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**BEFORE THE
FEDERAL AVIATION ADMINISTRATION
DEPARTMENT OF TRANSPORTATION
WASHINGTON, D.C.**

DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
JUL -7 2000 11:25

**In the Matter of Fees for FAA Services :
for Certain Flights :**

Docket FAA-00-7018 - 41

**REMARKS OF HELEN CAHILL OF
AIR NEW ZEALAND LIMITED
AT PUBLIC MEETING**

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REMARKS OF AIR NEW ZEALAND LIMITED

Helen Cahill

Good morning, members of the panel, ladies and gentlemen. My name is Helen Cahill, of Air New Zealand, based in Auckland, New Zealand, where I work as the Operational Charges Manager. I would like to offer some preliminary remarks on the Interim Final Rule setting overflight fees. Air New Zealand has a keen interest in the Interim Final Rule because the company crosses U.S.-controlled airspace in the Pacific en route to points in Asia. I thank you for the opportunity to speak, but must say that Air New Zealand is dismayed to find itself in the same position that it was in three years ago when both my manager Vince Dennehy and myself, working at that time for British Airways, appeared at another public meeting on overflight fees. Sadly, once again, I am here today to comment, after the fact, on a rule that has already been issued.

In its March letter to us, the FAA advised that "...the Interim Final Rule process is not the customary rulemaking approach used by the FAA." In fact, U.S. administrative law requires that interested parties receive an opportunity to be heard before a rule is put into place. Notice and comment procedures give the parties an opportunity to educate and influence the agency before it reaches a conclusion. The APA does not contemplate that parties will have the burden of changing the FAA's mind after the fact.

We request the FAA to withdraw the Interim Final Rule and to issue it as a Notice of Proposed Rulemaking. Whilst there might have been some justification in bypassing the APA by using an interim final rule in 1997, it defies credibility to suggest that there is a continuing justification three years later in applying the same peremptory process, when the FAA has spent over two years developing a cost-accounting system to support its fee schedule. It is still making changes in its analysis to meet recommendations of the Inspector General.

While the Court of Appeals for the District of Columbia upheld in 1998 the right of the FAA to use an interim final rule rather than the APA notice and comment procedures, it stated that "it is probably the case that once the FAA issued the IFR, the APA once again became controlling for all subsequent proceedings, but that is not the question before us." Asiana v. FAA, 134 F3d 393,398 (D.C. Circuit 1998). To suggest that the same urgency exists today as was mandated by Congress some three years ago is somewhat tenuous.

Assuring us that our comments will be taken into account before a "final final" rule is issued is small comfort. A "final final" rule may not be issued for years, whilst we will continue to pay fees in the meantime.

The system of user charges around the world hinges on transparency and acceptance. We believe that the United States is creating a dangerous precedent by setting fees in such a peremptory way. We believe that it is not only circumventing the notice and comment

provisions of the APA, but that it is flying in the face of international practice and its own bilateral obligations, which call for consultations before fees go into effect.

New Zealand was one of many countries in the Aviation Assembly this spring to urge the FAA to hold consultations before it issued the overflight fees.

The Interim Final Rule cites ICAO's guidelines for navigation charges ("ICAO Document 9082") as justification for charging user fees. The same document specifically calls for consultations as does the open skies agreement between New Zealand and the United States. Document 9082 specifically calls for consultations to allow the parties to attempt to reach a general agreement on charges and at a minimum to have sufficient information to gauge the fairness of the charges prior to their imposition. The New Zealand-U.S. open skies agreement requires the parties to encourage consultations on user charges, including exchanges of information sufficient to gauge the reasonableness of changes and sufficient notice of changes to permit users to express their views "before the changes are made." Surely the intent of this intergovernmental agreement was not an ex post facto review.

Circumventing procedures that ensure transparency and acceptance can only lead to distrust, discord and delay. It is probably the case that overflight fees could have been imposed sooner, if there had been a proper rulemaking and consultation process in 1997.

This may sound repetitious, but we appear to be in the same position today that we were in at the hearing three years ago in yet another way. Looking back through the transcript of my manager, Vince Dennehy, at that last FAA hearing, I note that he made then the same comment as I will make now. We have not had the time to analyze the supporting data for the fees and the information that has been provided has in any even been inadequate to conduct any detailed analysis. Air New Zealand is ready to pick up its fair share of the pure overflight costs. But we cannot determine if the fees are directly related to cost as required by the statute. We lack sufficient data to evaluate the allocation of costs between overflight costs and other FAA costs, between oceanic and enroute costs, and between overflight and non-overflight costs.

The FAA's report makes a number of assumptions without any explanations.

For example, the Interim Final Rule assumes that oceanic overflight costs for foreign carriers are identical to oceanic costs for U.S. originating/terminating flights and en route overflight costs for foreign carriers are identical to en route costs for U.S. originating/terminating flights. Yet such foreign flights are predominately operated at cruising altitudes and do not require the transitional intervention that U.S. originating/terminating flights require. Can you explain the basis for this assumption?

The report also assumes that the cost of providing overflight services is the same at each location, without taking airspace complexity into account. Can you tell us if any location-specific pricing analysis was undertaken?

Whilst we do not have sufficient information at this point to form a conclusion as to the appropriateness of the proposed charging structures, it is concerning that there is no evidence to substantiate some widely drawn assumptions used by the FAA to underpin its costing methodology.

For example, as to labor costs, we are not told how many people actually work on oceanic services by location, how many hours they work on oceanic services, what their positions and salaries are or what the optimal staffing numbers are for each position.

The Inspector General recommended that the FAA update its labor standards to better estimate labor costs and establish a labor distribution system to capture costs for the air traffic controller and airway facilities workforce. At present the FAA has established labor costs by relying on staffing standards rather than actual labor costs. The FAA estimated that it would respond to the Inspector General's suggestion by June 30, which is tomorrow. Can you tell us when this will be accomplished?

In the Overflight Fee Development Report, the FAA states that U.S.-controlled airspace activity is not the sum of the flights across the en route and oceanic environments as some flights transit both environments and summing flights across these environments would result in double counting. It isn't clear where such costs now sit. Furthermore, there are costs entailed in "transitioning" between oceanic and en route services. It is not clear where these transitional costs are allocated. Could you explain whether they are in the en route or oceanic cost pool?

The Inspector General suggested that depreciation be included in the cost accounting system. Could you explain what assets the FAA is depreciating and the depreciation policies adopted? Furthermore, a significant amount of capital expenditure appears to be current year expensed rather than capitalized and subsequently depreciated over the assets' lives.

On another note, in the absence of financial data proving the contrary, we are concerned that the fees might be applied in a discriminatory fashion, because Canada-to-Canada flights are exempt from the overflight fees, with \$10.8 million in respect of services in that area being carved out of the "overflights" cost base. Article 15 of the Chicago Convention requires that "...uniform conditions shall apply to the use, by aircraft of every contracting state, of all air navigation facilities ... which may be provided for public use for the safety and expedition of air navigation." ICAO Document 9082 likewise requires that "the system of charges must be non-discriminatory ...between two or more foreign users." Article 37(iii). There is no evidence to substantiate parity of charging across all 'foreign' (including Canadian) overflights.

Moreover, we find it surprising that Canada-to-Canada flights account for only c. 22% of the FAA's overflight costs as calculated in the Interim Final Rule. We request data on the actual cost to the FAA of these flights and the set-off arrangement that exist with NAVCANADA.

As both my manager Vince Dennehy and myself said at the last FAA public hearing, we do not dispute the right of the FAA to recover its cost of overflight provision. However, we

requested then and continue now to ask for the opportunity to have a meaningful exchange of data in order to progress this matter. I thank you for the opportunity to speak.