

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

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Notice of Proposed Amendment to	)	
	)	
<b>POLICY REGARDING AIRPORT RATES</b>	)	<b>Docket FAA-2008-0036</b>
<b>AND CHARGES</b>	)	
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**COMMENTS OF DEUTSCHE LUFTHANSA AG**

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**DATED: April 3, 2008**

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**April 3, 2008**

**COMMENTS OF DEUTSCHE LUFTHANSA AG**

Deutsche Lufthansa AG (“Lufthansa”) respectfully submits these comments in response to the Notice of Proposed Amendment to the 1996 Policy Regarding the Establishment of Airport Rates and Charges (the “Proposed Amendment”) issued by the Office of the Secretary and the Federal Aviation Administration (hereinafter referred to collectively as “DOT” or the “Department”).<sup>1</sup> Lufthansa strongly supports the comments submitted by the International Air Transport Association (“IATA”) and by the Association of European Airlines (“AEA”), which raise significant concerns about the Department’s proposal.

The Proposed Amendment would:

- 1) Allow airport operators to establish a two-part landing fee consisting of both a per-operation charge and a weight-based charge that would replace the current standard weight-based charge so long as the two-part fee “reasonably allocated costs to the appropriate users on a rational and economically justified basis;”

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<sup>1</sup> *Policy Regarding Airport Rates and Charges*, 73 Fed. Reg. 3310 (Jan. 17, 2008).

- 2) Allow the operator of a “congested” airport to charge users of that airport a portion of the cost of airfield projects under construction and not yet utilized by the airport users; and
- 3) Enable an operator of a “congested” airport to include in the airfield fees of that airport a portion of the airfield costs of other, less utilized “secondary” airports owned and operated by the same operator by different ways of modulating charges at the congested airport

The Department’s stated purpose in proposing these changes is to reduce congestion at certain U.S. airports by enabling the operators of those airports to use landing fees to incentivize airlines to reschedule services at less congested times of the day or at less congested “secondary” airports. As explained below, however, Lufthansa questions whether the Department’s proposals would accomplish that objective and is concerned that the Proposed Amendment, if implemented, would allow U.S. airport operators to depart from long-established charging principles. In coordination with IATA and its members, Lufthansa supports the premise that U.S. law, ICAO policies and international practice dictate that airport charges be:

- (1) revenue neutral (with regard to any modulation of airport charges);
- (2) cost based;
- (3) not unreasonable or discriminatory; and
- (4) tied to services actually provided.

In addition, as further discussed below, U.S. bilateral and multilateral air service agreements require that charges be equitably apportioned among categories of users. These principles are designed to ensure that airports do not misuse their monopoly power to overcharge airlines for services rendered.

While the Proposed Amendment claims to reaffirm the validity of these principles, Lufthansa is concerned that the Department's specific proposals could lead to a disproportionate allocation of costs and charges and the imposition of landing fees that are not directly linked either to the services provided or the costs implied, thus leading to an inefficient and unfair allocation of costs and charges among the different users. The Proposed Amendment raises concerns that airports would be allowed, if not encouraged, to increase fees in the name of mitigating congestion, resulting in significantly increased costs for airlines and their passengers, disruption of service for global networks, and potential discrimination against airlines that have made considerable investments at "congested" airports only to see their investments being utilized at other "secondary" airports for construction or growth management where the particular airlines neither operate nor seek to do so.

Lufthansa offers the following specific comments about each of the Proposed Amendment's three proposals:

**Two-Part Landing Fees**

The Proposed Amendment would allow airport operators to establish a two-part landing fee structure consisting of both a per-operation charge and a weight-based charge in place of the current standard weight-based charge. The two-part landing fee would be required to reasonably allocate costs to the appropriate users on a "rational and economically justified basis."<sup>2</sup> The Proposed Amendment suggests that the imposition of a per-operation charge would be intended to reduce the number of smaller aircraft, including regional jets, thereby reducing congestion. It is questionable whether such a charge would accomplish that

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<sup>2</sup> 73 Fed. Reg. at 3313-14.

objective, but there is little doubt that it would increase the cost of air travel to consumers and cause substantial inconvenience for passengers connecting onto international flights from domestic flights at affected airports. Large international airlines such as Lufthansa that operate global networks rely on traffic feed in the form of passengers connecting from regional jet and other smaller-aircraft operating short-haul (largely domestic) routes onto larger-aircraft operating on long-haul international routes. Lufthansa and other international carriers seek to offer their customers efficient, time-sensitive connections that are designed to minimize passengers' layover time between flights. This is a particularly important consideration for international passengers whose overall travel time from point of origin to point of final destination may be substantial. If the imposition of a per-operation charge were to prompt airlines to reschedule those smaller-aircraft connecting flights, passengers flying to Europe would likely be required to arrive on regional jets at their U.S. international gateway airport in the early afternoon, well in advance of the departure times of their international flights in the early and late evening. This would inconvenience passengers, increase crowding at the affected airports, and disrupt the global aviation system. Alternatively, if carriers were to decide that, notwithstanding the imposition of a per-operation charge, they would need to continue to fly regional jets during congested periods to support international service networks, the proposal would only serve to increase the costs of providing such services -- costs that ultimately would be borne by passengers -- but without addressing the underlying congestion problem.

#### **Cost of Facilities Under Construction**

The Proposed Amendment would also allow the operator of a "congested" airport to charge users of that airport a portion of the cost of airfield projects under construction.

Currently, costs of new or improved airfield facilities may only be included in airfield charges after the new or improved facilities are completed and in use, unless carriers using the airport agree otherwise. The proposal provides two alternatives: a) construction costs could only be included in the rate-base during periods when the airport experiences congestion; or b) construction costs could be included in the rate-base of the congested airport at all times. To qualify for inclusion, the facilities would have to be actually under construction, with all planning and environmental reviews completed, a financing plan developed, and financing arranged.

As noted in the Proposed Amendment, ICAO and DOT policy endorse the principle that airports are limited to charges that recover the cost of operating and maintaining the airfield. As such, airports can only charge airlines for facilities that are “used and useful” to those airlines.<sup>3</sup> Lufthansa agrees with IATA’s and AEA’s comments in opposition to efforts by airports to include pre-financing in their cost calculations for purposes of establishing charges because: (1) pre-financing is not typical for normal markets as generally, infrastructure projects throughout the world, and in particular in developed countries, are financed by private equity or capital market funds. (2) pre-financing through user charges in practice has proven to be more expensive for airlines, users and the wider economy; (3) providing an upfront pool of money reduces management incentives for investment to be delivered in a cost-effective and timely manner; (4) pre-financing is unfair because increasing costs to the airlines in advance of their receiving any infrastructure benefit places the airlines in the role of a banker granting interest-free loans; and additionally, there is no guarantee that

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<sup>3</sup> 73 Fed. Reg. at 3314. *See also* ICAO’s Policies on Charges for Airports and Air Navigation Services, ICAO Doc. 9082 (7<sup>th</sup> ed. 2004).

airlines paying for future facilities today will be the same airlines that will use those facilities or services when they become available for use..

Eventually, any increase in airport charges due to the inclusion of pre-financing would increase airlines' costs and ultimately be reflected in higher fares for the traveling public. Furthermore, the Proposed Amendment does not explain how the application of pre-financing charges would be an effective means of alleviating congestion.

The Proposed Amendment's pre-financing proposal also fails to take adequate account of U.S. international obligations. The Proposed Amendment states that, "before taking action to include costs of a project under construction in the rate-base of an airport with international service," an airport proprietor "should consult" Attachment 6 of the ICAO Airport Economics Manual.<sup>4</sup> Lufthansa respectfully submits that this precatory language is insufficient to ensure compliance with the United States' international obligations, not only in the context of ICAO, but also with respect to multilateral and bilateral air service agreements. If the Department decides to implement the Proposed Amendment, Lufthansa respectfully would urge the Department to revise this language to require compliance (rather than merely suggest consultation) with ICAO policy and also with U.S. obligations under applicable multilateral and bilateral air service agreements, including article 12 of the U.S.-EU Air Transport Agreement, which is discussed below.

### **Cross-Subsidization**

The Proposed Amendment would enable an operator of a "congested" airport to include in the airfield fees of that airport a portion of the airfield costs of other, less utilized

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<sup>4</sup> 73 Fed. Reg. at 3316 (Proposed Paragraph 2.5.3(b)) (emphasis added).

“secondary” airports owned and operated by the same operator. The proposal would allow an operator of a congested airport to consider the presence of congestion when determining the share of the airfield costs of the secondary airport to be included in the rate-base of the congested airport during periods of congestion. The Proposed Amendment suggests that by raising the cost of operating at the congested airport during times of congestion and by adding costs of the secondary airport to the rate-base of the congested airport, costs would be decreased at the secondary airport, thereby reducing the cost of service at that secondary airport. Lufthansa is opposed to cross-subsidization because it is anti-competitive and distorts the balance between facility investments made by airlines and the services provided. Cross-subsidization among airports as proposed in the Proposed Amendment could lead to unfair discrimination in favor of U.S. carriers (that have the right to operate at secondary airports) as opposed to foreign carriers (that may be prohibited from operating at a secondary airport altogether or at least constrained in their ability to do so).<sup>5</sup> This could give rise to challenges under article 15 of the Chicago Convention and existing U.S. bilateral and multilateral air service agreements on the basis of discrimination against foreign air carriers.

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<sup>5</sup> Foreign carriers’ access to some airports may be constrained by law (*e.g.*, perimeter rules that exclude long-haul international operations) or airport facilities (*e.g.*, runway and gate facilities that cannot accommodate the larger aircraft that are typically used for long-haul international service). In addition, foreign carriers such as Lufthansa must operate at airports where federal inspection services are available for international flights and there are sufficient behind/beyond-gateway connecting services available to support their international services. Consequently, for example, if the Port Authority of New York and New Jersey were to impose charges on foreign carriers such as Lufthansa that use New York’s JFK International Airport and allocate some of the charge revenue for use at LaGuardia or Stewart Airport, that would unfairly discriminate against the foreign carriers and would not create any incentive to reduce congestion at JFK because foreign carriers such as Lufthansa do not have the option to operate transatlantic or other long-haul international service at LaGuardia or Stewart Airport. The same would be true with regard to Washington Reagan National Airport (DCA) and Washington Dulles International Airport. Foreign carriers such as Lufthansa would receive no benefit from any funds expended at DCA because they are effectively prohibited from operating at that airport due to the perimeter rule in effect at DCA.

### **U.S. International Obligations**

As the Proposed Amendment recognizes, any airport charges imposed on foreign carriers must comply with the United States' international obligations, including those requiring that charges be "just, reasonable, and equitably apportioned among categories of users."<sup>6</sup> These are bedrock charging principles that, as explained above, reflect longstanding ICAO policy.<sup>7</sup> These principles also are reflected in the United States' multilateral and bilateral air service agreements, including the U.S.-EU "Open Skies" Air Transport Agreement, which governs Lufthansa's operations to/from the United States. The U.S.-EU Air Transport Agreement prohibits "unjustly discriminatory" user charges and requires that user charges be assessed "on terms not less favorable" than those imposed on any other airline.<sup>8</sup> The Agreement also mandates that airport user charges not exceed the full cost of providing services and states that "[f]acilities and services for which charges are made shall be provided on an efficient and economic basis."<sup>9</sup>

The Department historically has sought to craft its *Policy Regarding the Establishment of Airport Rates and Charges* to be "[c]onsistent with bilateral obligations" and to "endorse[] reasonableness and non-discrimination in airport fees" while ensuring that charges imposed

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<sup>6</sup> 73 Fed. Reg. at 3313.

<sup>7</sup> See ICAO's Policies on Charges for Airports and Air Navigation Services, ICAO Doc. 9082 (7<sup>th</sup> ed. 2004).

<sup>8</sup> U.S.-EU Air Transport Agreement, Article 12, Paragraph 1, April 30, 2007. Even before the U.S.-EU Agreement became effective, this guarantee of just and reasonable airport user charges governed U.S.-German aviation relations for decades. See U.S.-Germany Air Transport Services Agreement, Article 7(a), July 7, 1955, as amended.

<sup>9</sup> U.S.-EU Air Transport Agreement, Article 12, Paragraph 2. In addition, the Agreement states that consultations shall be encouraged between the competent charging authorities and the airlines utilizing airport services and facilities, and airports and airlines shall be encouraged to "exchange such information as may be necessary to permit an accurate review of the reasonableness of the charges." *Id.*, Article 12, Paragraph 3.

on foreign airlines are “equitably apportioned.”<sup>10</sup> Lufthansa questions whether the Proposed Amendment -- particularly the proposals to charge based on timing of operation, to use charges to pre-finance airport development, and to cross-subsidize secondary airports – is consistent with U.S. obligations under the U.S.-EU Agreement and ICAO policy that charges must bear a direct relationship to airport services or facilities actually provided.

Lufthansa also is concerned about the international precedent that would be set by the imposition of what could effectively be a form of congestion pricing.<sup>11</sup> There is a risk that the Proposed Amendment, if implemented, could prompt foreign governments to implement responsive or even retaliatory airport charging measures that could adversely affect U.S. carriers.<sup>12</sup> In addition, implementation at U.S. airports of DOT-sanctioned congestion pricing mechanisms could open the door to other jurisdictions imposing their own congestion pricing regimes.<sup>13</sup> Lufthansa was pleased to serve as a member of the Aviation Rulemaking Committee (“ARC”) formed by the Department in the fall of 2007 to solicit industry

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<sup>10</sup> *Brendan Airways, LLC et al. v. the Port Authority of New York and New Jersey*, Docket OST-05-20407, Order 2005-6-11, June 14, 2005, at 3-4.

<sup>11</sup> Although the Department states that the Proposed Amendment does not constitute “true congestion pricing” (73 Fed. Reg. at 3313), Lufthansa is concerned that, if implemented, the practical effect of the Department’s new policy could be to authorize U.S. airports to impose a form of congestion pricing because, as discussed above in text, the Proposed Amendment would allow the operator of a particular U.S. airport to attenuate, if not sever, the essential linkage between the amount of the charges being imposed and the cost of providing services and facilities used at that airport by the airlines being charged.

<sup>12</sup> The Aviation Assembly, which includes representatives of 34 embassies of foreign governments based in Washington, DC, plus the delegation of the European Commission, has raised concerns about the Proposed Amendment. Letter of Mr. Clive Wright, Chairman, Aviation Assembly, to DOT dated February 7, 2008.

<sup>13</sup> The ICAO policy document expresses “concern[] over the proliferation of charges on air traffic and notes that the imposition of charges in one jurisdiction can lead to the introduction of charges in another jurisdiction.” ICAO’s Policies on Charges for Airports and Air Navigation Services, ICAO Doc. 9082 (7<sup>th</sup> ed. 2004), at 3. It would be doubly regrettable if the United States were to introduce congestion pricing for airport charges and, in doing so, open the door to other countries following suit. As IATA notes in its comments, such a move would be inconsistent with the United States’ historically strong support for ICAO’s policies on cost-based charging.

perspectives on addressing airport delay and congestion concerns in New York. As noted during the ARC process, only a small number of countries utilize congestion pricing, most of which do so apparently for revenue generation purposes rather than for congestion management. It is important to note that ICAO rules that provide the internationally-accepted framework and basic principles for airport rates and charges do not support the use of congestion pricing as a basis for setting airport charges.<sup>14</sup> Lufthansa respectfully urges the Department not to deviate from those consensus principles by changing its established airport charging policy to allow for any form of congestion pricing.

### **Conclusion**

Whereas Lufthansa rejects the measures of the Proposed Amendments as not being the effective instruments to mitigate congestion, Lufthansa reaffirms the validity of the current ICAO's Policies on Charges for Airports and Air Navigation Services (Seventh Edition 2004, Doc 9082/7) and supports the current industry best practices set forth in the IATA Worldwide Scheduling Guidelines and reflected in EU Council Regulation 95/93 (on common rules for the allocation of slots at EU airports) for successfully managing congested airports around the world. These Guidelines offer a framework for the collaboration between airports and airlines necessary to ensure that carriers can plan future schedules with reliability based on historic flight patterns. The Guidelines also provide the requisite flexibility to accommodate ongoing

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<sup>14</sup> By contrast, the ICAO Manual on Air Navigation Services Economics (2007) does permit the use of congestion pricing only as it relates to air navigation services if certain requirements are met. Manual on Air Navigation Services Economics, Document 9161, International Civil Aviation Organization, Chapter 7, Section B, Paragraph 7.10 (2007). Congestion pricing of air navigation services must: (1) be non-discriminatory; (2) be cost based; and (3) include assurances that operators would indeed move to non-peak times as a result of the policy. Even if ICAO policy did contemplate congestion pricing in the context of airport charges (which it does not), the Proposed Amendment does not appear to satisfy these requirements.

adjustments in response to changes in the marketplace demand in order to better serve the needs of our passengers around the world. Lufthansa looks forward to continuing to actively participate in the critical dialogue needed to resolve airport capacity issues and to work with airports, other airlines, and governments to ensure the challenges of airport capacity can be met with sound solutions that support a vital and growing global airline industry.

Respectfully submitted,

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