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AT THE JUNE 29, 2000 PUBLIC MEETING
CONCERNING FEES FOR AIR TRAFFIC SERVICES
FOR CERTAIN FLIGHTS THROUGH U.S.-CONTROLLED AIRSPACE
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On behalf of British Airways I would like to thank the FAA and this panel for the opportunity to express our views regarding the Interim Final Rule imposing overflight charges for commercial flights through U.S. controlled airspace. Although I appreciate the opportunity to speak and despite the fact that I always enjoy visiting Washington, I am disappointed that it is necessary to be here at all. A little more than three years ago my former colleague Helen Cahill represented British Airways before a similar panel. Helen is here today on behalf of her current employer Air New Zealand and I apologize to her and to others who were here three years ago if my comments sound familiar. Unfortunately, issuance of the June 6 IFR makes it necessary to repeat many of the concerns discussed by Helen and other airlines three years ago.

At the outset, and as we explained in 1997, British Airways appreciates the Air Traffic Services provided to flights through U.S. domestic airspace and U.S. controlled international airspace. We also accept our responsibility to pay our fair share of the costs of providing those services.

However, the FAA must accept its responsibility to provide meaningful consultation opportunities before imposing overflight fees or other user charges. As pleasant as it may be for me to be here today, this public meeting is not a meaningful consultation.

We do not always agree with the views held by U.S. carriers. However there is no disagreement on this issue. In comments submitted to the FAA on July 17, 1997 the Air Transportation Association of America stated, and I quote:

Although we appreciate the May 1st public meeting that the FAA had on this subject, that meeting occurred after the development of the interim fee schedule and therefore is not what persons involved in international aviation matters would characterize as a satisfactory consultative step.

As recognized by ATA, consultations must take place before fees are developed. The June 6 IFR promulgated specified fees. Because those fees already have been developed, this meeting cannot be considered to constitute a consultation.

Consultations serve a valuable function. When conducted properly, they afford airlines the opportunity to evaluate the data documenting the costs that the applicable overflight charges are intended to cover, to have any questions answered and, most significantly, to collaborate with the charging authority to influence the determination of charges prior to finalization of those charges. A successful consultation will achieve consensus regarding (1) the level of charges required to accurately reflect the cost of providing the applicable services and (2) how those costs should be allocated among different users. At the conclusion of the consultation process, users will have had all their questions answered and have no basis for challenging the specific fee levels developed pursuant to that process.

The requirement that the competent charging authorities provide meaningful consultation

opportunities for developing user charges is reinforced by the Air Services Agreement between the United States and the United Kingdom. Article 10 of the Agreement specifies that:

Each Contracting Party shall encourage the competent charging authorities to provide users with reasonable notice of any proposals for changes in user charges to enable users to express their views before changes are made.

In this instance, where the Contracting Party is the United States Government and the competent charging authority is an agency of that government, the term "encourage" reasonably can be considered to be synonymous with ensure. The June 6 IFR included an already established overflight fee schedule. That schedule was developed without providing the airlines any opportunity to express their views. Under these circumstances, implementation of the IFR fee schedule on August 1 would constitute a violation of the U.S.-U.K. Air Services Agreement. As demonstrated by the demarche jointly submitted to the State Department by the Embassy of the United Kingdom and the embassies of twenty one other nations as well as the Commission of the European Union. It also would violate U.S. obligations imposed by bilateral agreements with numerous other nations including those which have signed the U.S. Open Skies Model Agreement, which contains the same language stated in Article 10 of the U.S.-U.K. Air Services Agreement.

The IFR states that:

The FAA has reviewed the corresponding ICAO Standards and Recommended Practices and has identified no differences with these regulations.

That statement is significant more for what it omits than for what it includes. It ignores the ICAO document most pertinent to the issues before us today. That document, is ICAO Document

9082/5 “Statements by the Council to Contracting States on Charges for Airports and Air Navigation Services.” Paragraph 22 of Document 9082/5 states that:

The Council recognizes the desirability of consultation with airport users before significant changes in charging systems or levels of charges are introduced, it being understood that the purpose of consultation is to ensure that the provider gives consideration to the views of users and the effect the charges will have on them; that consultation implies discussions between users and providers in an effort to reach general agreement on any proposed charges....

Paragraph 44 of Document 9082/5 states that:

The principles enunciated with respect to consultation concerning changes in airport charges in paragraph 22 are applicable also to changes in air navigation services charges, but in the latter case a need may also exist for more specific consultation between providers and airlines since air navigation services are generally provided by governments and it will therefore be easier to obtain a consultative opinion concerning their charges than in the case of airport charges where a number of conflicting interest may arise.

As stated in paragraph 22 of ICAO Document 9082/5, which I quoted a moment ago, “the purpose of consultation is to ensure that the provider give consideration to the views of users and the effect the charges will have on them.” Absent extraordinary powers of divination, the FAA could not have considered our views because we were provided with no meaningful opportunity to present them.

The ability to provide meaningful comments requires transparency -- that is allowing users to review the cost justification for proposed charges and have information adequate to enable the users to review the reasonableness of the proposed charges prior to promulgation of the charges. The June 6 IFR violated that requirement as well. No specific cost data was provided until issuance of the IFR by which time the fee schedule already had been developed.

We recognize that the rule issued on June 6 is characterized as interim. That characterization does not obviate the consultation and transparency requirements I have just discussed. Unfortunately, the rule is also characterized as final and the fees established by the IFR become effective August 1, even before the comment period closes. Even if the IFR contained an irrevocable commitment to adjust the fees retroactively following FAA consideration of comments submitted today and of the additional comments that will be submitted before the October 4 comment deadline, that commitment would not substitute for meaningful consultation opportunities. Such procedures would not be adequate because they would not allow the affected users to participate in the initial development of the fees they are being asked to pay.

Although I have some experience regarding overflight fees and the international consultation process, I do not claim any expertise regarding U.S. administrative law. However, I have been advised that the U.S. Administrative Procedures Act generally requires that affected parties be provided advanced notice and an opportunity to comment before finalization of the rule in question. I strongly suspect that any U.S. government agency that attempted to justify suspension of the notice and comment procedures required by the Administrative Procedures Act by explaining that notice and comment was not required because the agency would retroactively respond to comments at a later date would be faced with howls of outrage from individuals and entities affected by the rule. The FAA should not expect any less from foreign airlines.

I also note the assertion in the June 6 IFR that the 1996 statutory directive to proceed by interim final rule procedures remains in effect. As the FAA is aware, British Airways legal

advisers question that conclusion. Moreover, the 1996 legislation does not direct the FAA to forego traditional consultation procedures nor to otherwise ignore U.S. bilateral and multilateral consultation commitments.

I previously quoted from comments submitted by the Air Transport Association in connection with the overflight fees imposed in 1997. Those comments also noted that U.S. airlines are sensitive to consultative processes because the U.S. airlines “do not want to be placed in the position of advocating the indispensability of appropriate consultative opportunities and receiving the response that our government has not adhered to that principle.” That concern is well stated.

The European Organization for the Safety of Air Navigation (Eurocontrol) , NavCanada, and similar agencies throughout the world afford airlines the opportunity to evaluate the data documenting the costs that the applicable overflight charges are intended to cover, to provide their views prior to finalization of specific charges, and most significantly, to influence the determination of those charges. To a significant extent, the widespread international employment of consultation procedures reflects longstanding U.S. government insistence that U.S. airlines be afforded the protections provided by those procedures. The large U.S. land mass and the vast oceanic airspace controlled by the United States means that many airlines and international flights will be affected by U.S. overflight charges. Moreover, due to the United States leading role in aviation matters, its example may be followed by other nations. Accordingly, U.S. failure to comply with established consultation procedures could encourage other nations to follow suit,

thereby disrupting and possibly destroying the cooperative processes that currently enable the international airline industry and national governments to develop mutually acceptable overflight charges.

The IFR specifically solicits comments on the fee schedule, formulas used to determine the cost per unit, the associated collection process, and the scope of services for which costs will be recovered. We are still reviewing the data provided in the docket and anticipate being able to provide more substantive comments on some or all of these issues before the October 4 deadline. Based on our initial review we already have concerns regarding several key issues. These include fundamental questions regarding the FAA's decision to expense rather than capitalize certain costs regarding the allocation of certain costs among the various services provided.

It may be that the FAA will be able to answer our questions. Although that would be helpful it would not fully resolve the problem. The crux of the problem is that we should not have these types of questions at this stage of the process. Had the airlines been provided with meaningful consultation opportunities we would have been able to ask our questions and obtain answers before development of the fee schedule.

Implementation of customary consultation procedures would serve two purposes. First, greater participation by the industry could enhance the accuracy of the cost allocation process and better ensure that final overflight charges reflect equitable cost allocations. Second, it would confirm U.S. adherence to the ICAO mandated consultation procedures thereby avoiding the risk

that other countries would follow the U.S. example to the detriment of existing cooperative and mutually beneficial consultation procedures.

I would have preferred to have made more substantive comments here today. I can state unequivocally that British Airways lauds FAA's abandonment of Ramsey Pricing and supports its effort to develop a true cost-based charging system. Sadly, these efforts have fallen short of our expectations. In the time we have had to study the IFR, we have only been able to make surface judgments about the adequacy of the FAA's proposed methodology. Even with this cursory review, several troublesome issues have presented themselves.

In particular we challenge the assumption that the FAA incurs "identical" levels of costs to provide ATC Services for overflights as for aircraft that take off from or land in the United States. This defies common sense. Whilst overflights enter the U.S. system at a high cruising altitude, flights originating in the U.S. enter enroute airspace at a relatively low altitude level as they are "handed off" from the terminal environment. The U.S. originating flights then climb to cruising altitude while they are within enroute sectors. Similarly, flights that terminate in the United States must descend in altitude before being handed off to the terminal environment. For each enroute flight that takes off in or lands in the United States (and the vast majority of enroute flights do both), the FAA must expend considerable labor and other resources to assist in the transition of that flight between the varying altitude levels. By contrast, no similar service is provided to overflights, which generally maintain a high cruising altitude throughout their time in U.S.-controlled airspace. FAA's methodology completely disregards this critical distinction between

the level of ATC Services provided to overflights and non-overflights.

We also have a number of reservations regarding the way the FAA has calculated total costs of ATC provision. Conventionally, R & D costs should be capitalized and depreciated over a pre-determined period and that period would commence when the associated project produced operational benefit. This does not seem to be the case here.

We also require greater clarity regarding how the FAA has calculated the exclusion of overheads from the overflight charges. We would further ask the FAA to provide a more precise definition of flights and how data on flights and miles were gathered. There are a number of other areas of concern which we would hope to resolve through consultation. We intend to address those concerns in subsequent comments.

It still is not too late to remedy this situation. To that end British Airways respectfully requests that the FAA withdraw the June 6 interim final rule and defer imposition of overflight charges pending implementation of the internationally accepted consultation procedure. That approach is best calculated to develop overflight charges which will both compensate the FAA for its justifiable costs and comply with applicable legal, bilateral and multilateral requirements.

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