. Tr. at 3-4; *see generally* 14 C.F.R. pt. 135.

AirNet chose to seek certification as a Part 135 operator, and not as a Part 121 operator, because “we couldn’t offer the services we offer if we were [a Part 121 operator],” and because “we couldn’t operate as flexible and fluid as we do.” Hr. Tr. at 55. Indeed, Part 135 regulations were consistent with “the manner in which [] we conduct[ed] our business,” and a Part 121 operation would have entailed “a different [business] model.” *Id.* at 56, 163. Once AirNet demonstrated that it was capable of adhering to the Part 135 regulations, the FAA issued AirNet an Air Carrier Certificate, which stated that AirNet “is hereby authorized to operate as an air carrier.” Stat. Tr. at 207; *see* Hr. Tr. at 64. The FAA issues the same Air Carrier Certificate for both Part 121 and Part 135 operators. *See* Hr. Tr. at 133 (certificate “doesn’t distinguish between [Parts] 121 and 135.”).

The DOT prescribes economic regulations “in the public interest and consistent with public convenience and necessity.” Stat. Tr. at 3 (citing 49 U.S.C. § 40101(a)). A carrier must receive economic authority from the DOT before it can receive an Air Carrier Certificate from the FAA. Hr. Tr. at 125. To obtain economic authority, a carrier generally must receive from the DOT a certificate authorizing air transportation. *See* 49 U.S.C. § 41101(a) (requiring certificate pursuant to 49 U.S.C. §§ 41102-41113). One common example of such certification is a certificate of public convenience and necessity, which the DOT may issue pursuant to 49

U.S.C. § 41102. To obtain that certificate, an air carrier must establish that it is “fit, willing, and able to provide the transportation to be authorized by the certificate and to comply with [DOT regulations].” *See* Ex. 5 (49 U.S.C. § 41102(b)(1)). A carrier must undergo a lengthy review process, whereby the carrier must produce “a lot of financials” to demonstrate that it can “survive economically” in the period before it receives its Air Carrier Certificate, and that it “can go 90 days without income after that period.” Hr. Tr. at 125-26, 142-44.

The DOT may exempt a carrier from having to obtain a certificate of public convenience and necessity, if that carrier operates only certain smaller aircraft with more limited passenger options. In such cases, in lieu of a certificate of public convenience and necessity, a carrier may obtain authority as an air taxi operator, pursuant to CFR Title 14, Part 298. *See* Hr. Tr. at 142-49; Stat. Tr. at 3; Ex. 27 (14 C.F.R. § 298.11); Ex. 29 (air taxi registration form).

Here, AirNet is certified as a Part 298 air taxi operator. Hr. Tr. at 139-41. Accordingly, AirNet never obtained a certificate of public convenience and necessity. *Id.* at 68-69, 103. As a Part 298 operator, AirNet did not have to undergo the same rigorous “DOT economic and fitness review” associated with applying for a certificate of public convenience and necessity. *Id.* at 143-44, 157, 166. Indeed, AirNet avoided having to comply with numerous provisions within Title 49, Subtitle VII, Part A, subpart ii of the U.S. Code (entitled “Economic Regulations”), including having to obtain a certificate of public convenience and necessity. *Id.* at 145-48; *see* Ex. 29 (14 C.F.R. § 298.11) (listing statutes exempted with Part 298 certification). Part 298 certification enabled AirNet to merely show ownership and proof of insurance of its aircraft, and that it applied to obtain an Air Carrier Certificate from the FAA. Hr. Tr. at 124-25 (describing process to obtain air taxi registration from the DOT), 165-66; *see* Ex. 2 (14 C.F.R. § 298.3); Ex. 29 (14 C.F.R. § 298.11).

The Commissioner's final determination and the Board's decision

Epic filed a refund claim on AirNet's behalf, for sales tax collected on AirNet's jet fuel purchases during the period at issue. *See* Stat. Tr. at 1. In that claim, Epic contended that those purchases were exempt from taxation, because the fuel was used "directly in the rendition of a public utility service," per R.C. 5739.02(B)(42)(a) and R.C. 5739.01(P). The Commissioner, however, determined that Epic failed to demonstrate "compelling and significant indicia that are characteristic of a public utility." *Id.* at 4. In so doing, the Commissioner determined that AirNet's service "is specialized to a certain niche of persons, rather than the public in general." *Id.* at 9. The Commissioner also determined that AirNet "has not demonstrated that it is governed by any statute or regulation that grants the general public a legal right to demand or receive its service." *Id.* at 11-12. AirNet thus failed to demonstrate "that it is a public utility." *Id.* at 12. Accordingly, the Commissioner denied Epic's refund claim. *Id.* at 13.

In a Decision and Order dated September 3, 2014 ("BTA Decision"), the Board affirmed the Commissioner's final determination denying Epic's refund claim. In so doing, the Board had only to apply this Court's holding in the analogous *Castle Aviation* case. BTA Decision at 2-3. In *Castle Aviation*, this Court affirmed the Board's determination that an air taxi operator who did not hold a certificate of public convenience and necessity was not a "public utility" under R.C. 5739.01(P). *Id.* at 3; *see* 2006-Ohio-2420, ¶ 27-28. As the Board here noted, this Court in *Castle Aviation* also concluded that the taxpayer's operations were "similar to many other private business operations in that they must comply with various regulations, *e.g.*, safety or environmental operations, in order for the business to operate; however, those regulations do not control the relation between the business and the public as its customers." BTA Decision at 3 (citing 2006-Ohio-2420, ¶ 29). Accordingly, the Board here concluded that AirNet "is subject to

substantially similar regulations as” the air taxi operator in *Castle Aviation*. *Id.* The Board added that AirNet “is not subject to the great degree of ‘special regulation and control’ that *Castle Aviation* required to qualify as a ‘public utility’ under R.C. 5739.01(P).” *Id.* Therefore, the Board determined that AirNet was not a “public utility” under R.C. 5739.01(P), and that the Commissioner properly denied Epic’s refund claim.

Epic now appeals to this Court.

LAW AND ARGUMENT

In reviewing decisions of the Board, this Court determines whether the Board's decision is "reasonable and lawful." *Shiloh Auto., Inc. v. Levin*, 117 Ohio St.3d 4, 2008-Ohio-68, ¶ 15. This Court will affirm the Board's determinations of factual issues if the record contains reliable and probative evidence to support the Board's findings. *Id.* The burden rests on the taxpayer "to show the manner and extent of the error in the [Commissioner's] final determination." *Id.* ¶ 16. The Commissioner's findings "are presumptively valid absent a showing that they are clearly unreasonable or unlawful." *Id.*

First Proposition of Law:

Tax exemption statutes must be strictly construed, because exemptions are in derogation of the rights of all other taxpayers.

Recognizing an exemption for AirNet's purchases would give AirNet (and, in turn, Epic) an unfair advantage over their competitors, who would need to shoulder relatively greater tax burdens as a result.

It is well-established that an excise tax generally applies to "each retail sale made" in Ohio, and "it is presumed that all sales made in this state are subject to the tax until the contrary is established." *See* R.C. 5739.02. Tax exemptions are a matter of legislative grace and are the exception to this rule. *See Ohio Children's Soc'y, Inc. v. Porterfield*, 26 Ohio St.2d 30, 32-33 (1971). Accordingly, this Court has repeatedly explained that statutes creating tax exemptions must be strictly construed, because they are "in derogation of rights of all taxpayers and effectively shifts a greater tax burden to the nonexempt." *Id.* Strict construction requires construing statutory language *against exemption* – so that the onus is on the taxpayer to "affirmatively establish his right" to the exemption. *Nat'l Tube Co. v. Glander*, 157 Ohio St. 407, 409 (1952). If in doubt, this Court must resolve a claim *against exemption*.

Epic contends that the General Assembly “limits the [“public utility”] exemption to . . . the major air carriers and airlines with greater impact on the transportation industry and denies the exemption to those whose impact on the industry is insufficient.” *See* Brief of Appellant Epic Aviation LLC (“App. Br.”) at 30. However, that is simply not the standard that this Court uses – or should use – in conducting a “public utility” inquiry. When the General Assembly “sees fit to encourage certain activities by the granting of a tax exempt status, it is the duty of the courts strictly to construe exemption provisions, *rigidly applying only the express intent of the General Assembly.*” *Ohio Children’s*, 26 Ohio St.2d at 33 (emphasis added). Here, as discussed more below, the General Assembly’s intent in amending R.C. 5739.01(P) was to effectively codify this Court’s decision in *Castle Aviation*. As a result, the Board properly examined whether AirNet was subject to “special regulation and control by a governmental regulatory agency.” *See* BTA Decision at 3; 2006-Ohio-2420, ¶ 28. The Board thus properly concluded that AirNet did not qualify as a “public utility.” *See* BTA Decision at 3-4.

Accordingly, to avoid a “derogation of rights” of other taxpayers, and because Epic cannot overcome the heavy burden associated with satisfying the criteria for the “public utility” exemption, Epic’s refund claim should be denied.

Second Proposition of Law:

Both the plain language and legislative intent of R.C. 5739.02(B)(42)(a) and R.C. 5739.01(P) demonstrate that an air taxi operator is not a “public utility.”

The Board correctly determined that AirNet is not a “public utility” under R.C. 5739.02(B)(42)(a) and R.C. 5739.01(P). *See* BTA Decision at Stat. Tr. at 4-12. Even before reviewing that determination, however, this Court should examine the relevant statutory language – especially in light of the well-established principle that any claimed exemption must be construed strictly. Epic must show that the statute “clearly express[es] the exemption.” *See*

Ares, Inc. v. Limbach, 51 Ohio St.3d 102, 104 (1990). Epic cannot meet this burden, because neither the plain language nor legislative intent of R.C. 5739.01(P) “clearly expresses” an exemption for anyone beyond one holding a certificate of public convenience and necessity.

R.C. 5739.02(B)(42)(a) provides that sales tax does not apply to sales where the purpose of the purchaser is “to use or consume the thing transferred . . . *directly in the rendition of a public utility service*” (emphasis added). In relevant part, “used directly in the rendition of a public utility service” means:

[P]roperty that is to be incorporated into and will become a part of the consumer’s production, transmission, transportation, or distribution system and that retains its classification as tangible personal property after such incorporation; fuel or power used in the production, transmission, transportation, or distribution system; and tangible personal property used in the repair and maintenance of the production, transmission, transportation, or distribution system, including only such motor vehicles as are specially designed and equipped for such use. . . . *In this definition, “public utility” includes a citizen of the United States holding, and required to hold, a certificate of public convenience and necessity issued under 49 U.S.C. 41102.*

R.C. 5739.01(P) (emphasis added).

A. The plain language of R.C. 5739.01(P) unambiguously requires that, to qualify as a “public utility,” AirNet must hold a certificate of public convenience and necessity.

When construing a statute, this Court first must examine the statute’s plain language and apply the statute as written when the meaning is clear and unambiguous. *Medcorp, Inc. v. Ohio Dep’t of Job & Family Servs.*, 121 Ohio St.3d 622, 2009-Ohio-2058, ¶ 9. The words used must be afforded their usual, normal, and/or customary meanings. *Id.*; *see* R.C. 1.42.

Here, in defining the term “public utility,” R.C. 5739.01(P) identifies a single, specific group – *i.e.*, those air carriers that hold, and are required to hold, a certificate of public convenience and necessity pursuant to 49 U.S.C. § 41102. However, it is undisputed that AirNet

has never obtained a certificate of public convenience and necessity, nor has it ever sought to do so. *See* Hr. Tr. at 68-69, 103. Indeed, AirNet expressly sought – and received – an exemption from the requirement to hold a certificate of public convenience and necessity. *See id.* at 139-41, 166-69; Ex. 27 (14 C.F.R. § 298.11). AirNet’s business decision to forego a certificate of public convenience and necessity means that AirNet consciously opted out of the sole criterion identified as a “public utility” under R.C. 5739.01(P). Accordingly, based upon the unambiguous plain language of R.C. 5739.01(P), AirNet is not a “public utility.”

B. The legislative intent behind R.C. 5739.01(P) supports that AirNet is not a “public utility.”

Even if this Court were to conclude that an ambiguity exists in the plain language of R.C. 5739.01(P), the statute’s legislative intent confirms that AirNet does not qualify as a “public utility.” When a statute is subject to varying interpretations, it requires construction in a manner that carries out the intent of the General Assembly. *Sheet Metal Workers’ Int’l Ass’n v. Gene’s Refrig., Heat. & Air Cond., Inc.*, 122 Ohio St.3d 248, 2009-Ohio-2747, ¶ 29. In addition to statutory language, one must consider “the circumstances under which the statute was enacted, legislative history, and the consequences of a particular construction when determining the intention of the legislature.” *Id.*; *see* R.C. 1.49.

The General Assembly adopted the current version of R.C. 5739.01(P) in late 2006. *See* Am. Sub. H.B. 699, 126th Gen. Assemb., 2006 Ohio Laws File 152. In so doing, the General Assembly largely retained the prior version of R.C. 5739.01(P), but amended the statute by adding the now-last sentence defining “public utility.” *Id.* According to the Ohio Legislative Service Commission’s analysis of the bill containing this amendment:

[R.C. 5739.01(P) now] provides that a public utility includes a citizen of the United States holding, and required to hold, a certificate of public convenience and necessity issued under federal

law that authorizes the citizen to provide air transportation. The effect of so amending the definition is to exempt from sales and use taxes sales of property, fuel, or power used in, or used in the repair or maintenance of, foreign or interstate air transportation of passengers or property *by aircraft as a common carrier for compensation, or in furtherance of the transportation of mail by aircraft.*

Final Analysis, Am. Sub. H.B. 699, 126th Gen. Assemb., Ohio Leg. Serv. Comm'n, at 65 (emphasis added). To be sure, Epic repeatedly contends that AirNet is a “common carrier” and that AirNet transports U.S. mail. *See, e.g.*, Hr. Tr. at 64-65, 106-07, 136. If these contentions are true, then Epic cannot escape that the amended R.C.5739.01(P) was intended precisely for entities like AirNet – and that AirNet’s lack of certificate of public convenience and necessity is fatal to its “public utility” claim.

It also bears noting that the General Assembly enacted this amendment only six months after this Court’s decision in *Castle Aviation*. There, this Court explained that “many different criteria [] can be used to determine whether an entity qualifies as a public utility.” 2006-Ohio-2420. ¶ 27. Yet, “one of the most important criteria, if not the most important, . . . is *special regulation and control by a governmental regulatory agency.*” *Id.* (emphasis added). Like AirNet, *Castle Aviation* involved an air taxi operator that voluntarily chose not to obtain a certificate of public convenience and necessity. The Court concluded that there was “no evidence that any governmental agency set any requirements, other than safety, to govern [the taxpayer’s] business operations.” *Id.* ¶¶ 28-29. As such, the taxpayer did not qualify for the “public utility” exemption.” *Id.*

Though this Court’s decision in *Castle Aviation* did not explicitly hinge upon the taxpayer’s decision to forego a certificate of public convenience and necessity, that factor certainly contributed to the outcome – enough so that, just six months later, the General

Assembly amended R.C. 5739.01(P), thereby implicitly codifying *Castle Aviation*. It is presumed that the General Assembly is fully aware of any prior judicial interpretation of an existing statute when enacting an amendment. *Clark v. Scarpelli*, 91 Ohio St.3d 271, 278 (2001). Tellingly, the General Assembly did not define “public utility” as, say, an entity subject to “special regulation and control by a governmental regulatory agency.” As this Court noted in *Castle Aviation*, there are many possible traits of a “public utility.” *See* 2006-Ohio-2420, ¶ 27. Yet, the General Assembly opted to use an unambiguous, objective criterion to determine whether an air taxi operator is a “public utility” for tax purposes. In so doing, the General Assembly made a policy decision that a certificate of public convenience and necessity offers sufficient indicia of the “special regulation and control” associated with a “public utility” – if not better than any examination than the Commissioner could undertake. *See id.*

C. Established rules of statutory construction also compel the conclusion that AirNet is not a “public utility.”

Finally, rules of statutory construction reinforce that AirNet is not a “public utility,” as the General Assembly has defined that term.

First, the rule *expressio unius est exclusio alterius* provides that “the expression of one or more items of a class implies that those not identified are to be excluded.” *State v. Droste*, 83 Ohio St.3d 36, 39 (1998). Here, the definition of “public utility” relates to a class of citizens (*i.e.*, air carriers), but identifies only a subset of that class (*i.e.*, those “holding, and required to hold” a certificate of public convenience and necessity). Based upon this rule, those operators “not identified” – *i.e.*, those not holding, or not required to hold, a certificate of public convenience and necessity – “are to be excluded.” *See id.* Because AirNet does not hold a certificate of public convenience and necessity, it is thus excluded from being a “public utility.”

Second, when examining the legislative intent of a statute, a reviewing body should neither delete words that were used by the legislature, nor insert words that were not used. *Cleveland Mobile Radio Sales, Inc. v. Verizon Wireless*, 113 Ohio St.3d 394, 2007-Ohio-2203, ¶ 12. Here, as drafted, “public utility” merely “includes” holders of a certificate of public convenience and necessity. R.C. 5739.01(P) contains no language signaling that an air carrier could qualify as a “public utility” by satisfying another criterion. Yet, Epic’s desired statutory construction would require just that. To achieve Epic’s desired reading of R.C. 5739.01(P), one would need to insert the words “but is not limited to” (or a similar qualifier) after “includes,” so that the statute contemplates other possible ways to be a “public utility.” However, this Board should read the statute *as drafted* – limited as it is.

Accordingly, especially when viewed against the backdrop of construing tax exemption statutes strictly, this Court should construe R.C. 5739.01(P) as limiting “public utility” to those who hold a certificate of public convenience and necessity, and AirNet thus does not qualify.

Third Proposition of Law:

An air taxi operator does not qualify as a “public utility” under R.C. 5739.01(P), and its purchases are not exempt from taxation as having been used in the “rendition of a public utility service,” pursuant to R.C. 5739.02(B)(42)(a) and R.C. 5739.01(P).

Even if R.C. 5739.01(P) does not require the holding of a certificate of public convenience and necessity to qualify as a “public utility,” per R.C. 5739.02(B)(42)(a) and R.C. 5739.01(P), the Board correctly followed this Court’s decision in *Castle Aviation* to conclude that AirNet is not a “public utility.” *See* BTA Decision at 3-4.

To determine whether a taxpayer qualifies as a “public utility” under R.C. 5739.01(P), this Court must examine “the amount and degree of ‘special regulation and control by a

government regulatory agency” placed upon that taxpayer. *See* BTA Decision at 3 (citing *Castle Aviation*, 2006-Ohio-2420, ¶ 27).

In *Castle Aviation*, this Court affirmed the Board’s ruling that the taxpayer (an air taxi operator, like AirNet) failed to demonstrate that it was a “public utility.” 2006-Ohio-2420, ¶ 1. While acknowledging that “many different criteria [] can be used to determine whether an entity qualifies as a public utility,” this Court concluded that “one of the most important criteria, if not the most important, . . . is *special regulation and control by a governmental regulatory agency.*” *Id.* ¶ 27 (emphasis added). Ultimately, this Court concluded that there was no evidence that the taxpayer was subject to any *non-safety* regulations governing its “business operations.” *Id.* ¶¶ 28-29.

Like many private businesses, the taxpayer in *Castle Aviation* provided services that were open to the public and subject to “various regulations, *e.g.*, safety or environmental regulations, in order for the business to operate.” *Id.* ¶ 29. This Court, however, concluded that those regulations “do not control the relation *between the business and the public as its customers.*” *Id.* (emphasis added). This Court also rejected any notion that a “public utility” included any business claiming services open to the public; otherwise, that term would “encompass traditional private business enterprises which are, in various degrees, regulated by diverse public authorities, *e.g.*, dry cleaners, restaurants, and grocery stores. They are not and should not be deemed public utilities.” *Id.* (citations omitted).

Here, to be sure, like any other air operator, AirNet is subject to regulation by a number of governmental agencies. *See* Hr. Tr. at 53-54 (citing examples of federal regulation); Stat. Tr. at 10-11, 85-89 (describing array of federal and state regulation). However, as Epic’s expert witness conceded, there is a distinction between “safety regulations” (enforced by the FAA) and

“economic regulations” (enforced by the DOT). *Id.* at 138-39; *see also id.* at 148 (DOT “has no safety function”). This distinction is crucial, for as this Court explained in *Castle Aviation*, only “economic regulations” dictate whether an entity is a “public utility.”² *See* 2006-Ohio-2420, ¶¶ 28-29. That AirNet may have been subject to other types of governmental regulation, by itself, thus has no bearing on whether AirNet is a “public utility.”

Following this Court in *Castle Aviation*, the Board properly focused on whether AirNet was subject to economic regulations “that control[] the relation between it and the public as its customers.” *See id.* at 3-4. As discussed below, Epic cannot overcome that AirNet’s business and economic relationship with its customers is not burdened by governmental control, and thus AirNet does not qualify as a “public utility.”

A. AirNet’s certification as a Part 298 air taxi operator largely relieved AirNet from economic regulations that control its business and economic relationship with its customers, thereby removing the “special regulation and control” associated with a “public utility.”

Rather than obtain a certificate of public convenience and necessity, AirNet obtained certification as a Part 298 air taxi operator. That decision largely relieved AirNet from the sort of economic regulations that this Court in *Castle Aviation* associated with a “public utility.” Accordingly, the Board correctly concluded that AirNet is not a “public utility.”

The DOT prescribes economic regulations for air carriers “in the public interest and consistent with public convenience and necessity.” *Stat. Tr.* at 3. Here, however, AirNet’s decision to become certified as a Part 298 air taxi operator enabled AirNet to avoid the bulk of

² Epic also highlights the increase of regulations “arising from national security considerations,” especially since the events of September 11, 2001. *See App. Br.* at 14. Epic neglects to discuss, however, how security-related regulations “control the relation between [AirNet] and the public as its customers.” *See Castle Aviation*, 2006-Ohio-2420, ¶ 29.

the DOT's economic regulations. Far from the "special regulation and control" associated with a "public utility," the DOT provided only for minimal "economic regulations" upon AirNet.

To gain authorization to provide air transportation service, a carrier must, among other requirements, obtain "economic authority," in the form of a DOT certificate authorizing air transportation. *See id.* at 2-4; 49 U.S.C. § 41101(a). One common example of such certification is the certificate of public convenience and necessity. To obtain that certificate, an air carrier must establish that it is "fit, willing, and able to provide the transportation to be authorized by the certificate and to comply with [DOT regulations]." *See Ex. 5* (49 U.S.C. § 41102(b)(1)). A carrier must undergo a lengthy review process, whereby the carrier must produce "a lot of financials" to demonstrate that it can "survive economically" in the period shortly before and after the certificate's issuance. *See Hr. Tr.* at 125-26, 142-44.

The DOT may exempt a carrier from having to obtain a certificate of public convenience and necessity, if that carrier operates only certain smaller aircraft with more limited passenger options. In such cases, in lieu of a certificate of public convenience and necessity, a carrier may obtain authority as an air taxi operator, pursuant to CFR Title 14, Part 298. *See Hr. Tr.* at 142-49; *Stat. Tr.* at 3; *Ex. 27* (14 C.F.R. § 298.11); *Ex. 29* (air taxi registration form). Here, AirNet chose not to obtain a certificate of public convenience and necessity. *Hr. Tr.* at 68-69, 103. Rather, AirNet sought and obtained certification as a Part 298 air taxi operator. *Id.* at 139-41.

AirNet's business decision to become a Part 298 air taxi operator means that AirNet did not have to undergo the same rigorous "DOT economic and fitness review" associated with obtaining a certificate of public convenience and necessity. *Id.* at 143-44, 157, 166. Indeed, AirNet avoided having to comply with numerous provisions within Title 49, Subtitle VII, Part A, subpart ii of the U.S. Code (entitled "Economic Regulations"), including having to obtain a

certificate of public convenience and necessity. *Id.* at 145-48; *see* Ex. 29 (14 C.F.R. § 298.11) (listing statutes exempted with Part 298 certification). Part 298 certification enabled AirNet to merely show ownership and proof of insurance of its aircraft, and that it applied to obtain an Air Carrier Certificate from the FAA.³ Hr. Tr. at 124-25 (describing process to obtain air taxi registration from the DOT), 165-66; *see* Ex. 2 (14 C.F.R. § 298.3); Ex. 29 (14 C.F.R. § 298.11).

The Board's denial of "public utility" status to AirNet is wholly consistent with *Castle Aviation* and other precedent. For example, in *Sundorph Aeronautical Corp. v. Lindley*, BTA No. 82-D-842, 1986 WL 28027, at *7 (Jan. 10, 1986), the Board noted that "an air taxi operation is relieved from the requirements of the Federal Aviation Act," and as a result, that operation does not qualify as a "public utility." *Id.* at *7.

Similarly, AirNet's decision to exempt itself from the DOT's economic regulations is reminiscent of the taxpayer in *Childers v. Wilkins*, BTA No. 2004-R-1326, 2007 WL 1515129, at *4 (May 18, 2007). In *Childers*, the taxpayer operated a fleet of limousines and taxis in Toledo, where taxicabs are subject to "greater regulation" than limousines (mostly due to the regulation of taxi meters). *Id.* at *3. In Toledo, taxicabs and limousines required a similar permit process, but ultimately a different type of permit for their drivers. *Id.* The taxpayer's fleet included vehicles of different sizes, and only some were equipped with taxi meters – but all provided identical services, regardless of size or equipment. *Id.* at *4. The taxpayer operated his business essentially as a taxi service, but obtained limousine permits for *all* his vehicles (including those fitted as taxicabs). *Id.* According to the Board, the taxpayer's decision to obtain limousine permits "removed him from the greater regulation exercised on businesses providing taxi services." *Id.* at *6. Citing *Castle Aviation*, the Board concluded that the taxpayer did not

³ This Court has concluded that the granting of an Air Carrier Certificate is nothing more than "a perfunctory administrative function by the FAA." *See Castle Aviation*, 2006-Ohio-2420, ¶ 28.

qualify for the “public utility” exemption, because the minimal regulation associated with limousines did not rise to the level of “special regulation and control” by the government. *Id.*; *see* 2006-Ohio-2420, ¶¶ 27-28.

Here, citing *Sundorph*, both the Commissioner and the Board determined that AirNet, an air taxi operator, did not qualify as a “public utility” with respect to each of AirNet’s various services. *See* Stat. Tr. at 6-12; BTA Decision at 3. And, like the taxpayer in *Childers*, AirNet’s decision to obtain Part 298 certification “removed” AirNet from the more stringent economic regulations associated with a certificate of public convenience and necessity. *See* 2007 WL 1515129, at *6. Accordingly, as a result of that business decision by AirNet, this Court should agree that AirNet is not a “public utility.”

B. AirNet’s decision to forego a certificate of public convenience and necessity evidences that AirNet has removed itself from the “special regulation and control” associated with a “public utility.”

As discussed above, AirNet’s decision to become certified as an air taxi operator coincided with its decision not to obtain to certificate of public convenience and necessity. As Epic readily notes, the Board concluded that R.C. 5739.01(P) should be construed *not to require* the holding of a certificate of public convenience and necessity to qualify as a “public utility.” *See* App. Br. at 19; BTA Decision at 3. Insofar as the Board concluded that R.C. 5739.01(P) does not require a certificate of public convenience and necessity, the Board misconstrued the statute in dictum. In any event, AirNet’s business decision to forego that certificate remains instructive as evidence that AirNet is not a “public utility” under R.C. 5739.01(P).

To obtain safety authority from the FAA, an air carrier generally must receive a certificate authorizing operations pursuant to Part 121 or Part 135, depending upon the type of operation conducted and the size of aircraft used. *See* 14 C.F.R. § 119.1(a),(b). Part 121

generally refers to larger air carriers (*e.g.*, commercial airliners), and Part 135 generally refers to smaller carriers. *See* Stat. Tr. at 3-4; *compare generally* 14 C.F.R. pt. 121 *with* 14 C.F.R. pt. 135. AirNet is certified under Part 135 – partly due to its aircraft size, but also because “we couldn’t offer the services we offer if we were [a Part 121 operator],” and because “we couldn’t operate as flexible and fluid as we do.” Hr. Tr. at 55. Indeed, this decision was consistent with the manner in which AirNet conducted its business, as a Part 121 operation would have necessitated “a different [business] model.” *Id.* at 56, 163.

Before the Board, the Commissioner explained that R.C. 5739.01(P) requires a carrier to hold a certificate of public convenience and necessity to qualify as a “public utility.” Epic misconstrued that argument then – and it misconstrues that argument now – as saying that “only Part 121 carriers could qualify” as a “public utility.” *See* App. Br. at 19. Epic’s misstatements appear to be an attempt to draw focus away from the critical fact – *that AirNet could have obtained a certificate of public convenience and necessity, but chose not to do so.* Epic seeks to minimize that fact, by contending that only Part 121 operators are required to obtain a certificate of public convenience and necessity, and that a Part 135 operator like AirNet is absolved from that requirement. *See* App. Br. at 13, 18 n.7. Yet, just as Part 121 requires a certificate of public convenience and necessity, so, too, Part 135 contemplates a requirement for that certificate. *See* 49 U.S.C. §§ 41101, 41102; 14 C.F.R., pt. 135. Of course, just as AirNet did, a Part 135 operator may exempt itself from that requirement, by instead obtaining certification as a Part 298 air taxi operator. *See* Ex. 29 (14 C.F.R. § 298.11).

The fact remains that AirNet is free to obtain a certificate of public convenience and necessity, if it so desires, and that AirNet’s decision not to do so was a *business* decision. As Epic’s expert witness explained at the hearing, AirNet *could* obtain a certificate of public

convenience and necessity for Part 135 operation “if it involves scheduled passenger service,” or if AirNet chose to employ larger aircraft. Hr. Tr. at 154-55. However, that would require AirNet to fundamentally change its business model – something it chose not to do, opting instead to operate in its current form. *Id.* As discussed above, that decision enabled AirNet to free itself from the rigorous “economic and fitness review” associated with obtaining a certificate of public convenience and necessity. *See also id.* at 143-44, 157, 166. That AirNet can so freely avoid a ubiquitous “economic regulation” like the requirement for obtaining a certificate of public convenience and necessity – regardless of whether it was required – is strong indication that AirNet is simply not constrained by the “special regulation and control” associated with a “public utility.”

In any event, this Court’s denial of “public utility” status in *Castle Aviation* did not turn on a single criterion, *e.g.*, whether the taxpayer held a certificate of public convenience and necessity, was a Part 121 operator, etc. 2006-Ohio-2420, ¶ 27. Here, following *Castle Aviation*, both the Commissioner and the Board correctly denied AirNet “public utility” status, as AirNet did not evidence sufficient “special regulation and control.” *See Stat. Tr.* at 10; BTA Decision at 2-3. In turn, this Court should similarly conclude that AirNet is not a “public utility.”

C. Unlike a “public utility,” AirNet is free to make business decisions that are generally free from economic regulation.

The evidence in this case also indicates other ways in which AirNet generally could conduct its business while free from economic regulations – clear signals that AirNet did not qualify as a “public entity.” Indeed, the Commissioner determined that “AirNet has not demonstrated that it is governed by any statute or regulation granting the general public a legal right to demand or receive its service.” *See Stat. Tr.* at 11. In turn, the Board correctly

determined that “AirNet has voluntarily undertaken [] obligations through its contracts with its customers.” *See* BTA Decision at 3.

This Court has previously concluded that a business is not a “public utility” simply because it is subject to a wide range of regulations. *See Inland Refuse Transfer Co. v. Limbach*, 53 Ohio St.3d 10, 11 (1990). In *Inland Refuse*, a private trash hauling business in Cleveland sought exemption as a “public utility.” As an example of the requisite degree of government control over a “public utility,” this Court explained that R.C. 4921.04 granted power to the Public Utilities Commission of Ohio (“PUCO”) “over motor transportation companies to, *inter alia*, fix rates, regulate service and safety of operations, and regulate the relationship between these companies and the public to the exclusion of all local authorities.” *Id.* at 12 (internal quotations omitted). PUCO also designated the routes over which a company may operate. *Id.* Yet, independent of any control by PUCO, the taxpayer “voluntarily enter[ed] into agreements with municipalities to haul rubbish to disposal sites” and was free to “cease business without the prior approval of any regulatory agency.” *Id.* As a result, the public “could not demand and receive the taxpayer’s service as the public could if the taxpayer were specially regulated.” *Id.* at 11-12. Moreover, Cleveland regulations extended only to the condition of the taxpayer’s trucks, collection of hauling fees, and restrictions on operating hours. *Id.* The city did not control the taxpayer’s rates (other than to negotiate a contract rate for itself), nor did it restrict the areas in which the taxpayer could operate. *Id.* Accordingly, regulation of the taxpayer did not rise to the level of “special regulation” consistent with a “public utility.” *Id.*

Here, AirNet’s operations are similar to those in *Inland Refuse*. Epic has not cited any statute or regulation authorizing a body like PUCO to govern AirNet’s relationship with “the

public to the exclusion of all local authorities.” *See id.* at 12. Indeed, Epic acknowledged that AirNet was not subject to PUCO regulation. Hr. Tr. at 103.

1. AirNet is free to set its own rates.

As confirmed through hearing testimony, no statute or regulation *requires* that AirNet charge certain rates to its customers. *See id.* at 95-96. In 1985, the federal government deregulated rates and routes associated with the aviation industry. *Id.* at 133-34. With that freedom from rate regulation, AirNet devised its own pricing schedules for its Bank Services customers, which it then could adjust as appropriate through fuel surcharges. *Id.* at 77-78. AirNet could enter into contracts with individual banks, whenever AirNet felt like it could cover its “fixed costs” and “enjoy greater margins.” *Id.* at 77-81. AirNet had similar pricing independence as to its Express Services, as it offered slightly higher prices than its competitors (*e.g.*, FedEx and UPS) – for competitive reasons, due to its “specialized service.” *Id.* at 94.

2. AirNet is free to enter into contracts and provide services as it chooses, and aside from contractual obligations, AirNet is free to cease its business without first seeking outside approval.

AirNet also enjoyed the freedom to enter (or not enter) certain markets or provide (or not provide) certain services. For example, air taxi operators like AirNet could choose to devise programs for transporting dangerous materials, like radioactive materials. *See id.* at 84. Though the particulars surrounding such programs would be subject to FAA and DOT approval, AirNet retained discretion whether to enter into such programs in the first place: “[A]s an operator, I can choose to engage in carrying those types of materials, or I can say I’m not going to carry them. In either case[,] I have to file that with the FAA.” *Id.* Similarly, there was no statutory or regulatory requirement that AirNet perform its Bank Services or its Express Services. *Id.* at 95-

97. Nor was there any such requirement that AirNet (or any Part 135 operator) transport U.S. mail upon demand by the federal government. *Id.* at 106-07, 147.

Moreover, AirNet was free to *cease* doing business without first seeking regulatory approval (aside from contractual obligations into which it has voluntarily entered). *See Pittsburgh & Conneaut Dock Co. v. Limbach*, 18 Ohio St.3d 320, 323 (1985). In fact, Epic’s expert witness confirmed that Part 135 includes no regulation requiring FAA approval before a carrier ceases its business. Hr. Tr. at 152-54. He added that there is no scenario under which an air taxi operator like AirNet – who does not provide “essential air service” – would be required to continue its business involuntarily. *Id.* In another example, AirNet’s business model once included a service in which customers could drop off packages in “drop boxes” that had been set up in various cities, much like FedEx or UPS. Hr. Tr. at 92. However, due to the advent of new TSA regulations in 2001, AirNet made a business decision to “walk away” from that service. *Id.* There is no evidence that AirNet was somehow required to continue that service. *Id.*

In response, Epic offers the example of AirNet’s delivery of “sensitive” documents on behalf of the U.S. State Department, contending that “AirNet is not free to leave the business.” *See App. Br.* at 10, 13, 28. Epic acknowledged, however, that these obligations arose out of a *contract* with the State Department – and not out of a *statutory or regulatory* obligation. Hr. Tr. at 95-97. Similarly, Epic points to AirNet’s check-carrying services as an object of Congressional oversight. *See App. Br.* at 6-8. Yet, again, Epic acknowledged that there were no regulations mandating AirNet’s continued services. Hr. Tr. at 95-97. Epic also contends that AirNet’s radiopharmaceutical business is so unique that it is unknown “who would pick up the slack” if AirNet ceased those operations. *Id.* at 121-23. Even taking this contention as true, it has no bearing on *whether a statute or regulation would mandate* AirNet’s continued service in

the radiopharmaceutical business. Indeed, as the Board concluded, AirNet has “voluntarily undertaken [its] obligations through its contracts with its customers” and “chosen to perform these services and undertake the additional risks associated with them.” BTA Decision at 3-4. The Board added that “[n]o government regulation has imposed an obligation to provide such services upon AirNet.” *Id.* at 3.

3. The general public has no legal right to demand AirNet’s services.

Responding further to the notion that AirNet was generally free to cease its business, Epic contends that the general public has a “legal right to demand” AirNet’s services. *See App. Br.* at 22-27. Epic’s contentions are unavailing.

As an initial matter, Epic misframes this discussion by claiming that “the designation of a common carrier and that carrier’s rights and obligations arise from the common law that predates Ohio and even the United States.” *See id.* at 23. Specifically, Epic contends that “custom of trade” – or, “evidence of [the] industry custom of open access to [AirNet’s] services” – amounts to a “common-law right to demand” AirNet’s services. *See id.* at 27. Epic’s reference to common-law rights, however, misses the point.

For one, Epic wrongly presumes that this Court is faced with determining whether AirNet is properly designated as a “common carrier.” *See id.* at 23. That question is not before this Court. Rather, this Court must determine the extent to which the government exerts “special regulation and control” over AirNet’s business. *See Castle Aviation*, 2006-Ohio-2420, ¶ 27. And, discussing AirNet’s common-law rights and obligations does nothing to develop that issue. Evidence of “a general custom or trade” is admissible to “show that *the parties to a written agreement* employed terms having a special meaning within a certain geographic location or a particular trade or industry not reflected on the face of the agreement.” *E.g., Bottomline Ink*,

Corp. v. Huntington Bancshares, Inc., 6th Dist. Wood No. WD-08-003, 2008-Ohio-2987, ¶ 12 (emphasis added). In other words, evidence of “custom or trade” is intended to clarify a party’s *contractual* rights and obligations. That has no bearing on whether *the government* exerts “special regulation and control” over AirNet’s business. Tellingly, Epic attempts to frame the “legal right to demand” as a common-law right – because Epic simply cannot point to *any statute or regulation* giving rise to such a right.

In any event, the evidence in this case does not support that AirNet’s customers have a “legal right to demand” AirNet’s services. Epic cites witness testimony that AirNet will accept any packages from “everybody,” and that generally, it will not refuse a customer’s business. *See* App. Br. at 26-27. Epic contends that “it was understood that AirNet could not legally refuse a request by the public to use AirNet’s services.” *Id.* at 15. In so doing, Epic seems to argue that choosing never to turn away a customer’s business is equivalent to being *required* (by statute or regulation) to accept every customer’s business, under any circumstance. These are not the same thing, and contending otherwise simply confuses the notion of what “required” means. As the Commissioner determined, “[t]he question is not whether the public generally uses the services, but whether the public has the right to use the services *and whether those services can be denied to the public.*” Stat. Tr. at 9 (emphasis added) (citation omitted). *See also, e.g., Sundorph*, 1986 WL 28027, at *7 (denying “public utility” status, as “no provision or exception [] grants to the general public a legally enforceable right to demand [the taxpayer’s] services”).

Epic contends that, per industry custom, AirNet must accept any customer’s business. Yet, Epic does not address what consequences (if any) may arise if AirNet were to refuse that business. Rare as such an instance may be, if AirNet refuses a package, there is no evidence that any governmental body will intervene, or that AirNet will incur negative repercussions from that

decision (aside from losing that business to a competitor). As Epic’s expert testified at hearing, AirNet “can choose to engage in carrying [certain] types of materials, or [not] to carry them.” Hr. Tr. at 84. Similarly, AirNet occasionally transports U.S. mail, *see id.* at 106-07, but the federal government does not require that Part 135 operators, like AirNet, do so upon demand. In contrast, the government may mandate that Part 121 operators (who hold a certificate of public convenience and necessity) carry U.S. mail upon demand. *See id.* at 147. Finally, as discussed above, AirNet could cease its business at any time – and, thus, “the public could not demand and receive [AirNet’s] services, as it could if [AirNet] were specially regulated.” *See Castle Aviation*, 2006-Ohio-2420, ¶ 25.

Accordingly, even if industry “custom or trade” were relevant to the questions facing this Court, the simple fact remains that *no statute or regulation* controls AirNet’s business in such a way that the public has a “legal right to demand” AirNet’s services.

D. Whether AirNet serves the general public or operates in the public interest has no bearing on whether AirNet qualifies as a “public utility.”

This Court has considered – and expressly rejected – “the assertion that any business that simply claims that its services are open to the public can be categorized as a public utility.” *See Castle Aviation*, 2006-Ohio-2420, ¶ 29. After all, numerous traditional private businesses face regulation to some degree – but not all are rightfully deemed a public utility. *Id.* Here, Epic contends that AirNet is a “public utility,” because it holds out its services to the general public and operates in the public interest. *See App. Br.* at 22, 27-28. However, this Court should conclude, consistent with *Castle Aviation*, that that is not sufficient for AirNet to qualify as a “public utility.”

In *Castle Aviation*, this Court noted that “only a public utility service that is so important to the public interest *that special regulation and control have been imposed* upon it may have its

purchases excepted.” 2006-Ohio-2420, ¶ 25 (emphasis added) (citations omitted). With that, Epic appears to focus on the notion that AirNet provides services that are “important to the public interest,” including: AirNet’s “vital” role with the check-clearing process, especially after September 11, 2001; and its work transporting time-sensitive biological products and government documents. *See* App. Br. at 27-28. Yet, this Court is not faced with the normative question of whether AirNet provides “important” services. Rather, following *Castle Aviation*, the Board determined that AirNet has acted so as to avoid any “special regulation and control” by governmental authorities, and as a result, the public cannot demand AirNet’s services.

In any event, the evidence in this case indicates that AirNet only served only specific segments of the populations, and *not* the general public. *See* Stat. Tr. at 6-9. AirNet provided niche transportation services for specific segments of the public. AirNet’s “Bank Services” (comprising about 70 percent of AirNet’s business) involved transporting canceled checks for more than 100 major financial institutions throughout the United States. *See id.* at 2. Epic contends that “Bank Services” benefited “virtually anyone using the banking system for payment of checks.” *See* App. Br. at 22. Yet, it cannot be disputed that only a small group of consumers – *i.e.*, banks – sought and obtained these services from AirNet.

Similarly, AirNet’s “Express Services” (comprising about 30 percent of AirNet’s business) ultimately focused upon a small subset of consumers, rather than the general public. “Express Services” focused primarily upon the life sciences industry (*e.g.*, radiopharmaceuticals, lab specimens, human tissues, etc.) and shipment of dangerous/hazardous items (*e.g.*, explosives, chemicals, etc.). *See* Hr. Tr. at 44-52, 75-87. In fact, AirNet found a niche market with the transportation of lab specimens and radiopharmaceuticals, where AirNet “really seemed to hit a home run [and] the [customers] really valued our service.” *Id.* at 44. Because “Express

Services” was a “specialized high priority service” competing with larger carriers like FedEx and UPS, AirNet “tend[ed] to be a little pricier” than its competitors. *Id.* at 94. As a result, AirNet trumpeted greater flexibility and services, relative to its competitors, while understanding that “a lot of people mak[e] an economic decision not to use us.” *Id.* at 93-94. Accordingly, AirNet consciously set up its “Express Services” business model to focus upon several core groups of customers who “really latched on to our service.” *See id.* at 44.

Accordingly, the Board’s decision is consistent with the notion that the “public utility” inquiry does not depend upon whether AirNet held itself out to the general public or operated in the public interest.

E. Denying AirNet the “public utility” exemption is consistent with the legislative intent behind R.C. 5739.01(P).

Both the Commissioner and the Board correctly relied upon *Castle Aviation* in denying “public utility” status to AirNet. In so doing, both also acted consistent with the legislative intent of R.C. 5739.01(P).

As discussed above, the General Assembly amended this statute shortly after this Court’s decision in *Castle Aviation*. It is presumed that the General Assembly was fully aware of that decision (and this Court’s statutory interpretation therein) when enacting the amendment. *See Scarpelli*, 91 Ohio St.3d at 278. In other words, the amendment effectively codified *Castle Aviation*. Here, though the Board (in dictum) disagreed with the Commissioner’s contention that holding a certificate of public convenience and necessity is required to qualify as a “public utility,” it is indisputable that the General Assembly intended for that certificate to be at least an indicator of a “public utility.” To be clear, the Board concluded the lack of that certificate, by itself, did not preclude “public utility” status. *See BTA Decision* at 3. Yet, the Board added that this Court in *Castle Aviation* “did not affirm denial of the exemption based only upon [the lack

of that certificate].” *Id.* Rather, this Court “looked at the amount and degree of ‘special regulation and control’ by a government regulatory agency.” *Id.*

Epic contends that denying “public utility” status to AirNet “elevates administrative convenience over the legislative intent” of R.C. 5739.01(P). *See App. Br.* at 28. Epic curiously adds that, in originally denying the “public utility” exemption, the Commissioner “abdicate[d] his responsibility by declaring that only Part 121 operators qualify and avoiding the required case-by-case analysis,” as set forth by *Castle Aviation*. *Id.*; *see* 2006-Ohio-2420, ¶ 27. As discussed above, Epic mischaracterizes the Commissioner’s position as saying that “only Part 121 carriers qualify.” More importantly, though, Epic wholly ignores the exhaustive analysis conducted by both the Commissioner and the Board.

Epic also contends that a “case-by-case analysis” of the facts surrounding AirNet’s operations is necessary. *See App. Br.* at 28. But, that is precisely what occurred, before both the Commissioner *and* the Board. In *Castle Aviation*, this Court explained that “many different criteria [] can be used to determine whether an entity qualifies as a public utility.” 2006-Ohio-2420, ¶ 27. Yet, it stressed that “one of the most important criteria, if not the most important, . . . is special regulation and control by a governmental regulatory agency.” *Id.* Consistent with that pronouncement, neither the Commissioner nor the Board reached its decision based upon a single fact or criterion. Rather, as discussed above, both examined the totality of AirNet’s operations in concluding that AirNet did not qualify as a “public utility.”

In hopes of demonstrating that the facts here are “so different” from those in *Castle Aviation*, Epic lists a litany of traits describing AirNet’s operations. *See App. Br.* at 29-30. However, as discussed above, the Board correctly examined a host of facts (including AirNet’s

lack of a certificate of public convenience and necessity, as well as many of the facts listed in Epic's brief) in determining that AirNet failed to qualify as a "public utility."

Therefore, the relevant case law and evidence all supports the Board's determination that AirNet's operations do not qualify as a "public utility" under R.C. 5739.01(P).

CONCLUSION

For the foregoing reasons, the Commissioner respectfully requests that this Court affirm the Board's September 3, 2014 Decision and Order.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing “Merit Brief of Appellee, Joseph W. Testa, Tax Commissioner of Ohio” was served by U.S. Mail and e-mail on March 31, 2015, upon:

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APPENDIX

1.42 Common and technical usage

Baldwin's Ohio Revised Code Annotated | General Provisions (Approx. 2 pages)

Baldwin's Ohio Revised Code Annotated

General Provisions

Chapter 1. Definitions; Rules of Construction (Refs & Annos)

Statutory Provisions

R.C. § 1.42

1.42 Common and technical usage

Currentness

Words and phrases shall be read in context and construed according to the rules of grammar and common usage. Words and phrases that have acquired a technical or particular meaning, whether by legislative definition or otherwise, shall be construed accordingly.

CREDIT(S)

(1971 H 607, eff. 1-3-72)

Notes of Decisions (117)

R.C. § 1.42, OH ST § 1.42

Current through 2015 File 1 of the 131st GA (2015-2016).

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NOTES OF DECISIONS (117)

Administrative versus judicial construction
Ambiguous words
Ejusdem generis
Grammar and common usage
Insertion or deletion of words
Judicial inquiry, generally
Legislative history
Punctuation
Stare decisis
Technical interpretation

§ 119.1 Applicability.

Code of Federal Regulations | Title 14. Aeronautics and Space | Effective: September 11, 2007 (Approx. 7 pages)

Code of Federal Regulations
Title 14. Aeronautics and Space
Chapter I. Federal Aviation Administration, Department of
Transportation
Subchapter G. Air Carriers and Operators for Compensation or Hire:
Certification and Operations
Part 119. Certification: Air Carriers and Commercial Operators
(Refs & Annos)
Subpart A. General

Effective: September 11, 2007

14 C.F.R. § 119.1

§ 119.1 Applicability.

Currentness

(a) This part applies to each person operating or intending to operate civil aircraft—

- (1) As an air carrier or commercial operator, or both, in air commerce;
or
- (2) When common carriage is not involved, in operations of U.S.-
registered civil airplanes with a seat configuration of 20 or more
passengers, or a maximum payload capacity of 6,000 pounds or more.

(b) This part prescribes—

- (1) The types of air operator certificates issued by the Federal Aviation
Administration, including air carrier certificates and operating
certificates;
- (2) The certification requirements an operator must meet in order to
obtain and hold a certificate authorizing operations under part 121, 125,
or 135 of this chapter and operations specifications for each kind of
operation to be conducted and each class and size of aircraft to be
operated under part 121 or 135 of this chapter;
- (3) The requirements an operator must meet to conduct operations
under part 121, 125, or 135 of this chapter and in operating each class
and size of aircraft authorized in its operations specifications;
- (4) Requirements affecting wet leasing of aircraft and other
arrangements for transportation by air;
- (5) Requirements for obtaining deviation authority to perform
operations under a military contract and obtaining deviation authority to
perform an emergency operation; and
- (6) Requirements for management personnel for operations conducted

under part 121 or part 135 of this chapter.

(c) Persons subject to this part must comply with the other requirements of this chapter, except where those requirements are modified by or where additional requirements are imposed by part 119, 121, 125, or 135 of this chapter.

(d) This part does not govern operations conducted under part 91, subpart K (when common carriage is not involved) nor does it govern operations conducted under part 129, 133, 137, or 139 of this chapter.

(e) Except for operations when common carriage is not involved conducted with airplanes having a passenger-seat configuration of 20 seats or more, excluding any required crewmember seat, or a payload capacity of 6,000 pounds or more, this part does not apply to—

(1) Student instruction;

(2) Nonstop Commercial Air Tours conducted after September 11, 2007, in an airplane or helicopter having a standard airworthiness certificate and passenger-seat configuration of 30 seats or fewer and a maximum payload capacity of 7,500 pounds or less that begin and end at the same airport, and are conducted within a 25–statute mile radius of that airport, in compliance with the Letter of Authorization issued under § 91.147 of this chapter. For nonstop Commercial Air Tours conducted in accordance with part 136, subpart B of this chapter, National Parks Air Tour Management, the requirements of part 119 of this chapter apply unless excepted in § 136.37(g)(2). For Nonstop Commercial Air Tours conducted in the vicinity of the Grand Canyon National Park, Arizona, the requirements of SFAR 50–2, part 93, subpart U, and part 119 of this chapter, as applicable, apply.

(3) Ferry or training flights;

(4) Aerial work operations, including—

(i) Crop dusting, seeding, spraying, and bird chasing;

(ii) Banner towing;

(iii) Aerial photography or survey;

(iv) Fire fighting;

(v) Helicopter operations in construction or repair work (but it does apply to transportation to and from the site of operations); and

(vi) Powerline or pipeline patrol;

(5) Sightseeing flights conducted in hot air balloons;

(6) Nonstop flights conducted within a 25–statute–mile radius of the airport of takeoff carrying persons or objects for the purpose of conducting intentional parachute operations.

(7) Helicopter flights conducted within a 25 statute mile radius of the airport of takeoff if—

- (i) Not more than two passengers are carried in the helicopter in addition to the required flightcrew;
- (ii) Each flight is made under day VFR conditions;
- (iii) The helicopter used is certificated in the standard category and complies with the 100-hour inspection requirements of part 91 of this chapter;
- (iv) The operator notifies the FAA Flight Standards District Office responsible for the geographic area concerned at least 72 hours before each flight and furnishes any essential information that the office requests;
- (v) The number of flights does not exceed a total of six in any calendar year;
- (vi) Each flight has been approved by the Administrator; and
- (vii) Cargo is not carried in or on the helicopter;
- (8) Operations conducted under part 133 of this chapter or 375 of this title;
- (9) Emergency mail service conducted under 49 U.S.C. 41906; or
- (10) Operations conducted under the provisions of § 91.321 of this chapter.

Credits

[Amdt. 119-4, 66 FR 23557, May 9, 2001; Amdt. 119-5, 67 FR 9554, March 1, 2002; Amdt. 119-7, 68 FR 54584, Sept. 17, 2003; 72 FR 6911, Feb. 13, 2007]

SOURCE: Amdt. 119, 60 FR 65913, Dec. 20, 1995; Amdt. 119-9, 68 FR 47800, Aug. 11, 2003; 70 FR 7394, Feb. 14, 2005; Amdt. 119-17, 80 FR 1328, Jan. 8, 2015, unless otherwise noted.

AUTHORITY: Pub.L. 111-216, sec. 215 (August 1, 2010); 49 U.S.C. 106(f), 106(g), 1153, 40101, 40102, 40103, 40113, 44105, 44106, 44111, 44701-44717, 44722, 44901, 44903, 44904, 44906, 44912, 44914, 44936, 44938, 46103, 46105.

Notes of Decisions (4)

Current through March 26, 2015; 80 FR 16222.

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§ 298.3 Classification.

Code of Federal Regulations | Title 14. Aeronautics and Space | Effective: June 15, 2005 (Approx. 4 pages)

Code of Federal Regulations
Title 14. Aeronautics and Space
Chapter II. Office of the Secretary, Department of Transportation
(Aviation Proceedings)
Subchapter A. Economic Regulations
Part 298. Exemptions for Air Taxi and Commuter Air Carrier
Operations (Refs & Annos)
Subpart A. General (Refs & Annos)

Effective: June 15, 2005

14 C.F.R. § 298.3

§ 298.3 Classification.

Currentness

(a) There is hereby established a classification of air carriers, designated as "air taxi operators," which directly engage in the air transportation of persons or property or mail or in any combination of such transportation and which:

- (1) Do not directly or indirectly utilize large aircraft in air transportation;
- (2) Do not hold a certificate of public convenience and necessity and do not engage in scheduled passenger operations as specified in paragraph (b) of this section;
- (3) Have and maintain in effect liability insurance coverage in compliance with the requirements set forth in part 205 of this chapter and have and maintain a current certificate of insurance evidencing such coverage on file with the Department;
- (4) If operating in foreign air transportation or participating in an interline agreement, subscribe to Agreement 18900 (OST Form 4523 or OST Form 4507) and comply with all other requirements of part 203 of this chapter; and
- (5) Have registered with the Department in accordance with subpart C of this part.

(b) There is hereby established a classification of air carriers, designated as "commuter air carriers," which directly engage in the air transportation of persons, property or mail, and which:

- (1) Do not directly or indirectly utilize large aircraft in air transportation;
- (2) Do not hold a certificate of public convenience and necessity;
- (3) Carry passengers on at least five round trips per week on at least one route between two or more points according to its published flight schedules that specify the times, days of the week, and places

between which those flights are performed;

(4) Have and maintain in effect liability insurance coverage in compliance with the requirements set forth in part 205 of this chapter and have and maintain a current certificate of insurance evidencing such coverage on file with the Department;

(5) Have and maintain in effect and on file with the Department a signed counterpart of Agreement 18900 (OST Form 4523) and comply with all other requirements of part 203 of this chapter; and

(6) Hold a Commuter Air Carrier Authorization issued in accordance with subpart E of this part.

(c) A person who does not observe the conditions set forth in paragraph (a) or (b) of this section shall not be an air taxi operator or commuter air carrier within the meaning of this part with respect to any operations conducted while such conditions are not being observed, and during such periods is not entitled to any of the exemptions set forth in this part.

SOURCE: ER-929, 40 FR 42855, Sept. 17, 1975; 49 FR 48266, Dec. 12, 1984; 50 FR 31142, July 31, 1985; 57 FR 40103, Sept. 2, 1992; 60 FR 43527, Aug. 22, 1995; 67 FR 49231, July 30, 2002; 67 FR 58690, Sept. 18, 2002; 70 FR 25768, May 16, 2005; 75 FR 41585, July 16, 2010, unless otherwise noted.

AUTHORITY: 49 U.S.C. 329 and chapters 41102, 41708, and 41709.

Notes of Decisions (21)

Current through March 26, 2015; 80 FR 16222.

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§ 298.11 Exemption authority.

Code of Federal Regulations | Title 14. Aeronautics and Space | Effective: June 15, 2005 (Approx. 4 pages)

Code of Federal Regulations
Title 14. Aeronautics and Space
Chapter II. Office of the Secretary, Department of Transportation
(Aviation Proceedings)
Subchapter A. Economic Regulations
Part 298. Exemptions for Air Taxi and Commuter Air Carrier
Operations (Refs & Annos)
Subpart B. Exemptions (Refs & Annos)

Effective: June 15, 2005

14 C.F.R. § 298.11

§ 298.11 Exemption authority.

Currentness

Air taxi operators and commuter air carriers are hereby relieved from the following provisions of the Statute only if and so long as they comply with the provisions of this part and the conditions imposed herein, and to the extent necessary to permit them to conduct air taxi or commuter air carrier operations:

(a) Section 41101;

(b) Section 41504; except that the requirements of that section shall apply to:

(1) Tariffs for through rates, fares, and charges filed jointly by air taxi operators or commuter air carriers with air carriers or with foreign air carriers subject to the tariff-filing requirements of Chapter 415; and

(2) Tariffs required to be filed by air taxi operators or commuter air carriers which embody the provisions of the counterpart to Agreement 18900 as specified in part 203 of this chapter;

(c) Section 41702, except for the requirements that air taxi operators and commuter air carriers shall:

(1) Provide safe service, equipment, and facilities in connection with air transportation;

(2) Provide adequate service insofar as that requires them to comply with parts 252 and 382 of this chapter;

(3) Observe and enforce just and reasonable joint rates, fares, and charges, and just and reasonable classifications, rules, regulations and practices as provided in tariffs filed jointly by air taxi operators or commuter air carriers with certificated air carriers or with foreign air carriers; and

(4) Establish just, reasonable, and equitable divisions of such joint

rates, fares, and charges as between air carriers participating therein which shall not unduly prefer or prejudice any of such participating air carriers;

(d) Section 41310, except that the requirements of that subsection shall apply to through service provided pursuant to tariffs filed jointly by air taxi operators or commuter air carriers with certificated air carriers or with foreign air carriers and to transportation of the handicapped to the extent that that is required by part 382 of this chapter;

(e) Section 41902;

(f) Section 41708.

SOURCE: ER-929, 40 FR 42855, Sept. 17, 1975; 49 FR 48266, Dec. 12, 1984; 50 FR 31142, July 31, 1985; 57 FR 40103, Sept. 2, 1992; 60 FR 43527, Aug. 22, 1995; 67 FR 49231, July 30, 2002; 67 FR 58690, Sept. 18, 2002; 70 FR 25768, 25770, May 16, 2005; 70 FR 25768, May 16, 2005; 75 FR 41585, July 16, 2010, unless otherwise noted.

AUTHORITY: 49 U.S.C. 329 and chapters 41102, 41708, and 41709.

Notes of Decisions (20)

Current through March 26, 2015; 80 FR 16222.

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United States Code Annotated
 Title 49. Transportation (Refs & Annos)
 Subtitle VII. Aviation Programs
 Part A. Air Commerce and Safety (Refs & Annos)
 Subpart I. General
 Chapter 401. General Provisions (Refs & Annos)

Proposed Legislation

Effective: April 5, 2000

49 U.S.C.A. § 40101

§ 40101. Policy

Currentness

(a) Economic regulation.--In carrying out subpart II of this part and those provisions of subpart IV applicable in carrying out subpart II, the Secretary of Transportation shall consider the following matters, among others, as being in the public interest and consistent with public convenience and necessity:

- (1) assigning and maintaining safety as the highest priority in air commerce.
- (2) before authorizing new air transportation services, evaluating the safety implications of those services.
- (3) preventing deterioration in established safety procedures, recognizing the clear intent, encouragement, and dedication of Congress to further the highest degree of safety in air transportation and air commerce, and to maintain the safety vigilance that has evolved in air transportation and air commerce and has come to be expected by the traveling and shipping public.
- (4) the availability of a variety of adequate, economic, efficient, and low-priced services without unreasonable discrimination or unfair or deceptive practices.
- (5) coordinating transportation by, and improving relations among, air carriers, and encouraging fair wages and working conditions.
- (6) placing maximum reliance on competitive market forces and on actual and potential competition--
 - (A) to provide the needed air transportation system; and
 - (B) to encourage efficient and well-managed air carriers to earn adequate profits and attract capital, considering any material differences between interstate air transportation and foreign air

NOTES OF DECISIONS (101)

Adaptation to present and future needs
 Antitrust
 Appointment of counsel, September 11th Victims Compensation Fund
 Civil aeronautics and air transport industry promotion
 Competition
 Constitutionality
 Construction with other laws
 Departure from presumed award, September 11th Victim Compensation Fund
 Findings
 General Aviation Revitalization Act
 International air transportation
 Judicial resolution of issues
 Jurisdiction
 Law governing, terrorist attacks
 Limitation on awards, September 11th Victim Compensation Fund
 Limitations
 Negligent training and supervision
 Preemption
 Private economic factors
 Purpose
 Ripeness
 Safety considerations in public interest
 September 11th Victim Compensation Fund
 Standing
 Terrorist attacks

transportation.

(7) developing and maintaining a sound regulatory system that is responsive to the needs of the public and in which decisions are reached promptly to make it easier to adapt the air transportation system to the present and future needs of—

- (A) the commerce of the United States;
- (B) the United States Postal Service; and
- (C) the national defense.

(8) encouraging air transportation at major urban areas through secondary or satellite airports if consistent with regional airport plans of regional and local authorities, and if endorsed by appropriate State authorities--

- (A) encouraging the transportation by air carriers that provide, in a specific market, transportation exclusively at those airports; and
- (B) fostering an environment that allows those carriers to establish themselves and develop secondary or satellite airport services.

(9) preventing unfair, deceptive, predatory, or anticompetitive practices in air transportation.

(10) avoiding unreasonable industry concentration, excessive market domination, monopoly powers, and other conditions that would tend to allow at least one air carrier or foreign air carrier unreasonably to increase prices, reduce services, or exclude competition in air transportation.

(11) maintaining a complete and convenient system of continuous scheduled interstate air transportation for small communities and isolated areas with direct financial assistance from the United States Government when appropriate.

(12) encouraging, developing, and maintaining an air transportation system relying on actual and potential competition--

- (A) to provide efficiency, innovation, and low prices; and
- (B) to decide on the variety and quality of, and determine prices for, air transportation services.

(13) encouraging entry into air transportation markets by new and existing air carriers and the continued strengthening of small air carriers to ensure a more effective and competitive airline industry.

(14) promoting, encouraging, and developing civil aeronautics and a viable, privately-owned United States air transport industry.

(15) strengthening the competitive position of air carriers to at least ensure equality with foreign air carriers, including the attainment of the opportunity for air carriers to maintain and increase their profitability in foreign air transportation.

(16) ensuring that consumers in all regions of the United States, including those in small communities and rural and remote areas, have access to affordable, regularly scheduled air service.

(b) All-cargo air transportation considerations.--In carrying out subpart II of this part and those provisions of subpart IV applicable in carrying out subpart II, the Secretary of Transportation shall consider the following matters, among others and in addition to the matters referred to in subsection (a) of this section, as being in the public interest for all-cargo air transportation:

(1) encouraging and developing an expedited all-cargo air transportation system provided by private enterprise and responsive to--

(A) the present and future needs of shippers;

(B) the commerce of the United States; and

(C) the national defense.

(2) encouraging and developing an integrated transportation system relying on competitive market forces to decide the extent, variety, quality, and price of services provided.

(3) providing services without unreasonable discrimination, unfair or deceptive practices, or predatory pricing.

(c) General safety considerations.--In carrying out subpart III of this part and those provisions of subpart IV applicable in carrying out subpart III, the Administrator of the Federal Aviation Administration shall consider the following matters:

(1) the requirements of national defense and commercial and general aviation.

(2) the public right of freedom of transit through the navigable airspace.

(d) Safety considerations in public interest.--In carrying out subpart III of this part and those provisions of subpart IV applicable in carrying out subpart III, the Administrator shall consider the following matters, among others, as being in the public interest:

(1) assigning, maintaining, and enhancing safety and security as the highest priorities in air commerce.

(2) regulating air commerce in a way that best promotes safety and fulfills national defense requirements.

(3) encouraging and developing civil aeronautics.

(4) controlling the use of the navigable airspace and regulating civil and military operations in that airspace in the interest of the safety and efficiency of both of those operations.

(5) consolidating research and development for air navigation facilities and the installation and operation of those facilities.

(6) developing and operating a common system of air traffic control and

navigation for military and civil aircraft.

(7) providing assistance to law enforcement agencies in the enforcement of laws related to regulation of controlled substances, to the extent consistent with aviation safety.

(e) International air transportation.--In formulating United States international air transportation policy, the Secretaries of State and Transportation shall develop a negotiating policy emphasizing the greatest degree of competition compatible with a well-functioning international air transportation system, including the following:

(1) strengthening the competitive position of air carriers to ensure at least equality with foreign air carriers, including the attainment of the opportunity for air carriers to maintain and increase their profitability in foreign air transportation.

(2) freedom of air carriers and foreign air carriers to offer prices that correspond to consumer demand.

(3) the fewest possible restrictions on charter air transportation.

(4) the maximum degree of multiple and permissive international authority for air carriers so that they will be able to respond quickly to a shift in market demand.

(5) eliminating operational and marketing restrictions to the greatest extent possible.

(6) integrating domestic and international air transportation.

(7) increasing the number of nonstop United States gateway cities.

(8) opportunities for carriers of foreign countries to increase their access to places in the United States if exchanged for benefits of similar magnitude for air carriers or the traveling public with permanent linkage between rights granted and rights given away.

(9) eliminating discrimination and unfair competitive practices faced by United States airlines in foreign air transportation, including--

(A) excessive landing and user fees;

(B) unreasonable ground handling requirements;

(C) unreasonable restrictions on operations;

(D) prohibitions against change of gauge; and

(E) similar restrictive practices.

(10) promoting, encouraging, and developing civil aeronautics and a viable, privately-owned United States air transport industry.

(f) Strengthening competition.--In selecting an air carrier to provide foreign air transportation from among competing applicants, the Secretary of Transportation shall consider, in addition to the matters specified in subsections (a) and (b) of this section, the strengthening of competition

among air carriers operating in the United States to prevent unreasonable concentration in the air carrier industry.

CREDIT(S)

(Added Pub.L. 103-272, § 1(e), July 5, 1994, 108 Stat. 1094; amended Pub.L. 104-264, Title IV, § 401(a), Oct. 9, 1996, 110 Stat. 3255; Pub.L. 106-181, Title II, § 201, Apr. 5, 2000, 114 Stat. 91.)

EXECUTIVE ORDERS

EXECUTIVE ORDER NO. 13479

<Nov. 18, 2008, 73 F.R. 70241>

TRANSFORMATION OF THE NATIONAL AIR TRANSPORTATION SYSTEM

By the authority vested in me as President by the Constitution and the laws of the United States of America, it is hereby ordered as follows:

Section 1. Policy. It is the policy of the United States to establish and maintain a national air transportation system that meets the present and future civil aviation, homeland security, economic, environmental protection, and national defense needs of the United States, including through effective implementation of the Next Generation Air Transportation System (NextGen).

Sec. 2. Definitions. As used in this order the term “Next Generation Air Transportation System” means the system to which section 709 of the Vision 100—Century of Aviation Reauthorization Act (Public Law 108-176) (Act) refers.

Sec. 3. Functions of the Secretary of Transportation. Consistent with sections 709 and 710 of the Act and the policy set forth in section 1 of this order, the Secretary of Transportation shall:

(a) take such action within the authority of the Secretary, and recommend as appropriate to the President such action as is within the authority of the President, to implement the policy set forth in section 1 of this order and in particular to implement the NextGen in a safe, secure, timely, environmentally sound, efficient, and effective manner;

(b) convene quarterly, unless the Secretary determines that meeting less often is consistent with effective implementation of the policy set forth in section 1 of this order, the Senior Policy Committee established pursuant to section 710 of the Act (Committee);

(c) not later than 60 days after the date of this order, establish within the Department of Transportation a support staff (Staff), including employees from departments and agencies assigned pursuant to subsection 4(e) of this order, to support, as directed by the Secretary, the Secretary and the Committee in the performance of their duties relating to the policy set forth in section 1 of this order; and

(d) not later than 180 days after the date of this order, establish an advisory committee to provide advice to the Secretary and, through the Secretary,

the Committee concerning the implementation of the policy set forth in section 1 of this order, including aviation-related subjects and any related performance measures specified by the Secretary, pursuant to section 710 of the Act.

Sec. 4. Functions of Other Heads of Executive Departments and Agencies. Consistent with the policy set forth in section 1 of this order:

(a) the Secretary of Defense shall assist the Secretary of Transportation by:

(i) collaborating, as appropriate, and verifying that the NextGen meets the national defense needs of the United States consistent with the policies and plans established under applicable Presidential guidance; and

(ii) furnishing, as appropriate, data streams to integrate national defense capabilities of the United States civil and military systems relating to the national air transportation system, and coordinating the development of requirements and capabilities to address tracking and other activities relating to non-cooperative aircraft in consultation with the Secretary of Homeland Security, as appropriate;

(b) the Secretary of Commerce shall:

(i) develop and make available, as appropriate, the capabilities of the Department of Commerce, including those relating to aviation weather and spectrum management, to support the NextGen; and

(ii) take appropriate account of the needs of the NextGen in the trade, commerce, and other activities of the Department of Commerce, including those relating to the development and setting of standards;

(c) the Secretary of Homeland Security shall assist the Secretary of Transportation by ensuring that:

(i) the NextGen includes the aviation-related security capabilities necessary to ensure the security of persons, property, and activities within the national air transportation system consistent with the policies and plans established under applicable Presidential guidance; and

(ii) the Department of Homeland Security shall continue to carry out all statutory and assigned responsibilities relating to aviation security, border security, and critical infrastructure protection in consultation with the Secretary of Defense, as appropriate;

(d) the Administrator of the National Aeronautics and Space Administration shall carry out the Administrator's duties under Executive Order 13419 of December 20, 2006, in a manner consistent with that order and the policy set forth in section 1 of this order;

(e) the heads of executive departments and agencies shall provide to the Secretary of Transportation such information and assistance, including personnel and other resources for the Staff to which subsection 3(c) of this order refers, as may be necessary and appropriate to implement this order as agreed to by the heads of the departments and agencies involved; and

(f) the Director of the Office of Management and Budget may issue such instructions as may be necessary to implement subsection 5(b) of this

order.

Sec. 5. Additional Functions of the Senior Policy Committee. In addition to performing the functions specified in section 710 of the Act, the Committee shall:

(a) report not less often than every 2 years to the President, through the Secretary of Transportation, on progress made and projected to implement the policy set forth in section 1 of this order, together with such recommendations including performance measures for administrative or other action as the Committee determines appropriate;

(b) review the proposals by the heads of executive departments and agencies to the Director of the Office of Management and Budget with respect to programs affecting the policy set forth in section 1 of this order, and make recommendations including performance measures thereon, through the Secretary of Transportation, to the Director; and

(c) advise the Secretary of Transportation and, through the Secretary of Transportation, the Secretaries of Defense, Commerce, and Homeland Security, and the Administrator of the National Aeronautics and Space Administration, with respect to the activities of their departments and agencies in the implementation of the policy set forth in section 1 of this order.

Sec. 6. General Provisions. (a) Nothing in this order shall be construed to impair or otherwise affect:

(i) authority granted by law to a department or agency, or the head thereof; or

(ii) functions of the Director of the Office of Management and Budget relating to budget, administrative, or legislative proposals.

(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity, by any party against the United States, its departments, agencies, instrumentalities, or entities, its officers, employees, or agents, or any other person.

GEORGE W. BUSH

MEMORANDA OF PRESIDENT

PRESIDENTIAL MEMORANDUM

**DELEGATION OF AUTHORITY TO COMPENSATE AIR CARRIERS FOR
LOSSES RESULTING FROM THE TERRORIST ATTACKS OF
SEPTEMBER 11, 2001**

<Sept. 25, 2001, 66 F.R. 49507>

Memorandum for the Secretary of Transportation

By the authority vested in me as President by the Constitution and laws of the United States of America, including section 101 of the Air Transportation

Safety and System Stabilization Act (Public Law 107-42) [set out in a note under this section] (the “Act”), and section 301 of title 3, United States Code, I hereby delegate to the Secretary of Transportation the authority vested in the President under section 101 (a) (2) of the Act to compensate air carriers for the direct and incremental losses they incurred from the terrorist attacks of September 11, 2001, and any resulting ground stop order.

You are authorized and directed to publish this memorandum in the **Federal Register**.

GEORGE W. BUSH

Notes of Decisions (101)

49 U.S.C.A. § 40101, 49 USCA § 40101
Current through P.L. 113-296 (excluding P.L. 113-235, 113-287, and 113-291) approved 12-19-2014

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§ 41101. Requirement for a certificate

United States Code Annotated | Title 49. Transportation (Approx. 2 pages)

NOTES OF DECISIONS (10)

Generally
 Air carrier
 Air transportation
 Constitutionality

United States Code Annotated
 Title 49. Transportation (Refs & Annos)
 Subtitle VII. Aviation Programs
 Part A. Air Commerce and Safety (Refs & Annos)
 Subpart II. Economic Regulation (Refs & Annos)
 Chapter 411. Air Carrier Certificates (Refs & Annos)

49 U.S.C.A. § 41101

§ 41101. Requirement for a certificate

Currentness

(a) General.—Except as provided in this chapter or another law--

(1) an air carrier may provide air transportation only if the air carrier holds a certificate issued under this chapter authorizing the air transportation;

(2) a charter air carrier may provide charter air transportation only if the charter air carrier holds a certificate issued under this chapter authorizing the charter air transportation; and

(3) an air carrier may provide all-cargo air transportation only if the air carrier holds a certificate issued under this chapter authorizing the all-cargo air transportation.

(b) Through service and joint transportation.—A citizen of the United States providing transportation in a State of passengers or property as a common carrier for compensation with aircraft capable of carrying at least 30 passengers, under authority granted by the appropriate State authority--

(1) may provide transportation for passengers and property that includes through service by the citizen over its routes in the State and in air transportation by an air carrier or foreign air carrier; and

(2) subject to sections 41309 and 42111 of this title, may make an agreement with an air carrier or foreign air carrier to provide the joint transportation.

(c) Proprietary or exclusive right not conferred.—A certificate issued under this chapter does not confer a proprietary or exclusive right to use airspace, an airway of the United States, or an air navigation facility.

CREDIT(S)

(Added Pub.L. 103-272, § 1(e), July 5, 1994, 108 Stat. 1118.)

Notes of Decisions (10)

49 U.S.C.A. § 41101, 49 USCA § 41101

Current through P.L. 113-296 (excluding P.L. 113-235, 113-287, and 113-

291) approved 12-19-2014

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Final Analysis

*Ralph D. Clark and
other LSC staff*

Legislative Service Commission

Am. Sub. H.B. 699*

126th General Assembly

(As Passed by the General Assembly)

Reps. Calvert, Peterson, Flowers, J. McGregor, Hartnett, Chandler, D. Stewart, Skindell, S. Patton, Ujvagi, Carmichael, Collier, Combs, Core, C. Evans, D. Evans, Faber, Fende, Hagan, Koziura, Law, Mitchell, Reinhard, Schaffer, Seaver, Seitz, Setzer, J. White, Woodard

Sens. Carey, Stivers, Niehaus, Clancy, Kearney, Armbruster, Coughlin, Fingerhut, Gardner, Goodman, Hagan, Hottinger, Mumper, Spada, Padgett, Fedor, Wilson, Zurz, Jacobson, R. Miller, Roberts

Effective date: March 29, 2007; certain provisions effective December 28, 2006; certain other provisions effective on other dates

ACT SUMMARY

- Continues reimbursement of certain life insurance premiums for active duty members of the Ohio National Guard only if the Adjutant General determines the members are ineligible for that reimbursement under federal law.
- Includes in the definition of "FutureGen Project" in the Air Quality Development Authority Law related projects that support the development and operation of the buildings, equipment, and real property constituting the project, thus making such research projects eligible for funding under that Law.
- Permits the Ohio Building Authority to assess and plan capital facilities for state agency use, provides that the costs of such assessments and plans can be paid from bonds issued for the facilities, and expressly authorizes the purchase of property insurance for its facilities.

* *This analysis does not address appropriations, fund transfers, and similar provisions. See the Legislative Service Commission's Fiscal Note and Capital Bill Analysis for Am. Sub. H.B. 699 for an analysis of such provisions.*

present value per unit of natural gas (i.e., eight MCF) equals 50% of the net present value per unit of a well producing at least one unit per day.

Under continuing law, all real property (including oil and gas reserves) must be assessed and taxed at its "true value in money." The method employed to assess true value can vary. For oil and gas reserves, the statutes do not specify the method, but administrative rules (Ohio Admin. Code 5703-25-11(I)) state that when oil and gas rights are separate from ownership in the fee of the soil, the rights are to be valued "in accordance with the annual entry of the tax commissioner in the matter of adopting a uniform formula in regard to the valuation of oil and gas deposits in the eighty-eight counties of the state." The tax return form (DTE 6) indicates that the value computation for oil and gas reserves subtracts either 42.5% of flush production or 50% of production by secondary recovery methods from gross production (as in the act's valuation method), and converts this into a daily average production which is equal to the act's average daily production amount. Average daily production is then multiplied by a "decimal working interest" and by the per-unit taxable value fixed annually by the Tax Commissioner. The result is the assessed value of the oil or gas reserve, which is then multiplied by the royalty interest owner's share to determine the owner's apportioned assessed value.

Sales and use taxes: Exemption for sales of property used in air transportation

(R.C. 5739.01(P) and 5739.02(B)(42)(a)(not in the act))

Continuing law exempts from sales and use taxes sales where the purpose of the purchaser is to use or consume the thing transferred directly in the rendition of a public utility service. "Used directly in the rendition of a public utility service" generally means property that is incorporated into and will become a part of a production, transmission, transportation, or distribution system, and that retains its classification as tangible personal property after incorporation; fuel or power used in such a system; and tangible personal property used in the repair and maintenance of such a system.

The act provides that a public utility includes a citizen of the United States holding, and required to hold, a certificate of public convenience and necessity issued under federal law that authorizes the citizen to provide air transportation. The effect of so amending the definition is to exempt from sales and use taxes sales of property, fuel, or power used in, or used in the repair or maintenance of, foreign or interstate air transportation of passengers or property by aircraft as a common carrier for compensation, or in furtherance of the transportation of mail by aircraft.



real estate in that act. This conveyance authority expires one year after its effective date. (Divisions (A) and (C).)

University of Toledo conveyance

(Section 527.50)

The act authorizes the Governor to execute a deed in the name of the state conveying all of the state's right, title, and interest in specified University of Toledo land in the City of Toledo, Lucas County, to a purchaser or purchasers to be determined and the purchaser's or purchasers' heirs and assigns or successors and assigns (division (A)). The Board of Trustees of the University of Toledo is required to negotiate with any potential purchaser or purchasers and, in accordance with relevant laws, to contract for the real estate's sale and conveyance to the grantee or grantees selected by the board (division (B)).

Consideration for the conveyance of the real estate is a purchase price determined by the Board of Trustees that must be at least equal in amount to the real estate's appraised value as approved by the board. The act requires the Board of Trustees to cause the real estate to be appraised by one or more disinterested persons at a fee determined by the Board of Trustees. Upon the board's approval of the appraised value, it must notify the potential grantee or grantees in writing of the purchase price. (Division (C).) Unless otherwise provided in the contract for sale, the Board of Trustees is required to pay the costs of the conveyance except that the grantee or grantees must pay the appraisal fee (division (F)).

The net proceeds of the sale must be paid into the state's General Revenue Fund (division (E)).

This conveyance authority expires one year after the authority's effective date (division (G)).

HISTORY

ACTION	DATE
Introduced	12-05-06
Reported, H. Finance & Appropriations	12-12-06
Passed House (94-3)	12-12-06
Reported, S. Finance & Financial Institutions	12-19-06
Passed Senate (32-1)	12-19-06
House concurred in Senate amendments (84-2)	12-20-06

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