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BEFORE THE DEPT. OF TRANSPORTATION
DEPARTMENT OF TRANSPORTATION

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FEDERAL AVIATION ADMINISTRATION PUBLIC MEETING

ON

INTERIM FINAL RULE ESTABLISHING
FEES FOR FAA SERVICES FOR CERTAIN FLIGHTS

Docket No. FAA-2000-7018-48
Amendment No. 187-11

Thursday, June 29, 2000

Discovery Ballroom
Holiday Inn Capitol
550 C Street, S.W.
Washington, D.C.

ORIGINAL

I N D E X

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OPENING REMARKS:PAGE:

| | |
|----------------|---|
| Ida Klepper | 4 |
| Donna McLean | 4 |
| Randall Fiertz | 7 |

PUBLIC PRESENTATIONS:

| | |
|--|----|
| Helen Cahill | 15 |
| Air New Zealand Limited | |
| Michael Skrobica | 25 |
| Roy Goldberg | 28 |
| Steven R. Blough | 34 |
| Air Transport Association of Canada | |
| David O'Connor | 37 |
| International Air Transportation Association | |
| Lester M. Bridgeman | 46 |
| Long-Haul Charter Carriers of Italy | |
| Monique Sears | 50 |
| KLM, Royal Dutch Airlines | |

PUBLIC PRESENTATIONS:PAGE:

Karan Bhatia 56
Lufthansa German Airlines

Frederick S. Hird, Jr. 66
LTU International Airways

Charles R. Chambers 73
Association of Asia Pacific Airlines

Louis Beardsworth 86
British Airways

David Payne 102
Qantas Airways Limited

CLOSING REMARKS:

IDA KLEPPER 118

P R O C E E D I N G S

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

(9:15 a.m.)

MS. KLEPPER: Good morning, ladies and gentlemen. My name is Ida Klepper and I'd like to welcome all of you to this public meeting. The purpose of the meeting is to solicit comments on the Interim Final Rule for Fees for FAA Services for Certain Flights, commonly referred to as "overflight fees."

First I'd like to introduce to you the panel members for today's meeting. At the end of the table is Dr. Jeffrey Wharff, Economist, Office of Aviation Policy and Plans; Next is Dr. Woody Davis, Attorney-Advisor, Regulations Division, Office of the Chief Counsel; and seated next to Dr. Davis is Randall Fiertz, Acting Director, Office of Performance Management, who also serves as the Manager of the Overflight Fees Project.

Again, my name is Ida Klepper, I am the Manager of the Airmen and Airspace Rules Division of the Office of Rulemaking and I'll be serving as the program facilitator.

Before we proceed with the meeting this morning, I'd like to introduce you to Ms. Donna McLean, Chief Financial Officer of the FAA, who'd like to make a few opening remarks. Donna.

MS. MCLEAN: Thank you. Good morning and

1 welcome. I'd like to thank you for attending today's
2 meeting. You know that old cynical saying, the more
3 things change, the more they stay the same? Well, that
4 saying doesn't apply today.

5 The Overflight Rule is changing the way we do
6 business and that's why it's so important that you all
7 are here today.

8 We will be discussing the rule today. Randy
9 will be giving you a brief overview. But most
10 importantly, we'll be listening to you and your comments.
11 That is why it's so important that you're here today and
12 that is why I will keep my comments extremely brief.

13 We consider today's meeting an important step
14 in establishing Overflight Rules. Today we hope to
15 gather information and comments from you that will be
16 helpful to us in further developing and refining this
17 Interim Final Rule.

18 After today, you will have three additional
19 months in which to make your views known by submitting
20 written comments to the official docket for this
21 rulemaking. I can assure you that your comments today,
22 as well as any comments that are submitted to the docket,
23 will be fully considered in our rulemaking process.

24 I'd like to highlight just a few points
25 regarding the overflight fees. The statutory authority

1 for overflight fees is the Federal Aviation
2 Reauthorization Act of 1996. This directs us to
3 implement overflight fees through an Interim Final Rule
4 process. We did this initially, as most of you know, in
5 1997.

6 That rulemaking was subsequently set aside by
7 the Court of Appeals because an element of our cost
8 allocation methodology was determined to be in conflict
9 with the statute. That statutory authority for
10 overflight fees continues in affect, unchanged.

11 What has changed, however, is our methodology.
12 Following the 1998 court decision, the FAA decided to
13 base the overflight fees on cost data from its own cost
14 accounting system and that was then -- at that time it
15 was in its early stages of the cost accounting system
16 development.

17 We have now developed elements of our cost
18 accounting system which gives us actual cost for en route
19 and oceanic services. Our fees are based directly on
20 these costs, as Randy Fiertz will explain in a few
21 minutes.

22 We have generated and placed in the docket a
23 considerable amount of documentation explaining our
24 decisions and detailing our methodology. All of these
25 documents are available electronically, which is a far

1 cry from where we were a few years ago when you had to
2 physically go pick up these documents. I know several of
3 you here in the audience have had to do that in the past
4 and it's much easier to have it on the web site.

5 Ida will be explaining exactly what the DOT web
6 site is and will be giving you the specific internet
7 address for that. We believe this information should
8 enable you to see how we derive the fees, and hopefully
9 allow you to feel as comfortable about this process as we
10 do.

11 With that, I'll turn back the meeting to Ida.
12 I'm going to have to leave, I apologize. But I also want
13 to take an opportunity to thank the Overflight Rulemaking
14 Team, both in my organization, the Financial Office, in
15 General Counsel, in Policy and in our Rulemaking Office.
16 They've worked very hard on this rule and I would think
17 it shows in the amount of detail and information that's
18 going to be provided to you today. Thank you.

19 MS. KLEPPER: Thank you, Donna. Now I'd like
20 to turn the microphone over to Randall Fiertz to make his
21 summary presentation. Randy.

22 MR. FIERTZ: Welcome and good morning. Just as
23 Donna and Ida had mentioned, I want to thank you all as
24 well for coming to this meeting. I know a lot of you
25 have traveled a good ways and some of you are anxious to

1 get on with the long weekend coming up.

2 As was noted as well, I'm going to give a brief
3 outline of how the FAA derived the fees. We'll very
4 briefly go over the authorizing legislation, some of the
5 characteristics of the fees, just show you the map of
6 where the FAA does provide ATC services and then go
7 through the steps that we used to derive the fees and
8 then just walk through the schedule and the opportunities
9 for public comment.

10 The authorizing legislation for the FAA's
11 overflight fees is in the Federal Aviation
12 Reauthorization Act of 1996, which directs the FAA to
13 establish a fee schedule and collection process for ATC
14 and related services provided to aircraft, other than
15 military and civilian aircraft of the United States
16 government or of a foreign government, that transit
17 U.S.-controlled airspace but neither take off from nor
18 land in the United States.

19 The same legislation directs the publication of
20 an Interim Final Rule pursuant to which public comment
21 will be obtained in a Final Rule issue. This legislation
22 has not changed.

23 Again, briefly, some of the characteristics of
24 the Interim Final Rule. The FAA is expecting to bill
25 approximately \$40 million annually. The overflight fees

1 will be based on the great circle distance traveled in
2 U.S.-controlled airspace.

3 Cost recovery is limited to only those costs
4 determined to be directly related to the actual provision
5 of services. For example, costs related to
6 certification/regulation of the FAA are not included. To
7 be even more conservative, we have excluded our overhead
8 costs. Separate fees are calculated for air traffic
9 control services provided in both the en route, as well
10 as the oceanic environments.

11 As most of you know, the U.S. controls a very
12 large amount of airspace in the world and this is an
13 illustration to the example of where we do control. As
14 you can see, it reaches in the west almost all the way to
15 the Philippines, goes right across partway into the
16 Atlantic, up into the Arctic and down into the South
17 Pacific and the Caribbean.

18 We derived our fees through four basic steps.
19 First, determine which costs are directly related to air
20 traffic control services. Second, derive the unit cost
21 of the service. Third, determine the total cost of
22 overflights. And fourth, adjust the unit cost to include
23 the cost of billing and collection.

24 Under the same legislation which authorized the
25 FAA to collect overflight fees, the FAA was directed

1 separately to develop a cost accounting service for
2 managerial purposes.

3 The FAA decided to use the cost data, as
4 developed by the cost accounting system, as the basis for
5 its overflight fees and we've been working on that effort
6 over the past three years to develop that cost
7 information.

8 So really, as the first step of the first step,
9 we had to develop those costs and as you can see in en
10 route, our total ATC costs are about \$2.7 billion and in
11 the oceanic environment, approximately \$101 million.

12 To comply with Congress' direction to charge
13 "directly related" costs, FAA has decided to remove
14 overhead costs from both the en route and oceanic costs
15 for the purposes of calculating overflight fees. So you
16 can see that we've subtracted out our overhead costs, the
17 \$326 million out of the en route and \$7 million out of
18 the oceanic environment, to come up with the total
19 directly related costs in those two environments, the
20 \$2.4 billion and the \$94 million.

21 The second step, to derive unit cost of the
22 service, a very, very basic step, took the directly
23 related costs as we derived in step number one and
24 divided those by the total annual great circle distance
25 miles flown in that environment.

1 The total en route miles and oceanic miles
2 include all the miles flown within that system including
3 overflights, domestic, international, military, public
4 use, et cetera, to come up with the unit cost of \$36.14
5 and \$19.47.

6 Step number three was calculating the total
7 cost of providing service to overflights and is a
8 preliminary step that we needed to go through to get
9 ready for step number four. That's just very basically
10 taking the annual overflight miles flown and multiplying
11 them by the unit cost.

12 What that does is it allows the FAA to factor
13 in the cost of collections into the fees. This is done
14 by using the ratio of total cost of overflights plus the
15 cost of collections, divided by the total cost of
16 overflights. In other words, this method evenly spreads
17 out the cost of collections over all overflights, based
18 on fiscal year 1999 data.

19 Just a few quick comments on the schedule and
20 the opportunities for public comment. For the overflight
21 fees, the period of advance notice began when the Interim
22 Final Rule was put on display at the *Federal Register* on
23 June 2 and the fees will go into effect 60 days later on
24 August 1.

25 The first set of bills are expected to be

1 mailed around the middle of September, with payments due
2 30 days later, so, therefore, the middle of October.

3 As Donna had mentioned, the public comment
4 period is open until October 4, which is 120 days after
5 the June 2 display at the *Federal Register*.

6 The FAA will respond to all of the comments,
7 and a final rule will be issued once all of the comments
8 have been considered.

9 Thank you once again for participating in this
10 public meeting and I look forward, as does the rest of
11 the panel here, we look forward to hearing your comments.
12 Thank you.

13 MS. KLEPPER: Thank you, Randy. As Randy
14 mentioned, the panel members are here today to listen to
15 presentations by members of the public. A court reporter
16 will prepare a verbatim transcript of the meeting.
17 Copies of the complete transcript will be available after
18 July 12 and can be ordered directly from the court
19 reporter.

20 A copy of the transcript will also be placed in
21 the public docket. Ordering information for the
22 transcript is available at the registration table.

23 There's some other documents available at the
24 registration table also. They include copies of the
25 Interim Final Rule, the Regulatory Evaluation, the Fee

1 Development or Cost to Fee Report, the agenda for this
2 meeting and a general information sheet.

3 You will also find billing and collection
4 customer information forms. If you expect to be billed
5 for overflight fees and did not receive this form in the
6 mail, if you would complete it, that would assist us in
7 obtaining accurate information for you.

8 This meeting is open on a space available basis
9 to each person who registers at the door. An attendee
10 list will be prepared and placed in the public docket.
11 If you've not registered when you came in, if you would
12 please do so at the break.

13 We also request that anyone who wishes to make
14 a presentation, if you are not on the agenda at this
15 time, if you would notify the registration desk and we
16 will add your name to the agenda.

17 Speakers are cautioned to limit their comments
18 to issues pertaining directly to the Overflight Fees
19 Interim Final Rule and the regulatory evaluation
20 associated with this rulemaking.

21 Let me just briefly just summarize the format
22 and procedures for the meeting. I will call on each
23 speaker in the order that they'd signed up on the agenda.
24 If I call on a speaker and they're not here at that time,
25 I'll go on to the next speaker. Periodically then

1 I will go back over the agenda to see if the absent
2 speaker has arrived.

3 Each speaker will then please come forward to
4 the podium and present your information from the podium.
5 After each presentation, members of the panel may have
6 some follow up questions. Their questions are intended
7 to clarify or to focus on particular elements or concepts
8 expressed in the presentation and to offer you a further
9 opportunity to elaborate on those areas.

10 The questions are not intended to be a cross-
11 examination. In the event the questions are asked beyond
12 clarification, I'll exercise the prerogative of the chair
13 and interrupt.

14 Comments, questions or statements made by the
15 panel members are not intended to be, and should not be
16 considered, a final position of the FAA.

17 You're reminded that, once again, issues other
18 than those dealing with the Interim Final Rule are not
19 under consideration during this meeting. If anyone
20 wishes to make additional written comments on the Interim
21 Final Rule on the Regulatory Evaluation, if you'd submit
22 those comments to the docket. The docket number is FAA-
23 2000-7018 and the docket will be open until October 4.

24 Now, let's proceed to our first speaker this
25 morning. Our first speaker on the agenda is Ms. Helen

1 Cahill, representing Air New Zealand Limited.

2 MS. CAHILL: Good morning members of the panel,
3 ladies and gentlemen. My name is Helen Cahill for Air
4 New Zealand based in (inaudible), New Zealand, where I'm
5 working as an operational charges manager. I would like
6 to offer some preliminary remarks on the Interim Final
7 Rule setting overflight fees.

8 Air New Zealand has a keen interest in the
9 Interim Final Rule because the company crosses
10 U.S.-controlled airspace in the Pacific en route to
11 points in Asia. I thank you for the opportunity to
12 speak, but must say that Air New Zealand is dismayed to
13 find itself in the same position that it was in three
14 years ago, when both my manager, Vince Dennehy, and
15 myself, working at that time for British Airways,
16 appeared at another public meeting on overflight fees.

17 Sadly, once again, I'm here today to comment
18 after the fact, on a rule that has already been issued.

19 In its March letter to us, the FAA advised
20 that the Interim Final Rule process is not the customary
21 rulemaking approach adopted by the FAA. In fact, U.S.
22 administrative law requires that interested parties
23 receive an opportunity to be heard before a rule is put
24 into place.

25 Notice and comment procedures give the parties

1 an opportunity to educate and influence the agency before
2 it reaches a conclusion. If the APA does not contemplate
3 that parties will have the burden of changing the FAA's
4 mind after the fact. We request the FAA to withdraw the
5 Interim Final Rule and to issue it as a Notice of
6 Proposed Rulemaking.

7 Whilst there might have been some justification
8 in bypassing the APA by using an Interim Final Rule in
9 1997, it defies credibility to suggest that there is a
10 continuing justification three years later in applying
11 the same preemptory process when the FAA has spent over
12 two years developing a cost accounting system to support
13 its fee schedule. It is still making changes in its
14 analysis to meet recommendations of the Inspector
15 General.

16 While the Court of Appeals to the District of
17 Columbia upheld in 1998 the right of the FAA to use the
18 Interim Final Rule rather than the APA notice and
19 comments procedure, it states that it is probably the
20 case that once the FAA issued the IFR, the APA once again
21 became controlling for all subsequent proceedings, but
22 that is not the question before us. To suggest that the
23 same urgency exists today as was mandated in Congress
24 back some three years ago is somewhat tenuous.

25 Assuring us that our comments will be taken

1 into account before a final final rule is issued is small
2 comfort. A final final rule may not be issued for years
3 whilst we will continue to pay fees in the meantime.

4 The system of user charges around the world
5 hinges on transparency and acceptance. We believe that
6 the United States is creating a dangerous precedent by
7 setting fees at such a preemptory way. We believe that
8 it is not only circumventing the notice and comments
9 provisions of the APA, but that it is flying in the face
10 of the international practice and its own bilateral
11 obligations, which call for consultations before fees go
12 into effect.

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

16 The Interim Final Rule cites ICAO's Guidelines
17 for Navigation Charges, Document 9082, as justification
18 for charging user fees. The same document specifically
19 calls for consultations, as does the Open Skies
20 Agreement, between New Zealand and the United States.

21 Document 9082 specifically calls for
22 consultations to allow parties to attempt to reach a
23 general agreement on charges and, at a minimum, to have
24 sufficient information to gauge the fairness of the
25 charges prior to their imposition.

1 The New Zealand/U.S. Open Skies Agreement
2 requires the parties to encourage consultations on user
3 charges, including exchanges of information sufficient to
4 gauge the reasonableness of changes and sufficient notice
5 of changes to commit users to express their views before
6 the changes are made. Surely, the intent of this
7 intergovernmental agreement was not an *ex post facto*
8 review.

9 Circumventing procedures that ensure
10 transparency and acceptance can only lead to distrust,
11 discord and delay. It is probably the case that
12 overflight fees could have been imposed sooner if there
13 had been a proper rulemaking and consultation process in
14 1997.

15 This may sound repetitious, but we appear to be
16 in the same position today that we were in at the hearing
17 three years ago in yet another way.

18 Looking back through the transcript of my
19 manager, Vince Dennehy, at the last FAA hearing, I note
20 that he made the same comments then as I will make now.

21 We have not had the time to analyze the
22 supporting data for the fees and the information that has
23 been provided has in any event been inadequate to conduct
24 any detailed analysis.

25 Air New Zealand is ready to pick up its fair

1 share of the pure overflight costs, but we cannot
2 determine if the fees are directly related to costs as
3 required by the statute. We lack sufficient data to
4 evaluate the allocation of costs between overflight fees
5 and the FAA costs, between oceanic and en route costs and
6 between overflight and non-overflight costs.

7 The FAA's report makes a number of assumptions
8 without providing explanations. For example, the Interim
9 Final Rule assumes that oceanic overflight costs for
10 foreign carriers are identical to oceanic costs for U.S.
11 originating and terminating flights and en route
12 overflight costs for foreign carriers are identical to en
13 route costs for U.S. originating and terminating flights.

14 Yet such foreign flights are predominantly
15 operated at cruising altitudes and do not require the
16 transitional intervention that U.S. originating and
17 terminating flights require. Can you explain the basis
18 for this assumption?

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

24 While we do not have sufficient information at
25 this point to form a conclusion as to the appropriateness

1 of the proposed charging structures, it is concerning
2 that there is no evidence to substantiate some widely
3 drawn assumptions used by the FAA to underpin its costing
4 methodology.

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

10 The Inspector General recommended that the FAA
11 update its labor standards to better estimate labor costs
12 and establish a labor distribution system to capture
13 costs for the air traffic controller and air facilities
14 work force.

15 At present, the FAA has established labor costs
16 by relying on staffing standards and the actual labor
17 costs. The FAA estimated that it would respond to the
18 Inspector General's suggestion by the 30th of June, which
19 is tomorrow. Can you tell us when this will be
20 accomplished?

21 In the Overflight Fee Development Report, the
22 FAA states that U.S.-controlled airspace activity is not
23 the sum of flights across the en route and oceanic
24 environments, as some flights transit both environments
25 and summing flights across the environments would result

1 in double counting.

2 It isn't clear where such costs now sit.
3 Furthermore, there are costs entailed in transitioning
4 between oceanic and en route services. It is not clear
5 where the transitional costs are allocated. Can you
6 explain whether they are in the en route or the oceanic
7 cost pool?

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

15 On another note, in the absence of financial
16 data proving the contrary, we're concerned that the fees
17 may be applied in a discriminatory fashion because
18 Canada-to-Canada flights are exempt from the overflight
19 fees, with \$10.8 million in respective services in that
20 area being carved out of the overflight's cost base.

21 Article 15 of the Chicago Convention requires
22 that "Uniform conditions shall complete to the use, by
23 aircraft of every contracting State, of all air
24 navigation facilities which may be provided for public
25 use for the safety and expedition of air navigation."

1 Document 9082 likewise requires that the system
2 of charges must be non-discriminatory between two or more
3 foreign users. That's Article 37. There is no evidence
4 to substantial parity of charging across all foreign,
5 including Canadian, overflights.

6 Moreover, we find it surprising that Canada-to-
7 Canada flights account for only approximately 22 percent
8 of the FAA's overflights as calculated in the Interim
9 Final Rule. We request data on the actual cost to the
10 FAA of these flights and the setoff arrangements that
11 exist with NavCanada.

12 As both my manager, Vince Dennehy, and myself
13 said at the last public hearing, we do not dispute the
14 right of the FAA to recover its cost of overflight
15 provision, however, we requested then and continue to ask
16 now for the opportunity to have a meaningful exchange of
17 data in order to progress this matter. I thank you for
18 this opportunity to speak this morning.

19 MS. KLEPPER: Thank you, Ms. Cahill. If you'd
20 wait for just a moment, let me see, do any of the panel
21 members have any questions for Ms. Cahill?

22 DR. DAVIS: I have just a couple.

23 MS. KLEPPER: Woody, make sure you use the
24 microphone if you would, please.

25 DR. DAVIS: You said several times that what

1 you were concerned about, that there was not a proper
2 rulemaking and consultation process. Now, in American
3 law, when we do rulemaking we don't normally consult.

4 You said at the end -- we don't normally have a
5 consultation process in the international sense and you
6 also talk about meaningful exchange of data.

7 I would like for you to explain to me, what is
8 it that you want? Precisely what sort of forum or
9 exchange of information is it that Air New Zealand
10 believes it's not receiving in this matter or in this
11 process.

12 MS. CAHILL: Well, I think I mentioned a number
13 of items where we felt there was insufficient information
14 for us to be able to understand how some of the costs are
15 derived.

16 I think it's always helpful to be able to sit
17 down in a meeting and to actually discuss the concerns
18 face-to-face rather than trying to speak to a docket, it
19 isn't very responsive, and to be able to actually sit, to
20 explain where our concerns are, potentially have you
21 allay the concerns because you actually have the
22 information in hand and can provide that to us or else
23 indeed can go away and perhaps structure a response to
24 exactly reply to the needs that we've specified.

25 It's very difficult to actually properly

1 exchange information without being able to speak face-to-
2 face. It's just -- it just feels very unresponsive,
3 having to refer to a docket and get frustrated by the
4 fact that the information that you need isn't being
5 presented in the way you need it because it hasn't been
6 properly understood by the parties who are preparing that
7 information.

8 DR. DAVIS: You're aware in the docket about
9 the meetings we've had with the international
10 organizations who have presented us concerns and we've
11 responded in the materials and you've given us other
12 questions right now and you understand we'll respond in
13 the disposition of comments.

14 The other thing I was most interested in, you
15 were talking about for example, the Interim Final Rule
16 assumes the oceanic costs for foreign carriers are
17 identical to oceanic costs for U.S. originating and
18 terminating flights and en route overflight costs for
19 foreign are identical for en route costs for U.S.
20 originating and terminating flights.

21 Do you have any data to support that it's not?
22 Do you have any data on this point at all?

23 MS. CAHILL: No, that is one of the problems,
24 there isn't any information.

25 DR. DAVIS: Right, but you state it as a fact.

1 You're saying that that's what we're saying, but it's
2 your contention that they are not the same?

3 MS. CAHILL: I think until we have such
4 information to enable us to understand how the costs were
5 derived, it wouldn't be possible to draw a conclusion.
6 At the moment, what we're saying is we don't have that
7 information.

8 I think that the concern is that there is lack
9 of clarity as to what "direct costs" actually means in
10 accordance with the mandate from the legislation.

11 DR. DAVIS: In the documents that have been
12 provided that are part of the rulemaking package, can you
13 tell us where they're deficient and where it is not
14 clear?

15 MS. CAHILL: I don't have those documents in
16 front of me at the moment, but we can come back with
17 specific examples, if you'd like that.

18 DR. DAVIS: Please provide the docket what it
19 is that we're not clear about. Thank you.

20 MS. KLEPPER: Thank you. Our next scheduled
21 speaker this morning is Mr. Michael Skrobica, Air
22 Transport Association of Canada.

23 MR. SKROBICA: Good morning and thank you,
24 Madam Facilitator, for allowing me to make a few
25 observations with respect to the institution of

1 overflight fees.

2 Let me first say that the Air Transport
3 Association of Canada, which represents the commercial
4 air carriers of Canada, does not contest the right of the
5 FAA to impose overflight fees, so long as one, those fees
6 are developed in a transparent manner, including a
7 dialogue with affected parties before becoming effective;
8 and two, the fees are based directly on the FAA's cost of
9 providing services to overflights as required by U.S. law
10 and do not result in an over-allocation of costs to
11 overflights.

12 The legal basis for the establishment of
13 overflight fees is the FAA Reauthorization Act of 1996.
14 In that Act, Congress instructed the FAA to issue the
15 initial fee by way of an Interim Final Rule in order to
16 generate revenue for the 1997 fiscal year.

17 In 1997, ATAC challenged this approach and the
18 U.S. Court of Appeals for the District of Columbia
19 Circuit ruled that the FAA was correct to have issued the
20 rule by way of Interim Final Rule in that instance.

21 However, the Court of Appeals indicated that in
22 any subsequent issuance of a fee schedule, the process
23 set out in the Administrative Procedures Act would have
24 to be followed. The APA calls for notice to and comment
25 by affected parties before any rule may become effective.

1 Three years after the FAA's initial overflight
2 fees were adopted, the FAA has decided on this second
3 round of fee setting, which in our regard is not the
4 initial fee setting; thus, the FAA has acted improperly
5 by setting the fees without prior notice and comment by
6 affected airlines.

7 We also have some concerns with the FAA's
8 methodology. As expressed in the IFR, it may result in
9 the FAA passing on excessive costs to overflights. Our
10 legal counsel and the accounting firm KPMG will elaborate
11 on the apparent deficiencies in the FAA's methodology.

12 I also want to stress that the IFR and other
13 FAA documents that have heretofore been made available to
14 the public give insufficient information in many respects
15 to allow affected parties to understand and justify the
16 IFR's fees. This is not a transparent process and
17 unfortunately, appears to have resulted in fees that
18 exceed the FAA's costs that are "directly related" to the
19 provision of the services to overflights.

20 Accordingly, the Air Transport Association of
21 Canada request that the IFR be withdrawn and that the FAA
22 engage in a true notice and comment proceeding with
23 affected parties before making fees effective and that
24 the FAA supply sufficient understandable information on
25 the record to justify the fees as being directly related

1 to FAA's cost of providing services to overflights.

2 I thank you for this opportunity to express the
3 Association's view at this public meeting and hope that
4 you will respond to our concerns promptly, before the
5 Interim Final Rule is scheduled to become effective on
6 August 1. Thank you.

7 MS. KLEPPER: Thank you, Mr. Skrobica.
8 Questions from the panel?

9 (No response.)

10 MS. KLEPPER: None? Thank you very much.
11 We've been requested to make just one switch in the
12 agenda this morning from your printed agenda and that is
13 just switching the order of speakers between Mr. Blough
14 and Mr. Goldberg, so we'll now ask for Mr. Roy Goldberg
15 on behalf of Air Transport Association of Canada.

16 Mr. Goldberg, I'm told you need to try to speak
17 directly into the microphone to help the court reporter.

18 MR. GOLDBERG: Thank you, Madam Chairperson and
19 members of the panel. I'm Roy Goldberg on behalf of the
20 Air Transport Association of Canada.

21 I'd like to start off by incorporating into the
22 record the submission that ATAC made today entitled
23 "Preliminary Objections and Comments Regarding the Second
24 Fee Schedule" and also to incorporate another submission
25 made today by KPMG and some of that will be addressed by

1 me today and also by Dr. Blough, who will follow me on
2 behalf of that report.

3 The second fee schedule represents the second
4 attempt by the FAA in three years to impose overflight
5 fees in a manner that is not consistent with U.S. law.

6 ATAC members do not contest the right of the
7 FAA to charge a reasonable user fee for these services,
8 but such fees need to be developed in a transparent and
9 reliable manner that allows for the informed scrutiny and
10 analysis of the affected carriers before they're imposed
11 and also, there needs to be a methodology that does
12 ensure that each fee be directly related to FAA's costs
13 to provide the service. I will note that "each" is a
14 word that is used specifically in the statute.

15 The fees suffer from both procedural and
16 substantive defects. Procedurally, and you've heard it
17 already today and I think you'll hear it many more times
18 and it's in our paper, these fees needed to comply with
19 the APA.

20 This is a statute that applies in almost all
21 administrative rulemakings. While there are exceptions
22 and there was an exception three years ago, it does not
23 apply today.

24 The Court in the prior case was very clear that
25 Section 559 of the APA would apply here and that section

1 contains an exception to the APA, which could be referred
2 to as the express directive exception. If Congress
3 expressly directs the agency not to follow prior notice
4 and comment rulemaking, the agency may honor that express
5 directive.

6 Three years ago the circumstances were
7 different. The FAA was told to use an Interim Final Rule
8 for the initial fee schedule. Also, there was the
9 situation of the \$100 million that the FAA needed to
10 collect within less than a year's time and by the time
11 the rule was issued, within the matter of a few months.

12 Those circumstances do not exist. Congress did
13 not expressly direct the FAA in a second or supplemental
14 fee schedule to use an Interim Final Rule. As Ms. Cahill
15 has already reported and as is in our materials, quite
16 the contrary, the language of the statute uses the word
17 "initial" and the Court even surmised that subsequent
18 proceedings would be under the APA.

19 Given that there is no similar mandate or
20 circumstances here, there is at best conflicting
21 presumptions. I understand the FAA would like to use a
22 presumption that Congress wants these fees as quickly as
23 possible, but there's certainly an equally plausible
24 presumption that Congress, having envisioned or foreseen
25 the court challenge, the successful court challenge,

1 would want to make sure that in this instance the FAA got
2 it right by listening to the industry people, the people
3 from around the world, the different governments, the
4 different structures who can provide an analysis from the
5 financial and accounting professionals, in a legitimate
6 give-and-take consultation that precedes rulemaking.

7 The APA cases are very clear that there is a
8 concern that once an agency issues an Interim Final Rule,
9 any comments received after that will have difficulty
10 mustering any type of agency reaction that might be
11 present through the NPRM proceeding.

12 On substantive defects, obviously we've had
13 this for less than three weeks, KPMG has already looked
14 at this, they've got a preliminary report in the docket
15 and even on a preliminary basis, they've identified
16 substantial issues and, frankly, problems which make the
17 methodology the FAA has used inherently unreliable to
18 meet the statutory directive.

19 The standard here isn't what ICAO may dictate
20 for these fees, it's not what somebody may think is
21 reasonable under some accounting system, but rather it is
22 the statutory directive that each fee be directly related
23 to the costs of providing service to overflights.

24 For some reason, the FAA has adopted a cost
25 methodology that was not directed to coming to an answer

1 to that issue, but rather, they looked at -- on a
2 piecemeal approach, they've looked at certain components,
3 one line of business within the FAA and two environments
4 within that four-environment line of business.

5 The Arthur Andersen cost report was not
6 designed with overflight fees, it wasn't designed to set
7 overflight fees, they don't even address the issue of
8 overflight fees. It needs to be addressed in the proper
9 manner.

10 There are assumptions that do not have any
11 support. Dr. Davis raised the issue about one of the
12 most critical assumptions, both in the en route and the
13 oceanic environment, the FAA has assumed that every
14 flight in an overflight capacity will incur the same
15 costs for the FAA as any other flight, even though it's
16 not an overflight.

17 We would submit this defies common sense and
18 reality and we will put it to the FAA to let us know,
19 they must have support for this to make such an
20 assumption. The statement pervades the Fee Development
21 Report, Pages 3, 7, 8 and 9. Clearly, the FAA was
22 relying on this assumption, so we would hope and expect
23 that the FAA has something to provide, they haven't so
24 far, to show that this assumption is backed by credible
25 evidence and we'd certainly wait to see that, but at this

1 time we have to assume that there is no such evidence, it
2 has not been provided.

3 I'm just going to incorporate the list and
4 litany of two areas that are both in our submission and
5 in the KPMG materials. Number one is the issue of other
6 assumptions and allocations that the FAA has made that
7 are plainly either wrong or just not substantiated.
8 That's at Pages 19 and 20 of our materials, ATAC's
9 materials.

10 Pages 21 to 23 is a list of 20 areas where we
11 believe the FAA has failed to provide information to
12 explain how it got from Point A to Point B. For
13 reasonable and meaningful comment, even in an Interim
14 Final Rule situation, or perhaps even more importantly in
15 this situation, that material needs to be provided.

16 ATAC requests that the FAA withdraw this
17 Interim Final Rule before the fees become effective and
18 that the FAA issue a Notice of Proposed Rulemaking before
19 it moves ahead with fees, follows the procedures of the
20 APA and ensures that the methodology that it does adopt
21 is one designed to comply with the statutory directive
22 that each fee for overflights be directly related to
23 FAA's cost to provide services for those overflights.
24 Thank you.

25 MS. KLEPPER: Thank you. Any questions?

1 (No response.)

2 MS. KLEPPER: No? Okay. And now Dr. Steven
3 Blough.

4 DR. BLOUGH: Good morning, Madam Chairperson
5 and members of the panel. My name is Steven Blough, I am
6 a Ph.D. economist and I am a principal in the accounting
7 and professional services firm KPMG.

8 At the request of the Air Transport Association
9 of Canada, we have reviewed the documentation in the
10 docket supporting the overflight fee schedule. We had
11 very little time in which to perform our analysis,
12 moreover, as detailed in our report, the docket fails to
13 provide sufficient information for us to assess important
14 aspects of the methodology and critical assumptions made
15 in the development of the overflight fees.

16 Nonetheless, we were able to identify serious
17 problems with the methodology and the assumptions.
18 Fundamentally, we found that the FAA failed to perform
19 any study of the actual cost of services provided to
20 overflights relative to other flights in U.S., en route
21 and oceanic airspace.

22 In the absence of such a study, the methodology
23 used cannot be inherently reliable as a basis for fees
24 directly related to the cost of providing services to
25 overflights.

1 We have identified five areas where the FAA has
2 made unwarranted assumptions or simply failed to provide
3 sufficient information to understand and assess the cost
4 allocation process. The total cost pool allocated by the
5 FAA in determining its estimates of overflight costs is
6 nowhere identified in the information provided and
7 furthermore, it is clear in the information provided that
8 there were questionable assumptions made about the use of
9 current year capital investment costs in the overall cost
10 pool.

11 The second area was the allocation of the
12 overall cost pool to the combined en route and oceanic
13 environments. That's the area which is the focus of the
14 Arthur Andersen report, nonetheless, our report
15 identifies a number of issues and problems with the
16 methodology there.

17 The third area is the allocation of those
18 combined oceanic and en route costs to the individual
19 oceanic environment and the en route environment.

20 The fourth area is the backing out of overhead
21 costs performed by the FAA, which quite simply, is
22 completely undocumented in the information in the docket.

23 And finally, the allocation at the end of this
24 process of the costs associated with the oceanic and
25 en route environments to overflights and other U.S.

1 originating and terminating flights.

2 Again, nowhere in this process is any study of
3 the actual cost of providing overflights relative to
4 other flights and without such a study, the FAA cannot
5 reliably assess the costs of providing services to
6 overflights.

7 We have submitted our report, "KPMG Preliminary
8 Conclusions Regarding FAA's Methodology for Setting
9 Overflight Fees in the Second Fee Schedule" into the
10 docket. Thank you.

11 MS. KLEPPER: Thank you, Dr. Blough. Any
12 questions?

13 DR. DAVIS: Yes, one question.

14 MS. KLEPPER: Yes, Woody.

15 DR. DAVIS: Your comments are really directed
16 at establishing the fees for overflights on more of a
17 permanent basis. Is what's provided adequate for an
18 interim basis and if the changes were made for a final
19 basis later on, would that meet your concerns?

20 DR. BLOUGH: I think I'd have to defer the
21 issue of the basis for an interim versus a final to
22 Mr. Goldberg.

23 DR. DAVIS: Well, all right. But your comments
24 are directed to what should be in a Final Rule.

25 DR. BLOUGH: My comments are directed at the

1 question that ATAC asked me to look at, which was did the
2 methodology provide a reasonable basis for establishing
3 fees directly related to the costs of overflights.

4 DR. DAVIS: All right. Thank you.

5 MS. KLEPPER: Thank you very much. Our next
6 scheduled speaker is Mr. David O'Connor from the
7 International Air Transportation Association.

8 MR. O'CONNOR: Thank you, Ms. Klepper, and
9 thank you to other members of the panel for the
10 opportunity to make a presentation of the views of IATA
11 and its member airlines on the Interim Final Rule
12 assessing overflight fees for FAA services for certain
13 flights.

14 The International Air Transport Association is
15 a worldwide association comprised of 264 airlines and
16 IATA members account for most of the world's scheduled
17 international traffic and operate under the flags of 135
18 nations.

19 IATA's purposes include the promotion of safe,
20 regular and economic air transport for the benefit of the
21 peoples of the world and for the promotion of
22 international commerce. Forgive me for that
23 advertisement, but we say that every time we appear.

24 IATA and its airlines are interested in the
25 level of these new fees, the relationship of the fees to

1 the cost of providing service to overflying airlines, the
2 allocation of fees to various categories of users and the
3 accessibility of cost information on which these charges
4 are based.

5 While the FAA has obviously done a lot more
6 work in identifying the costs for various services it
7 provides to aircraft using its airspace and it has made
8 much of that work available to interested persons, we
9 must reserve comments on these other elements of the new
10 fees until our experts have reviewed the information that
11 you have made available.

12 I will focus today on what we regard as a major
13 shortcoming, the FAA's failure to engage in substantive
14 consultations with airlines before introducing new
15 overflight fees.

16 I think it was that famous American philosopher
17 Yogi Bera who said "This is deja vu all over again."
18 IATA was here in 1997 urging the FAA to defer its
19 recently issued Interim Final Rule until it had consulted
20 with the users who would be subject to the new fees for
21 overflights. IATA is back again today to ask the FAA to
22 engage the users of their airspace in meaningful
23 consultation, preferably before this new version of the
24 overflight fee rule takes effect. Our powers of
25 persuasion were inadequate to the task in 1997.

1 In the intervening three years, the FAA has
2 apparently adopted the view that proceeding by Interim
3 Final Rule is compelled by the FAA Reauthorization Act of
4 1996 and that no substantive discussion with users of
5 U.S. airspace can take place consistent with the *ex parte*
6 prohibitions of the Administrative Procedure Act.

7 The agency recites that the Congressional
8 purpose of requiring the fees by Interim Final Rule has
9 not been changed by the passage of time. IATA would
10 respond that the procedure was ill-advised in 1997 and is
11 still ill-advised today.

12 The Administration may have obtained the
13 consent of the Congress to proceed to judgment in this
14 fashion, but both branches seem to have assumed that the
15 United States is operating in a vacuum, that a sovereign
16 may exercise absolute control over the use of its
17 airspace, and the appropriate offer to international
18 users of U.S.-controlled airspace is take it or leave it.

19 With all due respect, that is not the
20 appropriate offer and, in fact, is inconsistent with the
21 U.S. Government's own position for at least the last 20
22 years, during which it has championed the right to
23 consultation in advance of the introduction of airspace
24 user charges, to transparency of cost information and to
25 charges that are reasonable and free of unfair

1 discrimination.

2 IATA and its airlines do not contest the FAA's
3 right to charge for the services it provides to users of
4 its airspace. We do insist that the implementation of
5 these substantial charges be undertaken in accordance
6 with the ICAO recommendations and the internationally
7 accepted practices that the United States has done so
8 much to promote.

9 Long before the United States became the
10 champion of Open Skies, it was the champion of Freedom of
11 the Skies. In the 1940s, and that was Fiorello
12 LaGuardia's time, U.S. negotiators labored long and hard
13 to persuade other countries to open their airspace to
14 transiting aircraft.

15 For 50 years the U.S. has been a member and an
16 active participant on the ICAO Council, where it has
17 promoted the right to transit and the introduction and
18 refinement of agreed standards to guide the providers of
19 air traffic services in developing fair and reasonable
20 charges for the services provided.

21 We are asking today that the United States
22 follow the guidelines for charging authorities that it
23 has helped to develop.

24 The FAA should welcome consultation with groups
25 of users. Airlines are your customers. Airline users

1 need to understand the basis for the new fees, what is
2 included in the air traffic services cost base and what
3 is not. They need to understand clearly how the
4 allocations have been made among various categories of
5 users and need assurance that the allocations have been
6 made fairly. Users also need time to adjust to new
7 operating costs and to have some insight into the
8 charging authority's plans for the future.

9 Many states have introduced user charges during
10 the last 20 years, both for overflight and for other air
11 traffic control services. Most states have committed to
12 consult in advance with users before the introduction of
13 user charges and before increases in the level of those
14 charges take effect.

15 This has led to a mature collection of
16 relationships among the service providers and the user
17 community. That includes airlines and general aviation
18 and others.

19 IATA, acting through its User Charges Panel,
20 which is a committee of airline user charges experts,
21 conducts over a hundred of these consultations with 60 or
22 more service providers every year. U.S. flag airlines
23 participate in the IATA User Charges Panel and have the
24 benefit of consultations with other countries.

25 IATA's effort to persuade the FAA to consult is

1 not an effort to establish an exclusive right to
2 consultations and we do not ask that any consultations be
3 kept in confidence. IATA and its User Charges Panel have
4 been designated by the member airlines to conduct
5 consultations on their behalf.

6 IATA recognized the FAA cannot negotiate new
7 charges or increases in old charges with users and that
8 as the sovereign provider of these necessary services, it
9 will have the last word in any consultation. However,
10 consultation does serve to illuminate the effective
11 charges when applied and it helps users understand the
12 costs on which the agency's charges are based. It is
13 good practice and it helps both users and the service
14 provider plan and conduct business more efficiently.

15 I have focused today on the element of the new
16 regulation that airlines and their governments find
17 objectionable on its face, the failure to make any effort
18 to consult with users before implementing new fees.

19 Many other states have introduced similar fees
20 for air traffic services. These states hate to be on the
21 receiving end of lectures from U.S. Government officials
22 about the proper level and allocation of charges and
23 about their obligation to consult with airline users
24 before introducing or increasing fees.

25 I assure you -- in fact, I thought I was

1 earlier on the program -- we'll hear more of this from
2 other speakers today, but what really annoys other
3 governments is for the United States to ignore the same
4 principles when the shoe is on the other foot and it is
5 about to introduce its own charges.

6 Finally, the obvious question, what can be done
7 to put things right? Well, you've heard some earlier
8 suggestions, but also, from the tone and tenor of the
9 Interim Final Rule, the FAA appears no more disposed to
10 back up and consult with users before implementing the
11 new fees today than it was in 1997.

12 IATA and its airlines are exploring the options
13 available to the FAA to get its procedures back on track.
14 It may be that all that can be done is to build a user
15 consultation provision into the Final Rule. This
16 solution will not set right the failure to consult users
17 prior to the introduction of new fees, but it would
18 sanction substantive consultations with users as a
19 prerequisite to future adjustments to the fees.

20 The Interim Final Rule procedure, with its rule
21 first, comment and consultation later, is more suitable
22 to the Red Queen than to the FAA. Making consultation
23 with users an element of the new rule would at least
24 reduce the unfair burden going forward.

25 Thank you and I'll respond to questions, if you

1 have any.

2 MS. KLEPPER: Thank you, Mr. O'Connor. Are
3 there any questions?

4 DR. DAVIS: The docket has summaries of four
5 meetings that we had before this Rule was issued with
6 representatives of various user groups, governments and
7 also specific industry ones. They expressed their views,
8 we listened and we've expressed our views and the FAA has
9 expressed views through the publication of documents.

10 What different consultative process do you
11 want? Would you be specific as to what it is that you
12 think would be more appropriate?

13 MR. O'CONNOR: Yes. I was not a participant in
14 those meetings and I have been and have made an effort to
15 at least understand where other interested parties are
16 coming from.

17 The process that we're talking to is engaging
18 in a substantive dialogue on the content of the fee, what
19 is behind the fee. You've heard from some of our earlier
20 participants here at the hearing what they want is please
21 explain yourself, how do these costs fit in various
22 categories.

23 The U.S. Government officials over in the other
24 building, on 7th Street, have participated in some of
25 these consultations in other areas of the world. It's

1 not rocket science, it's basically accountants sitting
2 down and talking to each other about where are these
3 costs and what are your plans and it's especially helpful
4 if we, as users, understand whether remedial efforts can
5 be taken.

6 This is not necessarily the case in the United
7 States, but in other countries if there's a need for
8 better facilities or better training and those things can
9 be built into the consultation and we'll say we'll go
10 forward together, we as airlines will be using these
11 services.

12 Now, obviously, the United States is something
13 of a different animal than a lot of these other countries
14 in the developing world where this is especially useful,
15 but it is nonetheless -- we look to the United States as
16 the North Star, if I can borrow a phrase, to show the way
17 in how proper consultations with users can take place in
18 this atmosphere.

19 I don't know if that's answering your question,
20 but it's not what you've had in terms of dialogue with
21 others in this particular proceeding. That is not what
22 we're talking about and we'll put some more of that in
23 the record so you can understand, but it's basically
24 sitting down with the people who understand the costs and
25 talking about them and also about the operational

1 elements that also are engaged in the services that are
2 provided.

3 MS. KLEPPER: Thank you. Our next speaker is
4 Mr. Lester Bridgeman on behalf of the Long-Haul Charter
5 Carriers of Italy.

6 MR. BRIDGEMAN: Good morning. Thank you for
7 giving me the opportunity to appear here today. I am
8 appearing actually on behalf of three air carriers, they
9 are Air Europe SPA, EuroFly SPA and Lauda Air Italy,
10 which constitute the entire long-haul charter airline
11 industry of Italy.

12 I'm here to call your attention to the
13 immediate, serious economic injury that these carriers
14 will suffer if your Interim Final Rule is permitted to go
15 into effect as scheduled.

16 My primary concern today is the substantive
17 impact upon my clients and for that matter, upon all
18 European charter carriers, that will result unless you
19 correct the failure to provide the kind of advance notice
20 that European charters requested of you almost two years
21 ago.

22 I don't mean to suggest now by concentrating on
23 the timing of the Rule that we can see the validity of
24 the FAA's cost analysis, I will leave that matter to
25 others. My clients haven't had the opportunity or the

1 time to formulate a position on that complex substantive
2 matter, so I will address only the procedure and
3 specifically the injury that will result if the Rule is
4 permitted to become effective on the present schedule.

5 In connection with this proceeding, the FAA has
6 repeatedly been told by members of the European charter
7 air carrier community that European tour organizers and
8 therefore, European charter carriers, must make their
9 arrangements for flying, including their pricing
10 arrangements, with charterers approximately a year in
11 advance of proposed operation and for that reason, apart
12 from any question of the legalities otherwise of the
13 FAA's procedure, you've repeatedly been requested to give
14 substantial advance notice of precisely what you propose
15 to do so that charter carriers could have at least some
16 opportunity to avoid the pricing inequities and the
17 potential losses that your recent action has now created.

18 My clients are relatively small, but their
19 existence is extremely important to them. Unlike
20 scheduled carriers, they are now unable to adjust their
21 present fares or charges to take into account the new
22 costs imposed by the Interim Rule.

23 They average six round trips daily on an annual
24 basis, that is to say six a day throughout the year,
25 between Europe and Caribbean points. In the next 33

1 days, if the Rule is not changed, your Rule will add
2 \$1,600 to each round trip cost of each such flight. I
3 want to make sure that I've got the figure right, it's
4 \$1,600.

5 Now with the present high cost of fuel, the
6 effectiveness of the Rule will convert marginal profits
7 into substantial losses for these carriers. I wouldn't
8 be here if this weren't a serious matter to my clients.
9 In the present economic climate, their survival as long-
10 haul charter carriers depends upon relief from the
11 effective date of the proposed rule.

12 It's a matter of no concern to us whether
13 that's done by withdrawal of the rule, by a general
14 postponement of the present August 1 effective date, by
15 postponement of that date with respect to charter flights
16 or charter carriers only or by your recognition that the
17 appropriate procedure is in any event compliance with the
18 normal APA requirements.

19 The statute on which you rely for issuance of
20 the Interim Final Rule was enacted almost four years ago.
21 The original Rule was issued on March 20, 1997, over
22 three years ago. It was invalidated by the Court of
23 Appeals for this circuit in January 1998, almost two and
24 a half years ago, and only the FAA, so far as I'm aware,
25 can claim responsibility for the long period of gestation

1 that finally produced a new rule less than a month ago.

2 Under those circumstances, I can conceive of no
3 reason why the effective date should not be extended,
4 generally or with respect to charter carriers in
5 particular.

6 We understand that you've consistently insisted
7 that your actions are controlled by the statutory
8 requirement for publication of, quoting the statute, "an
9 initial fee schedule and associated collection process as
10 an Interim Final Rule," but the statute imposes no
11 requirement for an effective date.

12 No reason appears after two and a half years of
13 inaction why the rule must become effective within less
14 than 60 days after publication and before rather than
15 after the date that is set for formal comments on the
16 Interim Rule.

17 The FAA's insistence upon that procedure after
18 almost three years of delay that can be contributed only
19 to the FAA could be characterized, I suggest, as
20 arbitrary and capricious.

21 Finally, I remind you that the Court of Appeals
22 for this circuit in the Asiana opinion expressly said,
23 and I'm quoting, "It is probably the case that once the
24 FAA issued IFR, the APA once again became controlling for
25 all subsequent proceedings."

1 First and foremost, KLM neither questions nor
2 objects to the authority of the Federal Aviation
3 Administration to establish fees for so-called
4 overflights. However, KLM does take issue with both the
5 process by which the fees have been established and the
6 inclusion of certain costs in the fee schedule.

7 Normally, when dealing with issues of this
8 nature and magnitude the FAA first publishes a Notice of
9 Proposed Rulemaking, providing ample time to receive and
10 consider comments before issuing a Final Rule.

11 Although Congress directed the FAA to issue an
12 initial overflight fee schedule by an Interim Final Rule
13 in 1997, fiscal year 1997, the Court of Appeals concluded
14 that it is probably the case that once the FAA issued the
15 IFR, the APA once again became controlling for all
16 subsequent proceedings.

17 Can you hear me okay?

18 MS. KLEPPER: Can everyone hear? Is it all
19 right?

20 MS. SEARS: No?

21 MS. KLEPPER: Try to get into the microphone a
22 little bit more directly. Thanks.

23 MS. SEARS: Yet, despite the fact that more
24 than two years have elapsed since the Court of Appeals
25 vacated the initial fee schedule, the FAA continues to

1 believe it is compelled to forego the regular procedure
2 and establish the overflight fees as an Interim Final
3 Rule, notwithstanding the complete absence of any
4 legislative urgency.

5 After all this time, the FAA appears determined
6 to avoid prior notice and comment procedure. Indeed, the
7 Interim Final Rule will be effective in just a few weeks,
8 well before the close of the comment period. In doing
9 so, the FAA presumes its methodology, assumptions,
10 categories and calculations are correct and appropriate.

11 But how can the FAA be so confident when such
12 decisions and assumptions have not been subjected to the
13 normal public notice and comment process, as well as to
14 the give and take of bilateral consultations?

15 Aside from the provisions of the Administrative
16 Procedure Act, this "pay now, ask questions later" policy
17 also violates fundamental bilateral air transport
18 principles of prior consultation and transparency.

19 KLM also objects to the effective date of the
20 rulemaking. Be it August 1 or August 5, it does not
21 provide carriers with sufficient time to adjust their
22 accounting systems to the change in the cost of
23 operations.

24 ICAO guidelines provide "The Council recommends
25 that states exercise caution in their general policy on

1 charges for air navigation services and take into
2 consideration the effect on users, in particular, the air
3 carriers, which may need to adjust their tariffs to deal
4 with increased costs arising from new or higher charges."

5 Accordingly, KLM requests that the effective
6 date of the new fee schedule be postponed at least an
7 additional 90 days to allow KLM and other foreign
8 carriers adequate time to adjust to the increased
9 charges.

10 KLM is also concerned about the inclusion of
11 certain costs in the overflight fee schedule. The
12 documents placed in the docket do not provide a
13 sufficient basis to evaluate the correctness of the FAA's
14 decisions as to which costs are to be included and which
15 costs are to be excluded.

16 While we agree in principle with the FAA's
17 decision to exclude overhead costs, we suspect that
18 several categories of costs included in the fee schedule,
19 such as capital investment and training, should be
20 considered overhead and should therefore be excluded.

21 The failure of the FAA to articulate in the
22 preamble to the Interim Final Rule all the definitions,
23 calculations and premises upon which the fee schedule is
24 based makes it extremely difficult for anyone on the
25 outside to determine whether the fee schedule is

1 reasonable.

2 Although we question why the FAA did not
3 determine its actual direct costs to provide overflight
4 services, we also question the method chosen by the FAA
5 to allocate costs between overflights and originating or
6 terminating flights. The FAA's assumption that the FAA
7 incurs identical costs in servicing overflights and non-
8 overflights is faulty because the number of instructions
9 generally given to a flight during transition is
10 significantly greater than the number provided to flights
11 operating at cruising altitudes.

12 With all due respect, the FAA should abandon
13 the Interim Final Rule in favor of a proper Notice of
14 Proposed Rulemaking and a series of consultations. At a
15 minimum, the FAA should postpone the effective date of
16 the rule until after it has received, considered and
17 responded to comments from the public.

18 Waiting until after it considers and responds
19 to public comments will improve the chances that the
20 FAA's final rulemaking product will be fair and
21 reasonable. It will also be consistent with principles
22 of administrative law and international accommodation.
23 Thank you.

24 MS. KLEPPER: Thank you. Any questions or
25 comments for Ms. Sears?

1 MR. FIERTZ: Yes, I have a question.

2 MS. KLEPPER: Randy?

3 MR. FIERTZ: Could you please elaborate on your
4 suggestion that capital investment and training should be
5 considered overhead and therefore, should be excluded?
6 Could you please elaborate on that?

7 MS. SEARS: Actually, no, I'd prefer not to go
8 into any detail. That was just a preliminary that
9 someone in our head office has done of the fee schedule
10 that was published with the Interim Final Rule in the
11 docket and we're still evaluating. That was something
12 that just popped out and we are planning to give more
13 formal comments on the fee schedule, we'd rather not
14 elaborate here.

15 MR. FIERTZ: Okay. Thank you.

16 DR. DAVIS: I have just two quick questions.
17 The docket starts with the March letter that was sent to
18 KLM or to all the users which said that the FAA would be
19 imposing fees for overflights soon. Did that have any
20 effect on you all's planning or did that have any effect
21 on anything?

22 MS. SEARS: We weren't able to take any action
23 -- are you referring to the accounting system?

24 DR. DAVIS: No. There was a letter that was
25 sent to all users in March, it's the first item in the

1 docket, one of the first items in the docket, that was
2 sent from the Chief Financial Officer to all known users,
3 which I'm pretty sure included KLM, which notified you
4 that we expected to impose the Interim Final Rule for
5 Overflights soon.

6 Did that have any effect on your planning or
7 activities did --

8 MS. SEARS: We weren't able to take any action
9 without any data, we had no idea what kind of fees we
10 would be dealing with. We knew that previously the Court
11 had overturned the Ramsey pricing schedule, the fee
12 schedule based on the Ramsey Pricing Rule, and so we knew
13 that -- we suspected that the costs would be lower, but
14 we had no idea, we had no data to base any decisions on.

15 DR. DAVIS: Thank you.

16 MS. KLEPPER: Thank you. Our next scheduled
17 speaker is Mr. Karan Bhatia on behalf of Lufthansa German
18 Airlines.

19 MR. BHATIA: Good morning. My name is Karan
20 Bhatia, I'm an attorney at Wilmer, Cutler & Pickering and
21 am appearing here today on behalf of Lufthansa German
22 Airlines.

23 Lufthansa appreciates the opportunity to
24 participate in today's public hearing. Lufthansa is
25 firmly committed to the view that complex regulatory

1 matters with serious international implications, such as
2 the implementation of a system of overflight fees, should
3 be addressed through meaningful discussions between the
4 promulgating government, other governments and interested
5 parties.

6 It was accordingly with considerable
7 disappointment that Lufthansa learned that the FAA had
8 decided to promulgate its new overflight fees through an
9 Interim Final Rule. Under the IFR published in the
10 *Federal Register* on June 6, the FAA will begin imposing
11 overflight fees on August 1, before any meaningful
12 dialogue will have occurred with the U.S.'s aviation
13 trading partners and before interested parties file
14 comments.

15 Requests by the United States' aviation trading
16 partners and interested parties to be briefed and have
17 substantive discussions on the Proposed Rule prior to the
18 implementation of the IFR were rejected.

19 This is, in Lufthansa's view, unfortunate. It
20 fails to comply with U.S. law, it ill-serves the cause to
21 which Lufthansa fully subscribes of arriving at a fair
22 and transparent system of fees directly related to the
23 cost of providing overflight services and it ill-serves
24 the goals of the international aviation community of
25 having national fees imposed only after due consideration

1 of international consequences.

2 The inconsistency with U.S. law is explained in
3 the joint letter dated March 22, 2000 from Lufthansa and
4 seven other carriers to the FAA and filed in the public
5 docket. Briefly stated, when vacating and remanding the
6 last FAA Rule promulgating overflight fees in 1997, the
7 D.C. Circuit made clear that subsequent proceedings
8 should occur under the rulemaking proceedings set forth
9 in the Administrative Procedure Act.

10 The Court specifically stated, and you've heard
11 this quote before, "It is probably the case that once the
12 FAA issued the IFR, the APA once again became controlling
13 for all subsequent proceedings."

14 This observation is consistent with precedent
15 in Action on Smoking and Health v. CAB, "Any exception to
16 normal notice and comment rulemaking requirements will be
17 narrowly construed and only reluctantly countenanced."

18 The instant proceeding promulgating a new rule
19 in a new docket clearly constitutes a subsequent
20 proceeding. Accordingly, we submit the FAA is required
21 to promulgate the rule using standard notice and comment
22 rulemaking procedures, which would permit meaningful
23 consultations and deliberation before the rule becomes
24 effective.

25 Employing such standard rulemaking procedures

1 would also alleviate the substantial danger posed by the
2 IFR that the rule going into effect is not fair,
3 transparent or faithful to the statutory mandate that any
4 overflight fees be directly related to the cost of
5 providing overflight services.

6 The IFR and the supporting documents placed in
7 the docket raise a series of very significant substantive
8 questions about how the fees were calculated. To take
9 just a few examples, it is impossible to determine from
10 the record how overhead costs were calculated and which
11 specific overhead costs were excluded from the rate base.
12 To the extent the supporting materials address this
13 matter at all, they raise potentially troubling issues.

14 For example, in the appendix to the full Arthur
15 Andersen report, child care facilities for air traffic
16 controllers appear to be included in both en route and
17 oceanic project descriptions. Clearly such costs are not
18 directly related to the cost of the FAA providing
19 overflight services, yet the materials do not make clear
20 that they were included or excluded as part of the
21 service costs.

22 A second example found in the Arthur Andersen
23 report is the inclusion of "unidentified F&E projects,"
24 also described as "programs which can't be associated
25 with a particular service," and their inclusion in the

1 cost of oceanic charges. It's unclear what these
2 projects are, let alone how, when they are not associated
3 with any particular service, they are directly related to
4 oceanic air traffic services.

5 Third, there is no justification offered for
6 why fixed costs, such as the \$33 million in en route
7 charges allocated for research and development of the
8 National Airspace System, are directly related to
9 overflight services when such costs relate to future
10 development and it's unclear what relationship they bear
11 to overflight services.

12 Fourth, the rule appears to be based on the
13 assumption described earlier by other speakers that the
14 FAA incurs the identical level of costs to provide ATC
15 services to overflights as to flights that take off from
16 or land in the United States, an assumption that does not
17 appear to be supported anywhere in the docket.

18 Clearly, issues such as these must be addressed
19 and, absent compelling responses that are not apparent in
20 the record, the IFR revised, if the proposed fees are to
21 be fair, transparent and satisfy the "directly related to
22 cost" standard.

23 In a normal rulemaking proceeding there would
24 be ample opportunity for such questions to be posed, both
25 by interested private parties and by foreign governments

1 in consultations, for the issues they raise to be
2 discussed and for the necessary revisions to the rule to
3 be made before the rule goes into effect.

4 That opportunity does not exist under the IFR
5 process implemented here. Even if the FAA addresses, as
6 we believe it must, the questions I just posed and other
7 questions that have been posed by interested parties here
8 today and in the KPMG report before the rule is made
9 effective, other similar queries will not get posed, much
10 less answered, until written comments are submitted in
11 October.

12 The result will be a rule that will not have
13 benefited from the rigorous examination of the normal
14 rulemaking process that will be neither fair nor
15 transparent and that may again be found not to comply
16 with the statutory mandate that the fees charged be
17 directly related to the costs of providing services.

18 Lufthansa urges the FAA to stay the effective
19 date of the overflight fee schedule until after it has
20 consulted with its aviation trading partners and after it
21 has received, considered, responded to and revised the
22 rule in light of written comments and questions from all
23 interested parties.

24 A point that occurred to me in response to
25 Dr. Davis' question to other speakers, what sort of

1 consultation do you want? It seems to me somewhat ironic
2 in this context that several months ago Newark
3 International Airport and the Port Authority of New York
4 and New Jersey attempted to promulgate fees applicable to
5 users, to carriers, without undergoing any form of
6 consultation, doing effectively what the FAA has done
7 here.

8 When carriers such as Lufthansa and others
9 filed a complaint with the DOT arguing that this didn't
10 satisfy reasonable standards, the Port Authority and
11 Newark International Airport withdrew the fees
12 retroactively and DOT issued a decision that suggested
13 strongly that the process of consultation -- that this
14 did not comply with FAA policy, that consultation is a
15 required part of any reasonable imposition of user fees.

16 I find it somewhat ironic that the FAA would
17 hold local governments to a higher standard than it holds
18 itself to.

19 Lufthansa shares with the FAA the goal of
20 arriving at a system of overflight fees that is fair,
21 transparent and justifiable. We do not believe that the
22 fee schedule promulgated in the June 6 notice satisfies
23 this standard. We urge the FAA to revise its procedures
24 to permit it, its aviation trading partners and
25 interested parties to work cooperatively to arrive at a

1 schedule that does. Thank you.

2 MS. KLEPPER: Thank you. Any questions? Yes,
3 Woody.

4 DR. DAVIS: I have a few questions. You said
5 that you thought that the FAA should proceed by a Notice
6 of Proposed Rulemaking. If the FAA issued a Notice of
7 Proposed Rulemaking, the *ex parte* prohibitions also
8 apply. The situation would be exactly what it is now,
9 that you would be making comments if we had public
10 meetings or you would be making comments to the docket.
11 How do you see consultation occurring within an NPRM
12 context?

13 MR. BHATIA: Well, first of all, consultations
14 with respect to foreign governments I think clearly could
15 go on. They have gone on in such context, so I don't see
16 that being an issue at all.

17 DR. DAVIS: So you're saying consultations not
18 between the users and the FAA but between the
19 governments?

20 MR. BHATIA: No, but even with respect to the
21 users, I don't see any reason why you couldn't have a
22 public meeting along the lines of this, where people who
23 are cost accountants from the FAA sit down with people
24 from the user community who are also experts in this
25 subject and figure out the answers to these troubling

1 questions.

2 What we have currently got on the record is
3 information, documents that don't allow us to determine
4 whether in fact this was done correctly or not. I'm not
5 calling for *ex parte* meetings that would not be open to
6 the public, some secret hidden meeting, I'm calling for
7 the kinds of open, frank discussions that would enable
8 everybody to feel satisfied that what we've got in fact
9 satisfies the statutory standard.

10 DR. DAVIS: So you would envision us having
11 really consultations before we issued a Notice of
12 Proposed Rulemaking?

13 MR. BHATIA: Absolutely. I would envision you
14 withdrawing the Interim Final Rule, issuing a Notice of
15 Proposed Rulemaking and at some point in time, either
16 before or afterwards, having these kinds of open and
17 frank consultations.

18 Recognize that we asked for -- people were
19 trying to find out what the system of calculation for
20 overflight fees was going to be going all the way back to
21 the last cost accounting meeting and the FAA refused to
22 participate in that. They said no, we're not going to
23 discuss with you what the charges are going to be, we're
24 not going to engage in a dialogue on this and think that
25 is, in our view, not useful, not the most productive way

1 of proceeding.

2 DR. DAVIS: And the March letter which said
3 that the fees would be the same or less than what they
4 were last time was not of any use?

5 MR. BHATIA: Well, the statutory mandate to the
6 FAA is not that you come up with fees that are less than
7 what they were last time. The statutory mandate is that
8 you come up with fees that are directly related to costs.

9 DR. DAVIS: And the statutory mandate is not
10 only the Final Rule. If all of the comments are
11 considered and meaningfully responded to in the
12 appropriate fashion and you pay fees as of August 1 and
13 if subsequently there are changes that are required, what
14 sort of harm will you have suffered by the FAA continuing
15 on with the current course?

16 We've previously made adjustments and given
17 refunds as necessary. What is the harm in proceeding the
18 way Congress told us to do?

19 MR. BHATIA: I think for the FAA to work under
20 the assumption that well, let's proceed with any type of
21 rule that we can with the idea that well, maybe we get it
22 right, maybe we get it wrong, but at the end of the day
23 we give you your money back just isn't good governance.

24 DR. DAVIS: Okay. Thank you.

25 MS. KLEPPER: Thank you. Our next speaker is

1 Mr. Frederick Hird, on behalf of LTU International
2 Airways.

3 MR. HIRD: Good morning, Madam Chairwoman,
4 members of the panel, interested parties. I'm Fred Hird,
5 attorney for LTU, a scheduled German air carrier which
6 operates 30 to 40 round trip flights per week from
7 Germany to the Caribbean and Mexico, which gives it a
8 substantial exposure to the new rule.

9 I have prepared a statement and submitted it
10 for the record, copies will be available later. I would
11 like to paraphrase that and focus on one aspect of it
12 today.

13 The LTU hopes that the Interim Final Rule will
14 be suspended, stayed or withdrawn pending completion of
15 proper procedures and a proper cost allocation. As
16 published, the new Interim Final Rule is plainly not in
17 compliance with the applicable law.

18 Let's focus on what the statute actually says.
19 The fees must be directly related to costs. "In
20 establishing fees, the Administrator shall ensure that
21 each of the fees is directly related to the
22 Administration's cost of providing the service rendered."

23 It goes on to refer to "Services provided by
24 the Administration to flights that neither take off nor
25 land in the United States."

1 "Providing the service rendered" and "services
2 provided to flights," these words make it clear that
3 Congress meant the actual FAA control and protection of
4 the specific flights operating, period. This should be
5 clear on its face.

6 Furthermore, the statute has already been
7 interpreted by the Court of Appeals for the District of
8 Columbia Circuit. In its opinion on the appeal of the
9 first Overflight Fee Interim Final Rule, that Court said
10 "The statutory language requiring that each fee be
11 directly related to the cost of providing the service
12 rendered expresses a clear Congressional intent that fees
13 must be established in such a way that each flight pays
14 according to the burden associated with servicing that
15 flight."

16 When the Court says "the burden associated with
17 servicing that flight," again it is clear that the
18 services actually provided are the focus for the fee.

19 While the Court of Appeals added "There may be
20 methods to reasonably determine an appropriate fraction
21 of the FAA's fixed costs to assign to each overflight,"
22 it did so in the context of determining the burdens
23 imposed by individual flights. There is no doubt that it
24 is the cost of servicing each flight that the Court and
25 the Congress have directed the FAA to determine.

1 These fees are not directly related to the
2 costs of servicing the flights. In the Interim Final
3 Rule, the FAA has included many costs not associated with
4 the burden of servicing each flight. Many of these
5 unexplained.

6 There is a dramatic example of improperly
7 included costs, however, that can be discerned from the
8 materials provided. In the document entitled "Overflight
9 Fee Development Report," and if the panel has copies of
10 that, I hope they might follow along with me, in Table 1
11 it shows that one-third of the oceanic fees and one-
12 quarter of the en route fees are to cover something
13 called "ARA expensed F&E labor/non-labor." That's \$33
14 million out of \$101 million in oceanic costs. These
15 costs are proportionately scaled down to determine the
16 fees, but the proportions remain essentially the same.

17 Well, what is ARA expensed F&E labor/non-labor?
18 In Table A-1 to Appendix A, Page 21 of the document, this
19 is defined as "All expensed costs, labor, non-labor and
20 overhead, incurred by ARA organizations necessary to
21 complete NAS modernization programs."

22 ARA and NAS are not identified in this
23 document, but in the acronym list, so-called, at Page F-1
24 of the Arthur Andersen Report, ARA is identified as
25 Office of the Associate Administrator for Research and

1 Acquisitions and NAS is the National Airspace System.

2 Thus, one-third of oceanic costs and fees and
3 one-quarter on en route costs and fees are not for
4 operations at all, but for research and new equipment.
5 This is research applicable to overflights? Is this new
6 equipment used for overflights? Should this be expensed
7 rather capitalized? Are oceanic flights even a part of
8 the National Airspace System? And what does research
9 have to do with the actual costs of handling a flight?

10 There is no way to tell and it all seems highly
11 unlikely that these questions can be answered to show
12 that these are directly related expenses. The only
13 explanation that the FAA has given for inclusion of these
14 costs, again a full one-third and one-quarter of the
15 respective fees, is in Table A-1 of Appendix A, the same
16 page to the Overflight Fee Development Report.

17 There it says, quote, "Capital projects serve
18 to modernize the NAS, enabling the continued provision of
19 a specific service." That is all. That one sentence is
20 the entire justification for the inclusion of one-third
21 of the oceanic fees and one-quarter of the en route fees
22 as directly related costs.

23 Modernization sounds like a noble goal and we
24 all know the FAA has had great difficulty and great
25 expense in connection with the modernization of its

1 system, but there must be something more than that to
2 justify the claim that research and new equipment
3 acquisition are directly related to specific overflight
4 operations and that these should make up one-third or
5 one-quarter of the directly related costs.

6 These are not the kind of operational expenses
7 authorized for recovery by Congress or contemplated by
8 the Court of Appeals.

9 What is the effect of the failure of the FAA to
10 limit overflight fees to overflight costs? As the
11 research and acquisition example shows, the FAA has
12 failed to limit the costs charged to overflying carriers
13 as required by Congress and by the Court of Appeals.
14 That renders the fees invalid, as contrary to the
15 applicable law.

16 How did this come about? There are many
17 possible answers, but one might be found at the preamble
18 to the new Interim Final Rule that even misstates the
19 holding on the appeal of the first Interim Final Rule.
20 The preamble says in that case "The Court concluded that
21 the FAA's methodology of determining costs violated
22 statutory requirements."

23 The Court said no such thing. The Court in
24 that case did not even consider the FAA's methodology of
25 determining costs. That may be in this case, the

1 previous case was an allocation case. The Court actually
2 held that whatever the FAA's costs, it had acted
3 improperly in allocating them according to value under a
4 statute that provided that fees must be directly related
5 to costs.

6 Thus, it appears that the new rule is based on
7 a misunderstanding of the Court of Appeals decision. In
8 any case, the significance of the words "directly
9 related" simply is not considered in the new Interim
10 Final Rule.

11 While the words "directly related" are recited
12 in the preamble and in the Overflight Fee Development
13 Report, these words are never interpreted nor explained.
14 It seems the FAA does not accept the "directly related"
15 language either issued by Congress or by the Court of
16 Appeals.

17 Congress put the requirement that fees be
18 directly related to costs in a subsection of the statute
19 called "Limitations." Perhaps the FAA thinks the use of
20 "directly related" is some kind of micro managing by
21 Congress which can be ignored. It is not and it cannot
22 be.

23 If user fees are not related to costs, they are
24 no longer user fees, they become taxes. Perhaps the FAA
25 would like to have the power to levy taxes, but Congress

1 has not given the FAA that power. However much the FAA
2 might like to make a profit on its overflight fees for
3 the benefit of other programs, that is exactly what
4 Congress has said it cannot do.

5 Overflight fees must be directly related to
6 costs of the actual service provided. Thus, there is
7 good reason to reconsider the costing behind the Interim
8 Final Rule.

9 LTU therefore asks that FAA suspend, stay or
10 withdraw the Interim Final Rule until it has conformed
11 its determination of the overflight fees to the
12 Congressional and Court requirements.

13 There are two time-tested legally favored
14 procedures to determine the proper costing, a Notice of
15 Proposed Rulemaking and diplomatic consultations. I note
16 here that 23 countries, including Germany, have formally
17 protested the absence of diplomatic consultations.

18 The time has come to return to the proper
19 procedures and allow discussion of the ways in which
20 actual costs can be determined and actual fees can be
21 determined before they go into effect. The best method
22 is open discussion and LTU stands ready to participate
23 with the FAA, other carriers and the effected national
24 governments in such discussions. Thank you.

25 MS. KLEPPER: Thank you. Any questions or

1 comments from the panel for Mr. Hird?

2 (No response.)

3 MS. KLEPPER: None. Thank you. Our next
4 speaker is Charles Chambers, Association of Asia Pacific
5 Airlines.

6 MR. CHAMBERS: Thank you, Chairperson Klepper
7 and members of the panel for allowing us this opportunity
8 today. Yes, I am a consultant with the Association of
9 Asia Pacific Airlines and will submit our statement for
10 the record.

11 The Association of Asia Pacific Airlines
12 includes 18 airlines from the Asia Pacific region, many
13 of whom will be effected by these fees. I would note
14 that the AAPA accepts the general principle of paying
15 fees for air traffic services if those fees are based on
16 actual costs for the services rendered and there are
17 meaningful and adequate consultations prior to the fees
18 being introduced, as well as after the fees are
19 initiated.

20 Much of what I'll say here today has been
21 stated previously and I would note that I think that
22 indicates clearly the strength of the views of all those
23 who are speaking today and represents what I think is
24 fair to say a consensus across the world about these
25 concerns.

1 I would also note today that this is not "beat
2 FAA Day" and I just wanted to note that I appreciate the
3 efforts that have been made over the last two and a half
4 years. I do think there has been some progress and
5 especially with getting the cost accounting system in
6 place and reacting to the overseers of the FAA, such as
7 the Inspector General.

8 Nonetheless, the AAPA is deeply concerned about
9 the FAA's introduction of overflight fees via this
10 Interim Final Rule. The AAPA member airlines that
11 overfly U.S.-controlled airspace object to this rule
12 because it does not provide all interested and affected
13 parties an adequate opportunity to meaningfully debate
14 the issues.

15 The member airlines are also concerned that
16 besides such procedural issues, the Interim Final Rule
17 process has led to several substantial defects that could
18 have been avoided if the FAA had used a Notice of
19 Proposed Rulemaking. Such rulemaking would have allowed
20 the opportunity to resolve these concerns before
21 collecting money from airlines.

22 In simple terms, the procedural concerns are
23 that the FAA failed to comply with the Administrative
24 Procedures Act, which you have heard today, the APA, by
25 issuing the Overflight Fees Rule without prior notice and

1 comment.

2 Also, there is, as you know, a strong legal
3 presumption that any new rule issued by an agency must
4 follow this fundamental aspect of U.S. administrative
5 law. We also believe that the FAA failed to meet
6 internal requirements and commitments with this new rule.

7 As you've heard, in vacating the FAA's initial
8 Overflight Fees Rule, the Court concluded that the
9 Congress, under the 1996 Act that authorized these fees,
10 expressly directed the FAA not to comply with the APA
11 only in issuing the initial overflight fee schedule.

12 The Court based this conclusion on its view
13 that the 1996 Act (1) told the FAA to issue the initial
14 fees schedule as an Interim Final Rule and (2) expressed
15 the desire by Congress that the FAA collect \$100 million
16 during the first year following passage of the 1996 Act.
17 The Court stated that the FAA had to move quickly in this
18 case to establish a fee schedule and collection process
19 to fulfill the statutory goal.

20 The Court also said that the APA would apply
21 after the initial fee schedule was issued. It's that
22 simple. The Court found that even though the 1996 Act
23 does not establish a specific time table for every step
24 in the regulatory process, it expresses a Congressional
25 intent to depart from normal APA procedures with respect

1 again only to the initial fee schedule.

2 Notably, the Court went on to state that it is
3 probably the case that once the FAA issued the initial
4 fee schedule, the APA once again became controlling for
5 all subsequent proceedings. Any revised fee schedule
6 that the FAA subsequently adopts, including this one,
7 therefore will not be an initial fee schedule subject to
8 the Interim Final Rule process, but rather revised fees
9 that are subject to the APA and the notice and comment
10 process therewith.

11 We would also note that Congress has not
12 exempted the FAA from APA requirements. There is no
13 directive that we've found from Congress that any revised
14 or otherwise subsequent overflight fee schedule take
15 effect without prior notice and comment under the APA.

16 The Congress has given no indication in
17 legislation subsequent to the 1996 Act that the FAA
18 remains under any expedited rulemaking timetable to
19 establish an overflight fee schedule. There is also no
20 specific requirement or expressed desire by the Congress
21 that the FAA collect \$100 million from new fees within
22 less than a year.

23 With the Congress silent on how the FAA should
24 proceed in the given circumstances, it is only
25 appropriate that the APA notice and comment procedures

1 must be followed.

2 It is also of great concern to the AAPA that
3 the FAA is not meeting its international commitments. By
4 issuing this Interim Final Rule, the FAA is not allowing
5 for appropriate consultations and information under its
6 international commitments.

7 The FAA, for example, has not complied with
8 international commitments of the United States under the
9 Chicago Convention, as well as commitments under a number
10 of bilateral agreements that it has concluded with other
11 nations.

12 An Interim Final Rule also does not conform to
13 the ICAO recommendation regarding consultations prior to
14 introduction of a new system of charges such as that
15 which you've introduced and I would have to say it is
16 ironic that in its 1997 Overflight Fees Interim Final
17 Rule the FAA referred to the principles set forth by ICAO
18 on charges for airports and air navigation services.

19 The U.S. Government can ill-afford to send a
20 message to the world that as a major proponent of
21 developing ICAO standards, it is acting in contravention
22 to those very principles it wants other countries to
23 adhere to.

24 Unfortunately, the U.S. Government has failed
25 to set an example of the proper manner through which new

1 charges systems are introduced. The AAPA would note that
2 NavCanada, in setting Canadian charges for air traffic
3 services, has consulted extensively with and continues to
4 consult with its users.

5 It is also a concern of the AAPA that the FAA
6 has compromised the right to judicial review. One of the
7 problems that is associated with the FAA using this
8 Interim Final Rule where the new fees become effective
9 before comments are considered and acted on by the agency
10 is that there is no specific deadline for the FAA to
11 issue a Final Rule. This means that the FAA may delay
12 issuing a Final Rule on Overflight Fees for many years.

13 Under the Interim Final Rule process that the
14 FAA has used in this case, unless an affected airline
15 files a petition with the Court of Appeals to challenge
16 the new rule by the end of July 2000, that carrier may
17 have to wait years to have the FAA's methodology for
18 calculating the new fees reviewed in a Court.

19 By requiring the FAA to receive and consider
20 comments before the new rule becomes effective and by
21 allowing parties to file court petitions within 60 days
22 after the first effective rule is issued, the right to
23 judicial review would not be unfairly subject to the
24 FAA's unilateral decision as to when, if ever, to issue a
25 Final Rule.

1 The AAPA also has substantive concerns with the
2 Interim Final Rule. We believe the new overflight fees
3 fail to comply with the statutory requirement that each
4 fee be directly related to the FAA's cost to provide the
5 service rendered.

6 As you know, the 1996 Act requires that each of
7 the fees for overflights be directly related to the FAA's
8 cost of providing the service rendered to aircraft that
9 neither take off from or land in the U.S.

10 As the Court observed in vacating the FAA's
11 initial Overflight Fees Rule, the Congress intended that
12 the fees be established in such a way that each flight
13 pays according to the burden associated with serving it.

14 We believe that the new fees are clearly not
15 directly related to the costs for services. As someone
16 has mentioned earlier, the FAA acted in an arbitrary and
17 capricious manner in assuming that its cost to provide
18 air traffic control and related service to overflights in
19 the en route environment is the same as its cost to
20 provide service to transitional flights in the en route
21 environment.

22 It would appear, however, that the FAA extends
23 greater resources to provide service to transitional
24 flights that take off or land in the United States and
25 are thereby transitioning at some point between high

1 altitude cruising and so-called hand-off to an AFF
2 control tower at an airport.

3 There is certainly no evidence in the docket to
4 support the FAA's assumption that overflights and
5 transitional flights use the same level of service. By
6 mixing overflights with these transitional flights, the
7 FAA has failed to ensure that overflying aircraft are
8 paying fees that are based solely on the burden
9 associated with servicing them.

10 We believe the FAA also improperly assumes that
11 its cost to provide service to overflights in the oceanic
12 environment are the same in all geographic areas within
13 U.S.-controlled airspace.

14 Labor charges for oceanic service primarily
15 reflect staffing in four facilities, Anchorage, Houston,
16 New York and Oakland. The FAA, however, provides no
17 justification that these labor rates are identical in
18 each facility.

19 The FAA clearly has not adequately explained
20 some costs. It is unclear why the FAA's cost to provide
21 service for overflights jumped over 50 percent, which is
22 a very significant increase, between fiscal year 1998 and
23 fiscal year 1999 when the FAA determined that overflights
24 were about \$32 million in 1998, jumping to \$48.5 million
25 in fiscal year 1999.

1 Also, given that the FAA's purported costs to
2 provide service in the oceanic environment are only 4
3 percent as high as the agency's costs to provide service
4 in the en route environment, that's \$94 million versus
5 \$2.4 billion, it is unclear why the FAA set oceanic fees
6 at a level that is 54 percent of the level it set for en
7 route fees and the AAPA is concerned that this represents
8 an improper over-allocation of FAA costs to the oceanic
9 environment.

10 Finally, and again most importantly, we believe
11 the FAA has not actually followed Congressional intent in
12 setting the new fees. The FAA's fee methodology is
13 contrary to Congressional intent in authorizing the new
14 fees. Simply stated, the Congress wanted the FAA to
15 determine what additional cost it incurs to provide
16 service to overlying aircraft that it would not already
17 incur to provide service to aircraft that land or take
18 off in the United States.

19 The Congress did not direct the FAA to
20 establish user fees based on the agency's total cost to
21 provide service in the oceanic and en route environments
22 and then charge overflights a fee based on those costs.
23 Rather, the Congress wanted overflights to compensate the
24 FAA for the additional cost it incurs to provide service
25 to overflights.

1 For the FAA to determine these costs to provide
2 service to overflights that would not otherwise be
3 incurred to provide service to non-overflights, the
4 agency needs to do two things. One, to calculate the
5 marginal or average variable cost to provide service to
6 overflights; and two, allocate some portion of fixed
7 costs to reflect the need for some additional level of
8 fixed costs that would not be necessary if the FAA
9 provided no service to overflights.

10 Until the FAA develops and implements a
11 supportable methodology reflecting this formula, it will
12 not have complied with the intent of Congress.

13 In closing, the AAPA wishes to reiterate its
14 objection to the vehicle of an Interim Final Rule in
15 implementing overflight fees and to express its support
16 for meaningful and adequate consultations prior to fee
17 imposition.

18 We find it quite disconcerting to see the FAA
19 move ahead using an Interim Final Rule with such clear
20 indications that it is not the appropriate process. It
21 seems the FAA has chosen to ignore the concerns of
22 effected parties and to charge ahead when there was no
23 reason to do so, including no requirement by the Congress
24 and clear direction from the Court that the APA should
25 apply in this case.

1 It is the AAPA's hope that the U.S. Government
2 and the FAA will consider carefully the consequences of
3 its actions and reconsider its implementation of
4 overflight fees by an Interim Final Rule.

5 Thank you. That concludes my remarks and I'll
6 be happy to answer any questions.

7 MS. KLEPPER: Thank you, Mr. Chambers.
8 Questions? Woody or Randy?

9 MR. FIERTZ: Go ahead.

10 DR. DAVIS: You spoke a bit about the intent of
11 Congress, specifically with regard to procedure and to
12 the methodology. With regard to the methodology when you
13 were saying that the FAA should just calculate marginal
14 cost and then some additional percentage of fixed cost,
15 what source material are you -- since you kept referring
16 to the intent of Congress, do you have some documentation
17 to support that and if so, would you please provide that?

18 MR. CHAMBERS: I certainly would. I think for
19 us it's essentially how we read the statutory language.

20 DR. DAVIS: Okay. And then the other, there
21 are letters in the docket from the Senate and House
22 Chairmen reaffirming the Congress' direction to us and
23 what's your reaction to that?

24 MR. CHAMBERS: Well, I'll have to read those
25 letters to see exactly what they say and I haven't, but I

1 would assume again that given that -- to us, it seems
2 like you have the structure in place, the taxes in place
3 to pay for your cost and if you're going to again charge
4 these overflight fees, what we understand the intent was
5 was to charge for that difference, in simple terms.

6 DR. DAVIS: And assuming -- the letters are
7 there, I can assure that, they're in the docket and if
8 those letters were to mature into legislation directing
9 us to continue with the Interim Final Rule, repeating the
10 Congress' direction which we think is already there, how
11 would your association react to that?

12 MR. CHAMBERS: Well, again I would have to say
13 that -- concurring again with what others have said about
14 what we see as not only the procedural requirements,
15 which I think clearly could have been done through a
16 Notice of Proposed Rulemaking, having been at the GAO and
17 worked on the Hill, I'm not sure that there was -- again,
18 I think there was a requirement up front and a concern up
19 front with getting these in place and getting those fees
20 calculated and I'm not sure again outside of the concern
21 that the FAA proceed with getting the fees in place and I
22 think that there's a concern that it be as timely as
23 possible, but I don't know that there was necessarily a
24 need to do it in this manner

25 DR. DAVIS: Thank you.

1 MR. FIERTZ: Let me just ask one question. You
2 lost me when you were talking about the over-allocation
3 to oceanic costs. If you could please elaborate on that,
4 I'd appreciate it.

5 MR. CHAMBERS: It just appeared to us, and
6 again, we haven't had a chance to look closely without
7 the consultation process at the numbers, that given the
8 limited amount of oceanic cost, it seems like relative to
9 that, that the charges were far greater than they
10 probably should be. Again, that was just based on a
11 review of your total oceanic cost versus your en route
12 cost.

13 MR. FIERTZ: I would suggest you look at the
14 number of flight miles, which is how that's allocated.

15 DR. WHARFF: I have a quick question. Under
16 your methodology, what methodology would you suggest to
17 allocate the fixed costs that you are referring to to
18 overflights?

19 MR. CHAMBERS: To allocate some portion of the
20 fixed costs?

21 DR. WHARFF: That's right. What methodology
22 would you propose?

23 MR. CHAMBERS: Well, again, I think just these
24 two steps. Again, that's why you need a consultation
25 process, to sit down and discuss how you might -- you

1 know, based on the experience of airlines across the
2 world, how you might do something like that, how you
3 might actually take those fixed costs, look at the
4 methodology that you've used, compare it to what you
5 could possibly use and look at the numbers.

6 Again, without the chance to sit down across
7 the table and do that, it's very hard to take a look and
8 see how you might implement such an action.

9 DR. WHARFF: Thank you.

10 MS. KLEPPER: Thank you very much,
11 Mr. Chambers. Our next scheduled speaker is Mr. Louis
12 Beardsworth with British Airways.

13 MR. BEARDSWORTH: Thank you, Madam Chairperson,
14 ladies and gentlemen. Good morning. My name is Lou
15 Beardsworth. I'm Air Traffic Control Charges Manager for
16 British Airways and obviously, British Airways welcomes
17 the opportunity to engage in this process, although we
18 note, as a former colleague of mine says, I believe it is
19 very unfortunate that we find ourselves three years down
20 the road and after a considerable amount of work,
21 obviously, on the part of the FAA, in a situation where
22 we are still presenting information in this manner;
23 although, we obviously appreciate the fact that this may
24 be the start of something which we hope will become a
25 different process.

1 I think that I should first of all state that
2 although we've submitted our position for the record, I
3 will talk around some of the issues I've heard generated
4 this morning and also refer back to the document and
5 quote some of the elements of that document I've
6 submitted.

7 Most importantly, I think the first thing to
8 say, and I will repeat in some aspects comments made by
9 some of the other speakers, is that we as British Airways
10 are happy, as other carriers are, to pay for the service
11 provided by ATSPs. However, I think it's very important
12 in making that statement, the usual elements we apply to
13 that are that those services are ones that have been
14 agreed to and there's consultation and discussion and
15 that we have absolute surety that we are paying the
16 correct cost of those services, the correct charge.

17 I know that one of the positions that's being
18 taken is that the charges that are currently being
19 suggested to be imposed by the Interim Final Rule process
20 are lower than those that were previously advocated. As
21 a carrier, we are interested in paying the correct price
22 and that may be that we are paying a higher price than
23 actually being advocated at the present, but in terms of
24 establishing a principle for service, the international
25 agreement is that we will pay the cost, not simply a

1 price and I would refer to the earlier discussion that
2 that might be considered a tax.

3 The current process that we're engaged in, and
4 I think it's important to state for the record, is not
5 what we would consider at British Airways as
6 consultation. It's been stated already that the FAA will
7 listen to what we have to say today and that does not
8 constitute consultation in its purest sense.

9 Consultation is an active engaged process
10 between the providers and the users which leads to
11 resolution and understanding of matters of concern. It's
12 well-established, in terms of my experience, over three
13 years of working for British Airways, I must have
14 consulted with 50 plus different countries scattered
15 across the world and within our own geographical
16 footprint, and it is not this process.

17 It has been clearly stated that documents will
18 be exchanged. That, in my understanding, is called
19 correspondence.

20 Just to be sure that this is not shall we say a
21 position that non-U.S. carriers have taken on this matter
22 of consultation, I think it's important to refer back to
23 some of the earlier proceedings with the FAA back in 1997
24 and the comments made by ATA at that time, and I quote.

25 This is referring back to a letter that was

1 submitted by ATA on the 17th of July '97 from the ATA.
2 "Although we appreciate the May 1 public meeting the FAA
3 had on this subject, that meeting occurred after the
4 development of the interim fee schedule and therefore, it
5 is not what persons involved in international aviation
6 matters would characterize as a satisfactory consultative
7 step."

8 Now, that's an interesting point of principle
9 in terms of this discussion, that the ATA recognizes what
10 the international carriers are also advocating this
11 morning.

12 It would be very easy to characterize
13 consultation, perhaps to the uninitiated, as being an
14 adversarial process. I think it's very important to
15 dismiss that if it could be considered a concern in the
16 way that this process develops with the FAA and I have
17 high hopes that we will be able to develop a meaningful
18 process with the FAA.

19 Consultation is not about an adversarial
20 exchange, it is about an understanding being gained
21 between the users and the providers. In thinking about
22 the users and the providers, the FAA is obviously --
23 well, is, I believe, the largest provider across the
24 globe, they obviously have a mixed responsibility of
25 being both a regulator and a provider.

1 If we leave the regulatory function to one
2 side, the purpose of an air traffic service provider,
3 once the safety question has been met as it will be met
4 and will be met by all the users, the primary concern is
5 to provide services to users. That is their raison
6 d'etre.

7 Surely it must be of benefit to all ATSPs, and
8 particularly with the FAA with the position of leadership
9 that you take, to ensure that the services it provides
10 are ones that the users require to a specification that
11 the users need and enabling the users to deliver the
12 service to the ultimate customer, the traveling public.

13 We are all aware of the fact that whether it be
14 within the continental United States or in Europe, the
15 issue of what rights of the traveling public are has been
16 taken to almost a legislative state. I would suggest
17 that reflecting that back to the people who pay the
18 provision accessed at air traffic control should also be
19 considered.

20 Clearly, there are international principles
21 around which this is established and one of those is
22 enshrined within bilateral agreements between the states
23 and if I can quote again from the Air Service Agreement
24 between the United States and the United Kingdom, Article
25 10 of the agreement states "Each contracting party shall

1 encourage the component charging authorities to provide
2 users with reasonable notice of any proposals for
3 change..."

4 The Interim Final Rule process has put us in a
5 position where we're beyond the state of it being a
6 proposal, as it being a fait accompli. Clearly, there is
7 a question there to be raised as to whether this breaches
8 an international agreement. That is one I will leave for
9 the attorneys to discuss.

10 Previous consideration of the IFR in terms of
11 the FAA's position against international standards, and
12 again I refer back to ICAO, stated that "The FAA has
13 reviewed the corresponding ICAO Standards and Recommended
14 Practices and has identified no differences with these
15 regulations."

16 Those of us who are exposed as part of our
17 normal working life to the ICAO requirements stated in
18 9082/5 will be aware that there may be a concern there
19 that actually there isn't full adherence and I quote from
20 Paragraph 44 of that document.

21 "The principles enunciated with respect to
22 consultation concerning changes in airport charges in
23 Paragraph 22 --" which I shall not read for everyone's
24 benefit - "are applicable also to changes in air
25 navigation service charges, but in the latter case --"

1 i.e. air navigation services -- "a need may also exist
2 for more specific consultation between providers and
3 airlines since air navigation services are generally
4 provided by governments and it will therefore be easier
5 to obtain a consultative opinion concerning their charges
6 that in the case of airport charges where a number of
7 conflicting interests may arise."

8 Clearly, the element of that that we should be
9 particularly concerned with is the purpose of
10 consultation is to ensure that the provider give
11 consideration to the views of users and the effect the
12 charges will have on them.

13 One of our speakers this morning has already
14 illustrated there may be severe economic dis-benefit the
15 way that these charges are being imposed upon us.
16 Clearly, that should be a concern to all of us and I'm
17 sure that the FAA would not wish to move to the point
18 where the imposition of charges would actually result in
19 less users having access to the system by virtue of their
20 bankruptcy.

21 When we talk about consultation and compare it
22 to the current state of the IFR, there is a very clear
23 need for transparency and timely delivery of data. We're
24 all aware that in the way today's service is currently
25 being delivered to us as part of the Interim Final Rule

1 process irrespective of its appropriateness, has not
2 given us the opportunity for proper examination and
3 certainly because of the process that the FAA appears to
4 be bound by, no opportunity to discuss concerns raised
5 once those matters of concern have been exposed.

6 There are also concerns here in terms of the
7 transparency that's being provided. I would have hoped
8 that in terms of what the FAA was seeking to achieve, it
9 would be seeking -- especially in light of the fact that
10 a number of developments are going on with ATSPs and
11 users, they would be seeking to exceed or at the very
12 least meet the best standards that have been recommended
13 by a number of consultative bodies, namely the
14 Performance Review Commission of Eurocontrol, which the
15 FAA is aware of, and also even Civil Air Navigation
16 Services Providers, CANSP.

17 We have all stated that the IFR for a number of
18 reasons gives us concerns. It gives me particular
19 concern because I have, from experience in a number of
20 different processes, found that the retrospective
21 analysis of a charge once accepted and having been
22 imposed upon users shall never reach a satisfactory
23 outcome for either users or the provider state.

24 The purpose of consultation being to actually
25 establish that that is a fair charge for a fair service

1 and that the process of consultation that we enter into
2 enables the building of a relationship which is then a
3 platform for going forward on all matters concerned with
4 either services or charges, clearly consultation and the
5 use of a Notice of Proposed Rulemaking would have given
6 that opportunity and would have set the FAA in a position
7 of leadership, rather than as it is now, currently one of
8 concern to users.

9 Although I have some experience with regard to
10 overflight fees and the international consultative
11 process, I do not claim to have expertise in U.S.
12 initiative law, although I've been advised the U.S.
13 Administrative Procedures Act generally requires the
14 effected parties to be provided advance notice and an
15 opportunity before finalization of the rule in question.

16 I strongly suspect that any U.S. Government
17 agency that attempts to justify suspension of notice and
18 comments required by the Administrative Procedures Act by
19 explaining that notice and comment was not required
20 because the agency would retrospectively respond to
21 comments at a later date, would face a considerable
22 barrage of concern. I think it is quite reasonable that
23 the FAA should not expect less from us as foreign
24 carriers.

25 These are some specific issues that we have

1 been able to identify with the KPMG report. I would
2 support, especially as an active user of the FAA services
3 as a pilot with British Airways, the point that's already
4 been made regarding overflight charges and flights
5 effected by transition, climbing and descending flights.

6 By inspection, any flight that is climbing or
7 descending uses a greater number of services from an ATSP
8 simply required by the number of heading changes,
9 climbing and descending, et cetera. Any activity-based
10 costing model that could be validated would show that to
11 be true.

12 Also, by inspection of the way that
13 sectorization, i.e., the pieces of airspace that are
14 allocated to air traffic controllers -- the size thereof,
15 it's clear that amount of airspace that can be allocated
16 to a transition sector is considerably smaller because of
17 the activity required and the number of radio calls.

18 We've seen also within that KPMG report the
19 question of R&D costs and how those are being effected.
20 We would clearly like to see the international precedents
21 used whereby costs are capitalized against a project once
22 something is delivered from it as an operational benefit.

23 Overhead reduction, enough statements have
24 already been made on that. That would be of concern to
25 me particularly, inasmuch as the cost of overhead having

1 been extracted from the cost of providing the charge, we
2 are now unsure as to whether a correct element has been
3 reduced in the cost of the charge that's being suggested
4 or if the number that has been removed is to some degree
5 arbitrary.

6 The last point, which has already been made and
7 I will restate for the record, is that we also have
8 concerns about the cost ratio of oceanic versus
9 overflights. The detail of that I don't feel I can go
10 into at the moment.

11 We have a number of international precedents
12 that we wish to see followed by the FAA, NavCanada being
13 the closest to home and possibly the best example of how
14 a relationship can be established between a new charging
15 agency and its users.

16 A very lengthy consultative process was entered
17 into which initially was adversarial, I make no bones
18 about that, but established a relationship whereby with
19 NavCanada, we have a clear understanding that they work
20 in the interest of the users and the users are happy to
21 pay the charges. There is transparency and understanding
22 between the provider agency and the users of services.

23 Eurocontrol, although being one of the earliest
24 agencies to establish a full charging procedure, has
25 recognized that its charging methods are inadequate and

1 is seeking to correct those through the activities of the
2 PRC and the PRU. We have supported those activities and
3 will continue to support them, as we would support the
4 FAA if we could reach a position of harmony with them.

5 I would reemphasize the benefits of
6 consultation are there for the users and there for the
7 provider. It is, what I would suggest, an opportunity
8 for the FAA to ensure that they follow international
9 principle and also establish leadership as the largest
10 provider of services across the globe and, I think
11 importantly, that they continue to comply with the
12 important principles established through ICAO and provide
13 through ICAO the leadership that will enable development
14 of this particular element of business, that of air
15 traffic management, to look forward in the appropriate
16 way.

17 We would consequently request that there is a
18 withdrawal of the IFR and that we move to a procedure
19 where the users can effectively engage with the FAA
20 through a consultative process.

21 I'd be happy to take questions.

22 MS. KLEPPER: Thank you. Any questions for
23 Mr. Beardsworth?

24 DR. DAVIS: Yes. I'm a little confused about
25 two things you've been going back and forth from. You

1 cited Paragraph 22 of the ICAO 9082/5, which says "...the
2 purpose of consultation is to ensure that the provider
3 give consideration to the views of users and the effect
4 the charges will have on them..." and that the FAA will
5 not have considered our views because we have been
6 provided with no opportunity to present them.

7 The fees are not in effect; you're standing
8 here giving us your views. Obviously you're providing us
9 information at this point that the FAA can take into
10 account before the rule goes into effect.

11 Then you talked about the NavCanada and
12 Eurocontrol process, which apparently is more than just
13 presenting your views. Could you elaborate on that? Is
14 that what you're suggesting, that rather than the
15 process, it's the practice of consultation that is
16 currently being done, what you're objecting to as not
17 being followed?

18 MR. BEARDSWORTH: The process that we're
19 currently into provides a certainty that a charge will be
20 imposed upon us on the 1st of August irrespective of
21 whether there is any concern or dispute between the two
22 parties.

23 We also do not have the opportunity for a
24 public discussion as to the quality of the information
25 that's used to provide those charges and that is what I

1 would consider would be the normal international
2 principle.

3 Consultation is an interesting process. It
4 takes various forms and I've cited examples simply to
5 provide some opportunity in a very short deposition for
6 you to understand that we are exposed internationally to
7 this process and we seek to reach a position with all
8 provider states whereby there is clear understanding
9 between the two parties.

10 That cannot happen through correspondence, it
11 can only happen through consultation and that
12 consultation would be a long process. The quality of
13 consultation I've been exposed to has been -- in a
14 sophisticated Western European State, it can be poor, but
15 establishing new charging principles in Libya over a can
16 of Coke in an airport can actually adhere to all the
17 principles of ICAO, with complete understanding between
18 the two parties.

19 The specific point in terms of what -- I'm
20 sorry, the second part of the question, you were thinking
21 what would I expect to see in this situation?

22 DR. DAVIS: Yes.

23 MR. BEARDSWORTH: I would expect to see first
24 of all the removal of the potential of the charge without
25 consultation so that the IFR is rescinded, that using I

1 believe knowledge that the FAA has gained through the
2 process and knowing it has been very active in trying to
3 understand what goes on with other ATSPs and their users,
4 that we enter into, if it is required by law in this
5 country, a public process so that anybody may have sight
6 of it, a consultation which is a round-the-table
7 discussion where the users are able to raise specific
8 points and the FAA feels in a position to understand the
9 users' concerns around those points and seek to resolve
10 them.

11 That in no way removes, as it does not remove
12 from any other ATSP, the ability of that ATSP to charge,
13 which is also enshrined within those ICAO principles.
14 However, what it does provide is the opportunity to
15 ensure that in commencing the relationship between the
16 change between just being a provider and being a provider
17 and a charger as NavCanada has gone through and others,
18 most of the international states have gone through now,
19 does mean that the beginning of that relationship is
20 forged through understanding, not conflict.

21 Here we clearly have a situation where there is
22 concern on our side and there is misunderstanding.

23 DR. DAVIS: How did you and NavCanada work that
24 out? You said that there was conflict to begin with with
25 them.

1 MR. BEARDSWORTH: Well, I'll be absolutely
2 straight, that at one point there was a group of users
3 who actually refused to pay and from our -- you will find
4 examining the charges world, there are a number of
5 examples where users have refused to pay and have brought
6 the provider state to the table and consultation has
7 taken place, after which problems have been resolved.

8 That is not the way to proceed. The way to
9 proceed is to ensure that the consultative process using
10 the model as have been advocated and used in other parts
11 of the world is entered into. That is a systematic
12 program about examination of the costs with the charges
13 element of the airlines or the providers, shall we say
14 the representative organizations, such as ATAC, and also
15 engaging with the technical advisors from the airlines
16 and also from the representative bodies, ensuring that
17 from the technical side, the services that are being
18 provided by the user state are appropriate, which gives
19 assurance from the charges side that actually these are
20 services we require that we're being asked to pay for.

21 DR. DAVIS: Thanks.

22 MR. BEARDSWORTH: It's a tough process.

23 DR. DAVIS: Thank you.

24 MS. KLEPPER: Any other questions or comments?

25 (No response.)

1 MS. KLEPPER: None. Thank you. Our last
2 speaker this morning, according to the formal agenda, is
3 Mr. David Payne with Qantas Airways.

4 MR. PAYNE: Thank you, Madam Chair. My name is
5 David Payne, I'm employed by Qantas as General Manager,
6 Airport Services Purchasing, a job which incorporates
7 user charges and it is in that role that I'm here today.

8 Qantas Airways Limited is an air carrier that
9 operates both domestically within Australia and also
10 offers international services, with the main focus being
11 on the Asia Pacific region, with onward services to
12 Europe.

13 Additionally, Qantas currently operates
14 services to three destinations in the United States,
15 Honolulu, Los Angeles and New York, and pays the
16 appropriate fees for those flights that land and depart
17 from the United States.

18 The fees currently proposed by the FAA for air
19 traffic control services provided to airline flights
20 through oceanic airspace controlled by the FAA will have
21 a direct and significant financial effect upon Qantas
22 because of the large number of flights that Qantas
23 operates between points in Australia and Japan that
24 traverse U.S. oceanic airspace.

25 The imposition of the proposed charge will

1 impact the services operated by Qantas to Japan, as they
2 will incur additional en route charges when passing
3 through the Oakland Flight Information Region.

4 The total number of flights operated by Qantas
5 to Japan, approximately 500 per annum, will result in an
6 increase in Qantas costs to Japan of approximately
7 \$250,000 U.S. per annum. Of course, this expense will
8 need to be passed on to our passenger fares and the
9 resulting charge to operations will depend on the
10 prevailing elasticity for demand on that route.

11 The talk this morning provides comments from
12 Qantas Airlines with respect to the Interim Final Rule
13 requiring aircraft operators to pay fees for air traffic
14 services which operate through U.S. airspace but do not
15 land or take off in the United States. Qantas further
16 reserves the right to complete and make further comments
17 by filing within the required date.

18 While Qantas is grateful for the opportunity to
19 express its preliminary views on the new rule imposing
20 fees for FAA ATC services for flights that do not take
21 off or land in the United States or in U.S. territory,
22 Qantas concurs in the views expressed by other foreign
23 airlines, that it is wholly improper for the United
24 States FAA to unilaterally adopt this rule without first
25 consulting foreign airlines and their governments or, at

1 a minimum, affording foreign airlines an opportunity to
2 submit their views and questions prior to finalization of
3 the rule.

4 If the FAA had done so, many of the questions
5 and uncertainties that now characterize the new rule
6 could have been avoided, just as the FAA could have
7 avoided the problems associated with the IFR issued in
8 1997, if it had engaged in prior consultations at that
9 time.

10 Qantas does not dispute the right of the U.S.
11 Government to impose overflight charges for the use of
12 the facilities and services that are provided. The
13 charges imposed, however, must be directly related to the
14 cost of the ATC services provided, be transparent and be
15 fair and reasonable.

16 The fees adopted in the IFR issued in early
17 June of this year do appear to reflect costs incurred by
18 the FAA to a degree that was not present with respect to
19 the 1997 IFR. Nonetheless, even under the point of view
20 that is most favorable to the FAA, it is simply not
21 possible to tell from the new IFR and the accompanying
22 documentation whether the FAA has properly complied with
23 the Congressional requirement that fees for overflight
24 air traffic control services be directly related to the
25 cost of providing the services rendered.

1 The documentation provided has many ambiguities
2 and omits significant items of information. The
3 rulemaking process is inherently flawed for that reason.
4 Furthermore, Qantas believes that new fees in fact do not
5 satisfy the standard and do not correctly reflect the
6 cost of providing ATC services to overflights.

7 Before Qantas outlines our concerns with the
8 current proposal, it is appropriate to remark that the
9 FAA's proposal has made significant steps towards the
10 alignment of costs with the proposed fees. In
11 particular, the recognition of costs being associated
12 with aircraft activity on other than a wide-based
13 formula, the so-called Ramsey Pricing Model, is laudable.

14 We also agree with the inclusion of general
15 aviation in an analysis as recognition of the positive
16 impact that GA has on the FAA's costs. Whilst this
17 current proposal may not see a large proportion of the
18 FAA's costs being passed on to GA, the recognition that
19 the major cost driver is an aircraft, irrespective of
20 type, is endorsed by Qantas.

21 Those comments notwithstanding, in its attempt
22 to establish fees that correspond to FAA costs, the FAA
23 has incorporated a number of assumptions into its fee
24 computation without providing any reasons why the FAA
25 believes the assumptions are valid or why the FAA has

1 made the assumptions in preference to relying on data
2 from its new cost accounting system.

3 For example, as other carriers have pointed
4 out, one of the main assumptions under the FAA's fee
5 calculations is that the ATC services provided to
6 en route and oceanic overflights respectively do not
7 differ from ATC services provided to other en route or
8 oceanic flights.

9 For example, the FAA states on Page 10 of the
10 docket, I quote, "Because the level of ATC services are
11 assumed identical for all aircraft operations within a
12 particular environment, that is en route or oceanic, it
13 is reasonable to assume that the costs of providing ATC
14 services to overflights are proportional for total ATC
15 costs within each environment."

16 This assumption is repeated at various points
17 in the FAA report, but the FAA does not explain why it
18 believes it can assume that the level of ATC services is
19 identical for all aircraft operations within a particular
20 environment. Indeed, the fact is that en route and
21 oceanic flights are not overflights, that is, those that
22 take off and land in the United States require more ATC
23 services to transition to and from the airport terminal
24 environment than do overflights.

25 These flights vary more in altitude than do

1 overflights. They fly more time at lower altitudes,
2 especially as they move into and out of terminal
3 airspace, and these lower altitudes are more congested,
4 requiring more controller attention.

5 The discrepancy between flights that require
6 transition services and those that do not is especially
7 acute in the case of oceanic airspace. In the case of
8 Qantas flights from Sydney to Japan, the flight track
9 through the Oakland FIR is 1,271 nautical miles. While
10 transitioning this airspace, which takes approximately 2
11 hours and 40 minutes, a pilot reports his position eight
12 times as procedure aircraft separation applies. For this
13 service, question will be charged approximately \$256 U.S.
14 dollars per flight.

15 Even though the new en route and oceanic
16 overflight fees are undoubtedly a better estimation of
17 the costs of ATC services for overflights than the 1997
18 fees, the new charges still do not reflect the cost of
19 providing these services to the degree that is both
20 desirable and reasonably possible, especially in
21 comparison to the higher cost of providing ATC services
22 to oceanic flights that take off and land in the United
23 States.

24 In addition, Qantas believes that the capital
25 investment expense that the FAA has included in its

1 calculation of the total costs for en route and ATC
2 services is far higher than it should be.

3 First, it is impossible to tell from the
4 information provided the degree to which the costs
5 classified as capital investment expense are dedicated to
6 ATC services.

7 Secondly, to the extent they may indeed support
8 ATC services, Qantas cannot tell whether those costs
9 classified as capital expense are being expensed or are
10 being depreciated.

11 Lastly, it appears that the FAA has included
12 substantial research and development costs within capital
13 investment expense. Qantas does not know the details of
14 these R&D expenses, but the point that is germane to
15 these discussions is that many FAA R&D projects are not
16 directly related to providing ATC services.

17 However, despite these comments, the
18 implementation of the oceanic and en route charges by the
19 FAA is not in accordance with normal international
20 practice. In Australia, for example, consultation on
21 proposed charges is conducted in two parts.

22 The first is a capital expenditure meeting
23 where the industry is invited to comment and endorse the
24 capital equipment expenditure of the air traffic service
25 provider. This ensures that the industry only receives

1 and subsequently pays for the level of service that is
2 required.

3 The second part of the consultation is a
4 financial planning meeting where the ATS provider
5 presents its three-year financial plan and the proposed
6 level of charging for each of the years. The level of
7 consultation provided by the Australian ATS provider
8 enables analysis of each divisional cost center, the cost
9 allocation methodology used and isolates areas where cost
10 improvement is required.

11 In line with the "user pays" principle, Qantas
12 looks to validate the costs of the service versus the
13 service level and the value provided before agreeing to a
14 fee level.

15 After the industry consultation has occurred
16 and the charging right has been agreed by all parties,
17 the Australian and international practice is that the
18 revised fee will become effective within two to three
19 months. This allows for airline budget amendments and
20 the review of ticket tariff structures.

21 In the case of the current proposal by the FAA,
22 the IFR covers the services provided with the current
23 staffing levels and the capital equipment that the FAA
24 has traditionally provided, without undertaking
25 discussions with the industry on what is actually

1 required.

2 The FAA has not held discussions with the
3 industry on the capital equipment needed to provide an
4 agreed level of service nor the number of operators
5 necessary to support the required level of service, nor
6 has there been any development of assessment criteria to
7 measure the achievement of the required standards of
8 service.

9 Indeed, there has been no discussion of
10 anything other than the full recovery of costs of
11 providing the current level of service. Normal
12 commercial practice would envisage the inclusion of
13 measures to encourage the FAA to become more efficient in
14 the delivery of the required level of service.

15 The proposed oceanic charge does not
16 differentiate between the Atlantic and Pacific Oceans,
17 yet intuitively, there would seem to be differing
18 operational conditions in these two areas. Thus, it
19 would seem that the current proposal, by failing to
20 establish different charges in each of these areas, has
21 failed to conform to the requirement to ensure that fees
22 reflect the cost of providing the services thereto
23 applicable.

24 However, without full transparency of the
25 various Pacific and Atlantic costs, it is not possible to

1 determine whether the proposed fees do accurately reflect
2 the costs of providing those services. Therefore, Qantas
3 questions the allocation of costs included in the cost
4 base for oceanic overflights as the proposed charge may
5 not efficiently reflect the level of service that is
6 provided.

7 Search and rescue costs, shown as emergency
8 services in the docket, should not be included in the
9 cost base unless under ICAO Document 9082/5 for services
10 that are identified are associated with any permanent
11 civil establishment of equipment and personnel maintained
12 for the purposes of providing such services.

13 Notice should also be taken of Document 9082/4,
14 where the Council recommends that the states should
15 refrain from imposing charges that discriminate against
16 international civil aviation in relation to other modes
17 of international transport.

18 Thus, to conform with international practice
19 under ICAO, search and rescue costs should not be
20 included in the cost base.

21 Undoubtedly, many of the questions that Qantas
22 and the other carriers have regarding the calculation of
23 the new fees could have been resolved and any
24 deficiencies in the fee calculation remediated if the FAA
25 had consulted with affected carriers and their

1 governments before the adoption of the new fees, in
2 accordance with standard regulatory practice both in the
3 United States, in Australia and in most foreign
4 countries.

5 Qantas recognizes that the FAA has made
6 significant improvements to its cost accounting systems
7 since the adoption of the former IFR in 1997. Qantas
8 therefore urges the FAA to continue this progress and to
9 work with users to immediately adjust the new fees to
10 correctly reflect the actual cost of providing the
11 services in question.

12 The limited amount of time available for these
13 comments does not allow us to detail all of the areas in
14 which Qantas believes the IFR has made either erroneous
15 or, at best, highly questionable assumptions in the
16 calculations to establish the new en route and oceanic
17 fee levels. Qantas will present these further objections
18 more formally by the deadline for comments, either
19 individually or collectively with other effected
20 carriers.

21 Some additional areas in which Qantas would
22 like further information and clarification are the
23 following. Are the costs associated with the military
24 and the other state functions excluded from the oceanic
25 overflight cost base? If these carriers are not required

1 to pay for the provision of their required services, the
2 costs of providing such services should not be borne by
3 the carriers.

4 Can the FAA explain how the incremental cost
5 associated with procedural airspace control was derived?
6 Direct maintenance costs were allocated based on the
7 number of controllers. Oceanic overflight is mainly
8 carried out using procedural separation, which requires a
9 lower capital outlay than domestic overflight where radar
10 is used. Therefore, does the FAA believe that the
11 proposed allocation is appropriate?

12 Will the FAA be able to provide detail into the
13 build up of direct oceanic facilities and equipment costs
14 which were developed as part of the cost allocation
15 study?

16 Can the FAA say why the set up development
17 costs for billing are only amortized over two years?
18 Normal commercial practice is that a repayment period of
19 some five years is more appropriate than two.

20 Based on the current and proposed capital
21 expenditure programs and efficiency gains that will
22 occur, does the FAA envisage that the new overflight fees
23 will be reduced at some time in the future?

24 What traffic growth forecast figures were used
25 in setting up the charging levels? What program does the

1 FAA envisage will be instituted to drive down costs
2 rather than to simply institute a cost plus billing
3 system?

4 In terms of the specific cost analysis summary
5 provided in the docket, there needs to be a precise
6 definition of what constitutes a flight and how details
7 of the flights and the miles were determined. There is
8 no specific statement of the number of flights and the
9 mileage figures for the flights that do not take off or
10 land in the U.S.

11 There is no statement of the differences in
12 flight numbers and the costs between the Pacific and the
13 Atlantic centers. There needs to be a further
14 distribution of the controller's time applied to
15 overflights and transitions at both en route and oceanic
16 centers.

17 In closing, Qantas seeks an opportunity to
18 consult with the FAA on its costing allocation
19 methodology and the appropriate level of fees for
20 overflight ATC services. In a report commissioned by
21 some of the affected international carriers, KPMG has
22 indicated a number of areas of concern with the IFR.

23 In the time available, the detailed queries
24 raised in KPMG report have not been included in this
25 presentation, but further reference will be made to this

1 report in the final response to the IFR.

2 In line with international practice, we ask, as
3 we did in 1997, that the FAA defer implementation of
4 overflight charges until the FAA has completed
5 appropriate consultations with the international airline
6 industry. Thank you very much.

7 MS. KLEPPER: Thank you, Mr. Payne. Questions
8 or comments? We'll start with Randy.

9 MR. FIERTZ: Just a couple of clarifying
10 questions, please. The first would be on Page 2 in your
11 statement. If you could clarify when you talk about why
12 the FAA has made the assumptions "in preference to
13 relying on data from its new cost accounting system," I
14 just don't follow what you're saying.

15 MR. PAYNE: Randy, we're not sure from the
16 information that is available to us whether the source of
17 the allocations was based upon hard data or whether it
18 was done in the back office throwing darts at a dart
19 board. What we're asking for is what's the hard data.

20 DR. DAVIS: Just a follow up on that,
21 throughout the document is the term "cost accounting
22 system." There is no cost allocation system with this
23 rule, but you feel like what is being presented as the
24 cost allocation system rather than a cost accounting as
25 what it says in the docket?

1 MR. PAYNE: Would you repeat the question?

2 DR. DAVIS: You keep using "cost allocation"
3 over and over again. In the rulemaking documents and in
4 the Arthur Andersen report, it's a description of the
5 cost accounting system, which is a description of how
6 costs have been accounted for by the FAA.

7 In your response to Randy, you seem to indicate
8 that you think that this rule is based on an allocation
9 of cost rather than an accounting of costs.

10 MR. PAYNE: That's my understanding.

11 DR. DAVIS: It's in your statement as well. An
12 accounting system is different than an allocation system.
13 Okay. The other thing is you reference in there about
14 search and rescue, at least from the standpoint of
15 emergency services in the docket.

16 I don't know of anything in the docket that
17 talks about emergency services, and search and rescue are
18 not part of the costs that are included per se. Are you
19 referring to something else in one of the other documents
20 that's talking about emergency services?

21 MR. PAYNE: No. In my reading of the docket,
22 emergency services, which I read to mean search and
23 rescue, emergency services are included in the cost
24 allocation. That would seem to be against the
25 requirements of ICAO under the document I quoted.

1 DR. DAVIS: Okay. Thank you.

2 DR. WHARFF: I just had a comment. We're
3 certainly interested in users having the opportunity to
4 review the data that we relied on to develop these fees
5 and I was just noticing going through your comments and
6 your questions here that a number of your questions are
7 actually addressed in the docket, and to the extent that
8 they're not and they're relevant to this rulemaking, we
9 would certainly point you in the direction of where this
10 information is contained in the docket, or if we've left
11 out critical information, we will do every effort to
12 provide that information to the docket.

13 MR. PAYNE: Thanks for those comments, Jeff.
14 It probably opens up a Pandora's Box that has been raised
15 by so many other of the speakers and that is there may
16 very well be the information that we're after in the
17 docket somewhere.

18 That information would come out through face-
19 to-face discussions that probably is more difficult by
20 reading a document than by sitting and talking to
21 officials about "has this been included, where has it
22 been included, what is the quantum of it."

23 To try to undertake the process the way we're
24 doing it at the moment may establish an adversarial
25 situation that would not exist if face-to-face

1 discussions were possible.

2 MS. KLEPPER: Any other questions from the
3 panel?

4 (No response.)

5 MS. KLEPPER: None. Thank you, Mr. Payne.

6 MR. PAYNE: Thank you.

7 MS. KLEPPER: Is there anyone who has asked to
8 be added to the agenda that I haven't called on?

9 (No response.)

10 MS. KLEPPER: Is there anyone else here that
11 hadn't asked to be added to the agenda but would now like
12 to make a comment or a statement?

13 (No response.)

14 MS. KLEPPER: Seeing no hands, I will say that
15 once again, anyone who wants to make additional written
16 comments, the docket will remain open. The docket number
17 is FAA-2000-7018. Those comments should be mailed to
18 U.S. Department of Transportation Dockets, 400 7th
19 Street, S.W., Room Plaza 401, Washington, D.C. The zip
20 is 20590.

21 You're also welcome to submit comments
22 electronically. You can go into the docket management
23 system, that address is <http://dms.dot.gov/> and again,
24 the docket will remain open until October 4.

25 I'd like to remind everyone once again there

1 will be a verbatim transcript of this meeting, it will be
2 available for ordering after July 12. A copy of the
3 transcript will also be made part of the public docket.

4 I'd like to thank everyone for coming today and
5 for all your information and input. By my watch, it's
6 now 12:12 and we are adjourned. Thank you.

7 (Off the record at 12:12 p.m.)

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