DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 187

RIN 2120–AG17

Fees for FAA Services for Certain Flights

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of agency reconsideration of Final Rule.

SUMMARY: Since August 1, 2000, the FAA has been charging fees, required by law, for air traffic control and related services provided to aircraft that fly in U.S.-controlled airspace but neither take off from, nor land in, the United States. These fees, commonly referred to as ''Overflight Fees,'' were authorized by the Federal Aviation Reauthorization Act of 1996, enacted on October 9, 1996.

The Aviation and Transportation Security Act (the 2001 Act), enacted on November 19, 2001, amended the Overflight Fee authorization in several respects. First, the 2001 Act changed the wording of the operative standard by substituting ''reasonably'' for ''directly'' (thereby requiring that fees be ''reasonably related'' to costs, rather than ''directly related'') and ''Administration's costs as determined by the Administrator'' for ''Administration's costs.'' Second, the 2001 Act provided that ''the determination of such costs by the Administrator is not subject to judicial review.''

On May 6, 2002, the FAA published a notice of inquiry in the **Federal Register** seeking public comment on whether and to what extent, if any, these statutory changes require the FAA to modify its Final Rule on Overflight Fees (67 FR 30334). That rule is the subject of a petition for review before the United States Court of Appeals for the District of Columbia Circuit (the Court).

The purpose of this document is to summarize the public comments received, to indicate the disposition of those comments, and to advise the public of the results of the FAA's reconsideration of the Final Rule.

FOR FURTHER INFORMATION CONTACT: Randall Fiertz, Office of Cost and Performance Management (APF–2), Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591, (202) 267–7140; or Dr. Harold (Woody) Davis, Office of the Chief Counsel (AGC–200), Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591, (202) 267–3152.

SUPPLEMENTARY INFORMATION:

History

The Federal Aviation Reauthorization Act of 1996 (the Act) directs the FAA to establish, by Interim Final Rule, a fee schedule and collection process for air traffic control (ATC) and related services provided to aircraft, other than military and civilian aircraft of the U.S. Government or of a foreign government, that fly in U.S.-controlled airspace but neither take off from, nor land in, the United States (49 U.S.C. 45301, as amended by Public Law 104–264). Such flights are commonly referred to as ''Overflights.'' The Act further directs the FAA to seek public comment after issuing the Interim Final Rule, and subsequently to issue a Final Rule.

As originally enacted, the Act directed the FAA to ensure that the fees authorized by the Act were ''directly related'' to the FAA's costs of providing the services rendered. The Act further states: ''services for which costs may be recovered include the costs of air traffic control, navigation, weather services, training and emergency services which are available to facilitate safe transportation over the United States and other services provided by the Administrator or by programs financed by the Administrator to flights that neither take off from, nor land in, the United States.''

On March 20, 1997, the FAA published an Interim Rule (IFR), ''Fees for Air Traffic Services for Certain Flights through U.S.-Controlled Airspace'' (62 FR 13496), which established the Overflight Fees. The FAA invited public comment on the IFR and held a public meeting on May 1, 1997. The effective date of the rule was May 19, 1997, and the comment period closed on July 18, 1997. The FAA also published two amendments to that IFR on May 2, 1997 (62 FR 24286) and October 2, 1997 (62 FR 51736).

That rulemaking was subsequently challenged in the United States Court of Appeals for the District of Columbia Circuit. The Air Transport Association of Canada (ATAC) and seven foreign air carriers petitioned the Court to review the rule. On January 30, 1998, the Court issued its Opinion on the eight consolidated petitions in the case of *Asiana Airlines* v. *FAA,* 134 F. 3d 393 (D.C. Cir. 1998). The Court rejected the petitioners' claims that: (a) the FAA acted improperly in employing an expedited procedure before the effective date of the IFR; and (b) the FAA violated the anti-discrimination provisions of various international aviation agreements. The Court, however, concluded that the FAA's methodology for determining costs violated statutory requirements, vacated the IFR fee schedule, and remanded to the FAA for further proceedings. The FAA subsequently refunded all fees (nearly $40 million) collected under the IFR. On July 24, 1998, the FAA published a Final Rule (63 FR 40000) removing the 1997 IFR.

Although the 1997 IFR had been removed, the statutory requirement that FAA establish Overflight Fees by IFR remained in effect. Therefore, in 1998 the FAA began developing a new IFR on Overflight Fees using a different methodology. The fees this time were to be derived from cost data produced by the agency's new Cost Accounting System (CAS), then under development. On June 6, 2000, the FAA published a new IFR with a request for comments and notice of another public meeting (65 FR 36002, June 6, 2000). The FAA held the public meeting on June 29, 2000, and 12 individuals representing 10 different organizations made presentations. A discussion of the comments made at the public meeting can be found in the docket of this rulemaking (Docket No. FAA–00–7018). (This may be found on the Internet by going to the search function of the Department of Transportation's electronic Docket Management System (DMS) Web page *http://dms.dot.gov/search*), typing in the last four digits of the Docket number (7018), and clicking on ''search.'') The FAA began charging fees under the new IFR on August 1, 2000. The FAA twice extended the comment period; first on October 6, 2000 (65 FR 59713), and again on October 27, 2000 (65 FR 64401), closing it finally on December 26, 2000.

On November 1, 2000, the Congress enacted the National Transportation Safety Board Amendments Act of 2000 (Public Law 106–424). Section 16 of that Act deemed the Interim Final Rule, published on June 6, 2000, to have been issued in accordance with the procedural requirements of the Act.

Just before the August 1, 2000, effective date of the fees, the ATAC and seven foreign air carriers again petitioned the Court to review the new IFR. The petitions were again consolidated into a single case (*ATAC* v. *FAA*). Issues raised by the petitioners included some of the same process and procedure questions raised in the previous litigation. Petitioners also, raise new issues regarding the adequacy of information provided by the FAA to support the fees and whether the fees met the then existing statutory requirement of being ''directly related''

to the FAA's costs of providing the services. The Court heard oral arguments on May 14, 2001 and, on July 13, 2001, issued an Opinion finding that the FAA had failed to provide an adequate explanation for one assumption in its fee setting methodology (*i.e.*, that the costs, on a per-mile basis, of providing ATC and related services to Overflights are the same as the costs of providing such services to flights that take off and/or hand in the United States). Because the FAA had failed to address this assumption, the Opinion directed that the IFR be vacated. At the time the Opinion was issued, the FAA was in the final stages of Executive Branch review of a Final Rule on Overflight Fees, which contained a detailed explanation of the assumption in question. Because the Court faulted only FAA's failure to provide an *explanation of an assumption* in support of the IFR, and not the *substance* of the IFR itself, the FAA decided to proceed with issuance of the Final Rule in order to both meet the requirements of the Act and address the concerns of the Court.

The Final Rule was published in the **Federal Register** on August 20, 2001. It reduced the fees established under the IFR by approximately 15%, effective immediately, and provided for retroactive application back to the original date of imposition (*i.e.*, August 1, 2000). The same group of eight petitioners who had sought judicial review of the most recent IFR again sought such review of the Final Rule. That litigation is ongoing (the second *ACTAC* v. *FAA* case).

Following the August 20, 2001 publication of the Final Rule, the FAA petitioned the Court on August 24, 2001 to reconsider the remedy (vacating the IFR) it had imposed in its Opinion of July 13, 2001. On December 28, 2001, the Court granted the FAA's request, modifying its July 13 Opinion and issuing a Mandate that remanded but did not vacate the IFR.

Legislative Action

On November 19, 2001, the President signed new legislation addressing Overflight Fees. The Aviation and Transportation Security Act (the 2001 Act), Public Law No. 107–71, contained the following amendment (Section 119(d)):

> (d) AMENDMENT OF GENERAL FEE SCHEDULE PROVISION.—Section 45301(b)(1) (B) of title 49, United States Code, is amended—(1) by striking ''directly'' and inserting ''reasonably''; (2) by striking ''Administration's costs'' and inserting ''Administration's costs, as determined by the Administrator,''; and (3) by adding at the end ''The Determination of such costs by the Administrator is not subject to judicial review.''

Thus, the statutory authorization for the Overflight Fees (49 U.S.C. 45301(b)(1)(B)) now provides:

> (the Administrator) shall ensure that each of the fees required by subsection (a) is reasonably related to the Administration's costs, as determined by the Administrator, of providing the service rendered. Services for which costs may be recovered include the costs of air traffic control, navigation, weather services, training and emergency services which are available to facilitate safe transportation over the United States, and other services provided by the Administrator or by programs financed by the Administrator to flights that neither take off nor land in the United States. The Determination of such costs by the Administrator is not subject to judicial review.

The accompanying Conference Committee Managers' Report on the 2001 Act (the Report) addressed the amendment of the ''Overflight Fee'' language, as follows:

> The Conference substitute amends section 45301(b) of title 49, United States Code, with respect to limitations on overflight fees to (1) to make the language consistent with the new security fee language of this Act, and (2) to clarify Congressional intent with respect to the FAA costs upon which the fees can be based. Specifically, the conference substitute replaces the word ''directly'' with ''reasonably,'' since the word directly has been a source of much confusion and narrow interpretation, and has been a primary cause of securing litigation which as frustrated and delayed the FAA's imposition of the overflight fees for a number of years. Additionally, this amendment specifies that the FAA's costs upon which the fees are based are to be determined solely by the Administrator. This is a clarify that the Administrator has full authority to determine costs by appropriate means. This amendment is not intended to require revision of the fees recently promulgated by the FAA (66 FR 43680, Aug. 20, 2001) but rather, to clarify longstanding Congressional intent that the FAA expeditiously and continuously collect the fees authorized under section 453012(a) of title 49.

Reconsideration of Final Rule

Remand of Record in Final Rule Case

On January 25, 2002, The FAA sought from the Court a limited remand of the record in the Final Rule case. As stated in the agency motion:

> The purpose of the requested remand would be to permit the FAA, on it own initiative, to conduct a limited reconsideration of the final rule in light of the new legislation. More specifically, the agency would conduct such reconsideration solely to determine the extent, if any, to which the change in the operative statutory standard requires the FAA to modify its final rule. If the agency determines that no such modification is required by the changes in the statute from ''directly related'' to ''reasonably related,'' and the substitution of ''Administration's costs, as determined by the Administrator'' for ''Administration's costs,'' the agency would continue with the final rule that it has already adopted. This is because the FAA seeks to determine only whether Congress has required the agency to make changes in its final rule, and does not contemplate making any discretionary changes at this time.

The FAA's motion also explained that it intended to seek public comment on the new legislation:

> Although the FAA believes that it could proceed without additional notice and comment (*see* 5 U.S.C. 553(b)(A) (excepting interpretive rules from notice and comment rulemaking)), it has concluded that providing an opportunity for such comment would be in the public interest. Accordingly, before making its decision as to whether the statutory change requires a modification of the final rule, the FAA would provide a 30-day period in which interested parties could address the matter of the new provision's requirements.

On April 22, 2002, the Court ordered the Final Rule record returned to the FAA ''so that it may conduct proceedings, for no more than 60 days from the date of this order, to determine to what extent, if any, the Aviation and Transportation Security Act, Pub. L. No. 107–71, Section 119(d) (November 19, 2001), requires the agency to modify its final rule, 'Fees for [F]AA Services for Certain Flights' 66 FR 46380 (Aug. 20, 2001).''

Request for Comments

The FAA published a notice of inquiry in the **Federal Register** on May 6, 2002, seeking public comment (within 30 days, or by no later than June 5, 2002) regarding the extent, if any, to which the statutory changes require the FAA to modify its Final Rule.

Summary of Comments and Disposition

The FAA received two comments in response to its notice; from (1) Britannia Airways, Ltd., and (2) the seven petitioners in the ongoing Overflight Fee litigation, who submitted joint comments prepared by their counsel in the litigation (referred to hereafter as ''the ATAC comments'').

Both the Britannia and the ATAC comments state that the November 2001 amendments to 49 U.S.C. 45301 (section 119(d) of the 2001 Act) do not affect or apply to the Final Rule issued by the FAA in August 2001, and therefore do not require any rulemaking with regard to the Final Rule. In reaching this conclusion, both comments refer to the legislative history of the 2001 Act, citing

the statement in the Report that the amendment ''is not intended to require revision of the fees recently promulgated by the FAA. . .''

The ATAC comments make three points: (1) That Section 119(d) is not retroactive; (2) that Section 119(d) is not self-executing; and (3) that the Final Rule is invalid. The Britannia comments review the history of 49 U.S.C. 45301 and conclude that the November 2001 amendments are ''entirely prospective.'' With respect to the first two points, while agreeing with the conclusion that the amendments do not require any rulemaking by the FAA at this time, the FAA rejects, as detailed below, the commenters' assertion that Section 119(d) has no application to the Final Rule and is ''entirely prospective.'' The FAA will not address the third point because it is beyond the narrow scope of this notice, but notes that in connection with the issuance of the Final Rule, the FAA fully explained why the Final Rule meets all statutory requirements.

Agency Consideration of Effects of Statutory Changes

The FAA has carefully considered all relevant comments received, as well as all applicable legislative history and applicable statutes. The FAA concludes that the 2001 Act does not require rulemaking because the statute merely clarifies and amplifies congressional intent so as to provide further validation of both the Interim and Final Rules. More specifically, the FAA concludes that, first, the 2001 Act applies to both rules, and second, the Interim and Final Rules, both issued under the previous version of 49 U.S.C. 45301, meet the requirements of the 2001 Act. This conclusion is consistent with the explicit language of the Act, the Report, and applicable case law.

The FAA finds that these conclusions are supported by analysis of the changes made in 49 U.S.C. 45301 by the 2001 Act, as detailed below:

(1) *By striking ''directly'' and inserting ''reasonably''.*

As previously noted, Congress made this change to clarify how the FAA's methodology for setting Overflight Fees is measured. Instead of the previous language stating that fees must be ''directly'' related to costs, the statute now states that fees must be ''reasonably'' related to costs, which, according to the Report, is what Congress intended when it originally enacted 49 U.S.C. 45301.

Congress has not prescribed a precise method that must be followed by the FAA in setting Overflight Fees, but rather has set the parameters within which final action must fall. The change in the ''reasonably related'' language makes clear Congress' desire that the FAA have reasonable latitude to establish Overflight Fees within the basic parameter that such fees be cost-based. As a result, a fee-setting methodology that is acceptable under the ''directly related'' language must also be acceptable as ''reasonably related'' to costs. The FAA has already concluded that the fee-setting methodology first used in the Interim Final Rule and then in the Final Rule meets the ''direct related'' standard. The FAA now finds that this methodology also, necessarily, meets the ''reasonably related'' standard.

In its discussion of the amendment of the statutory standard, the Report emphasized that the ''directly related'' standard ''has been a source of much confusion and narrow interpretation, and has been a primary cause of recurring litigation which has frustrated and delayed the FAA's imposition of the overflight fees for a number of years.'' When Congress, as a matter of *clarification,* changed the ''directly related'' language to ''reasonably related,'' the Report indicated that ''directly related'' was always intended to be broadly construed. Consequently, the clear significance of the change in the statutory language, coupled with the new limitation on judicial review of these fees, is that Congress wants a standard affording the agency reasonable latitude applied to both the Interim Final and the Final Rules. In this regard, the Report specifically notes that Congress did not ''intend to require revision of the fees'' already promulgated, and directs the FAA to ''expeditiously and continuously collect the fees'' as Congress always intended since enactment of the Overflight Fee authorization in 1996.

Thus, the FAA believes that the new statutory language applies to the fees previously established by the IFR and by the Final Rule of August 20, 2001. In the FAA's view, those fees were properly established under the ''directly related'' standard, and the Congress' clarification of that standard by the change in language to ''reasonably related'' necessitates no further rulemaking. Even if one were to conclude that the fees established in the IFR and the Final Rule of August 20, 2001 were not ''directly related,''—a conclusion with which the FAA would disagree—the fees nevertheless would clearly meet the ''reasonably related'' standard to costs. Accordingly, no further rulemaking would be required.

(2) *By striking ''Administration's costs'' and inserting ''Administration's costs, as determined by the Administrator,''*

One of the issues raised in the current litigation has been whether the FAA's CAS accurately captures the FAA's costs of providing air traffic control and related services to overflying aircraft. Both the 2001 Act and the Report address this issue. First, by the Act, stating that costs are to be determined solely by the Administrator as well as the determination is not subject to judicial review. Then, by the Report emphasizing that ''the FAA's costs upon which the fees are based are to be determined solely by the Administrator. This is to clarify that the Administrator has full authority to determine costs by appropriate means.''

This language explicitly provides that the Administrator may use whatever methods or systems she deems appropriate (such as the CAS) in making cost determinations for fee setting purposes. It is entirely her decision. While the FAA believes that the Administrator could delegate this authority, like other Administrator authorities, to others in the FAA, in fact the Administrator personally approved both the Interim Final Rule and the Final Rule. Thus, because the costs for Overflight Fee purposes have already been determined personally by the Administrator, both of those determinations are within the explicit provisions of the revised statute. Therefore, she need make no further determinations under the 2001 Act with regard to either the Interim Final Rule or the Final Rule.

(3) *By adding at the end ''The Determination of such costs by the Administrator is not subject to judicial review.''*

This provision pertains solely to the jurisdiction of the reviewing court and thus is unrelated to the substance of the Interim and Final Rules, the matter at issue here. The FAA believes it is noteworthy, however, that the provision supports the decision of the FAA not to initiate rulemaking in response to the 2001 Act. Clearly, Congress acted to limit judicial review in order to help keep the current rules in place and to allow the FAA to ''expeditiously and continuously collect the fees* * * .''

In summary, based on careful analysis of the 2001 Act and all relevant comments, the FAA has concluded that the current Final Rule and Interim Final Rule comply fully with the amended statutory standard for Overflight fees. The FAA has considered the two comments received during the course of the proceeding, and finds that no further notice and public comment is required under the Administrative Procedure Act

or was contemplated by the Congress when it made the statutory change. The FAA has also concluded that an additional round of notice and comments in the context of a rulemaking proceeding addressing Congress' recent changes to the statute would not be in the public interest. As the Conference Committee Managers' Report says:

This amendment is not intended to require revision of the fees recently promulgated by the FAA (66 FR 43680, Aug. 20, 2001) but rather, to clarify longstanding Congressional intent that the FAA expeditiously and continuously collect the fees authorized under section 45301(a) of title 49.

Dated: June 19, 2002.

Jane F. Garvey,

Administrator.

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