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June 29, 2000

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OFFICE OF THE
CHIEF COUNSEL
FAA'S DOCKET

BY HAND DELIVERY

Ms. Donna McLean
Assistant Administrator for Financial Services
Federal Aviation Administration
800 Independence Avenue, S.W.
Washington, D.C. 20591

Re: FAA Docket No. FAA-00-7018 – 36
Fees for FAA Services for Certain Flights

Dear Ms. McLean:

Enclosed please find an original plus ten copies of the “Preliminary Objections and Comments of Air Transport Association of Canada (“ATAC”) to Second Fee Schedule for Overflights” for inclusion in the Docket in this matter. ATAC respectfully reserves the right to supplement its submission based on additional information and data obtained by ATAC.

Sincerely,



Roy Goldberg
for SCHNADER HARRISON SEGAL & LEWIS LLP

Enclosures

cc: Mr. Michael Skrobica – ATAC
Robert W. Kneislcy, Esq.

carriers before the fees are imposed; and (2) the FAA's methodology ensures that "each" such fee is "directly related" to FAA's costs to provide ATC Services for overflights, as required by the governing law. *See* 49 U.S.C. § 45301(b)(1)(B). Unfortunately, FAA's Second Fee Schedule violates both of these fundamental requirements.

□ **Procedural Defect.** FAA has failed to comply with the procedures required by the Administrative Procedure Act, 5 U.S.C. § 553(b), (c) (*APA*), under which FAA was required to issue a "notice of proposed rulemaking" (*NPRM*) to allow affected parties to provide comments that the FAA would consider before making the new fees effective. Although Congress may, through legislation, direct an agency to disregard the APA's requirements, such a directive must be **express**; it cannot be merely implied.

This "express directive" exception does not apply to the Second Fee Schedule. Section 273 of the Federal Aviation Reauthorization Act of 1996 (the *1996 Act*) specified that the FAA should issue the "***initial*** fee schedule . . . as an interim final rule . . ." 49 U.S.C. § 45301(b)(2) (emphasis added). No language in the 1996 Act or any subsequent legislation similarly directs FAA to use an "interim final rule" for a second or other supplemental fee schedule. As the D.C. Circuit surmised in *Asiana Airlines, et al. v. FAA*, "once the FAA issued the IFR" for the initial fee schedule, "the APA once again became controlling for all subsequent proceedings . . ." . 134 F.3d 393 at 398.

The circumstances surrounding the current fee schedule are significantly different from when FAA promulgated the Initial Fee Schedule. Congress' expressed desire for FAA to collect \$100 million from overflights during FY 1997 (49 U.S.C. § 45301(b)(1)(A)) imposed an extraordinary time pressure on FAA which prompted the

D.C. Circuit to conclude that FAA “had to move quickly to establish a fee schedule and collection process in order to fulfill this statutory goal.” 134 F.3d at 398. FAA faces no similar mandate in the current fiscal year. Any presumption by FAA that Congress wants overflight fees to be collected as soon as possible is countered by an equally warranted presumption that, given the experience with the Initial Fee Schedule, Congress would have wanted FAA to receive and consider the informed comments of affected parties before the new rule becomes effective. Where, as here, the relevant statute is silent with respect to the express wishes of Congress and there are, at best, conflicting presumptions as to what Congress might have wanted, the “express directive” exception to the APA cannot apply.

□ **Substantive Defects:** Although ATAC’s review of the FAA’s cost methodology is preliminary given how recently FAA published the Second Fee Schedule and accompanying documents, it is nevertheless clear that FAA has once again developed the overflight fees in violation of the statutory directive that each fee be directly related to FAA’s costs to provide ATC Services to overflights. 49 U.S.C. § 45301(b)(1)(B). After reviewing the Second Fee Schedule and the methodology used by the FAA to set the overflight fees, the accounting and economic consulting firm KPMG concluded that “the FAA’s methodology for setting the new overflight fees is not inherently reliable for ensuring that the new fees are directly related to the costs incurred by FAA to provide ATC Services to each flight.” “KPMG Preliminary Conclusions Regarding FAA’s

Methodology for Setting Overflight Fees in Second Fee Schedule,” June 29, 2000 (*KPMG Report*), at 2.³

A fundamental problem with FAA’s fee-setting methodology is that FAA did not attempt to isolate and capture the costs (such as labor, telecommunications services, utilities, *etc.*) that FAA directly incurs in the provision of ATC Services to overflights. *Id.* The Arthur Andersen report commissioned by FAA entitled “Cost Methodology Used to Develop Cost of Enroute and Oceanic ATC Services” (*Andersen Report*), did not undertake to determine the level of FAA costs that are directly related to providing services for overflights. *Id.* Nor did it examine and verify FAA’s entire cost accounting system. This piecemeal approach deprived Arthur Andersen and the FAA from substantiating key assumptions and allocations made with in the assignment of costs to the enroute and oceanic environments. Thus, at the very least FAA has acted prematurely in basing its overflight fees on a study that failed to examine all of the relevant areas of the FAA’s cost accounting system. *Id.*

ATAC also is concerned that FAA has once again applied a value-based methodology in determining the level of the overflight fees. The Andersen Report reveals that one of FAA’s “guiding principles” has been to “[p]lace costs into homogeneous pools reflecting distinct services provided to groups of users, *preserving opportunities for the FAA to approach user fee pricing from a wide spectrum of policy choices.*” Andersen Report at iii-iv (emphasis added). The “principle” of setting fees based on “policy choices” is inherently incompatible with a fee-setting methodology that bases the fees solely on the costs of providing the services being rendered.

³ The KPMG Report is being concurrently submitted to FAA and is hereby incorporated into ATAC’s submission.

In addition, because FAA did not look specifically at costs for overflights, it has resorted to a methodology which assumes that “the cost of providing service for overflights is the same as for any other aircraft operation within the enroute and oceanic environments”⁴ This assumption, which pervades the FAA’s Fee Development Report (pages 3, 7, 8 and 9), appears to defy common sense and reality. Certainly there is nothing in the docket that supports FAA’s assumption that the costs to provide ATC Services for overflights are identical to the costs for nonoverflights. See KPMG Report, at 2-3.

As set forth below, FAA’s methodology also suffers from multiple examples of assumptions and allocations which are erroneous or unsubstantiated, or both. These examples are listed throughout the KPMG Report, at 6-16. Equally problematic are the many instances in which FAA has failed to disclose critical information and data underlying an assumption or conclusion used in its fee-setting methodology. *Id.*

Finally, FAA’s most recent statement that its annual costs to provide ATC Services for overflights is \$48.7 million lacks credibility given that FAA has made widely discrepant claims regarding its costs for overflights during the past three years, claiming in 1997 that the costs were \$12.6 million⁵; in 1999 that the costs were \$32 million⁶; and in 2000 that its costs were \$22.1 million.⁷

⁴ “Overflight Fee Development Report in Support of ‘Fees for FAA Services for Certain Flight [sic],’ Interim Final Rule, May 26, 2000,” (*Fee Development Report*), at 9.

⁵ *Analysis of Overflight Costs and Pricing*, March 14, 1997 (*GRA Report*), at 46, 53-54.

⁶ *Memorandum from John L. Meche, Deputy Assistant Inspector General for Financial and Information Technology, U.S. Department of Transportation* (Dec. 17, 1999).

⁷ House Report 106-622, “Department of Transportation and Related Agencies Appropriations Bill, 2001,” May 17, 2000 (“The FAA estimates that \$22,100,000 in overflight user fees will be collected during fiscal year 2001”).

BACKGROUND

The 1996 Act

Section 273 of the 1996 Act authorized the FAA to establish a schedule of new fees, and a collection process for such fees, for “Air traffic control and related services provided to aircraft other than military and civilian aircraft of the United States government or of a foreign government that neither take off from, nor land in, the United States.” 49 U.S.C. § 45301(a)(1). Services for which costs could be covered through the fees include: “the costs of air traffic control, navigation, weather services, training and emergency services which are available to facilitate safe transportation over the United States, and other services provided by the Administrator or by programs financed by the Administrator to flights that neither take off nor land in the United States.” 49 U.S.C. § 45301(b)(1)(B). Congress “authorized” FAA “to recover in fiscal year 1997 \$100,000,000.”⁸ Congress also directed FAA to “ensure that each of the fees” imposed on overflying aircraft be “directly related to the Administration’s costs of providing the service rendered” to the overflying aircraft.⁹ In addition, Congress directed FAA to “publish in the Federal Register an initial fee schedule and associated collection process as an interim final rule, pursuant to which public comment will be sought and a final rule issued.”¹⁰

⁸ 49 U.S.C. § 45301(b)(1)(A).

⁹ 49 U.S.C. § 45301(b)(1)(B).

¹⁰ 49 U.S.C. § 45301(b)(2).

The Initial Fee Schedule

On March 20, 1997, the FAA published the Initial Fee Schedule for overflight fees. According to the FAA, its annual costs directly attributable to overflights were only \$12.6 million.¹¹ FAA nevertheless sought an additional \$77.2 million per year in overflight fees, which purported to reflect FAA “fixed and common” costs that it assigned to overflights through a value-based allocation methodology called “Ramsey pricing,”¹² and approximately \$8 million in administration and collection costs.

ATAC and six affected air carriers challenged the Initial Fee Schedule by filing a petition for review by the U.S. Court of Appeals for the D.C. Circuit. In a decision issued in January 1998, *Asiana Airlines et al. v. FAA*, 134 F.3d 393, the D.C. Circuit vacated the Initial Fee Schedule on the ground that the FAA’s methodology for setting the overflight fees violated the 1996 Act’s requirement that “each” fee be “directly related to . . . the costs of providing the service rendered.” 134 F.3d at 402. The Court specifically found that FAA improperly “set fees on a basis other than cost” when it “apportioned its costs among user groups based on each group’s relative sensitivity to the amount charged.” *Id.* at 403.

As a result of the Court's ruling, the FAA suspended fee collections, and later refunded the \$40 million in fees that had then been collected. In addition, the D.C. Circuit granted the entire amount of attorneys’ fees requested by ATAC under the attorney-fee recovery provisions of the Equal Access to Justice Act, 28 U.S.C. § 2412(d). *Air Transport Association of Canada v. FAA*, 156 F.3d 1329 (1998).

¹¹GRA Report, at 46, 53-54.

¹² GRA Report, at 53-54.

The Court held that ATAC was entitled to recover its attorneys fees because the FAA lacked a “substantial justification” for the fee-setting methodology used in the Initial Fee Schedule. *Id.* at 1332. The court explained that it could not “hold that an attempt by an agency to completely displace Congress is substantially justified.” *Id.* at 1332-33.

The Second Fee Schedule

Nearly four years after Congress passed the 1996 Act, and almost two and one-half years after the D.C. Circuit vacated the Initial Fee Schedule, the FAA issued the Second Fee Schedule.¹³ As with the Initial Fee Schedule, FAA prepared the Second Fee Schedule essentially in secrecy from the public. FAA did not notify the public of the methodologies and allocations it was considering for imposition of the fees, and acted without consulting the air carriers that would be subject to the fees.

The Second Fee Schedule imposes “a fee for air traffic and related services provided to users of aircraft that transit U.S.-controlled airspace (airspace owned or delegated to the United States) but do not take off from or land in the United States.” 65 Fed. Reg. at 36004.¹⁴ In the Second IFR, FAA states that the “cost to the FAA associated with overflights covered under this rule is projected to be approximately \$50.4 million, including the cost of developing and collecting the fees.” 65 Fed. Reg. 36004. Contemporaneous with its issuance of the Second Fee Schedule, FAA issued the Andersen Report and the Fee Development Report. According to the FAA, the Andersen Report “details how the FAA’s new” cost accounting system (CAS) “determines the FAA’s costs of” providing “air traffic services” in the enroute and oceanic environments, and the Fee Development Report “details how, based on the CAS, the FAA determined

¹³ “Fees for FAA Services for Certain Flights,” 65 Fed. Reg. 36002 (June 6, 2000).

¹⁴ The Second Fee Schedule exempts “Canada-to-Canada” operations.

the cost of services provided to overflights based on the cost of enroute and oceanic services.” 65 Fed. Reg. at 36005. FAA states that “[e]ssentially, the overflight fee is computed based on distance flown through U.S.-controlled airspace,” with separate computations made for services provided in enroute airspace and in oceanic airspace to reflect the different costs of providing services in each of these environments.” *Id.*

FAA states that, based on the Fee Development Report, it will “charge users \$37.43 per 100 nautical miles (or portion thereof) flown in enroute airspace and \$20.16 per 100 nautical miles (or portion thereof) flown in oceanic airspace.” *Id.* FAA also advises that its “formula” for imposing fees “assumes that actual entry and exit data are available for individual flights in U.S.-controlled airspace. If not, best available flight data will be used.” *Id.*

The Second IFR establishes a deadline for submitting comments on the Second Fee Schedule of October 4, 2000. *Id.* However, more than two months before this deadline – August 1, 2000 -- FAA will begin to impose fees under the Second Fee Schedule. 65 Fed. Reg. 36002. FAA states that the Second Fee Schedule “will be reviewed when the Final Rule is issued and at least once every 2 years, and adjusted to reflect changes in costs.” *Id.* at 36005. FAA provides no timetable for when, if ever, a Final Rule will be issued.

PRELIMINARY OBJECTIONS AND COMMENTS

I. **FAA WAS NOT FREE TO DISREGARD THE APA'S REQUIREMENT OF PRIOR NOTICE AND COMMENT.**

By issuing its new fees as an “Interim Final Rule,” FAA has failed to comply with the prior notice and comment requirements of the APA. Because no exception to the APA applied to the Second Fee Schedule, it was clear error for FAA to disregard these requirements.

A. **The APA Requires Prior Notice and Comment Before a Rule Becomes Effective.**

Under the APA, before a government agency imposes a substantive rule it must issue a notice of *proposed* rulemaking in order to allow affected parties to participate in the rule making process *before* the rule becomes effective. *See* 5 U.S.C. § 553(b) (“[g]eneral notice of a proposed rule making shall be published in the Federal Register”). After the required notice has been provided, “the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments” 5 U.S.C. § 553(c).

Public participation in rule making is necessary to “allow the agency to benefit from the experience and input of the parties,” *National Tour Brokers Ass’n v. United States*, 591 F.2d 896, 902 (D.C. Cir. 1978), and to “enable[] the agency . . . to educate itself before establishing rules and procedures which have a substantial impact on those regulated,” *Texaco, Inc. v. FPC*, 412 F.2d 740, 744 (3rd Cir. 1969). The agency must not only allow parties to submit comments, it must also give “consideration [to] the relevant matter presented” in the comments it receives. 5 U.S.C. § 553(c); *see also* K. Davis,

Administrative Law Treatise, § 7.4, at 312 (3rd ed. 1993) (APA “compels an agency to receive and *consider* comments”) (emphasis added).

In *Wong Yang Sung v. McGrath*, 339 U.S. 33, 40-41 (1950), the Supreme Court stated that administrative agencies should be required to conform to the APA as much as possible:

The [APA] . . . represents a long period of study and strife; it settles long-continued and hard-fought conventions, and enacts a formula upon which opposing social and political forces have come to rest. In contains many compromises and generalities, and no doubt, some ambiguities. Experience may reveal defects. But it would be a disservice to our form of government and to the administrative process itself if the courts should fail, so far as the terms of the Act warrant, to give effect to its remedial purposes where the evils it was aimed at appear.

The APA is not satisfied by allowing affected parties to comment *after* the rule becomes effective. “[T]he fact that the regulations were *only interim ones* and that interested persons were given an opportunity to comment following their promulgation [does not] excuse the [agency’s] departure from [APA] procedures.” *Kollett v. Harris*, 619 F.2d 134, 145 (1st Cir. 1980). This is because the “purpose of prior notice and comment is to afford persons an opportunity to influence agency *action in the formulative stage, before implementation, when the agency is more likely to be receptive to argument.*” *Id.* (emphasis added). “Permitting the submission of views after the effective date is no substitute for the right of interested person to make their views known to the agency in time to influence the rule making process in a meaningful way.” *United States Steel Corp. v. EPA*, 595 F.2d 207, 214-15 (5th Cir. 1979) (citations omitted). It is because of the “psychological and bureaucratic realities of *post hoc* comments in rulemaking

[that] Congress specified that notice and an opportunity for comment are to *precede* rulemaking.” *New Jersey v. EPA*, 626 F.2d 1038, 1050 (D.C. Cir. 1980); *see also National Tour Brokers, supra*, 591 F.2d at 902 (questioning ability of agency to “maintain[] a flexible and open-minded attitude toward rules” after “put[ting] its credibility on the line” through issuance of a final rule); *see also Sharon Steel Corp. v. EPA*, 597 F.2d 377, 381 (3rd Cir. 1979) (“[a]fter the final rule is issued, the petitioner must come hat-in-hand and run the risk that the decision make is likely to resist change”).

B. The 1996 Act Only Directed the FAA to Use an Interim Final Rule for the “Initial” Fee Schedule in 1997.

Although Congress may direct an agency not to follow the APA’s requirements for prior notice and comment, such a directive *must be express*. Under 5 U.S.C. § 559, a “[s]ubsequent statute may not be held to supersede or modify” the APA’s requirements “except to the extent *that it does so expressly*.” (Emphasis added). *See Marcello v. Bonds*, 349 U.S. 302, 310 (1955); (Congress’ intention to supersede the APA must be clear); *Assoc. of Data Processing Serv. Orgs. v. Board of Governors*, 745 F.2d 677, 686 (D.C. Cir. 1984) (“the import of the § 559 instruction is that Congress’s *intent to make a substantive change be clear*”) (emphasis in original). In reviewing the Initial Fee Schedule, the D.C. Circuit acknowledged that prior decisions had “looked askance at agencies’ attempts to avoid the standard notice and comment procedures, holding that exceptions to § 553 must be ‘narrowly construed and only reluctantly countenanced’ in order to assure that ‘an agency’s decision will be informed and responsive.’” 134 F.3d at 397 (citation omitted). The court further reflected that Congress’ intent for the APA not to apply must “‘be clear.’” *Id.*

The heavy burden imposed by section 559 cannot be satisfied merely by reference to legislative history or perceived “Congressional acquiescence.” *Greenwich Collieries v. Director*, 990 F.2d 730, 736 n. 5 (3rd Cir. 1993), *aff’d*, 511 U.S. 1028 (1994); *Nichols v. Asbestos Workers Local 24 Pension Plan*, 835 F.2d 881, 896, n. 105 (D.C. Cir. 1987) (“rigorous standard” of section 559 not met where legislative history was of “uncertain import”). In addition, any exception to the APA created by Congress will be narrowly construed to carry out solely the expressly-stated directive of Congress. *See Rayford v. Bown*, 715 F. Supp. 1347, 1354-55 (W.D. La. 1989) (subsequent law created “an exception to the APA only insofar as is needed to ensure that” the express directive of Congress was carried out; “To give it any greater effect would frustrate the policy goals of the APA”).

In finding that the Initial Fee Schedule could be issued through an Interim Final Rule, the D.C. Circuit clearly was influenced by the exceptional circumstances faced by the FAA in 1997. The court specifically pointed to the fact that: 1) Congress had expressly directed FAA to “publish in the Federal Register an *initial* fee schedule and associated collection process as an interim final rule, pursuant to which public comment will be sought and a final rule issued”; and 2) Congress had expressed its desire that FAA collect \$100 million in overflight fees before the end of FY 1997. *See* 134 F.3d at 398 (“the statute contemplated that the IFR would be issued and implemented during fiscal 1997. Given that the Act was not passed until after the beginning of fiscal 1997, the agency had to move quickly to establish a fee schedule and collection process in order to fulfill this statutory goal.”) Had either of these critical factors not been present, the court may well have found that the rigorous requirements of the “express directive”

exception to the APA had not been met. Indeed, the D.C. Circuit surmised that the APA *would* apply *after* the Initial Fee Schedule was issued:

“Even though [the Act] does not establish a specific timetable for every step in the regulatory process, it plainly expresses a congressional intent to depart from normal APA procedures [with respect to the initial fee schedule]. The FAA followed that Congressional intent as far as it went. ***It is probably the case that once the FAA issued the [Initial Fee Schedule], the APA once again became controlling for all subsequent proceedings***, but that is not the question before us.”¹⁵

The circumstances surrounding the Second Fee Schedule are fundamentally different from those surrounding FAA’s issuance of the Initial Fee Schedule in 1997. Nowhere in the 1996 Act did Congress direct FAA to use an interim final rule for a second or other subsequent fee schedule. And, unlike in 1996, there is no express Congressional directive regarding the amount of fees to be collected in the current fiscal year. Although there has been a two and one-half year gap between the court’s vacating of the Initial Fee Schedule and FAA’s issuance of the Second Fee Schedule, this delay is attributable solely to the FAA. *See Housing Study Group v. Kemp*, 736 F. Supp. 321, 335 (D.D.C. 1990) (where Department of Housing and Urban Development had “been studying [the] problem for more than one and one-half years but no emergency action [had] appeared necessary to HUD until” it issued its Interim Final Rule, HUD failed to show “sufficient reason to stifle the public’s entitlement to full illumination and vigorous discourse provided through the normal notice and comment period required for all substantive rules of an agency”).

The fact that Congress directed FAA to issue the *Initial* Fee Schedule *in 1997* via an Interim Final Rule does not mean that Congress also expressly directed FAA to issue a

¹⁵ 134 F.3d at 398-99 (emphasis added).

second fee schedule by Interim Final Rule. As set forth above, there are critical differences between the situations confronting FAA in 1997 and now. In addition, almost four years have passed since the passage of the 1996 Act. Congress, when it enacted that law, could not have anticipated that the court would vacate the Initial Fee Schedule and that the FAA would wait an additional two and one-half years after the court ruling before it would issue a revised fee schedule. FAA apparently presumes that Congress would have wanted FAA to issue the current fee schedule by interim final rule. But it is certainly an equally plausible presumption that had Congress known that the court would vacate the Initial Fee Schedule, it would have wanted FAA to receive the benefit of informed comments before making any subsequent fee schedule effective. Where, as here, Congress has been silent as to how the FAA should proceed in the given circumstances, the “express directive” exception to the APA cannot apply.¹⁶

**D. FAA’s Failure to Comply with the APA is
Compounded by its Disregard of the ICAO Principles.**

In developing the new overflight fees in secrecy, and implementing the fees before considering and reacting to comments from interested parties, FAA also has acted contrary to the “ICAO Principles.”¹⁷ The ICAO Principles are long established standards, which the United States has championed, governing the conduct of nations in international aviation matters, including specifically the setting of air navigation charges.

¹⁶ To justify its decision to disregard the APA’s prior notice and comment requirements for the Second Fee Schedule, FAA asserts that that the 1996 Act “continues to require that the fees be promulgated by Interim Final Rule.” 65 Fed. Reg. at 36003. This is incorrect because, as set forth above, Congress did not expressly direct the FAA to issue the Second Fee Schedule without prior notice and comment. Nor does FAA fare better when it points to the May 25, 2000 letter from Representative John J. Duncan, Jr., Chairman of the House Aviation Subcommittee. 65 Fed. Reg. at 36003, 36004. The statement of a single Congressman nearly four years after Congress enacted the relevant statute cannot satisfy the requirement of 5 U.S.C. § 559 that Congressional intent to supersede the APA be “express.”

¹⁷ *Statements by the Council to Contracting States on Charges for Airports and Air Navigation Service*, ICAO Doc. 9082/5 (5th ed. 1997).

These Principles require signatory nations, prior to imposing user fees, to engage in “discussions between users and providers in an effort to reach general agreement on any proposed charges.” Paragraph 22(ii) of the Principles states that “[i]n any . . . imposition of new charges the airport users should, so far as is possible, be given the opportunity to submit their views to and consult with the airport operator or competent authority.” In addition, the “users should be provided with adequate financial information.” Paragraph 44 applies these requirements to “changes in air navigation services charges.”

The ICAO Principles recognize that the need for prior consultations with users is especially great with respect to fees charged for oceanic overflights:

The collection of air navigation services charges in cases where the aircraft does not fly over the provider State poses difficult and complex problems. It is for the States to find the appropriate kind of machinery on a bilateral or regional basis for meetings between provider States and those of the users, aiming to reach as much agreement as possible concerning the facilities and services provided, the charges to be levied and the methods of collecting these charges.

ICAO Principles, ¶ 43 (emphasis added).

FAA’s use of an Interim Final Rule promulgate the new fees blatantly disregards these fundamental precepts of international obligations and expectations, precepts that the U.S. government itself has championed as vital to respectful relations among cooperating nations.

II. UNDER THE METHODOLOGY OF THE SECOND FEE SCHEDULE, FAA’S FEES ARE NOT DIRECTLY RELATED TO THE COSTS TO PROVIDE SERVICES FOR OVERFLIGHTS.

A. The 1996 Act Requires that Each Fee be Directly Related to FAA’s Costs to Provide Services to Overflights.

Under the 1996 Act, the FAA must “ensure that each of the fees” imposed on overflying aircraft be “directly related to the Administration’s costs of providing the service rendered” to the overflying aircraft.¹⁸ The D.C. Circuit has emphasized that, under this directive, the Overflight Fees “must be established in such a way that *each flight pays* according to *the burden associated with servicing that flight.*” *Asiana Airlines et al. v. FAA*, 134 F.3d at 402 (emphasis added); *see also Air Transport Association of Canada v. FAA*, 156 F.3d at 1332 (FAA may not adopt a fee-methodology which “write[s] out of the statute the requirement that ‘each of the fees’ be ‘directly related’ to the cost of providing the service rendered”) (emphasis in original).

B. FAA’s Reliance on the Andersen Report Prevents it From Establishing Fees Based on its Actual Costs.

In setting the new overflight fees, FAA did not attempt to isolate and capture the actual costs incurred by FAA to provide services to overflights. Rather, FAA purported to look at its total costs to provide services in the enroute and oceanic environments, and to apply its formula for determining costs in those environments to the subset of overflights. *See* KPMG Report, at 2. The most obvious problem with this methodology is that it is based, *inter alia*, on the assumption made by FAA that “the level of ATC services are . . . identical for all aircraft operations within a particular environment (i.e.,

¹⁸ 49 U.S.C. § 45301(b)(1)(B).

enroute or oceanic)” Fee Development Report at 7. FAA makes this assumption throughout its Fee Development Report. *See id.* at 3, 7-9.

This assumption appears untenable. Common sense and reality indicate that FAA expends greater resources to provide Service to “transitional” flights which takeoff and/or land in the United States and are thereby “transitioning” at some point(s) between i) high-altitude cruising level and ii) “hand-off” to and/or from a FAA control tower at a U.S. airport. There is certainly no evidence in the overflight fee docket to support FAA’s “assumption” that overflights and transitional flights use the same level of ATC Services. By mixing overflights with transitional flights, FAA has failed to ensure that overflying aircraft are paying fees based solely on “the *burden associated with servicing that flight.*”¹⁹

FAA’s reliance on the Andersen Report to support its fee methodology also appears inadequate because, not only did Arthur Andersen not look specifically at the overflight fee issue, its report was limited to consideration of FAA’s cost accounting system for only two out of for cost areas in a single LOB of FAA. Specifically, the Andersen Report deals solely with the enroute and oceanic environments within the ATS LOB. There is no indication that the FAA has developed a cost allocation methodology for the enroute and oceanic environments which is consistent with the cost allocations used for FAA’s terminal and flight services environments within the ATS LOB, or with respect to the other LOBs within FAA. Thus, at a minimum, the Andersen Report lacks sufficient scope to support the methodology used by FAA to set its overflight fees.

¹⁹FAA also improperly assumes that FAA’s costs to provide Service to overflights in the oceanic environment are the same in all geographic areas within U.S. controlled airspace. Labor charges for oceanic Service primarily reflect staffing in four facilities: New York, Oakland, Houston and Anchorage. FAA improperly assumes, without justification, that labor rates are identical in each facility.

C. FAA Has Made Several Other Erroneous Assumptions and Allocations.

As detailed in the KPMG Report, FAA's methodology for setting overflight fees in the Second Fee Schedule is infected by a host of assumptions that are at best, unsubstantiated, but more often than not simply erroneous. Based on the KPMG Report, it appears that FAA, *inter alia*, may have **improperly**:

- included in the "Full Cost of Enroute and Oceanic Services" approximately \$773 million of "AF Expensed F&E Labor/Non-Labor," "ARA Expensed F&E Labor/Non-Labor," and "ATS RE&D Expensed Labor/Non-Labor" in the Capital Investment category;
- assumed that SDP labor costs are an adequate basis for allocating non-labor costs and workers compensation claims costs;
- assumed that "staffing standards" accurately reflect the allocation of actual labor costs of field labor in the System Support Center and System Management Office;
- assumed that the ratio of Oceanic sectors to total sectors is an appropriate basis to determine Oceanic vs. Enroute costs for AF services and systems implementation costs;
- disregarded the costs associated with flights transitioning between Enroute and Oceanic airspace;
- overstated costs directly related to providing ATC Services to overflights;
- assumed that the level of ATC Services is identical for all aircraft operations within a particular environment (i.e., enroute or oceanic);
- assumed that the level of services provided to each flight is the same regardless of the level of congestion of the airspace transited by the flight;
- assumed that the level of services provided to each flight is the same on a per-mile basis regardless of the number of sectors transited by the flight;
- ignored the true nature of costs incurred by the FAA when a flight is handed off from one sector to another; and
- assumed that billing and collection charges are appropriately assessed on a per-mile basis.²⁰

²⁰ KPMG Report, at 6-16.

D. FAA's Most Recent Pronouncement of its "Costs" Must Be Contrasted with Other Recent Statements of its "Costs" for Overflights.

Although the Fee Development Report asserts that FAA incurs costs of approximately \$48.7 million for overflights, the credibility of this figure is challenged by the various discrepant pronouncements FAA has made regarding its purported "costs" to provide ATC Services for overflights. Over the past three years, FAA has stated that its annual "costs" for overflights were \$12.6 million,²¹ \$32 million,²² and \$22 million.²³ These widely disparate cost characterizations can only serve to impeach the credibility of FAA's latest cost figure. At a minimum, FAA needs to explain why the \$48.7 million figure is any more accurate than these other figures.

E. FAA May Have Once Again Based the Fees on "Value."

According to the Andersen Report, a "guiding principle" of the FAA in setting up its cost accounting system has been to "[p]lace costs into homogeneous pools reflecting distinct services provided to groups of users, *preserving opportunities for the FAA to approach user fee pricing from a wide spectrum of policy choices.*" Andersen Report at iii-iv (emphasis added). The "principle" of setting fees based on "policy choices" is inherently incompatible with a fee-setting methodology that bases the fees solely on the costs of providing the services being rendered. To the extent that the overflight fees in

²¹GRA Report, at 46, 53-54.

²² Memorandum from John L. Meche, Deputy Assistant Inspector General for Financial and Information Technology, U.S. Department of Transportation (Dec. 17, 1999).

²³ House Report 106-622, "Department of Transportation and Related Agencies Appropriations Bill, 2001," May 17, 2000 ("The FAA estimates that \$22,100,000 in overflight user fees will be collected during fiscal year 2001").

the Second Fee Schedule were calculated to enable FAA to “preserve opportunities . . . to approach user fee pricing from a wide spectrum of policy choices,” the fees violate the requirement that they be directly related to cost.

F. FAA Appears to be Seeking to Recover More than the Level of Costs that Congress Intended to be Allocated to Overflights.

Congress’ intent behind the 1996 Act was to ensure that overflights compensate FAA for the services provided by FAA. There is no indication that Congress specifically intended for overflights to pay for services that were already being provided to aircraft which take off or land in the United States. However, FAA’s fee methodology does not limit the overflight fees to the additional costs that FAA incurs to provide ATC Services directly related to overflights.²⁴ See KPMG Report, at 12-13.

G. FAA Has Failed to Disclose Critical Information Regarding its Fee-Setting Methodology.

Not only has FAA made a number of errors in its methodology, as described above, but equally problematic is that FAA has failed to provide an adequate explanation of critical assumptions and calculations by which it derived the fees. The KPMG Report lists the numerous categories of information that FAA has failed to provide to affected carriers. According to KPMG, FAA has failed to disclose or otherwise provide, *inter alia*:

1. a complete explanation as to how the total pool of FAA costs was derived;
2. information showing how the total pool of FAA costs was allocated across all FAA services;

²⁴ Although the D.C. Circuit has suggested that FAA can allocate to overflights some of the “fixed costs” incurred by FAA, such costs should be limited to those associated with providing services directly to overflights.

3. any explanation of the justification for including large amounts of expensed, rather than capitalized, system implementation and capital acquisition costs in the cost pool to be allocated;
4. a discussion of the activities associated with each cost center that would permit evaluation of the reliability of the cost assignments to the four ATC service environments;
5. information on the total pool of costs associated with each cost element, and the allocation of those cost elements across the four services;
6. any information supporting the assumption that the costs associated with each facility are uniquely related to a specific SDP;
7. any information supporting the assumption that all labor costs in an SDP that provides enroute and/or oceanic services are actually directly related to the provision of enroute and/or oceanic services;
8. adequate information on the allocation of telecommunications costs.;
9. historical data regarding workers' compensation claims to determine the nature of their distribution between the services;
10. sufficient information to determine the validity of the statistical study used to establish the ratios of Enroute to Oceanic on-position time;
11. sufficient information to determine the reasonableness of the use of a single set of on-position time ratios to allocate a broad spectrum of costs between the Enroute and Oceanic environments;
12. information regarding allocation of internal FAA telecommunications costs to the Oceanic service;
13. sufficient information to judge the reasonableness of the allocations of capital investment costs based on project or program coding, and the assumptions made in making such allocations;
14. satisfactory documentation of percentages used to allocate certain individual cost elements, such as Contract Maintenance;
15. any derivation of the amount of overhead costs it purports to have removed;
16. any information concerning the principles used to determine what types of costs are included in overhead;

17. an activity analysis associated with overflights in both the enroute and oceanic environments along with a cost driver analysis indicating how best to allocate costs to each activity;
18. information on cost differences between SDPs, or an explanation of the reason why costs were not allocated between overflights and U.S. originating/terminating flights at individual SDPs in order to capture differences in costs in different portions of U.S. airspace;
19. any explanation of why the extensive flight data available was not used to determine a reliable allocation of costs, despite the statement in the Andersen Report that “automation systems readily track events related to [ATS] services”; and
20. any analysis of the costs associated with billing and collection of overflight fees, or any discussion of the rationale for charging such fees on a per-mile basis.²⁵

FAA’s failure to disclose such critical information and data improperly deprives the affected air carriers from having the genuine ability to understand and verify the methodologies, assumptions, allocations and conclusions used or reached by FAA in setting the overflight fees. *See Central and Southern Motor Freight Tariff Ass’n v. United States*, 777 F.2d 722, 739 (D.C. Cir. 1985) (“[t]o avoid the pitfall of arbitrariness . . . the [agency] is obligated to set forth a more thorough and reasoned explanation of the . . . costs”). In *Connecticut Light & Power Co. v. NRC*, 673 F.2d 525, 530-31 (D.C. Cir.), *cert. Denied*, 459 U.S. 835 (1982), the D.C. Circuit made clear:

To allow an agency to play hunt the peanut with technical information, hiding or disguising the information that it employs, is to condone a practice in which the agency treats what should be a genuine interchange as mere bureaucratic sport. An agency commits serious procedural error when it fails to reveal portions of the technical basis for a proposed rule in time to allow for meaningful commentary.

²⁵ KPMG Report, at 6-16.

See also Portland Cement Ass'n v. Ruckelhaus, 486 F.2d 375, 393 (D.C. Cir. 1973), *cert. denied*, 417 U.S. 921 (1974) (“[i]t is not consonant with the purpose of a rule-making proceeding to promulgate rules on the basis of inadequate data, or on data that, [to a] critical degree, is known only to the agency”).

RELIEF REQUESTED

For the foregoing reasons, ATAC requests that FAA (1) withdraw the Interim Final Rule before its fees become effective, and (2) issue a Notice of Proposed Rulemaking in compliance with the FAA to develop any new fees, and (3) otherwise follow procedures to ensure that the fees are developed with full involvement of affected parties and are directly related to FAA’s costs of providing overflight services.

Respectfully submitted,

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