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BEFORE THE

FEDERAL AVIATION ADMINISTRATION

WASHINGTON, D.C.

DOCKET NO. FAA-1999-6622-8

COMMENTS OF THE CARGO AIRLINE ASSOCIATION

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By publication in the December 14, 1999, edition of the *Federal Register*, the Federal Aviation Administration issued a Notice of Proposed Rulemaking proposing both substantive and “cosmetic” changes to the existing rulemaking process. 64 *Fed. Reg.* 69856 (Dec. 14, 1999). Although this rulemaking proceeding is far-reaching and deals with many facets of the rulemaking process, the Cargo Airline Association will limit its discussion to one issue – the proposed deletion of the reference in 14 C.F.R. § 11.65 which authorizes informal contacts between the FAA and interested parties during the life of a rulemaking proceeding. The Cargo Airline Association submits that this proposal is unnecessary, **not** in conformance with existing DOT *ex parte* policy, and counter to the interests of enhancing safety.

The stated reason for the proposed policy change is that:

This provision (the existing § 11.65) is contrary to DOT *ex parte* policy, which prohibits non-public contacts with DOT officials once an NPRM has been issued. Where discussion of a proposal is appropriate, the FAA will hold an open public meeting.

64 *Fed. Reg.* 69857. A review of the applicable DOT policies, however, reveals that such informal contacts are not *per se* prohibited and indeed should be encouraged in order to enhance safety in the most expeditious manner.

The subject of “prohibited communications” is found in 14 C.F.R. § 300.2 which bans substantive communications between the FAA and “interested persons” concerning a **public proceeding**. In turn, a “public proceeding” is defined, *inter alia*, as:

A rulemaking proceeding involving a hearing as described in paragraph (b)(4)(i) of this section’ or an exemption proceeding covered by this chapter. (Other rulemaking proceedings are covered by the *ex parte* communication policies of DOT Order 2100.2.)

14 C.F.R. § 300.2 (b)(4)(ii). Therefore, it is clear that the applicable DOT policy covering most FAA rulemaking proceedings is contained in DOT Order 2100.2. A copy of DOT Order 2100.2 is attached hereto as Appendix A.

Contrary to the conclusions drawn by the FAA in this rulemaking, DOT Order 2100.2 **encourages** interaction between the FAA and the public in the context of rulemaking proceedings. Accordingly, “[p]ersons directly responsible for a rule-making action should undertake such contact with the public as will be helpful in the resolution of questions of substance and justification, and should be receptive to proper contacts from those affected by or interested in the proposed action.” DOT Order 2100.2 (2) (a). The only requirement is that, after an NPRM has been issued, a record of the contact should be made and placed in the public docket. See 2100.2 (3) (b).

¹ A proceeding involving a hearing conducted on the record after notice and opportunity for an **evidentiary** hearing as provided in 14 C.F.R. § 302.24. This section is clearly inapplicable to the rulemakings discussed herein.

To be fair, it should be noted that Order 2100.2 draws a distinction between contacts made after an NPRM has been issued **but before final comments have been filed** and contacts made after the closing date for comments has passed. **Before** final comments are due, the only regulatory requirement is that evidence of *any ex parte* contact should be placed in the applicable docket. See 2100.2 (3) (b). **After** the closing date for comments, Order 2100.2 urges more caution (“Public contact of the nature discussed in this order should be held to a minimum once the closing date for comments on a particular rule-making action has passed”), but such contacts are not prohibited. 2100.2 (2) (c). And while a public meeting is suggested at this stage of the proceeding, it is clearly not mandatory (“If it is necessary to have public contact at this stage of a rule-making proceeding, the meeting **should, if possible**, be announced publicly or all persons who have expressed an interest in the rule-making action should be invited to participate”). *Id.*

Relying on long-standing DOT policy and practice regarding public contacts in rulemaking proceedings, many industry working groups have formed and have worked cooperatively with the FAA toward regulatory solutions to various problems. If section 11.65 were amended as proposed, unintended chaos and confusion would necessarily result. A prime example of the problems that the proposed ban will create can be seen in the ongoing FAA/industry effort to ensure the continued safe operation of aircraft converted from passenger to all-cargo use.

Over the past several years, the FAA has raised several questions with respect to the structural integrity of converted cargo aircraft. Because of the ongoing nature of these inquiries,

the all-cargo industry formed a B-727 Working Group to coordinate efforts with the FAA.* This Working Group, in conjunction with the FAA, has successfully addressed several key issues and continues in existence to work with the FAA to ensure a cooperative effort to enhance system-wide safety. Any ban on informal contacts – even after NPRMs are issued – compromises this process.

As a practical matter, in circumstances involving technical issues which eventually lead to the finalization of Airworthiness Directives, informal contacts prejudice no one -- especially if the substance of the contacts is placed in the appropriate Docket. Indeed, the interaction between government and industry engineers has proven to be the most effective way of resolving outstanding issues. Any requirement to conduct this dialogue formally through written “pleadings”, or to hold open public meetings on such topics, is simply counterproductive.³

Accordingly, the Cargo Airline Association respectfully urges that the FAA abandon its intention to delete that portion of § 11.65 of its regulations which currently encourages informal contacts between the Agency and industry members. Contrary to the justification stated in the instant NPRM, existing DOT policy does **not** prohibit the contacts addressed by § 11.65; it only provides the guidelines to be followed in **permitting** such dialogue. If the goal of the FAA is to

² A parallel effort exists with respect to the DC-8 freighter conversions. The so-called Joint Task Force (JTF) is currently in the midst of a major project to identify any conversion-related DC-8 problems and to propose any necessary aircraft **modifications**. Ongoing uninhibited communications with the FAA are crucial to the ultimate success of the program, whether or not the Agency has released an NPRM dealing with these matters. See *64 Fed. Reg. 71689* (Dec. 22, 1999).

³ In fact, holding a public meeting may inhibit open and honest communication between interested parties and may therefore delay or compromise a final resolution of important safety issues.

promote government/industry cooperation in expediting safety enhancements, § 11.65 should remain intact.

Respectfully submitted,

Handwritten signature of Stephen A. Alter in black ink, featuring a long horizontal flourish at the end.

Stephen A. Alter-man, President

Handwritten signature of Yvette Rose in black ink, with a stylized, cursive script.

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January 28, 2000

Department of Transportation**Office of the Secretary****Washington, D.C. Department of Transportation****ORDER**

DOT 2100.2

10/5/70

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SUBJECT: POLICIES FOR PUBLIC CONTACTS IN RULE MAKING

1. **PURPOSE.** This order sets forth basic policies for contacts with members of the public taking place during the course of rule making as to rules other than those FAA rules involving airspace assignment and use.
2. **GENERAL POLICIES.** It is the policy of this Department to encourage full public participation in rule-making actions taken by any operating element of the Department and to provide for the open development of rules. To assure adequate public participation, apart from the opportunity to respond in writing to a notice of proposed rule making and to appear and be heard at a hearing called in connection with rule making, the following should be adhered to:
 - a. Persons directly responsible for a rule-making action should undertake such contact with the public as will be helpful in the resolution of questions of substance and justification, and should be receptive to proper contacts from those affected by or interested in the proposed action.
 - b. To discharge the Department's obligation to conduct its rule-making activities in a public manner, interested members of the public should be afforded adequate knowledge of such contacts. This is necessary to assure the equal opportunity to which all interested members of the public are entitled in making their views known to the Department. Knowledge of the substance of contacts with individual members of the public may be as important for consideration by other interested members of the public as knowledge of individual written comments. Further, if such knowledge is not made available, the Department may be deprived of informed and valuable comment.
 - c. Public contact of the nature discussed in this order should be held to a minimum once the closing date for comments on a particular rule-making action has passed. Contacts made

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this stage of a rule-making proceeding, even if reported and docketed, tend to be hidden since many persons feel that they have no need to check further the public docket after the closing date for comments. Contacts of this type may also

- subject the rule-making action concerned to attack in court.

If it is necessary to have public contact ● t this stage □ x ● rule-making proceeding, the meeting should, if possible, be

- announced publicly or all persons who have expressed an interest in rule-making action ● should be invited to participate. In no event should any group or individual be given any information regarding the rule making that is not ● available to all groups or individuals.

3. POLICY FOR REPORTING CONTACTS WITH THE PUBLIC.

- a. Reports of the substance of contacts, including meetings with interested members of the public, should be made as hereinafter provided when the contact is one:
 - (1) Involving headquarters personnel of the Office of the Secretary or of any operating administration whose duties include direct participation in the development of rules or who are in a position responsible for influencing such development; and
 - (2) In which members of the public furnish information or express views bearing on the substance of a rule proposal.
- b. When the contact takes place after the issuance of ● notice of proposed rule making in the subject matter, the report should be made and included in the public docket promptly following the contact. When the contact takes place before the issuance of a notice of proposed rule making and when the substance of the contact forms one of the bases for issuance of the notice, the substance of the contact should be discussed in the preamble to the notice. ● in any case there x ● legitimate reason for not discussing the prior contact in the preamble to the notice, then a report of the contact should be made and placed in the public docket when the notice is issued.

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4. **FORM OF REPORT.** The report to be included in the public docket need not be a verbatim transcript of the meeting. On the other hand, a mere recitation that on X day a meeting was held with listed persons to discuss a named general subject is inadequate. The report should, at a minimum, contain -
- a. A list of the participants;
 - b. A summary of the discussion; and
 - c. A specific statement of any commitments made by any Departmental personnel.



John A. Volpe
Secretary of Transportation