

BEFORE THE
U.S. DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, D.C.

In the matter of: :
 :
Notice of Proposed Amendments :
To Policy Regarding : **Docket No. FAA-2008-0036**
Airport Rates and Charges :

Comments of the International Air Transport Association

The International Air Transport Association appreciates the opportunity to comment on the U.S. Department of Transportation’s “Notice of Proposed Amendment to Policy Statement” (FAA-2008-0036) (hereinafter “DOT Proposal”). IATA represents 240 international airlines, 78 of which fly to and from U.S. airports. As such, our members will be directly impacted if these proposed amendments to the “Policy Regarding Airport Rates and Charges” (61 Fed. Reg. 31,994 – June 21, 1996) are implemented.

IATA urges the Department of Transportation to withdraw these proposed amendments, as we believe they are inconsistent with international law and do not represent effective mechanisms for controlling congestion at our nation’s airports.

IATA is disappointed with the method DOT used to present this proposal to the commercial aviation community. The first time the industry was apprised of this approach was via a brief presentation during a meeting of the 2007 Aviation Rulemaking Committee (ARC). No advance notice of the presentation was provided and little time was set aside for discussion or consideration. Given the time and expense dedicated to the ARC process by the airlines and their representatives, and the airlines nearly unanimous rejection of pricing as an effective means to manage aviation congestion, we feel justified in our expectation that there would have been a more comprehensive review of these proposals by the ARC stakeholders prior to their publication in the Federal Register.

Under U.S. law, ICAO policy and international practice, airport charges must be (1) revenue neutral; (2) cost based; (3) just; (4) not unreasonable or discriminatory; (5) equitably apportioned among users; and (6) tied to services actually provided to the airlines.¹ These laws/policies are reflective of the need to guard against airports leveraging their monopoly status to overcharge airlines for services rendered.

While the DOT Proposal reaffirms some of these principles at a high level, it undermines both the letter and spirit of these monopoly controls by significantly

¹ This language is most recently reflected in the new Air Services Agreement the United States signed with the European Community on April 30, 2007. (See also Convention on International Civil Aviation, ICAO Doc. 7300 "Chicago Convention", Art 15; ICAO's Policies on Charges for Airports and Air Navigation Services, ICAO Doc. 9082/7 (2004)

expanding the list of allowable costs against which an airport can charge its users. This in turn offers airports the ability to circumvent appropriate financial controls in the name of congestion management. This would likely result in increased costs for airlines and their passengers, disruption/elimination of service (particularly to local communities) and discrimination against certain classes of airlines and aircraft. Equally troubling is the fact that the DOT Proposal does not offer any promise that this radical change in DOT rates and charges policy will have a significant impact on managing airport congestion.

The following offers IATA's detailed analysis of the three amendments set forth in the DOT Proposal:

Two-Part Landing Fees

The DOT Proposal seeks to modify the current rates and charges to explicitly recognize the ability of airports to establish a two-part landing fee: weight based and per-operation. This would apply to both congested and non-congested airports. The Department argues that the imposition of a per-operation charge will result in the reduction in the number of smaller aircraft landing during peak hours, thereby reducing congestion.

IATA has consistently supported the reduction of the weight element in ATC charges, as there is no direct relation between aircraft weight and the cost to the

airport of delivering landing and take-off services. However, we are opposed to using two part-landing fees to implement so-called market mechanisms in the name of congestion management. IATA is opposed to congestion pricing, whether the Federal Government or local airport authorities impose it, as we do not believe it is an effective way to manage congestion.

ICAO only supports the introduction of economic pricing if it is:

1. **Non-discriminatory**; congestion pricing would discriminate against time sensitive passengers without practical travel alternatives. It would also discriminate against network carriers that little opportunity to adjust their entire schedule or network to avoid peaks. Finally it would discriminate against smaller aircraft sizes.
2. **Cost based**; congestion pricing is contrary to the internationally accepted principle of cost based charging. During peak hours more flights share the same infrastructure and therefore the cost per movement should in fact be lower, not higher.
3. **Revenue neutral**: While not explicitly stated in the DOT proposal, it is imperative that any additional charges imposed on carriers during peak hours correspond with equivalent decreases in charges during non-peak hours. Any deviation from this rule would violate the long accepted revenue neutrality requirement. Airports would need to impose substantially increased charges to influence traffic during peak hours. This

would in effect require carriers operating at peak hours to subsidize carriers operating outside of the peak, a clear and unwise distortion of the free market.

4. **Include assurances that operators would move to non-peak times as a result of the policy:** While the Department suggests that it is logical to assume that smaller planes will avoid landing during congested periods, it ignores the network realities of the major international airports in the U.S. that would likely prevent this result. We see no evidence that this two part-landing fee would provide this necessary assurance required by ICAO policy.

On this last point, DOT appears to continue to minimize the fact that international carriers depend in large part on feed from local and regional airports to support their flights leaving the U.S. Imposition of a per operation charge during peak hours will unlikely result in international carriers reducing that regional airline feed during peak hours. Rather, it is more likely that carriers will increase fares for that time period to cover any increased fees. This will have a significant impact on passengers from smaller communities that have no practical choice but to fly via these hubs. The limited number of connecting passengers willing to arrive at hub airports many hours prior to their international flight to avoid these additional charges could produce unacceptable airport congestion and commensurate security vulnerabilities.

Cost of Facilities Under Construction

IATA is strongly opposed to allowing airports to charge airlines for the cost of airport facilities under construction. We consider this a significant departure from accepted U.S. and international practice and an invitation for abuse by airport monopolies.

As noted in the DOT proposal, ICAO regulation and U.S. law interpreting the same holds that airports are limited primarily to charges that directly recover the costs of operating and maintaining the airfield. As such, airports should only charge airlines for facilities “needed and used” by those airlines.² It is difficult to understand how construction projects can be “used” by the airlines.

Similarly, most Air Services Agreements signed by the United States define user charges as “a charge imposed on airlines for the provision of airport, airport environmental, air navigation, or aviation security facilities or services including related services and facilities.”³ Such definition suggests the “provision” of an actual service or facility. Thus, charges for facilities under construction but not yet in use would fall outside of the scope of “user charges”.

² See ICAO’s Policies on Charges for Airports and Air Navigation Services, ICAO Doc. 9082/7 (2004). In this respect, the *Anti-Head Tax Act* allows airports to levy “reasonable rental charges, landing fees, and other service charges from aircraft operators for using airport facilities of an airport owned or by [a] State or subdivision” (See 49 U.S.C. § 40116 (e) (2) Notably the taxable event constitutes the “use of airport facilities”, and not the potential use of an airport under construction.

³ See U.S. – EC Air Services Agreement signed on April 30, 2007, Art. 1 § 10

IATA has been consistently opposed to efforts by airports to include pre-financing in their cost calculation, noting the following:

- Pre-financing through user charges has in practice been ultimately more expensive for airlines, passengers and the wider economy
- Providing an upfront pool of money reduces management incentives to deliver on investments in a cost-effective and timely manner
- Pre-financing is unfair to airlines as there is no guarantee that airlines paying for future facilities will be the same as the airlines using the service when it comes on line
- Pre-financing is not appropriate for publicly or privately owned airports that have access to private capital. Pre-financing by airlines will increase the total financing costs of the airport for the eventual customer (the passenger) due the high cost of capital for airlines. If assistance is required, governments should step in and provide financing based on the broader economic benefits to the community.
- Pre-financing through user charges is unnecessary and is not applied to other transport sectors where public sector financing is available
- Airlines and airports have demonstrated that they can work together on key capacity enhancing projects without the need to utilize pre-financing

The DOT Proposal indicates that airports should consult ICAO Doc. 9562 Airport Economic Manual for guidance on accepted principles for charging users for

projects under construction. Putting aside the fact that the DOT proposal stops short of mandating that airports follow these principles, we would also recommend that any Amendments require airports to follow the direction of ICAO Doc. 9082 Policies on Airport Charges, which clearly states that:

Pre-funding should only be employed where aircraft operators will benefit by provision of needed, improved or lower cost service which could not otherwise be provided because regular sources of financing are insufficient and it is not possible or it is too costly to access capital markets.⁴

The DOT Proposal does not suggest that airports in the United States have any difficulty obtaining financing for well-designed development projects. Instead, ironically, DOT is attempting to intervene in an otherwise efficient free market process in the name of so-called market mechanisms. We believe this proposed intervention is unwarranted, unnecessary and offers no evidence of being an effective congestion management tool.

We are also less confident than DOT that pre-financing will hasten the arrival of capacity expansion projects. In fact, there is no language in the DOT Proposal that would prevent airlines from instead using pre-financing to support projects of limited or no value to airlines. The “needed and used” language and the current

⁴ See ICAO's Policies on Charges for Airports and Air Navigation Services, ICAO Doc. 9082/7 (2004), Page 9 § 24

guidance against pre-financing are designed precisely to prevent such unnecessary and costly projects. If congestion management were the goal, we would have expected some requirement that pre-financing only be used for capacity expansion projects. Instead, it appears that congested airports are free to pursue pre-financing for any project.

DOT attempts to provide some protection against airport operators leveraging their monopoly power to pursue unnecessarily costly projects by mandating that pre-financing can only be used when construction is approved and underway. However, this does not prevent airports from raising capital for unnecessary and costly projects in the name of congestion management.

For example, an airport may wish to build a lavish new entrance to their terminal. If the airport is “congested” it could immediately raise landing fees during peak hours to support pre-financing of the non-congestion relieving project. Lenders normally reticent to fund the construction of such an unnecessary, non-revenue generating project would be confident that they would receive their return because of the airport’s access to capital via the airline charging process. There would be limited incentive for airport management to complete the project on time as the ability to charge for ongoing construction is not time limited by the DOT proposal.

Further, ICAO Doc 9082 clearly states that in the rare case that pre-financing is pursued, there must be “effective and transparent economic regulation” of the airports to ensure that the airlines are consulted on the projects, that there be performance auditing and benchmarking of the project and that there be accounting to ensure that aviation user charges remain solely for civil aviation purposes.⁵ Nothing in the DOT Proposal suggests that DOT is prepared to mandate this type of regulation on airports.

Finally, the Amendments ask for comments on whether pre-financing charges should be applied only during congestion periods or over the entire day. IATA strongly opposes any pre-financing based user charges as a means to address congestion. However, if the DOT Proposal is accepted, it would be illogical and in contradiction with most air services agreements signed by the U.S., for DOT to allow airports to charge in the name of congestion during hours when there is no congestion.

Cross subsidization

Cross subsidization, like pre-financing and per operations charges, is a significant departure from existing domestic laws and accepted international policy. We see nothing to suggest that exceptions to this policy should be made

⁵ See ICAO's Policies on Charges for Airports and Air Navigation Services, ICAO Doc. 9082/7 (2004), Page 9 § 24, (i)

in order to provide airports greater opportunities to exert congestion pricing on the airlines.

IATA has consistently opposed cross subsidization for a number of reasons:

- Cross subsidization contradicts accepted ICAO principles that charges be directly related to the cost of providing those services.
- Cross subsidization often leads to anticompetitive effects as one group of airlines will invariably be required to subsidize another group of airlines
- This in turn leads to a market distortion of competition and an imbalance in the level playing field
- It often results in airlines and their passengers paying for facilities and services that they do not use and will not (or cannot) benefit from
- It tends to discourage cost reduction and cost efficiency since airports are no longer restricted to recovery of only the true costs of the services they provide.

Looking specifically at the DOT proposal, subsidization of secondary airports via primary airport fees will likely result in competitive distortions between full service carriers (that normally serve the primary hub airports) and low-cost carriers (that often support underutilized secondary airports). It also will distort competition between U.S. carriers (that are not constrained in their ability to fly to secondary airports) and international carriers (whose ability to utilize secondary airports is

limited by either bilaterals or market realities). This would open the possibility of a successful challenge under Article 15 of the Chicago Convention and existing U.S. bilateral agreements for discrimination against foreign air carriers.⁶

We are also concerned with the lack of specificity as to what charges from the secondary airport could or could not be included in the primary airport base rate. The DOT proposal may contradict the spirit and the letter of the *Airport Improvement Act*, which imposes a number of conditions on airports receiving government financial assistance. Under this Act “air carriers making similar use of [an] airport must be subject to substantially comparable charges for facilities directly and substantially related to providing air transportation.”⁷ It is undisputed that the charges imposed by airports must be “directly” and substantially linked to the actual services / facilities provided. Thus, the criterion to determine the relatedness of secondary to primary airports, as envisioned by the DOT proposal, does not seem to be in line with this Act.

While we acknowledge that condition 3 in paragraph 2.5.4 of the 1996 Rates and Charges Policy seeks to ensure that the costs of one airport be “reasonably related”⁸ to the benefits received from the primary airport, there does not appear to be any detailed guidance as to what charges can be included under that

⁶ See U.S. – EC Air Services Agreement signed on April 30, 2007, Art. 1 § 10 and Art. 12 § 1

⁷ See 49 U.S.C. §47107 (a) (2)

⁸ 61 Fed. Reg. 31,994 – June 21, 1996 at 32020

umbrella. Allocation of cost from one airport to another would be problematic and open the entire system to a strong legal challenge.

Finally, we note the language in this section of the DOT Proposal calling for airports to engage in meaningful discussions in advance of increasing or establishing new airline fees. (DOT Proposal, pg 21). Unfortunately, there is no indication that DOT prepared to step in and insist on these discussions if in fact they do not take place.

In summary, we have significant concerns about each of the amendments in the DOT Proposal. More generally, we have a number of additional general concerns about the DOT Proposal.

We are concerned that DOT is sending conflicting signals to the international community with this Proposal. It is important to note that the U.S. Government has been a strong supporter of existing ICAO policies on cost-based charging and user consultation, most recently evidenced during the ICAO Airport and ATC Economics panel discussions in advance of the 2008 ICAO Economic Conference. At ICAO, the U.S. delegation is actively seeking ways to eliminate charges that are aimed at recovery of airport costs directly from passengers without true cost justification. The following section of a U.S. working paper to ICAO reflects this position:

The Airport Economics Manual (Doc 9562) provides a detailed discussion on establishing the cost basis for the individual airport-related charges, both with respect to aeronautical and no-aeronautical activities.

Consistent with the concept of cost relatedness, Doc 9562 explicitly notes that an allocation system should be designed to associate costs with those users that most directly consume the services in question.⁹

The DOT effort to circumvent the letter and spirit of these bedrock ICAO policies appears to be inconsistent with U.S. Government policy as recorded with ICAO.

IATA is concerned about the international precedent that would be set by the U.S. Government's implementation of these congestion-pricing proposals. IATA has two related concerns. First, we believe if the DOT proposal is implemented, U.S. airlines run the risk of retaliation by foreign governments concerned about these increased U.S. fees. Second, a U.S. DOT-sanctioned congestion pricing mechanism opens the door to other jurisdictions imposing their own congestion pricing schemes. As noted during the ARC process, only a small number of countries have utilized pricing as a tool for congestion management. In reality, the few countries that have congestion pricing in place appear to be more motivated by revenue generation than by congestion management. A U.S. blessing of congestion pricing will only invite more abuse in this regard. Brazil's recent announcement that it intends to increase parking fees at Sao Paulo's international airport to manage tarmac congestion is only the most recent

⁹ U.S. Working Paper to ICAO Airports Economic Panel, submitted February 14, 2008.

example of this behavior. International airlines are not in a position to absorb these charges.

In summary, we believe that the DOT proposal is an unjustified attempt to circumvent long held policies in order to encourage airports to use “market mechanisms” to manage airport congestion. No direct evidence has been offered to prove that the implementation of these pricing policies is more likely to control congestion than making the economic and political investments in enhanced technology, infrastructure and procedures at congested airports and in congested airspace. Removing needed restrictions on monopoly-based charging, while at the same time pursuing federally sanctioned auctions of new capacity will ensure an uncoordinated, non-standardized, costly and likely unsuccessful effort to address the serious and growing issue of airport congestion. It will also likely result in increased costs and decreased options for the substantial portion of the public that relies on air transport to support its business and leisure travel.

On behalf of our two hundred and thirty five member airlines, we respectfully request that the Department of Transportation withdraw these proposed amendments to their rates and charges policies.

Thank you for your consideration,

Sincerely,

A handwritten signature in black ink that reads "Douglas E. Lavin". The signature is written in a cursive, flowing style.

Douglas E. Lavin

Regional Vice President

International Air Transport Association

601 Pennsylvania Avenue, N.W., Suite 300

Washington, D.C. 20004

(202) 628 9292