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BEFORE THE  
FEDERAL AVIATION ADMINISTRATION  
WASHINGTON, D.C.

In the Matter of	:	
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FEES FOR FAA SERVICES	:	Docket No. FAA-00-7018-28
FOR CERTAIN FLIGHTS	:	
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STATEMENT OF  
LTU LUFFTRANSPORT-UNTERNEHMEN GmbH. (LTU)

FREDERICK S. HIRD, JR.  
Suite 280  
1850 M Street, N.W.  
Washington, D.C. 20036  
(202) 778-0878

Attorney for LTU LUFFTRANSPORT-  
UNTERNEHMEN GmbH.

June 29, 2000

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FEDERAL AVIATION ADMINISTRATION  
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STATEMENT OF  
LTU LUFTTRANSPORT-UNTERNEHMEN GmbH. (LTU)

I am Frederick S. Hird, Jr., attorney for LTU, also known as LTU International Airways. LTU asks that the Interim Final Rule published June 6, 2000 be suspended, stayed or withdrawn pending completion of proper procedures and a proper cost allocation. As published the new Interim Final Rule is plainly not in compliance with the applicable law.

LTU, a scheduled German air carrier, was a party to the appeal of the 1997 Interim Final Rule. LTU operates 30 to 40 roundtrip flights per week, depending on the season, between Germany and the Caribbean and Mexico, each of which will be affected by the fees set in the new Interim Final Rule. All operate in "oceanic" air space as defined in the new rule, and several also use "en route" air space. Thus LTU will operate 3,000 to 4,000 one-way "oceanic" flights in the next twelve months. This is more than twice the affected operations LTU had when the 1997 overflight fees were adopted.

Using the Amsterdam-Montego Bay example in the preamble to the Interim Final Rule, LTU will be liable for more than \$1,000,000 in overflight fees per year. It appears the fees set in the Interim Final Rule are at least twice what can be justified by directly related costs. Thus LTU is aggrieved by the improper establishment of the new overflight fees.

There are at least three problems associated with the new Interim Final Rule. One is the failure of the FAA to honor international obligations for prior consultations with the other governments affected, as to which Germany and 22 other major countries have submitted a formal protest. Another is the failure to use normal notice and comment procedures to develop a rule which would conform to the applicable law. The third is the failure of the Interim Final Rule to comply with the congressional and judicial requirements that overflight fees be directly related to the costs of the services provided. I want to address myself to the costing problem.

1. The Fees Must Be Directly Related to Costs.

The authorizing statute provides:

. . . In establishing fees . . . the Administrator shall ensure that each of the fees . . . is directly related to the Administration's costs of providing the service rendered. Services for which costs may be recovered 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 (emphasis added). "[P]roviding the service rendered", "Services provided . . . to flights", these words make it clear that Congress meant the actual FAA control and protection of the specific flights operated. Period. This should be clear on its face.

Furthermore, this statute has already been interpreted by the Court of Appeals for the District of Columbia Circuit. In its opinion on the appeal of the first overflight fee Interim Final Rule, that Court said: "Statutory language requiring that 'each' fee be 'directly related to . . . the costs of providing the service rendered' expresses a clear congressional intent that fees must be established in such a way that each flight pays according to the burden associated with servicing that flight." Asiana Airlines v. FAA, 134 F.3d 393, 402 (1998). When the court says "the burden associated with servicing that flight", again it is clear that the services actually provided are the focus for the fee.

While the Court of Appeals added that "There may be methods to reasonably determine an appropriate fraction of the FAA's fixed costs to assign to each overflight", it did so in the context of determining "the burdens imposed by individual flights". Ibid. at 402-03. There is no doubt that it is the cost of servicing each flight that Congress and the court have directed the FAA to determine.

2. The Fees Are Not Directly Related to the Costs of Servicing the Flights.

In the Interim Final Rule, the FAA has included many costs not associated with the burden of servicing each flight. Many of these are unexplained. The most dramatic example of improperly included costs, however, is discernible from the materials provided. Table 1 of the FAA document "Overflight Fee Development Report" shows that one-third of the oceanic fees and one-quarter of the en route fees are to cover "ARA Expensed F&E Labor/Non-Labor". In Table A1 in Appendix A to that document (p. 21), this is defined as "All expensed costs (labor, non-labor and overhead) incurred by ARA organizations necessary to complete NAS modernization programs." "ARA" and "NAS" are not identified in this document, but in the "Acronym List" at page F-1 of Costing Methodology Report, prepared by Arthur Andersen, "ARA" is identified as "Office of the Associate Administrator for Research and Acquisitions", and "NAS" is the "National Airspace System".

Thus one-third of oceanic costs and fees, and one-quarter of en route costs and fees, are not for operations at all, but for research and new equipment. Is this research applicable to overflights? Is this new equipment used for overflights? Should this be expensed rather than capitalized? Are oceanic flights even a part of the National Airspace System? And what does research have to do with the actual

costs of handling a flight? There is no way to tell, and it all seems highly unlikely.

The only explanation the FAA has given for inclusion of these costs, again a full one-third and one-quarter of the respective fees, is in Table A1 of Appendix A to the Overflight Fee Development Report. There it says (at p. 21) "Capital projects serve to modernize the NAS enabling the continued provision of a specific service." That is all. Modernization sounds like a noble goal, and we all know the FAA has had great difficulty and great expense in connection with the modernization of its system. But there must be something more than that to justify the claim that research and new equipment acquisition are "directly related" to specific overflight operations, and that these should make up one-third or one-quarter of the "directly related" costs. These are not the kind of operational expenses authorized for recovery by Congress or contemplated by the Court of Appeals.

3. The Effect of the Failure of the FAA to Limit Overflight Fees to Overflight Costs.

As the research and acquisition example shows, the FAA has failed to limit the costs charged to overflying carriers as required by Congress and the Court of Appeals. That renders the fees invalid as contrary to the applicable law. How did this come about?

There may be many answers, but one might be found in the fact that the preamble to the new Interim Final Rule misstates the holding on the appeal of the first Interim Final Rule. The preamble says "the court concluded that the FAA's methodology of determining cost violated statutory requirements." 65 Fed. Reg. 36003, col. 3. The court said no such thing. The court in that case did not even consider the FAA's methodology of determining costs. That may be this case. The previous case was an allocation case. The court actually held that, whatever the FAA's costs, it had acted improperly in allocating them according to value, under a statute that provided that fees must be "directly related" to costs.

Thus it appears the new rule is based on a misunderstanding of the Court of Appeals decision. In any event, the significance of the words "directly related" simply is not considered in the new Interim Final Rule. While the words "directly related" are recited in the preamble and the Overflight Fee Development Report, these words are never interpreted nor explained. It seems the FAA does not accept the "directly related" language, either as used by Congress or by the Court of Appeals.

Congress put the requirement that fees be "directly related" to costs in a sub-section of the statute called "Limitations". Perhaps the FAA thinks the use of "directly related" is micromanaging by Congress, which can be ignored. It is not, and it cannot be.

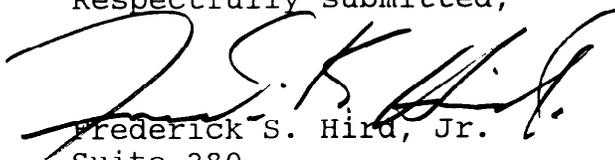
If user fees are not related to costs, they are no longer user fees. They become taxes. Perhaps the FAA would like to have the power to levy taxes. But Congress has not given the FAA that power. However much the FAA might like to make a profit on its overflight fees, for the benefit of other programs, that is exactly what Congress has said it cannot do. Overflight fees must be "directly related" to the costs of the actual service provided. Thus there is good reason to reconsider the costing behind the new Interim Final Rule.

#### Conclusion

LTU asks that the FAA suspend, stay or withdraw the Interim Final Rule until it has conformed its determination of the overflight fees to the congressional and court requirements. There are two time-tested and legally favored procedures to determine the proper costing: a notice of proposed rulemaking and diplomatic consultations. The best time to make fees directly related to actual costs is before they go into effect. The best method is open discussion. LTU

stands ready to participate with the FAA, other carriers and the affected national governments in such discussions.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'F. S. Hird, Jr.', written over the typed name.

Frederick S. Hird, Jr.  
Suite 280  
1850 M Street, N.W.  
Washington, D.C. 20036  
(202) 778-0878

Attorney for LTU LUFTRANSPORT-  
UNTERNEHMEN GmbH.

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