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14 CFR Part 187

Fees for FAA Services for Certain Flights; Final Rule

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 187

[Docket No.: FAA–00–7018; Amendment No. 187–12]

RIN 2120–AG17

Fees for FAA Services for Certain Flights

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final Rule.

SUMMARY: The FAA is issuing this final rule, required by law, lowering the fees it established by interim final rule, which was issued on May 30, 2000 (65 FR 36002, June 6, 2000). The interim final rule established fees for FAA air traffic and related services for certain aircraft that transit U.S.-controlled airspace but neither take off from, nor land in, the United States. This final rule allows the FAA to continue to charge fees as required by law. This action also addresses a recent Court of Appeals opinion concerning the interim final rule.

DATES: Effective August 20, 2001.

FOR FURTHER INFORMATION CONTACT: Randall Fiertz, Office of Cost and Performance Management, (APF–2), Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591; telephone (202) 267–7140; fax (202) 493–4191.

SUPPLEMENTARY INFORMATION:

Availability of the Final Rule

You can get an electronic copy using the Internet by taking the following steps:

(1) Go to the search function of the Department of Transportation's electronic Docket Management System (DMS) web page (http://dms.dot.gov/search).

(2) On the search page type in the last four digits of the Docket number (7018). Click on ''search.''

(3) On the next page, which contains the Docket summary information for Docket No. 7018, click on the document number for the item you wish to view.

You can also get an electronic copy using the Internet through FAA's web page at http://www.faa.gov/avr/armhome.htm or the **Federal Register**'s web page at http://www.access.gpo.gov/su_docs/aces/aces140.html.

You can also get a copy by submitting a request to the Federal Aviation Administration, Office of Rulemaking, ARM–1, 800 Independence Avenue SW., Washington, DC 20591, or by calling (202) 267–9680. Be sure to identify the amendment number or docket number of this rulemaking.

The Small Business Regulatory Enforcement Fairness Act

The Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996 requires FAA to comply with small entity requests for information or advice about compliance with statutes and regulations within its jurisdiction. Therefore, any small entity that has a question regarding this document may contact their local FAA official, or the person listed under **FOR FURTHER INFORMATION CONTACT.** You can find out more about SBREFA on the Internet at our site, http://www.faa.gov/avr/arm/sbrefa.htm. For more information on SBREFA, e-mail us at *9–AWA–SBREFA@faa.gov.*

Introduction

Since 1996, the Federal Aviation Administration (FAA) has undertaken several rulemaking actions to impose fees for FAA services provided, made available, or used by certain flights. Congress directed the FAA to establish these fees to recover the cost of FAA services rendered to certain aircraft operators who otherwise do not contribute by taxes or other assessments to the cost of the air traffic control system. The details of the authority as well as the fees and other pertinent details are provided below.

The FAA's rulemaking efforts to impose these statutorily required fees have been repeatedly challenged in court. The most recent challenge resulted in an opinion of the U.S. Court of Appeals for the District of Columbia Circuit that was issued on July 13, 2001 (*Air Transport Association of Canada* vs. *FAA*; 00–1334, July 13, 2001). In that opinion, issued in response to a consolidated petition for review of the Interim Final Rule (IFR) that established the fees, the Court stated, ''Because FAA has failed to articulate the basis for its conclusions that 'the unit costs of providing [air traffic control] services to overflights within each environment [are] identical to the unit costs of providing [air traffic control] services to all air traffic within each environment,' we vacate the 2000 Rule and remand to the FAA for further proceedings consistent with this opinion.''

Because the Court faulted the *explanation* provided by the FAA in the IFR, and not the *substance* of the IFR, the FAA has determined that the publication of this Final Rule will both meet the requirements of the statute and address the concerns of the Court. Moreover, the publication of this rule completes the FAA's task of establishing the fees as directed by Congress. Also, this action provides a detailed record that explains the basis of these fees—which the FAA, through its agency expertise, developed to meet the Congressional mandate.

Overview

The provision of air traffic control and related services by the FAA involves an exceedingly complex series of events requiring thousands of people and hundreds of machines, collectively costing many billions of dollars. Some 40,000 to 50,000 flights operate within the U.S. air traffic system each day; only about 650 (or fewer than 1.5%) of these flights meet the definition of an Overflight, and only about 300 flights per day are currently subject to these fees.

As detailed below, many different services are provided, made available, or used in several different ways to flights operating in the U.S. air traffic system. While no two flights are exactly alike, all flights that enter the air traffic system receive benefits from the entire ATC system, whether requested or not. All the services provided by the FAA are required for all flights because the ATC system is an interdependent, interlocking chain of people and equipment that seamlessly benefits all flights in all circumstances, with or without the operators' participation or knowledge, to travel safely through U.S. airspace.

Services to these flights, as detailed below, usually begin with the filing of a flight plan, but continue well beyond the flight plan (e.g., training, airspace planning, emergency services, etc.). As Congress recognized, the development, operation and maintenance of the ATC system involves many activities and services (the statute lists a few of these services) whose fixed and common costs ''swamp'' any of the highly variable activities and services that are provided to, made available to, or used by any individual flight. FAA used its Cost Accounting System (described in the ''Costing Methodology Report,'' provided in the docket, FAA–00–7018, item 6) to determine the costs of providing the air traffic services used by all flights (including those subject to the fees). As costs can be segregated by the lines of business of the FAA (in this case Air Traffic Services), the costs can be further broken down by the major airspace environments (Terminal, Oceanic, and Enroute) where services are provided to flights in U.S.-controlled airspace. The flights that are subject to these fees use mainly Enroute and/or Oceanic services. Therefore, only the

costs of these two air traffic environments were used in deriving the fees, in part to ensure that only the costs ''directly related'' to services for flights in these two airspace environments would be considered in establishing fees.

Since the ATC system is available to all flights, and all flights benefit from the ATC system, the FAA does not distinguish between flights as to the services provided within each ATC environment. Consequently, there is little, if any, cost difference between any of the flights within each ATC environment. Nearly all costs for services provided or used serve to make the system available, with any individual flight cost variability lost in a sea of fixed and common costs (see discussion of the first comment below). While there are cost differences between the two environments (Enroute and Oceanic), and these are reflected in the fees, ultimately the costs of providing the air traffic control and related services to any given aircraft within each operational environment are essentially identical. Any cost variation in services provided an individual flight is *de minimis.* The costs are essentially the same, whether the flight flies at 41,000 feet, 31,000 feet, or 5000 feet, or whether the flight has one radio contact or many radio contacts with controllers. Also, the FAA has no current or projected system (nor does FAA believe one could be developed economically) that could track the *de minimis* cost difference that might exist between individual flights.

Accordingly, the fees described below fairly treat all users the same in terms of costs, just as all flights are treated the same in terms of the benefits and services. Those who are subject to the fees, who are otherwise interchangeable with any other user in the ATC system, pay fees based on the same costs as other users because the services provided, made available, or used are the same as for any other flight. Therefore, as detailed below, the fees imposed in this rulemaking are based directly on the costs to the FAA of providing services for safe air transportation for all flights, including those subject to fees.

As noted by the Court of Appeals in the case cited above, it would appear that the costs of some flights should be different from others. But the ATC system does not provide services individually; rather it provides benefits globally. This is because of the interlocking relationship of the costs of the air traffic control system and the requirement to have all services available to all flights at all times to achieve safety for all. Set forth below, especially in the FAA's response to the comments, are the details of how the FAA has complied with the statutory mandate, along with further explanation of why the cost to the FAA of any flight, in either the Enroute or the Oceanic environment, is essentially the same, on a per-mile basis, within each environment.

Background

Authority To Establish Fees

The Federal Aviation Reauthorization Act of 1996 (the Act) directs the FAA to establish by Interim Final Rule (IFR) 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 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 to subsequently issue a Final Rule.

The Act directs the FAA to ensure that the fees authorized by the Act are ''directly related'' to the FAA's costs of providing the service rendered. The Act further states that ''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.''

Services for which fees can be charged under the Act are those ''rendered'' or ''provided'' by the FAA. By specifying that these services include all ''services which are available to facilitate safe transportation over the United States,'' the Act further recognizes that, due to the integrated and interlocking nature of the air traffic control and related services, fees will be based on the cost of all FAA services provided, made available, or used by those aircraft operations covered by the Act.

Every aircraft, including those covered by the Act, directly receives the benefit of a wide variety of services through the integrated FAA system merely by being present in U.S.-controlled airspace. No request for services is necessary, as it is impossible for flights to safely pick and choose what services are necessary for their own safety and that of others in the ATC system.

It is clear that Congress well understood that the full range of these ATC and related services would be used by the FAA in calculating the fees when Congress provided that costs may be recovered for the many services that are available to facilitate safe transportation of aircraft over the United States.

Fee Concept

The FAA's ATC system is considered the preeminent ATC system in the world. Each year, some 40 percent of the world's aircraft operations take place within this system. The system is a fully integrated, massively complex collection of people and equipment, with backup capabilities and redundancies, which facilitates the safe transportation of aircraft in U.S. airspace every moment of the day.

To accomplish this task, the FAA makes available a wide array of services that are rendered directly or indirectly to the highly diverse and frequently dense aircraft operations in U.S. airspace. These aircraft operations range from the smallest, most basic, private aircraft operating in good weather from grass fields, to the largest, most sophisticated, commercial aircraft operating in bad weather to the busiest airports in the world. These aircraft operations also include a large assortment of U.S. and foreign government and military aircraft operating at all extremes of flight.

One category of these aircraft operations involves aircraft that neither land in nor takeoff from the United States, but do operate in U.S. airspace under the direction of the FAA. These ''Overflights'' are a microcosm of the larger, complex set of aircraft operations. Overflights involve virtually every size and type of aircraft flying everything from short distances at low altitudes to long distances at high altitudes. The same tremendous variety of equipment, instrumentation and capabilities seen in all other flights (i.e., non-Overflights) is also seen in Overflights.

The type and scope of interaction between the FAA and a given user, either an Overflight or a non-Overflight, may vary considerably from one flight to another, but the services rendered involve making available at all times the total system that facilitates the safe transportation of all aircraft. For the ATC system to properly provide safe flight to all operators, the many services provided, made available, or used must work together harmoniously so that the FAA can serve any aircraft anywhere in

the ATC system, regardless of how it is equipped and where it is going.

Any aircraft flying in FAA-controlled airspace may use any system or set of systems during any portion of the flight. Due to the passive nature of parts of the ATC system, such as navigational aids, the FAA does not always know precisely who is using a particular aspect of the ATC system, when, or how many times. Likewise, any aircraft flying in the ATC system receives many services automatically just by being in the system, without having to request the services specifically. All flights benefit from merely entering the system, and these benefits are far beyond any explicitly requested by a user.

Communication between the user and the FAA may be initiated by either the FAA or by the aircraft operator. Oftentimes, vital ATC services are provided and received without the full knowledge of both parties, the provider and the recipient. For example, the routing of aircraft to avoid other aircraft or bad weather, or to enjoy better flying conditions, is frequently accomplished by the FAA without the user's specific knowledge (or understanding of why a particular routing or re-routing was given by the FAA). Similarly, the use of navigational aids and other automatic flight information systems is nearly always accomplished without the knowledge of the FAA. For example, satellites and VOR's emit radio signals that are available for use for navigational purposes by any and all aircraft equipped to receive their signals—and this is a genuine benefit to all such aircraft—but the FAA has no way of knowing or metering when these signals are being received and by whom. These aspects of the ATC system, provided by the FAA at considerable cost, are in many ways comparable to signals and warnings used in other modes of transportation (e.g., highway traffic lights, warning signals at railroad crossings, lighted directional buoys in harbors and waterways, weather channels and reports), all of which contribute in major ways to transportation safety but are impossible to meter directly to specific users. Finally, many other services, such as emergency assistance or routing to an alternate airport, may be accomplished without the knowledge of affected aircraft, other than the one having the emergency or needing the service.

To establish fees that capture this dynamic, varied and highly integrated system that must meet the highest of safety standards, the FAA has chosen a fee-setting methodology (as detailed below) that not only captures the costs of making available the many services rendered, but fairly meters those costs among the users based on the number of miles flown in the ATC system by each user.

In summary, the fee system established under this rulemaking has been based directly on the FAA's costs of making the services rendered by this highly integrated ATC system available to all flights, including Overflights, to facilitate their safe operation in the airspace controlled by the United States.

Overflight Operations

Operators of overflight aircraft benefit from the FAA's provision of ATC and related services in several ways. First, and most importantly, FAA's air traffic services enhance safety through the availability of ATC, navigation, and communications services, as well as the provision of many emergency services that facilitate safe air transportation. Second, flying through U.S.-controlled airspace allows the operator to choose optimized routing for the aircraft, which is a substantial benefit. The level and type of ATC and other services that are provided or made available to operators of overflights depends, in part, on the portions of U.S.-controlled airspace such flights transit. These services that are available to operators include communications, navigation, radar surveillance, emergency services, and flight information services. For aircraft transiting U.S. enroute airspace, Air Route Traffic Control Centers (ARTCCs) provide separation by means of radar surveillance (if they are operating under instrument flight rules or generally in airspace above 18,000 feet). Also, these flights mainly use navigational aids and radio communication with ARTCCs.

For aircraft transiting oceanic airspace, where radar surveillance and some navigational aids are not available, navigation is generally conducted by on-board systems. Aircraft separation, however, is provided under procedural control, under which flights report their position to an air traffic controller each time they fly over a specified reporting point.

The FAA estimates that approximately 236,000 non-public flights (i.e. in aircraft that are not statutorily exempt) annually transit U.S.-controlled airspace without landing or taking off in the United States (see the report entitled ''Overflight Fee Development Report, as Amended,'' item 101 in the docket).

Charging overflights for ATC and related services is accepted in the international arena. The International Civil Aviation Organization (ICAO) states that ''where air navigation services are provided for international use, the providers may require the users to pay their share of the related costs * * *.'' (ICAO's Policies on Charges for Airports and Air Navigation Services, Paragraph 36 (Document 9082/6)). Further, paragraph 47 of Document 9082/6 notes that ''providers * * * may require all users to pay their share of the cost of providing them [air navigation services for international use] regardless of whether or not the utilization takes place over the territory of the provider State.'' (Document 9082/6, adopted by ICAO in December 2000, has been placed in the docket as item 119. An earlier version of this document, ICAO Document 9082/5, had been previously placed in the docket as item 7.)

Use of Overflight Fees

At the same time Congress passed the Act, it also established 49 U.S.C. 41742, which sets forth how the Overflight Fees are to be used. Each year, $50 million from fees or other funds made available to the FAA are authorized and appropriated for the Essential Air Service (EAS) program. This program, administered by the Office of the Secretary of Transportation, provides air carrier service to small communities. The statute has been in effect since October 1996, and $50 million has been authorized and appropriated each subsequent year. The statute underscores the need for the FAA to act expeditiously in establishing and collecting Overflight Fees.

History

On March 20, 1997, the FAA published an Interim Final Rule (IFR), ''Fees for Air Traffic Services for Certain Flights through U.S.-Controlled Airspace'' (62 FR 13496), which established fees for FAA air traffic and related services provided to certain aircraft that transit U.S.-controlled airspace but neither take off from, nor land in, the United States. 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 additional amendments to that IFR on May 2, 1997 (62 FR 24286) and October 2, 1997 (62 FR 51736).

That rulemaking was subsequently challenged. The Air Transport Association of Canada (ATAC) and seven airlines petitioned the United States Court of Appeals for the District of Columbia (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. *the 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. However, the Court concluded that the FAA's methodology of determining cost violated statutory requirements. Therefore, the Court vacated the IFR fee schedule and remanded the IFR to the FAA for further proceedings consistent with the opinion. On July 24, 1998, the FAA published a Final Rule (63 FR 40000) removing the 1997 IFR.

After the FAA removed the 1997 IFR, the FAA met with various user and aviation interest groups to listen to their concerns about fees under the Act. The last such meeting was on May 24, 2000, and included the Department of Transportation General Counsel and members of her staff. A summary of each of these meetings can be found in the docket for this rulemaking.

On June 6, 2000, the FAA published a new Interim Final Rule 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 following section of this document. The FAA began charging fees on August 1, 2000. The FAA extended the comment period on October 6, 2000 (65 FR 59713), and again on October 27, 2000 (65 FR 64401), closing the comment period on December 26, 2000. Also, 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 Act.

Just before the August 1, 2000, effective date of the current fees, the ATAC and seven airlines again petitioned the Court to review the Interim Final Rule. The petitions were again consolidated into a single case. Issues raised by the petitioners included some of the same process and procedure questions raised in the previous litigation, as well as new issues regarding the adequacy of information provided by the FAA to support the fees and whether the fees meet the statutory requirement of being ''directly related'' to the FAA's costs of providing the services. The Court heard oral arguments on May 14, 2001. On July 13, 2001, the Court issued an opinion, described in the ''Introduction'' section of this rulemaking.

Reports Adopted by the FAA

The FAA asked Capital Economics, a firm with expertise in finance, accounting and economics, to review the fee schedule developed by the FAA to recover the costs of providing ATC and related services to ''Overflights.'' Capital Economics is located in Washington, DC, and specializes in conducting analysis of complex regulatory issues. The FAA requested Capital Economics to assist in responding to comments on the IFR. The FAA has adopted for this rule the Capital Economics report, entitled ''A Review of FAA Overflight Fees.'' This report has been placed in the rulemaking docket (Docket No. FAA–00–7018, item 99).

The Capital Economics review confirms that the FAA's fee structure is well within the scope of commonly accepted economic, financial, and accounting principles as applied in a practical, real-world setting. Also, in Capital Economics' view, the FAA's reliance on a mileage-based fee structure complies with the statutory requirement that the fees be cost-based and not value-based. The review also finds that due to the prospective high metering costs of other alternative methods, the mileage-based metric is likely to be the least expensive measure to employ to assign costs to Overflights. In addition, the FAA agrees with Capital Economics' conclusion that there is no better alternative allocation mechanism than the mileage-based method used by the FAA, even ignoring metering costs. The report indicates that the fee structure developed by the FAA meets the ''subsidy-free'' test, which means that the Overflight Fees do not subsidize other agency costs, users, or services. The basis for these conclusions is captured in the Capital Economics report.

The FAA also has relied extensively on the work of the accounting and professional services firm, Arthur Andersen, which has been one of the agency's partners in developing its Cost Accounting System (CAS) and has provided advice to the FAA on CAS-related accounting matters. Arthur Andersen developed a ''Costing Methodology Report,'' which was used by the FAA in deriving its Overflight Fees. Arthur Andersen later published an Addendum to this report. Both of these items are included in the rulemaking docket (FAA–00–7018), items 6 and 101, respectively. The Costing Methodology Report describes how the CAS captures costs for all FAA lines of business and how costs are assigned to the Enroute and Oceanic Services. The Addendum to the Arthur Andersen report addresses several of the principal comments the FAA has received on the Overflight Fee IFR.

As noted above, the FAA has adopted the Capital Economics and Arthur Andersen reports in responding to many of the comments received in this rulemaking. Those comments are addressed in detail below.

Discussion of Comments

The FAA received a total of 57 different comments, many of them multiple times, from the 28 commenters listed below, in response to the Interim Final Rule, including statements made at the public meeting held on June 29, 2000. In addition, the FAA either already had or received several letters, reports and other items of information relating to the Interim Final Rule. The FAA carefully considered these documents as well as the comments prior to issuing this Final Rule.

A number of the commenters generally agree that the FAA has the right to collect fees for its services; however, many argue that the methodology the FAA uses to derive its fees is flawed. Several commenters requested additional information or clarification regarding certain underlying assumptions, cost categories, terminology, cost data, cost allocation processes, and reports provided by consultants. Although many of the requests for information did not identify a specific issue or problem, the FAA has attempted to respond to these comments wherever possible, and has provided an additional reference or a point of contact where further information can be obtained if needed.

Many commenters included extensive attachments in support of their position, which can be found in the docket. Most comments are from foreign air carriers, trade associations representing those air carriers, and individuals. The commenters are:

Air Europa Lineas Aereas, S.A.U
Air New Zealand Limited
Air Transport Association of Canada (ATAC)
Airtours International Airways Ltd.
American Airlines
Association of Asia Pacific Airlines (AAPA)
Aviation Assembly
British Airways PLC
Corsair
Deutsche Lufthansa A.G.
Eric A. Jackson
Iberia Lineas Aereas De Espana
International Air Carrier Association (IACA)

International Air Transport Association (IATA)
International Business Aviation Council, Ltd.
Japan Airlines Company, Ltd.
John R. Bell II
Joseph A. Beaudoin (on behalf of the ATAC)
KLM Royal Dutch Airlines
KPMG LLP (on behalf of the ATAC)
Long Haul Charter Carriers of Italy
LTU-Lufttransport-Unternehmen GmbH. (LTU)
Michael Jengo, Jr. (on behalf of Air New Zealand and other air carriers)
Monarch Airlines Limited
National Business Aviation Association, Inc. (NBAA)
Qantas Airways Limited
Richard Henrikson
Societe Air France

Summary of Comments and Disposition

As stated earlier, many of the commenters agree that the FAA has the right to charge fees for Overflights; however, those commenters disagree with several elements of the FAA's approach to determining those fees. Generally, commenters raise numerous detailed issues on the Interim Final Rule, a number of which have been repeated by several commenters. Therefore, for clarity, the FAA has grouped most of the comments. The following list identifies the major substantive issues raised by the commenters:

- The cost of providing air traffic control and related services to Overflights versus non-Overflights in the Enroute and Oceanic environments,
- The inclusion of fixed and common costs in the Overflight Fee cost pool,
- Whether Overflight Fees are subsidizing other costs or services,
- The definition of fees ''directly related'' to costs as used by the Act,
- Lack of consultation,
- Violation of the Administrative Procedure Act (APA),
- Violation of international agreements,
- Violation of International Civil Aviation Organization (ICAO) guidelines,
- Accounting and charging for services provided by air traffic controllers at Enroute Centers before having the cost of Terminal Services,
- Accounting for costs incurred in the transitional airspace between Oceanic and Enroute Services,
- How the FAA determines the cost of providing services to Overflights,
- Individual fees for each service delivery point (SDP),
- Alternative methods to assign costs to users, and
- Requests for additional information.

These comments, and all others received, are addressed below.

1. The Cost of Providing Air Traffic Control and Related Services to Overflights Versus Non-Overflights in the Enroute and Oceanic Environments

Many commenters suggest that Overflights cost less than non-Overflights for various reasons. Several air carriers give specific examples of the difference between costs of providing service to Overflights versus non-Overflights. British Airways states that the FAA incurs a higher level of labor costs for ATC services to aircraft at lower altitudes. The following are additional examples that express the same concern.

According to the Air Transport Association of Canada (ATAC), the FAA assumes that the level of service it provides to each flight is the same regardless of the degree of congestion in the airspace transited by the flight. That is, the FAA assumes that the labor costs required for controllers to maintain proper separation in congested airspace are the same as the labor costs required in sparsely used airspace. The ATAC states that the FAA fees rely on this assumption, even though ATAC notes that the FAA itself acknowledges on page 2 of its original Fee Development Report (Docket item 4), that ''the level of air traffic service provided to Overflights depends, in part, on the portions of U.S.-controlled airspace transited by such flights.''

The ATAC also states, ''the FAA assumes that the level of services provided to each flight is the same on a per-mile basis regardless of the number of sectors transited by the flight. This assumption ignores the costs incurred by the FAA when a flight is handed off from one sector to another. Such costs will differ among flights with the same number of GCD miles but transiting different numbers of sectors.''

Qantas Airways opines that ''one of the main assumptions underlying the FAA's fee calculations is that the ATC services provided to Enroute and Oceanic Overflights, respectively do not differ from ATC services provided to other Enroute or Oceanic flights.'' Qantas notes that the FAA provides no information to show the validity of this assumption.

Joseph A. Beaudoin, a former air traffic controller, states, in comments submitted on behalf of the ATAC, that Overflights represent a ''miniscule percentage'' of total Enroute traffic, and that the vast majority of Enroute traffic is either (1) flights operating at lower altitudes (below 18,000 feet) the entire time they are in the Enroute environment, or (2) flights transitioning through the lower altitude airspace on their way to or from the Terminal environment or high altitude sectors (18,000 feet and above). Mr. Beaudoin maintains that these low altitude and transitional flights require a much higher level of controller attention and contact than do the Overflights, and provides several pages of narrative explaining in great detail what he believes is involved in providing ATC services to each type of flight in the Enroute environment. His conclusion is that Overflights require much less time and effort on the part of the controller, and that Overflights require much less in the way of services and equipment than low altitude and transitional flights.

In subsequent comments, Mr. Beaudoin also asserts that the controller manpower required to service Overflights and non-Overflights is not common since controllers generally are not simultaneously providing services to Overflights and non-Overflights. Mr. Beaudoin further comments that the FAA's labor costs are not fixed; rather the number of controllers providing services varies, depending on the volume of aircraft operating within the particular geographical area or sector and the nature of those aircraft operations.

Michael Jengo, Jr., a former air traffic controller, submits, on behalf of Air New Zealand and other air carriers, another comment on the ATC services offered in the Oceanic environment, stating, ''There is a significant difference in the level of ATC services provided to an Overflight that traverses oceanic non-radar airspace and a flight that lands or departs a U.S. airport.''

The consulting firm of KPMG, which submitted several detailed comments on behalf of the ATAC, states that by using Average All-Aircraft Cost as a surrogate for Average Overflight Cost, the FAA ensures that the Overflight fees in the Enroute environment are not ''directly related'' to the FAA's costs of providing ATC services to Overflights.

KPMG further argues that Low Altitude and Transitional Flights require a high level of FAA controller attention and contacts with radar facilities because they occur within airspace: (1) in which aircraft are constantly requesting or requiring clearance to change altitude; (2) that is often congested; and (3) which is frequently affected by weather problems and airport delays.

KPMG concludes that because most flights are non-Overflights, the Average Cost used by the FAA is close to the

average cost to provide services to non-Overflights, and the substantial differences in costs between provision of ATC services to Overflights and non-Overflights results in a large disparity between the Overflight Fees and the actual costs of providing ATC services to Overflights.

FAA Response: The FAA disagrees with these comments. The FAA believes its Overflight Fee development approach is a reasonable one, consistent with the Act, and that it fairly assesses fees for the provision of ATC and related services. The FAA did not seek to differentiate between Overflights and non-Overflights for the following reasons: (1) The FAA incurs the vast majority of costs by making its comprehensive ATC system available to all flights (regardless of the type of aircraft and its equipment and capabilities); (2) the FAA's marginal cost, including labor cost, for providing services to any flight is close to zero; (3) the majority of FAA's costs are common and fixed costs; and (4) the controllers' responsibilities for Overflights are not fundamentally any different than for non-Overflights.

In the statute requiring the Fees (49 U.S.C. 45301), Congress provided:

> [The FAA] shall ensure that each of the fees required by subsection 'a' is directly related to the Administration's costs of providing the service rendered. Services for which costs may be recovered include the cost of air traffic control, navigation, weather services, training and emergency services which are *available* (emphasis added) 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 FAA incurs a significant amount of costs simply by making services *available*, as Congress specifically authorized (as quoted above), since the same ATC infrastructure is used to provide services to Overflights and non-Overflights. Also, the benefits all flights receive flow mainly from the ATC system, not the individual ATC actions related to an individual flight.

The FAA ATC system is designed to service and benefit all flights by providing for safe passage for all flights all the time. Overflights can be anywhere in the ATC system at any point in time for any amount of time, and can use any of the available services, regardless of the type of flight, user, aircraft, or the aircraft equipment and capabilities. Overflights are provided, have made available, or use the extensive ATC and related services because of weather deviations, aircraft type and equipment, radar vectors, traffic congestion, flight stability/comfort, merging routes/crossing routes, transitioning from one ATC environment or servicing point to another, as well as many emergency services such as diverting to alternate airports. No matter where an aircraft is in U.S.-controlled airspace, the FAA makes available an extensive and full offering of services to that aircraft to facilitate safe air transportation. As a conservative estimate, the burden each flight imposes on the FAA is determined by the number of miles flown by that flight in each ATC environment. Therefore, each Overflight is charged an appropriate fee based on its Great Circle Distance (GCD) mileage traveled in the Enroute airspace and its GCD mileage flown in the Oceanic airspace.

The FAA agrees with the conclusions presented by Capital Economics in its report (Docket item 99), which supports the FAA's fee methodology with respect to Enroute and Oceanic Services (in section IIIA, Enroute, pages 8–10):

> The marginal cost of servicing any particular flight in the Enroute environment is very small. This is due to several factors. The Enroute airspace environment is not capacity constrained. System constraints do exist, but they are in other environments, such as Terminal Radar Approach Control Facility (TRACON) and Terminal Operations. In addition, for safety purposes, the air traffic control system has significant built-in redundancy, with multiple overlapping components. Also, in providing air traffic control services, the FAA incurs costs by making services available (e.g., radio navigation aids and broadcast weather services) regardless of whether any particular flight uses the services. These services are always available in full supply to any and all users that need to use them. Once an aircraft enters U.S.-controlled airspace, the U.S. ATC system is immediately engaged, and the entire ATC infrastructure and full scope of services are available, regardless of the type of flight, user or aircraft. The requirements of providing full and constant availability of services to all users are designed into the system and result in real costs incurred in the provision of air traffic control services.
>
> These factors ensure that no additional physical assets would be required to service an additional flight. In addition, the level of service utilization does not directly impact on those costs that in many other contexts are considered variable, such as labor costs. Consider the following:
>
> (1) An air traffic controller is paid the same amount regardless of whether he or she has to monitor a particular aircraft across his or her screen or communicate directly with that aircraft. Similarly, a controller is paid the same regardless of whether he or she has to communicate with an aircraft once or a dozen times. A controller is also paid the same regardless of whether he or she works during hours when the airspace is quiet or hours when the airspace is busy.
>
> (2) Controllers have to be trained to provide all Enroute air traffic control services and meet all air traffic situations regardless of whether or not they encounter all air traffic situations. The cost of training does not vary depending on how much service is delivered.
>
> (3) Enroute radar and navigation equipment have to be operational at all times regardless of how many flights are in the airspace. It is not possible to shut off one or more radar or navigational aids at any point in the day in order to reduce the overall cost of the radar system.
>
> (4) Telecommunications capability and capacity have to be available at all times during the day regardless of whether any, or how many, transmissions are made. Telecommunication services are procured on a fixed lease basis, similar to renting a pipeline, whereby costs do not increase with small additions to traffic.
>
> Thus, in addition to the fact that the entire ATC system is built to provide a level of service to all users, regardless of whether they actually utilize all the services, the lumpy (fixed over substantial output ranges) nature of input costs traditionally considered to be variable, such as labor or communications, means that the additional cost of servicing an additional flight is very small.
>
> This is not to say that there are no differences in the marginal costs of servicing one type of Enroute flight versus another. It is to say however that both costs are very small and are swamped by the allocation of fixed and common costs that must be made in order to cover the costs of ATC services.

The Capital Economics report states further, with respect to Oceanic Services (in section IIIB, Oceanic, page 12):

> The marginal cost of servicing any Overflight or non-Overflight in the Oceanic environment is very small. In fact, there may be no difference in the marginal costs between the two types of flight as the same types of procedural controls are generally used for non-Overflights as for Overflights. The services they receive are very similar, if not identical, while in the Oceanic environment. But, more importantly, any marginal cost differences that do exist are swamped by the large fixed and common costs that must be allocated.

2. The Inclusion of Fixed and Common Costs in the Overflight Fee Cost Pool

Several commenters state that the FAA should not have included fixed and common costs in the Overflight Fee cost pool. They argue that the FAA should have included only the marginal cost of Overflights in order to meet the statutory requirement that fees be ''directly related'' to costs. Specific comments on this issue were received from ATAC, which states that the FAA makes the assumption that all Enroute or Oceanic costs not categorized as ''overhead'' are costs that should be included in determining fees directly related to FAA's costs of providing

services to Overflights. Furthermore, ATAC comments that by failing to remove all fixed costs, the FAA overstates the costs directly related to providing services to Overflights.

Lufthansa and KPMG assert that the FAA should remove from the total costs attributable to Overflights all costs that would have been incurred, even if the FAA provided no services to Overflights. They state that the overhead amounts removed by the FAA from the Overflight Fee cost base clearly do not include all FAA fixed costs of providing ATC services; they believe that all fixed costs should have been removed.

FAA Response: The FAA disagrees with these comments. All users of the ATC system benefit by being in the system, and all should bear the costs. The FAA developed a unit cost for providing air traffic and related services in the Enroute and Oceanic environments to provide a mechanism for apportioning fairly among all users the overwhelmingly large common and fixed costs of the ATC system. The FAA derived the unit costs by dividing the total costs of providing ATC services, less overhead, in each environment, Oceanic and Enroute, by total miles flown in that particular airspace. The use of mileage allows tailoring of the costs to the individual user in a manner that is easy to administer but fair to the users.

As Capital Economics points out in its previously cited report, if the FAA were to charge only the marginal cost of the specific ATC and related services provided to Overflights, it would be unable to recover anywhere near the cost of the activity. Capital Economics notes (in section II, page 3), ''Faced with this situation, economists typically call for a fee system involving a marginal or incremental component plus a markup to cover fixed and common costs.'' This is essentially what the FAA has done. All directly related costs (including fixed and common costs) are derived from CAS data and apportioned among all flights, whether Overflights or non-Overflights.

In its January 1998 opinion (*Asiana Airlines* v. *the FAA,* 134 F. 3d 393 (D.C. Cir. 1998)), based on its review of FAA's previous Overflight Fees, the United States Court of Appeals for the District of Columbia Circuit recognized that provision of ATC and related services to Overflights entails fixed and common costs that must be allocated:

> The difficulty with determining the portion of fixed and common costs attributable to Overflights is that by definition these costs are shared among a great number of users besides Overflights and so, in a sense, do not directly relate to the quantity of services consumed. Thus, a method must be devised to apportion these costs among all the users who benefit from them, without violating the strictures of the statute.

Understanding the existence and nature of FAA's fixed costs, the Court also stated:

> There may be methods to reasonably determine an appropriate fraction of the FAA's fixed costs to assign to each Overflight, and if the FAA does not have enough information to precisely determine the burdens imposed by individual flights, it may proceed based on the best data available.

Because all users receive benefits from the ATC system, and because making ATC and related services available involves a significant amount of fixed and common costs, it is clearly consistent with the Act, as noted by the Court, that the FAA find a way to allocate those costs among all users who benefit from them. This is exactly what the FAA has done. It recognized the need to allocate fixed and common costs, and used an appropriate economic method based on the best available data. This does not mean that the unit cost methodology used by the FAA is the only way these costs could be apportioned. There may indeed be another way to do it—but Congress left it to the FAA to determine the methodology. The method chosen by the FAA is clearly reasonable and within the parameters specified by the Court. Indeed, as Capital Economics notes (in section II, pages 4–5):

> * * * there are many appropriate methodologies. This problem arises in practice in countless settings: virtually every business firm or government organization provides not just one service but several, and these services are often the joint product of the entity's operations. It may be possible to isolate the marginal or incremental costs of servicing a particular subgroup of customers, and this may be possible for each and every conceivable subset of customers. However, in the presence of fixed and common costs the sum of these marginal costs will fall below the total costs of serving all customers. In the extreme, but not uncommon, case of very large fixed and common costs, it is quite possible that the separate marginal or incremental costs of servicing any and all subgroups is virtually zero for each group. It is customary in these instances to allocate costs based on sales revenues, level of customer activity, level of production, or some other similar, conventional method. Examples of such allocation methods are ubiquitous.

3. Whether Overflight Fees Are Subsidizing Other Costs or Services

Commenters suggest that the FAA subsidizes other services or costs by treating Overflights the same as all other flights in the Enroute and Oceanic environments. Similarly, KPMG claims that because the FAA's costs for Overflights are substantially lower than for non-Overflights, the FAA's use of ''Average Cost'' as a surrogate for ''Overflight Cost'' means that the FAA is requiring Overflights to subsidize substantially FAA's provision of ATC services to non-Overflights. Based on this assumption, KPMG theorizes that Overflight fees are not ''directly related'' to FAA's costs to provide ATC services to Overflights.

FAA Response: The FAA disagrees. As previously explained, the FAA developed a unit cost of providing, or making available, ATC services in both the Enroute and Oceanic environments. The FAA then applied those unit costs to total miles flown to achieve a fair, as well as direct, allocation of costs between Overflights and non-Overflights in each environment that does not subsidize any user.

Commenters who allege or at least suggest the possible subsidization of Overflights by non-Overflights do not provide any convincing analysis to support their claims, whereas the Capital Economics analysis demonstrates that the Overflight Fees are subsidy-free.

Capital Economics states (in section II, page 6): ''Fees that are *subsidy-free* are widely regarded by economists to be preferable to those that are not. This is because *subsidy-free* fees prevent one service from subsidizing or from being subsidized by the other services offered.'' The Capital Economics analysis goes on to state that ''subsidy-free fees are defined as those that pass two tests: (1) Fee revenues from a service do not exceed the Stand Alone Costs (SAC) of that service; and (2) fee revenues for a service are never below the incremental cost of that service, measured as the total cost savings of not producing the service.''

The Capital Economics report states (in section IIIC, page 13) as follows:

> An FAA analysis of Enroute Overflights, attached to this report as Attachment 1, has determined that the stand-alone cost (SAC) of servicing these flights is at least $181M. The cost of servicing these Enroute Overflights (which underlies the current fee structure) is estimated to be approximately $30M, which is well below the upper bound, the SAC of serving these flights. Thus, the current fee structure quite easily passes the first of the subsidy-free tests outlined earlier—revenues for the service do not exceed the SAC of the service. In addition, as commenters have argued, the incremental cost of servicing Overflights is extremely low and perhaps nearly zero. Thus, the estimated $30M cost that serves as the basis for Enroute Overflight fees under the current fee structure easily passes the second test for subsidy-free pricing—the costs recovered by the fees are never lower than incremental costs.

An FAA analysis of Oceanic Overflights, included in Attachment 1 has determined that the stand-alone cost of these flights is at least $28M. As a result, the current fee structure easily passes the first of the subsidy-free tests outlined earlier. That is, the current fee structure is based on an estimate of approximately $19M to service these flights, which is well below the SAC of serving these flights. In addition, as commenters have argued, the incremental cost of servicing Overflights is very low. Thus, the estimated $19M in costs which underlies the current fee structure easily passes the second test for subsidy-free pricing: the costs recovered by the fees are never lower than incremental costs.

The system the FAA has developed does not subsidize any user. Costs that are incurred on behalf of users who are statutorily exempt from Overflight Fees (i.e., military and government aircraft), as well as the Canada-to-Canada flights, have not been assigned to other users. Costs incurred on behalf of those parties are borne by the FAA.

4. The Definition of Fees ''Directly Related'' to Costs as Used by the Act

Several commenters claim that Overflight Fees do not meet the Congressional requirement that the fees be ''directly related'' to FAA's costs of providing the ATC services to Overflights, and that the FAA does not provide a definition of ''directly related'' in the Interim Final Rule. One comment received on this issue is from the ATAC, which states, ''We understand that an issue may exist as to whether Congress intended the FAA to recover only incremental costs to providing ATC services to Overflights. To the extent that that was Congressional intent, the FAA makes the unwarranted assumption that all Enroute or Oceanic costs not categorized as ''overhead'' are costs that should be included in calculating costs directly related to FAA's costs of providing services to Overflights.'' Another commenter, LTU, states, ''While the words ''directly related'' are recited in the preamble and the Overflight Fee Development Report, these words are never interpreted nor explained. It seems the FAA does not accept the ''directly related'' language, either as used by Congress or by the Court of Appeals.''

FAA Response: The FAA disagrees with this comment. In the statute requiring the Fees (49 U.S.C. 45301), Congress provided:

(The FAA) shall ensure that each of the fees required by subsection ''a'' is *directly related* (emphasis added) to the Administration's costs of providing the service rendered. Services for which costs may be recovered include the cost of air traffic control, navigation, weather services, training and emergency services which are *available* (emphasis added) 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.

Congress did not define ''directly related'' for the FAA. As is common with many similar statutes, Congress left it to the FAA to reasonably interpret the Act to determine which costs are ''directly related'' and thereby useable in the derivation of the FAA's Overflight Fees. While some commenters may disagree, the FAA has chosen a reasonable and somewhat narrow definition of costs so that each fee (Enroute and Oceanic) is directly related to FAA's costs of making available the many services that could be, and are, used by Overflights. And, as Capital Economics states (in section II, page 2), ''There is no standard, or agreed upon, definition of 'directly related' in the accounting or economic fields.''

Overflight Fees are based on the FAA's actual costs, as required by the Act, and as determined by the new Cost Accounting System (CAS), derived directly from the costs of the many services made available. The CAS provides the total cost pools for the services provided in the Enroute and Oceanic environments. All costs that are traceable to these two environments are used in the fee development process. All costs attributable to the other two ATS Services, Terminal and Flight Services, are specifically excluded, even though some Overflights use these services.

Additionally, although directly traceable to specific services, the FAA excludes all overhead costs from the total cost pools used in deriving its Overflight Fees. This exclusion, as well as the exclusion of Terminal and Flight Service costs, is done through an abundance of caution to ensure compliance with the statutory provision that the fees must be ''directly related'' to the FAA's costs of the services provided, or made available, to Overflights. Within each cost pool (Enroute or Oceanic), costs are apportioned between Overflights and non-Overflights according to Overflight and non-Overflight miles. Then, to ensure that each Overflight is charged an amount that reflects the quantity of ATC and related services made available to it, a mileage-based fee structure is employed. The result is that each individual operator's fees are directly proportional to its number of Overflight miles flown, as measured by Great Circle Distance from point to point of U.S.-controlled airspace.

5. Lack of Consultation

Nearly every commenter complained that the FAA should have engaged affected parties in consultations before issuing the Interim Final Rule. Several commenters further requested the FAA to consult with them after the effective date of the Interim Final Rule, but before issuance of the Final Rule.

FAA Response: The FAA disagrees. The FAA did engage in consultation before the Interim Final Rule was issued. The FAA acknowledges that the nature of the consultation may have been different than that expected or desired by many commenters. It was as much as is allowable under U.S. law, and the FAA believes it was effective in making the views of the users known.

The FAA published the Fees for FAA Services for Certain Flights (commonly referred to as ''Overflight Fees'') Interim Final Rule on June 6, 2000. Although conducting rulemaking via an Interim Final Rule (IFR) is not the FAA's normal or necessarily preferred rulemaking practice, the FAA was directed by Congress in the Act to use the IFR process to establish Overflight Fees.

Since then, the FAA has received several affirmations of Congressional intent, including two letters from Congress (Docket items 23 and 28) as well as the subsequent legislation (Docket item 97) reaffirming the Congress's direction that the FAA establish Overflight Fees via the IFR process.

Since passage of the Act, the FAA has on several occasions met with user and aviation interest groups to listen to their concerns about fees. The FAA held a meeting with representatives from the European charter carriers, two meetings with the Washington Aviation Assembly, and a meeting with counsel from interested airlines. A summary of each of these meetings can be found in the docket of this rulemaking, items 11, 15, 16, and 22, respectively. The FAA held a public meeting on June 29, 2000, to provide information regarding the Interim Final Rule and to invite comments from interested parties.

Additionally, and separate from the Overflight Fee rulemaking, the FAA held two Cost Accounting ''Industry Day'' meetings (July 29, 1999 and June 30, 2000) to present and discuss Enroute and Oceanic costs for fiscal years 1998 and 1999, respectively. Finally, the docket of the current rulemaking was extended twice to allow additional comments for FAA's consideration prior to issuing a Final Rule. Several additional comments were submitted to

the docket even after the final closing of the comment period on December 26, 2000. The FAA has also considered and addressed those comments (in this section) in proceeding with the Final Rule.

Many commenters stated that the FAA violated international agreements and ICAO guidelines by not consulting with users prior to the implementation of the Overflight Fee Interim Final Rule. The FAA disagrees with the commenters on this issue. However, the agency has decided to take advantage of an option available to it to provide another forum for consultation. The FAA intends to form an Aviation Rulemaking Committee for Overflight Fees (pursuant to the Administrator's authority under 49 U.S.C. 106(p)(5)) soon after publication of the Final Rule.

Aviation Rulemaking Committees were authorized under the 1996 FAA Reauthorization Act, and afford the FAA additional opportunities to obtain direct, firsthand information and insight from interested parties by meeting together and exchanging ideas with respect to proposed and existing rules. In this instance, the Aviation Rulemaking Committee's primary task will be to propose possible revisions to the Overflight Fees.

The FAA expects that the Overflight Fee Rulemaking Committee will serve as a forum for interaction among the FAA, the users, and the public. The Committee will be assigned specific tasks by the FAA Administrator or the Assistant Administrator for Financial Services.

The FAA intends to establish such a committee within 90 days after the issuance of this Final Rule. At that time, a Notice will be published in the **Federal Register** with specific details such as committee charter, membership, administration, and duration.

6. Violation of the Administrative Procedure Act (APA)

A significant number of commenters claim that the FAA violated the Administrative Procedure Act (APA) by issuing an IFR rather than a Notice of Proposed Rulemaking (NPRM). In addition, some commenters argue that the FAA should not have used an IFR for what they claim to be the ''second'' or ''supplemental'' fee schedule following the 1997 IFR.

The ATAC captured many commenters' opinions in its statement at the public meeting asserting that the 1998 Court of Appeals opinion required that any subsequent fee schedule issued under the Act would require an NPRM pursuant to the APA. The ATAC added that the APA calls for notice to and comment by affected parties before any rule may become effective and that the FAA acted improperly by setting the fees without prior notice and comment.

One commenter claims that APA notice and comment procedures may be waived in extreme circumstances and there does not appear to be any reason to employ extraordinary procedures in this case given that the FAA has been developing the fees for several years.

FAA Response: The FAA disagrees that it violated the APA. The FAA published its previous Overflight Fee IFR on March 20, 1997. This rulemaking was reviewed by the United States Court of Appeals for the District of Columbia. The Court rejected the petitioners' claims that (1) the FAA acted improperly in employing an expedited procedure before the effective date of the Interim Final Rule, and (2) the FAA violated the Administrative Procedure Act. Subsequently, the recent (July 13, 2001) decision by the Court of Appeals (referred to above) agreed with the FAA.

7. Violation of International Agreements

LTU, Lufthansa, Iberia Airlines, Japan Airlines, AAPA, British Airways, Air New Zealand, and others comment that the FAA violated international/bilateral agreements by not consulting with the affected parties before issuing the rule.

FAA Response: The FAA disagrees with these comments, as noted previously. The FAA did consult with all parties as required by both U.S. and international law.

The FAA provided an opportunity for foreign governments, foreign air carriers, and other interested parties to provide comments on the IFR for approximately two months before its effective date. In addition, the FAA met formally and informally with representatives from foreign governments and the user community to receive and provide information regarding the IFR. The FAA held a public meeting (on June 29, 2000) to allow interested parties yet another opportunity to voice their concerns regarding the rule. While this is not the type of consultation desired by the commenters, it is consistent with international and U.S. obligations of the FAA in this rulemaking.

Commenters further state that bilateral agreements and ICAO recommendations impose an obligation or a responsibility upon the United States to consult with other governments and their carriers prior to imposing user fees. To the extent possible, the FAA met with those governments that expressed an interest in meeting with the agency regarding the rule. Indeed, two informational meetings were held, in February of 1999 and 2000, with a number of members of the Washington Aviation Assembly, a group of Washington-based diplomats from a number of foreign Embassies, including specifically representatives of virtually all of the countries with carriers significantly affected by the Interim Final Rule.

In the previous litigation (*Asiana Airlines* v. *the FAA*, 134 F. 3d 393 (D.C. Cir. 1998)), the U.S. Court of Appeals agreed with the FAA's position on consultation. The Court's opinion stated:

> We agree with the FAA that its actions did not violate any duties actually imposed by international aviation agreements. Most of the agreements relied upon by petitioners speak of general aims, not specific obligations * * *. The petitioners have not cited any international agreement that comes close to imposing duty to consult. But even if such a duty could be found in an agreement only to encourage consultations, the record does not indicate that the FAA failed to consult with affected foreign users. Prior to the effective date of the IFR, FAA staff held informal meetings as well as public meeting with representatives of foreign airlines, provided copies of materials from the docket relevant to the IFR development, and accepted forty comments on the rule. Although these exchanges may not have influenced the content of the regulations made effective on May 19, 1997, the terms ''consultation'' and ''exchange of information'' in the cited international agreements do not import the full notice and comment apparatus of APA. The procedures adopted by the FAA cannot be said to have breached the terms of these international agreements.

The FAA's rulemaking and consultative procedures in the current IFR have been nearly identical to the previous rule. The FAA believes that there has been no violation of any international obligation of the U.S. As explained more fully under the previous comment on ''lack of consultation,'' the FAA intends to establish an Aviation Rulemaking Committee for Overflight Fees to serve as a forum for interaction among the FAA, the users, and the public on matters relating to Overflight Fees.

8. Violation of International Civil Aviation Organization (ICAO) Guidelines

Lufthansa, Japan Airlines, AAPA, ATAC, Air New Zealand, and others claim the FAA violated ICAO guidelines by not consulting with affected parties prior to promulgation of the rule and by issuing an Interim Final Rule. AAPA indicates that the United States has an obligation to consult with users regarding any fees due to the large area of international airspace that has been designated to it by ICAO. Air New

Zealand asserts that the Interim Final Rule cites ICAO guidance for navigation charges in justifying its user fees, but ignores that the same document calls for prior consultations on fees.

FAA Response: The FAA disagrees with the commenters who allege that it violated ICAO guidelines. The ICAO principles they cite do not *require* authorities to conduct consultations prior to implementation of user fees. These principles—which at the time FAA issued the IFR and the comments were received—were set forth in paragraph 22 of ICAO Document 9082/5, Statements by the Council To Contracting States on Charges for Airports and Air Navigation Services (Docket item 7). They ''recognize the desirability of consultation with airport users before significant changes in charging systems or levels of charges are introduced.'' Further, ICAO Document 9082/5 goes on to state, in paragraph 44 that ''The principles enunciated with respect to consultation concerning changes in airport charges in paragraph 22 are applicable to changes in air navigation services charges.''

The ICAO guidance document indicates that there may be a need for more specific consultation with respect to air navigation charges, but then states, in paragraph 45, that ''consultation implies no more than discussions between users and providers in an attempt to reach general agreement on any proposed charges, and that failing such agreement, governments would continue to be free to impose the charges concerned.'' The Council continues in paragraph 45 with the recommendation that ''when any significant review of existing charges or the imposition of new charges is contemplated by a provider of air navigation services, appropriate prior notice should, so far as possible, be given at least two months in advance to the principal users.'' This (the 2-month advance notice) is what the FAA did in the current instance. When it issued the current Interim Final Rule, the FAA acknowledged its responsibility to conform to ICAO guidelines where possible; and (by giving 2-month advance notice, with opportunity to comment, before the fees went into effect, and holding the public meeting on June 29, 2000) did so to the maximum extent possible under U.S. law.

It should be noted that, subsequent to the issuance of the IFR and the receipt of public comment, ICAO in December 2000 issued a new Sixth Edition of the above cited guidance document. The new document, entitled ''ICAO's Policies on Charges for Airports and Air Navigation Services,'' has been placed in the docket (Docket item 119). While it includes some new material and a rearrangement of previous guidance, the language cited above is retained, almost verbatim, in paragraph 49 of the new document, the only difference of any consequence being a recommendation that 4-months advance notice be given for fee changes, vs. the 2-months that were recommended at the time FAA issued the Interim Final Rule.

9. Accounting and Charging for Services Provided by Air Traffic Controllers at Enroute Centers, Before Having Determined the Cost of Terminal Services

Air New Zealand, Lufthansa, Air France, Iberia Airlines, Japan Airlines, KPMG, and Joseph Beaudoin (on behalf of the ATAC), and others comment that the Overflight Fees might not be accurate because the FAA has not yet determined the cost of Terminal Services. Without having determined these costs, they question whether the FAA can properly account for services provided by Enroute Centers to aircraft taking off or landing at airports that lack an air traffic control tower.

FAA Response: The FAA acknowledges that the cost data for Terminal Services is not yet available in CAS at the service level. The FAA disagrees, however, that Terminal Service costs are required to calculate Overflight Fees. They simply are not. Since Overflights do not use Terminal Services, only the Enroute and Oceanic Service costs are needed. CAS has been providing Enroute and Oceanic costs since 1998.

Enroute controllers sometimes provide approach control services for airports that have no control tower; this occurs most commonly at island airports outside the U.S. Controllers are not actually scheduled on duty to provide this service exclusively; therefore, controller labor costs are not affected by assisting flights landing at these airports. Only very minor costs are associated with the provision of this particular service, compared with the significant amount of fixed and common costs that are incurred in providing multiple services. Thus, the impact on costs of providing services at airports that have no control tower is *de minimis*. This circumstance is addressed as follows in the Capital Economics report (see Capital Economics report, Docket item 99, Section IIIA, page 11):

> If we expand the analysis to consider the incremental cost of adding the entire block of Overflights as a group while holding all other services at their normal levels we must conclude that the change in total costs is still very small. That is, if we start with a system that handles only non-Overflights and then add all Overflight traffic to that system, the change in total costs would be negligible. But this is also true of any similarly sized subgroup of flights. Whether this subset be defined as 'Overflights' or 'all flights that are enroute to South Dakota,' the change in total costs from serving these subsets (holding all other services at their regular levels) is negligible. This is true of any system characterized by very large shared input costs. Moreover, to trace costs to specific services also has its costs. In such circumstances, a composite of services is usually priced as a group.

The incremental costs of Enroute controllers serving flights at non-tower airports would be very small and thus make essentially no difference in the overall cost pool. Therefore, it is not necessary to delay the implementation of Overflight Fees to be able to calculate the *de minimis* effect of Terminal costs on the fees.

10. Accounting for the Costs Incurred in the Transitional Airspace Between Oceanic and Enroute Services

Several commenters argue that the FAA did not account for the costs incurred in the transitional airspace between Oceanic and Enroute Services. Former controller Michael Jengo, arguing on behalf of Air New Zealand and several other international air carriers, cites the example of a Tokyo-to-San Francisco flight. At about 200 miles from San Francisco, this flight would be transferred from non-radar airspace to a radar transitional sector, which would then descend the flight from cruise altitude to about 13,000 feet into the Bay TRACON airspace. He states that an Oceanic Overflight does not normally receive such transitional service, and that, therefore, the flight landing or taking off will require more manpower and equipment than an Oceanic flight that only transits U.S. airspace.

The ATAC asserts that the FAA failed to provide sufficient information for the portion of FAA's total cost pool dedicated to providing ATC services to aircraft in the combined Enroute and Oceanic environments. And Air New Zealand points out that while there are costs involved in ''transitioning'' between Oceanic and Enroute Services, it is not clear where these transitional costs are allocated.

In a supplemental declaration, Mr. Jengo states, ''oceanic air traffic controllers are generally assigned on a given day to either oceanic procedural sectors or to the oceanic radar transitional sector * * * they do not

work both procedural and radar sectors at once.''

KPMG asserts that given this differentiation between procedural and radar transitioning sectors, and the fact that ''oceanic overflights are primarily procedural,'' and ''do not normally use radar transitioning sector,'' it also follows that neither controller manpower nor capital equipment in the Oceanic radar transition environment is common among Overflights and non-Overflights.

FAA Response: The FAA disagrees with these comments. The FAA has identified clear boundaries between where Oceanic airspace ends and Enroute begins for purposes of the Interim Final Rule. The IFR does not attempt to address and account individually for all local variations or nuances in the ATC system. Instead, the CAS uses carefully developed business rules that are generally consistent with the boundaries between Enroute and Oceanic, and tracks costs accordingly. Flights departing from or landing in the United States descend or ascend in airspace that is generally radar-controlled and thus fall under the ''Enroute'' cost and service category. Within Oceanic airspace, the FAA generally provides the same type of Oceanic procedural services to all flights. Overflights constitute only about 1.25 percent of all Enroute flights and a little more than 10 percent of all Oceanic flights, and it is impossible to meter the use of all services that an Overflight could use.

The comments that the costs of providing ATC services to non-Overflights in transitional airspace are significantly higher than the costs of providing such services to Overflights appear to reflect a misunderstanding of exactly how these costs are accounted for under the CAS. The airspace Mr. Jengo calls ''oceanic radar transitional sector'' is, by the FAA's CAS definitions, accounted for as Enroute airspace, because of the type of services (radar, communication, navigation, etc.) provided in that region. The CAS attempts to group services in logical categories, according to the type of services the FAA provides. Where there are variations in controller activities, these differences are mostly reflected in the CAS.

The commenters appear to be concerned that much greater costs are incurred in providing service to the non-Overflights, and that as a result the Oceanic Overflights are essentially being over-charged to provide this greater level of service to the non-Overflights. This is not the case, however, since, as explained in the two preceding paragraphs, the costs of services provided in the ''radar transitional sectors'' are generally assigned under Enroute, rather than Oceanic.

11. How the FAA Determines the Cost of Providing Services to Overflights

Many commenters argue that the FAA should determine the cost of providing services solely to Overflights. Some commenters state that the FAA could use other, more appropriate methods such as activity-based costing (ABC), to better allocate Enroute and Oceanic costs. The ATAC suggests that the FAA conduct an activity analysis associated with Overflights in both the Enroute and Oceanic environments, along with a cost-driver analysis indicating how best to allocate costs to each activity.

KPMG, in comments submitted on behalf of the ATAC, states that it is not reasonable for the FAA to rely solely on the Arthur Andersen Costing Methodology Report (Docket item 6) and FAA's own ''improper'' assumptions, given that the FAA could instead use the well-accepted ABC methodology to determine its actual costs to provide ATC services to Overflights. KPMG further indicates that ABC is a standard cost accounting method that apportions costs of resources to those specific activities that the resources support.

In additional comments submitted later (KPMG ''Report on New Materials Regarding FAA's Overflight Fees,'' Docket item 105), KPMG asserts that the FAA has the means to make a reasonable estimate of the portion of its labor costs that are attributable to Overflights. KPMG again argues that the FAA could have used ABC to determine its actual costs of providing ATC services to Overflights.

FAA Response: The FAA disagrees. The concept of ABC cannot be applied in a useful way to Overflights, because it would require a fundamentally different approach to Cost Accounting than the one that the FAA has been working to develop for several years. Massive amounts of specific, detailed data, not currently collected, on individual actions by each controller would be needed to implement an ABC approach. This type of approach was considered by the FAA early on in the development of the current CAS, but was rejected as being neither practicable nor particularly useful. The costs in time and dollars to gather and maintain detailed activity data would have been substantial and the data itself was not considered meaningful for managerial purposes. In addition, there would still be a need to allocate the overwhelming amounts of common and fixed costs, as is done under the current CAS, since these costs represent all but a minimal part of the overall costs of providing the ATC and related services. This is so because all of the FAA's ATC services must be available at all times to all flights (Overflights or non-Overflights) regardless of the amount of air traffic activity to ensure the safety of any flight. As noted in the Act:

> Services for which costs may be recovered include the costs of air traffic control, navigation, weather services, training and emergency services which are *available* (emphasis added) 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 FAA incurs a significant amount of cost by making ATC services *available*, whether or not such services are used by a specific flight at a particular time. The services rendered involve making available at all times the total system that facilitates the safe transportation of all aircraft. As noted by Capital Economics in their review (see the Capital Economics report, Docket item 99, Section III A, Page 8):

> These services are always available in full supply to any and all users that need to use them. Once an aircraft enters U.S.-controlled airspace, the U.S. ATC system is immediately engaged, and the entire ATC infrastructure and full scope of services are available, regardless of the type of flight, user or aircraft. The requirements of providing full and constant availability of services to all users are designed into the system and result in real costs incurred in the provision of air traffic control services.

See also the FAA's response to comments under the heading ''The cost of providing air traffic services to Overflights versus non-Overflights.'' In addition, the FAA recognizes that, while there may be very small differences in the marginal costs of providing services to one type of an Enroute flight versus another, these incremental costs are so small relative to fixed and common costs that total Enroute costs must be allocated to cover the full cost of the services provided. On this point, the Capital Economics analysis concludes (see Capital Economics report, Section III A, page 10):

> This is an absolutely crucial point that seems lost on commenters, who complain that activity-based costing or some other close examination of the production process would allow a more direct and complete relationship between costs and outputs to be established. In other words, they hold that while the costs may be difficult to trace back to individual outputs, it is in fact possible to do so and a careful study of the activities involved will shed light on how costs should

be assigned. This reveals a misunderstanding of common and joint costs, which are the primary feature of air traffic control costs in providing services to Overflights.

Consider an example of an input that is common to the production of two outputs, such as the fence that a farmer installs to contain his cows and sheep. The installation cost of the fence is clearly common to both the production of cows and of sheep. Commenters would suggest that studying the production process under activity based costing principles would allow for the cost of the fence to be attributed precisely between the cows and sheep. But in reality they cannot be so assigned regardless of how closely they are studied. They are shared costs.

Even inputs that are traditionally considered variable, such as labor, can be largely or completely common. Consider the case where all the wear and tear on the farmer's fence is due to aging. The farmer's time spent on fence mending is a cost that is common to both the production of cows and sheep, and no amount of scrutiny or activity based costing techniques will allow them to be assigned to one output versus the other. The farmer's fence-mending efforts are a common input into the production of both cows and sheep. In a similar vein, it is not at all clear that controller time used in providing ATC services to flights is separable or assignable to individual flights. The suggestion that monitoring contacts made with aircraft will allow one to do this ignores the fact that, in providing ATC services, a controller is by definition simultaneously monitoring and providing safe passage for all flights within his or her airspace, Overflights and non-Overflights included.

12. Individual Fees for Each Service Delivery Point (SDP)

Several commenters suggest that the FAA should have a unique fee for each SDP because each SDP has had its unique costs identified by the FAA's Cost Accounting System.

KPMG adds that the FAA failed to provide information on cost differences between SDPs, or an explanation of the reason why costs were not allocated between Overflights and U.S. originating/terminating flights at individual SDPs in order to capture differences in costs in different portions of U.S. airspace. In addition, KPMG argues that the cost differentials among the various SDPs do not solely reflect the differing number of flights encountered by each SDP. To the contrary, the differentials reflect different cost structures for each SDP (e.g., differing levels of costs for labor, telecommunications and other inputs based on local rates and charges for labor, electricity, telecommunications, etc., and/or the price, efficiency and/or characteristics of equipment). KPMG suggests that in order for each Overflight Fee to be ''directly related'' to the costs of providing ATC services for that Overflight, the FAA needed to make an adjustment to reflect the actual cost structure for the SDP(s) involved in servicing that Overflight.

Qantas Airways expresses its concern that the proposed Oceanic charge does not differentiate between the Atlantic and Pacific, although intuitively there would seem to be differing operational conditions in these two areas.

Air New Zealand and other commenters ask that the FAA provide data to support its derivation of its Oceanic unit rate for each segment (Atlantic or Pacific) of Oceanic airspace in terms of the numbers of aircraft movements and the distances flown.

FAA Response: The FAA agrees that it has a significant amount of cost data available by SDP and that the costs of providing Enroute and Oceanic Services differ by varying degrees from one SDP to another. The FAA disagrees, however, with the suggestion that it should have determined unique fees for each SDP for this rulemaking. As noted by Capital Economics (see Capital Economics report, Section III A, Page 14):

> Commenters complain that the FAA has acknowledged that its cost accounting system allows it to measure costs by Center. They argue that, therefore, Overflights should be charged based on the actual Centers crossed since costs may vary by Center.
>
> In the current fee determination, the FAA has opted for a simplified fee structure to minimize Overflight administration costs, particularly for the introduction of the fees. The present fee determination aggregates costs across Centers and charges a per-mile fee based on the total cost of all Centers. In effect, the fee is based on an average Center cost.
>
> The administrative burden of proving flight tracking, billing and collections, and customer service related to Center-based fees would be significant. Establishing fees by Center would mean additional workload that would include: setting up, maintaining, and monitoring an automated system to provide the necessary data; conducting quality control for billing and collections to ensure that each flight has been assigned the appropriate rate for each Center; and providing customer support for such detailed inquiries. All these costs would add to the overall cost of supplying ATC services to Overflights, which all Overflights would have to bear through higher fees. These administration costs could result in higher overall fees for all. In addition, there are some specific service costs that have been identified in total for all Centers, but a determination has not yet been made as to how best to attribute them to specific Centers. Thus, achieving Center-based pricing would require additional accounting work.

The FAA does not have SDP-specific data for all of its costs. Indeed, significant amounts of total costs at the 21 Centers (SDPs) are currently available only at aggregate levels that would need to be allocated among all SDPs if SDP-specific fees were to be adopted. More than 15 percent of Enroute costs and more than 45 percent of Oceanic costs are in this category. Allocation of those costs among the SDPs would require new accounting systems. While there may be differences between SDPs, the costs of measuring those differences would exceed any benefits that might result from greater precision in fee setting.

Meanwhile, the FAA continues to work to implement improvements and refinements in the CAS. Assuming that the system evolves to the point where all costs can be fairly and accurately assigned by SDPs, the FAA will again consider the option of charging fees by SDPs.

13. Alternative Methods To Assign Costs to Users

Commenters suggest that the FAA should consider other ''better'' measures, such as cost per activity, cost per flight hour, cost per handle, or some other appropriate method, for assigning costs to users. KPMG, for example states, ''The FAA also makes the unwarranted assumption that miles traveled is an appropriate measure of the cost incurred in providing ATC services. At the Industry Presentation, the FAA presented information on 'Cost per Flight Hour' and 'Cost per Activity' and stated that 'Cost per Activity' is a more meaningful measure of the costs incurred by the FAA at Enroute SDPs.'' KPMG also states ''The FAA has failed to provide any explanation of why the extensive flight data available was not used to determine a reliable allocation of costs, despite the statement in the Andersen Report that 'automation systems readily track events related to (ATS) services.' For example, a 'handle' is a measurable event tracked by automation systems at each service delivery point and can be considered a unit of service * * *.'' Air New Zealand suggests that using mileage as a denominator results in Oceanic Overflights picking up twice their share of costs, on a per-flight basis, compared to all Oceanic flights.

FAA Response: The FAA disagrees with these comments. Cost per Flight Hour and Cost per Activity are used globally in the FAA's cost measurement methodology for management purposes to ensure a well rounded approach to understanding the agency's costs and in gaining ATC managerial efficiencies. But these types of measurements are not internationally accepted, nor do systems exist to track Overflights on either a

Cost per Flight Hour or a Cost per Activity basis. FAA did, however, consider several other metrics before making its determination that using the average unit cost approach with Great Circle Distance (GCD) miles was most appropriate and most fair for the Overflight Fee IFR. Other metrics considered include the following:

- Cost per air traffic control handle (count of each time an aircraft is handed-off from one Sector to another, either within the same ATC Center or between different Centers), which is a type of Activity Based Costing system;
- By actual distance flown (as opposed to GCD);
- By amount of time flown within the ATC system; and
- By weight of aircraft type—together with various weight-based combinations such as square root of aircraft weight, GCD times square root of aircraft weight, and square root of GCD times aircraft weight.

Upon reviewing the above alternatives, the FAA concluded that average unit cost, coupled with GCD, has the following advantages:

- Widely used and accepted around the world (e.g. Eurocontrol, Airservices Australia, Airways Corporation of New Zealand, and NAV CANADA (enroute));
- Generally considered a good approximation of the level of services provided;
- Eliminates most of the effects of weather, winds, air traffic control instructions, as well as traffic volume and flow;
- Shortest possible distance between two points, giving the user the lowest possible charge based on distance.

The other options did not offer these advantages.

Overall, recognizing that the FAA is *precluded by statute from using any of the weight-based measures* (since weight is essentially a measure of value), the advantages of using Great Circle Distance appear to far outweigh those of any other usable metric.

Most importantly, the FAA found that cost-per-mile method is the most accurate and non-discriminatory (objective measure that can not be influenced by the FAA or users), and the least expensive measure to use. The Enhanced Traffic Management System (ETMS), which provides the flight data used to derive the fees and to determine the charge for an individual flight, is a proven and existing system. Any other method of measuring contacts or services (e.g., Activity Based Costing systems) would have to be separately and specifically developed, at considerable cost, for what represents less than 1.5 percent of total flight activity in U.S.-controlled airspace. Moreover, using flight-miles as the basis for setting fees is a widely accepted practice in international aviation (e.g., Eurocontrol, Airservices Australia, Airways Corporation of New Zealand, and NAV CANADA (enroute)). Congress left it up to the FAA to determine the most appropriate measure for the agency, regardless of practices around the world, so long as the metric chosen is permissible under the Act.

14. Cost of Overflight Billing and Collections

In several reports prepared on behalf of the ATAC and numerous international air carriers, KPMG questions the methodology used by the FAA to allocate billing and collection costs. For example, it states, ''The FAA has failed to provide any analysis of the costs associated with billing and collection of Overflight fees, or any discussion of the rationale for charging such fees on a per-mile basis.'' It further notes, ''The FAA fee schedule will result in the same billing and collection fees to a carrier who has one long Overflight as to a carrier with many shorter Overflights resulting in the same total mileage. The assumption that GCD miles are the appropriate basis for apportioning billing and collection costs is without explanation or foundation.''

FAA Response: The FAA acknowledges that it provided only a summary, rather than a detailed analysis of its billing and collections costs when it published the Interim Final Rule. The FAA has in fact done considerable analysis of its billing and collection costs. The FAA reviewed its billing and collection costs again in preparing the Final Rule and, as a result of that review, billing and collection costs have been reduced by nearly 17% in this rule. The following table presents a detailed, item-by-item comparison of the earlier estimate with the current one. Differences in the estimates are explained in the notes following the table.

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COMPARISON OF PREVIOUS (FY99) AND CURRENT (FY00/01) ESTIMATES OF OVERFLIGHT FEE DEVELOPMENT AND OPERATING COSTS

Functions	FY99 Development Costs	FY00/01 Development Costs	FY99 Operating Costs	FY00/01 Operating Costs
BILLING OPERATIONS:				
1. Staff support for Billing & Collections (Accounting, processing, billing, postage & customer relations)			$300,000	$230,000
2. Development and revalidation of Overflights Accounts Receivable Management Information System (OARMIS) for customer tracking, accounting & billing	$562,000	$582,000		
3. Overflight analysis and fee derivation	$75,000	$75,000		
SYSTEM SUPPORT:				
4. Air Traffic system operations, programming, data extraction & quality control			$530,000	$345,000
5. Accounting system operations support			$100,000	$100,000
6. Research & analysis	$100,000	$100,000		
7. Geographic Information System (GIS) setup and implementation (for mapping US airspace and developing flight tracks)	$510,000	$510,000		
8. Enhancement, revalidation and integration of GIS	$282,000	$182,000		
HARDWARE/SOFTWARE:				
9. Equipment upgrade and maintenance – new servers, computers, Air Traffic data laboratory support, etc.	$21,000	$21,000	$33,000	$50,000
TOTAL COSTS:	**$1,550,000**	**$1,470,000**	**$963,000**	**$725,000**

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Major differences between FY99 and current billing and collections costs: The changes from the previous cost estimate are the result of having more ''actuals'' rather than ''estimates'', including more than 8 months of actual operating experience under the IFR. Development costs dropped $80,000 due to removal of an estimated $100,000 to develop external web access (to be included later, when completed), offset by a $20,000 increase for OARMIS revalidation. Operating costs are substantially lower due to greater efficiencies realized in the operation of the air traffic data extraction and processing activities as well as the accounting and billing operations.

FY99 figures and calculation of Billing and Collections costs: The developmental costs of $1,550,000 were to be recovered over 2 years in equal annual amounts of $775,000. Operating costs were estimated to be $963,000 per annum. Thus, the annual recovery was $775,000 + $963,000, for a total of $1,738,000 for each of the initial two years.

Current figures and calculation of Billing and Collections costs: The developmental costs of $1,470,000 will be recovered over 2 years in equal annual amounts of $735,000. Operating costs are now estimated to be $725,000 per annum. Thus, the annual recovery will be $735,000 + $725,000, for a total of $1,460,000 for each of the initial two years.

The use of GCD miles flown to allocate billing and collection costs: The FAA chose an allocation methodology that reasonably and fairly allocates these costs among all users. There is significant variation in the number and length of flights from one operator to another. It is true, as KPMG notes, that one long flight might be charged the same amount of billing and collection costs as a large number of much shorter flights. It is far from clear, however, whether this is a problem or not. Alternative methods that might be considered include (a) a flat charge per bill; (b) charging on a per-flight basis; (c) some combination of (a) and (b); or (d) some combination of (a) or (b) with the current per-mile method. While the FAA has identified this issue for further study and discussion, it has nevertheless determined that the current system of allocating billing and collection costs on the per-mile basis is reasonable and appropriate, and consistent with the authorizing statute.

15. Increase in Costs of Providing Services From FY 1998 to FY 1999

Commenters express concern that the FAA's costs of providing services to Overflights increased significantly from FY 1998 to FY 1999. For example, the AAPA states, ''It is unclear why FAA's costs to provide service for Overflights jumped over fifty percent, a significant increase, from fiscal year 1998 to fiscal year 1999.'' KPMG notes ''During the Industry Presentation, the FAA revealed that its expenses for capital acquisition and implementation costs were substantially higher in FY 1999 than in FY 1998.''

FAA Response: The FAA acknowledges that the cost of providing Enroute and Oceanic Services increased from 1998 to 1999. When the FAA released its FY 1998 cost data, it acknowledged that its costs were understated. This was attributable to (1) FAA's failure to capitalize and subsequently depreciate a number of assets, and (2) a particularly conservative costing methodology used with the new Cost Accounting System. In FY 1999, as the CAS evolved further, the FAA was able to capitalize a significant amount of assets based on better data. The FAA also made accounting refinements in such areas as telecommunications costs, allowing more accuracy in cost reporting. These accounting refinements in telecommunications costs resulted in more accurate, but increased, allocations to certain services.

In addition, the FAA's costs of providing overall service increased in FY 1999 in both the Enroute and Oceanic environments. Acquisition costs increased significantly due to a continued focus on modernization efforts, such as the Display System Replacement and the Wide Area Augmentation System project.

16. The Possible ''Over-Allocation'' of Costs to the Oceanic Cost Pool

The AAPA asks for an explanation of why the Oceanic fees are approximately 54% of the Enroute fees, although total Oceanic costs of $94 million are only about 4% of total Enroute costs of $2.4 billion. They express concern that this might represent an over-allocation of FAA costs to the Oceanic environment.

FAA Response: The FAA disagrees that there may have been an over-allocation of costs to the Oceanic Service. The unit rates for Overflight Fees are determined by the number of miles flown in each separate environment (Oceanic and Enroute). The higher the number of miles flown in one environment, the greater the denominator when dividing costs by miles to calculate the unit rate. In FY 1999, the number of miles flown in the Oceanic environment was 483,522,588, while the number of miles flown in the Enroute environment was 6,619,138,872. This explains why the Oceanic fee is a higher percentage of the Enroute fee despite Oceanic costs being a significantly smaller number compared to Enroute costs.

The FAA does not believe that the facts of the situation provide any support for the concern that costs may have been over-allocated to the Oceanic Service due to the methodology the FAA used to develop its fees. The FAA uses the total cost (less overhead costs) of each of the two Services (Enroute and Oceanic) and the total miles flown in each respective environment to determine the unit rate for each. All data used in the calculation are actual figures. Since the two Services are very different, this methodology is quite reliable for allocating the costs. For the above reasons, the FAA's fee development methodology does not result in an over-allocation of costs to the Oceanic environment.

17. British Airways Asks the FAA To Provide a More Precise Definition of ''Flights'' and How Data on Flights and Miles Are Gathered

FAA Response: In the FAA's Enhanced Traffic Management System (ETMS) database, a flight is entered into the system when the operator of the aircraft files a flight plan, and/or the FAA receives its points of entry into, and exit from, U.S.-controlled airspace. Also, flights are generally confirmed by radio communication, contact reports, or radar detection. For the purposes of Overflight Fees, a flight is defined by when an aircraft transits U.S.-controlled airspace, but neither takes off from nor lands in the U.S.

In the Oceanic environment, when an aircraft reports its Oceanic position to the FAA, the position coordinates become part of ETMS. Similarly, in the case of Enroute traffic, radar systems provide aircraft coordinates that become part of the same database. These coordinates are then used to determine where the aircraft entered and exited the U.S.-controlled airspace. The Great Circle Distance for the flight is then calculated between the entry and exit points, and multiplied by the appropriate unit rate to determine the amount of the fee to be billed.

18. Qantas Airways Suggests That ''Search and Rescue'' Costs Should Not Be Included in the Overflight Fee Cost Base, According to ICAO Guidance

FAA Response: The FAA agrees. Search and Rescue costs have not been included in either the Enroute or the Oceanic cost pools.

19. A Better Explanation Is Needed of the Canada-to-Canada Domestic Flight Exemption

Commenters request a better explanation of the Canada-to-Canada exemption. For example, Air New Zealand expresses concern ''that the fees might be applied in a discriminatory fashion because Canada-to-Canada flights are exempt from the Overflight fees,'' thereby causing an estimated loss in revenue to the FAA of $9.7 million annually. The commenter notes further that this may be in violation of Article 15 of the Chicago Convention or the provision of ICAO Document 9082/5 (Docket item 7) that requires non-discriminatory treatment of foreign users.

FAA Response: U.S.-to-U.S. and Canada-to-Canada flights often transit the other country's airspace for any of several reasons, such as weather, volume of activity, equipment malfunction, more direct routing, pilot request, etc. Currently, the FAA and NAV CANADA have an agreement in place to mutually exempt from otherwise applicable Overflight fees for aircraft of any nation that transit one country's airspace but originate and land in the other country. The loss in revenue to each air traffic service provider is roughly equivalent, and the arrangement is beneficial to both in terms of the safer and more efficient operation of the joint ATC system serving high volumes of aircraft near the borders of the two countries.

The FAA was very cognizant of the various non-discriminatory provisions cited by the commenters when it was structuring the arrangement with NAV CANADA, and does not believe the agreement violates any of those provisions. The agreement exempts aircraft that take off from and land in the same country, regardless of nationality, and does not exempt aircraft belonging to or operated by a specific country. For example, when Air Canada flies from Vancouver to Toronto, a large portion of that flight often occurs in U.S.-controlled airspace near the U.S.-Canada border, yet there is no fee charged by the FAA. Aircraft of any country flying that same route would be equally exempt.

20. The Cost of the U.S.–NAV CANADA Agreement

Air New Zealand asks for more detailed cost data on the flights affected by FAA's agreement with NAV CANADA, as well as the specifics of the arrangement with NAV CANADA. Also, Qantas Airways asks whether the cost of providing services to Canadian traffic has been excluded from the calculation of Overflight Fees.

FAA Response: On December 6, 2000, the FAA placed three additional documents (see Docket No. FAA–00–7018; items 100–102) in the Overflight Fee docket relating to the agreement with NAV CANADA. These are as follows:

(1) Internal FAA Memo of April 12, 2000, providing ATC activity data for use in the FAA Overflight Fee Development Report (Item 4 in the Overflight Fee docket).

(2) An Addendum to the Overflight Fee Development Report showing the estimated fee collections with Canada-to-Canada flights excluded.

(3) The September 1999 Agreement between the FAA and NAV CANADA.

Collectively, these documents show that FAA's estimated costs of providing ATC services to the exempted Canada-to-Canada flights have been removed from the expected Overflight Fee billings. Thus, there is no cross-subsidization of the exempted flights. Those flights are now estimated to cost $9.7 million on an annual basis, and the amount to be billed annually by the FAA is that much less. While FAA's total costs related to Overflights are estimated at $43.2 million, Overflight Fee billings will amount to only an estimated $33.5 million. As noted in the IFR, the difference of $9.7 million represents the cost to the FAA of the mutual exemption arrangement with NAV CANADA. This cost will not be passed on to Overflight customers or to any other user; it will be borne by the FAA.

21. Requests for Additional Time Before Overflight Fees Are Implemented

The Long Haul Charter Carriers of Italy and other commenters request more time to factor the Overflight Fees into their costs of providing service.

FAA Response: The FAA denied this request for a number of reasons. As noted previously, in the Federal Aviation Reauthorization Act of 1996 (the Act), Congress directed the FAA to establish Overflight Fees expeditiously by the Interim Final Rule process. In spite of several opportunities to do so, Congress has chosen not to change this statutory direction, and even reaffirmed that point last year in the NTSB Authorization Act (see Docket item 97). Also, each year since 1997 EAS has been funded based on the assumption that fees were being collected. The FAA moved as expeditiously as possible to implement the new fees. This nevertheless took a long time to accomplish, due in large part to the FAA's decision to wait until it had sufficiently accurate cost data from which to derive the fees. This data was not available until after the Inspector General's audit of FAA's financial statements for FY 1999 was completed on March 1, 2000.

Throughout this process, however, the FAA has always indicated its intent to implement the new Overflight Fees via the Congressionally directed IFR process. (See the several meeting summaries in the docket for this rulemaking—items 11, 15, 16, and 22.) Even prior to those meetings, the FAA distributed an information paper (see Docket item 9) to more than 150 countries at an ICAO Conference in Montreal in September 1998, informing them that, ''FAA is working as expeditiously as possible to issue *another interim final rule* (emphasis added) that will reestablish overflight fees.''

Finally, about three months in advance of publication of the current IFR, the FAA sent a letter of notification to the aviation industry informing known Overflight operators of FAA's imminent plans to reestablish Overflight Fees by an IFR. (See Docket item 1). This letter also was published in the **Federal Register** of March 9, 2000.

In view of the above information and notification provided by the FAA over the past few years regarding its intent to issue another IFR on Overflight Fees, and in view of the fact that the IFR, when issued, provided another 2-month advance warning before the fees were effective, the FAA did not believe any additional delay in the effective date of the fees was necessary.

22. Air New Zealand Asks What Traffic Growth Assumptions the FAA Used in the Derivation of Its Overflight Fees

FAA Response: None. The FAA used only FY 1999 cost and flight data. The current Fees are based on the FAA's actual costs for FY 1999, as shown in the FAA's final audited financial statements. The FAA derived the unit rate by using these actual costs and the actual miles flown that year in each (Enroute and Oceanic) environment. No part of the Fee methodology is based on growth assumptions.

23. Exceptions From Fees for Emergencies

American Airlines comments that flights that are scheduled to either land in or take off from the U.S., but then have to make an unscheduled foreign stop for safety-related reasons (thereby becoming an Overflight) should not be charged Overflight Fees.

FAA Response: The FAA disagrees. Congress directed the FAA to establish

Overflight Fees for those flights that neither take off from, nor land in, the United States (except military and government aircraft of the United States and foreign governments). The FAA must enforce this Congressional direction in a nondiscriminatory manner. Regardless of whether the situation is considered an emergency, if any flight constitutes an Overflight, as defined by the Interim Final Rule and the Final Rule, the FAA is required by law to charge Overflight Fees to that flight.

24. Determining Total Costs Before Being Able To Calculate Overflight Fees

Some commenters suggest that the FAA must be able to determine its total costs before being able to calculate Overflight Fees accurately. KPMG, supported by several other commenters, asserts that the FAA did not explain how it determines its total costs pool, and that the FAA's failure to determine its total costs raises a fundamental issue of whether the FAA has obtained and used the information it needs to determine its costs of providing ATC services in the Enroute and Oceanic environments.

Japan Airlines, Iberia Airlines, and others assert that, since the CAS is not yet fully operational, the FAA cannot accurately state how much it spends on Overflights.

FAA Response: The CAS has been capable of determining the FAA's total cost pool since its initial implementation at the end of FY 1997. Currently, the Enroute, Oceanic, and Flight Services costs have been itemized and identified at the Service level. All other costs are captured at the FAA lines of business (LOB) level. To ensure that all costs have been captured, the FAA reconciles total costs in the CAS to total costs in the FAA's General Ledger Accounting System, the Departmental Accounting and Financial Information System (DAFIS). Also, on an annual basis, FAA produces a ''Statement of Net Costs,'' which reports overall agency expenses. This is one of six standard statements published each year as part of FAA's annual financial statements. Those statements can be found on the Internet at *http://www.faa.gov/aba/html_finance_manage/fin_state_ann_rep.html.*

The FAA disagrees that it did not discuss how it determines its total cost pool. As the Costing Methodology Report (Docket item 6, page iii, Executive Summary) states, ''The purpose of this report is to describe (1) how the Federal Aviation Administration's (FAA) Cost Accounting System captures costs for all FAA lines of business, and (2) how costs were assigned to the Enroute and Oceanic air traffic control (ATC) services.''

In addition, the Arthur Andersen Addendum to the Costing Methodology Report (Docket item 98, Section 3, page 6) states:

> The CM Report included a section (Section 3.0) that described the origin of CAS financial data. While the report focuses on how financial data, related to the Enroute and Oceanic services, were processed, the scope of the system covers all areas of FAA costs, including non-Enroute and Oceanic data. Arthur Andersen participated in the development of the reconciliation process and subsequent FAA enhancements to confirm that all costs are reconciled between the general ledger and the CAS. These procedures are in place and are routinely performed by FAA personnel.

The FAA, of course, does not dispute that the CAS has not yet been fully implemented. It is a work-in-progress, currently expected to be in place agency-wide by the end of FY 2002. But it is not needed agency-wide to derive Overflight Fees. All that is needed for that is the cost data for Enroute and Oceanic Services (since Overfights use only those two Services), and CAS has been providing that data since 1998.

25. The FAA Included Non-Recurring Costs in Enroute and Oceanic Cost Calculations

Several commenters, including Air New Zealand, British Airways, Lufthansa, LTU, KPMG, and others maintain that in the Enroute and Oceanic cost calculations, the FAA should not have included such non-recurring costs as those related to the Y2K computer problems.

KPMG complains further in its later comments (see KPMG ''Report on New Materials Regarding FAA's Overflight Fees,'' Docket item No. 105) that the Arthur Andersen Addendum (Docket item 98) does not address what it (KPMG) considers the overriding problem, i.e., that, even if the one-time Y2K costs were correctly ''expensed,'' rather than ''capitalized,'' for financial accounting purposes, it is improper to treat them as recurring expenses for purposes of the Overflight Fees.

FAA Response: The FAA disagrees. When determining its total costs, the FAA must include those costs that are ''expensed'' in their entirety in that year, as well as the applicable portion of ''capitalized costs'' that was expensed. Expenditures fall into one of these two categories. Some costs are expensed, meaning that the total cost is recognized as an expense in the period in which it is incurred, because the benefit of the incurred expense is also received in that period. Some costs, however, are capitalized, meaning that the entity expects to receive the benefit of the cost over more than one year. In these cases, a portion of the cost is expensed each year the benefit is received.

The FAA's Office of Financial Management publishes a desk guide that summarizes FAA's accounting practices for deciding the kinds of costs that are expensed versus those that are capitalized (see Arthur Andersen's discussion of this in the Costing Methodology Report Addendum, Docket item 98, pages 7–8). The desk guide indicates that software costs can be capitalized, but makes an exception for ''enhancements that merely correct a design flaw or extend the useful life of the software.'' The desk guide can be found on the Internet at *http://www.faa.gov/aba/html_finance_manage/asset__cap.html.*

The FAA's practice is in accordance with Statement of Federal Financial Accounting Standards (SFFAS) No. 10, ''Accounting for Internal Use Software'' issued by the Federal Accounting Standards Advisory Board (FASAB). This statement is effective in FY 2001, and the Board has encouraged its early implementation. SFFAS No. 10 advises expensing Y2K costs as they are incurred. The Board's advice in this instance is based on the fact that ''enhancement'' needs to be limited to instances where new capabilities are being added to the software. Since Y2K remediation did not add new capability, these costs were expensed in the year incurred.

In addition to Y2K costs, there are financial adjustments representing both costs and credits that are included in the Enroute and Oceanic cost pools. These include: value of inventory held primarily at the FAA Logistics Center, disposal of obsolete or retired supplies, disposal of certain inventory, value of inventory due to holding and repairs to damaged inventory, and correction of a prior year expense. Offsetting these adjustments to a large extent are several credits, for the over-expensing of certain environmental and capital investment costs in FY 1998. All of the costs in this cost category are directly related to the provision of Enroute and Oceanic Services. As stated clearly in the IFR, and again in the Final Rule, FAA intends to update and adjust its fees regularly to reflect changes in costs. Thus, whatever the net effect of these adjustments on the level of the Overflight Fees, it will not be an ongoing cost to users. In addition, while

this treatment of the prior year's non-recurring expenses and credits for the purposes of setting the current year's fees may introduce time-lag issues into the recovery of costs through fees, it is a treatment that can be expected to provide accurate cost recovery over time. That is, while hypothetically it is possible that last year's non-recurring costs are a poor indicator of the current year's non-recurring costs and is therefore likely to lead to somewhat inaccurate fees, over time there is no reason to believe that it will be systematically over or under the appropriate amount of costs incurred. In the long run, any incidental overcharges that occur can be expected to be at least largely, if not entirely, offset by instances of undercharges.

In addition if, as the petitioners suggest, the FAA were to attempt to resolve this timing issue by deviating from the standard cost classification rules outlined above, it would inject a highly subjective and arbitrary process concerning cost treatment into every round of rate setting.

26. The FAA Expensed Costs That Should Have Been Capitalized

Many commenters express concern that the FAA expensed costs should have been capitalized. Air New Zealand suggests that a better explanation of depreciation policies is needed, because a significant amount of capital costs appear to be expensed in the current year rather than being capitalized and depreciated over the life of the asset.

KPMG comments that FAA's capital cost categories are described as expensed costs that are related to implementation of capital systems, acquisitions, and research, engineering and development costs. KPMG says the FAA methodology assumes that these costs are directly related to flights occurring during the fiscal year in which they are expensed, and that the association of these costs with capital programs strongly suggests that this assumption is unwarranted. KPMG concludes that, even where expensing of capital investment costs for financial statement purposes is warranted, such costs should be spread over the period of the anticipated benefit for purposes of determining annual costs ''directly related'' to the ATC services provided.

KPMG complains that Arthur Andersen is silent with respect to other large costs that the FAA has improperly expensed for purposes of determining its costs ''directly related'' to Overflights. These include the $668 million—25% of total Enroute costs, and an additional $33 million—33% of the total Oceanic cost pool. KPMG argues that the benefits of NAS modernization programs extend over many years and for purposes of economic analysis, these costs must be spread throughout the period of the benefits rather than expensing them in the year initially incurred.

FAA Response: The FAA agrees in part. The FAA's capital investment appropriations, Facilities and Equipment (F&E) and Research, Engineering and Development (RE&D), are used both for acquisitions that are expensed as well as for acquisitions that are capitalized. Examples of valid expense items that may be paid from FAA's capital appropriations include training, maintenance, spare parts, and other consumables. In determining its depreciation policy, the FAA has followed Federal Accounting Standards. As noted previously, the FAA's Office of Financial Management publishes a desk guide that summarizes FAA capitalization and accounting practices. Chapter 2 of this desk guide instructs FAA personnel responsible for accounting for property, plant, and equipment, how to treat these items properly. This document provides the following guidance regarding capitalization of software and research and development costs, respectively:

- * * * *software* costs that are *not* eligible for capitalization include * * * enhancements that merely correct a design flaw or extend the useful life of the software.'' Y2K remediation expenses fall into this category.
- * * * Expense any costs incurred for a project before technological feasibility has been determined.'' This describes *research and development* projects as executed by the FAA.

This desk guide states that the procedures and policies on which the guide is based are in compliance with all relevant Federal Accounting Standard Advisory Board Statements as well as requirements of the Chief Financial Officers Act.

As part of the FAA's annual financial audit for FY 2000, which was completed on March 1, 2001, it was determined that certain costs that had been expensed in 1999 should have been capitalized. In particular, subsequent to publication of the FY 1999 Financial Statements, it was determined that some of the costs captured under the Enroute and Oceanic ''ARA Expensed F&E Labor/Non-Labor'' categories should have been capitalized instead of being expensed. As a result of this adjustment, the cost category entitled ''depreciation'' has increased slightly due to the additional costs now being capitalized and then depreciated over periods of up to 20 years. These costs were derived from various projects relating to the provision of Enroute and Oceanic air traffic services.

The net impact is the following:

ENROUTE SERVICE

	Original FY 1999 costs	Amended FY 1999 costs
ARA Expensed F&E Labor/Non-Labor	$668,351,218	$421,196,901
Depreciation	$208,296,479	$213,706,687
Net change due to adjustment	.....	($241,744,108)

OCEANIC SERVICE

	Original FY 1999 costs	Amended FY 1999 costs
ARA Expensed F&E Labor/Non-Labor	$33,186,457	$13,082,745
Depreciation	$5,182,602	$5,622,672
Net change due to adjustment	.....	($19,663,642)

Making such adjustments to the financial statements is a normal part of the financial review process, whether the statements are those of a private company or a public sector agency. These adjusted FY 1999 costs are the basis for the FAA's derivation and adjustment of its Overflight Fees for the Final Rule. As this adjustment in the Final Rule means that there have been overpayments under the Interim Final Rule, the FAA will promptly provide credits and refunds pursuant to 49 CFR part 89.

27. Expenses in the Capital Investment Category

Several commenters suggest that the FAA should not have included Airway Facilities (AF) Expensed F&E Labor/Non-Labor, ARA Expensed F&E Labor/Non-Labor, and ATS RE&D Expensed Labor/Non-Labor in the Capital Investment category. LTU comments that the FAA included many costs not associated with the burden of servicing each flight (e.g., ARA RE&D costs) and that many of these are unexplained.

FAA Response: The FAA disagrees. The full cost of a service should include expenses incurred in that year, including the applicable portions of capital costs that were expensed. In addition, the FASAB's Statement of Federal Financial Accounting Standards (SFFAS) No. 4, ''Managerial Cost Accounting Concepts and Standards,'' states that depreciation (current year portion of capitalized costs) should be included as a part of full cost.

FASAB's SFFAS No. 6, ''Accounting for Property, Plant and Equipment,'' states that costs for construction of assets not yet complete should not be included in full cost. These costs should be collected as ''work in process'' (WIP) and capitalized when the asset is placed in service.

The FAA's cost accounting methodology calculates the full cost of providing Enroute and Oceanic Services. The full cost does include capitalized costs as applicable and as outlined by the appropriate Federal Accounting Standards.

As noted in the discussion of the preceding comment (relating to the expensing of costs that should have been capitalized), it was determined in the course of the audit of FAA's financial statements for FY 2000 that the FAA had over-expensed certain costs during FY 1999. These particular costs should have been capitalized and depreciated instead over periods of up to 20 years. The costs used by the FAA to derive its Overflight Fees for the Final Rule reflect these adjustments.

28. Air New Zealand, KPMG, Lufthansa, and LTU Ask the FAA To Explain the ARA Expensed F&E Labor/Non-Labor Costs Under ''Capital Investment''

FAA Response: As noted above in the discussion of the two immediately preceding comments, the FAA has adjusted its costs for FY 1999 under the ARA Expensed F&E Labor/Non-Labor category as a result of the FY 2000 financial statement audit. The amended amount for the Enroute Service is $421,196,901, and the amended amount for the Oceanic Service is $13,082,745.

ARA Expensed F&E Labor/Non-Labor consists of projects that support the modernization of the National Airspace System. Project codes have been established in the CAS to capture the costs of these projects. These projects generally represent ''ATS products.'' An ATS product could be a piece of equipment or a capability used in the provision of ATC services, or an enhancement to an existing system or capability. Subject matter experts determined which of the four ATS Services each project benefits, and the costs associated with each project were assigned to the appropriate Service. In some cases, a project may benefit more than one Service. In such instances, subject matter experts familiar with these projects determine the appropriate percentage split between the Services.

There are a total of approximately 2,100 line items for Enroute and Oceanic Services combined. Examples of the types of projects included in this cost element are the following:

- For Enroute, examples include work on the Wide Area Augmentation System for the Global Positioning System, Display System Replacement, HOST Replacement, Y2K Date Change Program, LORAN-C, Long Range Radar Replacement, and Voice Switching Control System (VSCS).
- For Oceanic, examples include work on Oceanic Automation Systems, ARTCC Building/Plant Improvement, VSCS for Houston, and Remote Maintenance Monitoring.

The FAA has a complete list of these projects, and will make it available upon request. Contact Randall Fiertz in FAA's Office of Cost and Performance Management, (202) 267–7140, for further information.

29. The ATAC and KPMG Question the FAA's Assumption for Using Labor Costs as the Basis for Allocating Non-Labor Costs. They Also Question the FAA's Reliance on Staffing Standards To Allocate Certain Costs

FAA Response: The FAA disagrees that these assumptions are improper. The Arthur Andersen Costing Methodology Report Addendum (Docket item 98) addresses both (a) the use of labor costs to assign non-labor costs and (b) the use of staffing standards to allocate costs, stating as follows (see section 2, pages 4–5):

When designing the CAS, the FAA relied on the Federal Accounting Standards Advisory Board's Statement of Federal Financial Accounting Standard No. 4, Managerial Cost Accounting Concepts and Standards for the Federal Government (FASAB 4). FASAB 4 discusses the complexity of cost accounting processes to be employed by federal agencies but does not specify the degree of complexity or sophistication of any managerial cost accounting process. FASAB 4 instructs agencies to determine their own appropriate level of detail or complexity based on several factors. Two of these factors, key to the FAA's cost accounting design, include:

Relative precision desired and needed in cost information; and

Practicality of data collection and processing.

These two factors form the basis for the ''best available data'' concept adopted by the FAA. 'Best available data' as defined by the FAA refers to the use of data that is readily available from either automated or non-automated sources, that represent the most current and accurate source of data in any given business area. Often, the FAA had choices as to what data to use as the basis for an allocation. The FAA strived to choose the most accurate and readily available data source. Arthur Andersen concurs with the design decisions made based on both our public and private sector experience and our assessment of the sources of information for use in this phase of the CAS implementation. When faced with a decision between one source that is not readily available and another that is, FAA management made a determination as to the relative costs and benefits to select the appropriate source. The FAA relied on this approach, as reflected in the CM Report, to develop the following cost assignments:

Allocating Airway Facilities (AF) non-labor costs and Air Traffic (AT) and AF workers compensation claims to projects and Service Delivery Points (SDPs) based on labor costs; and

Allocating AF labor costs to projects and SDPs based on staffing standards.

The FAA's reason for allocating these costs to projects and SDPs, at the current time, is to accomplish full costing of Air Traffic Services (ATS) organization's services for Overflight Fee purposes. In the future, new business drivers, such as cost and performance management, may require these costs to be directly assigned. Arthur Andersen concurs with this initial design decision until direct tracing capabilities are available for the entire AF work force. AF non-labor costs represent approximately 1% of total Enroute costs. To directly assign AF non-labor costs the FAA would have to modify its legacy accounting system (currently scheduled for replacement in FY 2002) requiring an extensive system development effort beyond the current

project's scope. In addition, this change would impose a major process change on employees. Therefore, for the purposes of determining Overflight Fees, the FAA deemed the burden of the changes described above to outweigh any benefit that might be derived given the relative size of the cost pool at issue. Arthur Andersen agrees with the FAA's approach of deferring the implementation of direct assignment techniques for this small pool of costs.

As for workers compensation costs, AT generates the major share of the workers compensation liability. ATS believes it is reasonable, based on the nature of air traffic control work, that labor costs, used as a proxy for headcount, is a reasonable indicator for the accurate distribution of workers compensation claims (i.e., the more employees an SDP has, the higher their workers compensation bill). The FAA is working to improve this assignment by using actual workers compensation claims as the basis, an improvement planned for fiscal year 2001. Arthur Andersen concurs with this initial effort and the need to routinely reexamine the initial cost drivers.

In place of actual time recording, the FAA is relying on staffing standards to assign AF labor costs to projects and SDPs. This approach has been discussed with the IG. These discussions have resulted in agreement that staffing standards represent the best available data source for allocating these costs at the present time. This agreement comes with the understanding that ATS management works towards a more direct, time recording-based method of assigning these costs (the FAA recently provided a report to the IG outlining a plan to implement labor distribution agency-wide). Arthur Andersen supports the continual refinement of the labor reporting processes in use and planned by the FAA.

Since the December 1, 2000 issuance of the above-quoted Arthur Andersen Addendum, the FAA has experienced some slippage in its plans for handling Workers Compensation costs. The use of actual claims as the basis for distributing those costs is no longer planned for implementation in FY 2001. Instead, the FAA is continuing to examine alternative ways to assign these costs, with actual claims being one of the options under consideration.

30. Air New Zealand, Iberia Airlines, Japan Airlines, ATAC, KPMG, and Others Ask for an Explanation of Why the FAA Used the Ratio of Oceanic Sectors to Total Oceanic and Enroute Sectors To Allocate Certain Maintenance Costs

FAA Response: The FAA used a three-step approach in allocating maintenance costs to Oceanic:

- First, costs associated with equipment dedicated solely to the provision of Oceanic Service, e.g. ODAPS (Oceanic Display and Planning System) and DOTS (Dynamic Oceanic Tracking System) are assigned to the Oceanic Service.
- Second, for equipment that is shared between the Enroute and Oceanic Services, (e.g., building infrastructure and environmental equipment), sector ratio percentages (the percentage of Oceanic sectors in the total of Enroute plus Oceanic sectors) were applied as the allocation basis.
- Finally, no costs were included in Oceanic for equipment such as radars, certain navigational aids, and other equipment that provide no benefit to Oceanic users.

In the second step, where costs are shared between Enroute and Oceanic, the sector ratio percentages are considered the most appropriate basis to allocate maintenance costs. This determination was made because, of the various alternative methods considered, sector count appeared to most accurately reflect the actual workload of a technician. This is because the ability to generate and maintain sectors is a function of the number of ''suites'' of equipment available at that location. The number of suites of equipment correlates to the workload of a technician. The allocation percentages thus derived for each Oceanic SDP are shown in the table below. These percentages apply only to those programs shared between Enroute and Oceanic.

SDP	Basis amount (AF costs) (percent)
New York ARTCC	17
Oakland ARTCC	17
Houston ARTCC	5
Anchorage ARTCC	14

Three other bases were considered to allocate AF non-labor costs from Enroute to Oceanic. The table below describes each option and the reason why it was not used:

Aircraft Handled.	This measure does not have any correlation to the nature of an AF technician's work (i.e., number of facilities maintained).
F&E Funding.	This measure is considered inconsistent because funding can vary considerably by year and has no correlation to the nature of an AF technician's work.
Work Distribution.	AF Managers at specific SDP's were queried as to the distribution of technicians' work between Oceanic and Enroute systems. This approach was deemed unreliable (i.e., too subjective) and therefore inadequate.

31. The ATAC and KPMG Request a Discussion of the ATC Cost Centers Used To Assign ATC Costs

KPMG comments that the FAA has provided no discussion of the activities associated with each cost center that would permit evaluation of the reliability of the cost assignments to the four ATS Services. KPMG further states that the FAA has failed to provide information on the total pool of costs associated with each cost element, and the allocation of those cost elements across the four Services.

FAA Response: For cost accounting purposes, the FAA is comprised of more than 10,000 ''cost centers'' that designate the specific organization to which each employee is assigned. Cost centers identify organizations throughout the FAA, such as the FAA Administrator's Office, staff offices such as Human Resources, Civil Rights, Public Affairs, etc., as well as the operational LOBs such as Air Traffic Services (ATS), Regulation and Certification, Civil Aviation Security, etc. Since every organization within the FAA incurs costs, they are referred to as cost centers. Every time an organization incurs costs, its cost center code is identified with that cost in the cost accounting system.

Air Traffic Services has, by far, the largest number of cost centers within the agency. For example, each air route traffic control center (ARTCC) has a unique cost center code that identifies it. Air traffic controllers within each of the ARTCCs perform the activities associated with providing Enroute and/or Oceanic ATC services. Cost centers also uniquely identify other air traffic organizations that provide Terminal and Flight Service Station Services. Other cost center codes identify field maintenance organizations that are actively engaged in ensuring that the equipment used to provide various services such as navigation, communications, surveillance (radar), etc., are maintained in working order. Cost centers identify the System Support Centers and System Support Units (SSCs and SSUs) that perform the maintenance activities as well as the System Management Offices (SMOs) that manage each of the SSCs and SSUs.

Cost centers contribute to a better understanding of the FAA's costs. For

example, through the use of cost centers, the FAA is able to identify the organizations that perform flight inspections of the equipment used to provide air traffic services. Cost centers also allow the FAA to identify organizations outside of the Air Traffic Services organization that provide support necessary for ATS to function. One example is the Academy at the Mike Monroney Aeronautical Center in Oklahoma City. The Academy develops and provides training to air traffic controllers and the employees that maintain the equipment used to provide air traffic services. In summary, cost centers are invaluable elements that allow the FAA to identify every organization, and its associated costs, throughout the agency.

As for the cost elements (i.e., line items) for Enroute and Oceanic Services, the FY 1999 cost pools for each cost element are provided in the ''Overflight Fee Development Report, as Amended'' for the Final Rule. Each line item on page 6 of this report represents a cost element. The FAA did not provide the total pool of costs for the other two ATS Services, because the costs for Terminal and Flight Services were not yet available by each cost element in 1999.

32. British Airways, ATAC, KPMG, and Others Request That the FAA Provide Information Supporting the Apparent Presumption That All Labor Costs in an SDP That Provides Enroute and/or Oceanic Services Are Directly Related to the Provision of Such Services

FAA Response: The FAA used subject matter experts, who were part of the team of individuals who developed the original CAS design and methodology to cost out each service in CAS. These individuals performed the analysis of facilities, including the assignment of labor costs at those facilities, for each of the four ATS Services. All labor costs at SDPs were assigned by these subject matter experts, based on the function to which the costs contribute and the direct relationship of each function to the provision of the Enroute and Oceanic Services. The FAA will make available the documentation behind the assignment of costs to SDPs and ATS Services upon request. Contact Randall Fiertz in FAA's Office of Cost and Performance Management (202) 267–7140.

33. Commenters Request the FAA To Provide Adequate Information on the Allocation of Telecommunications Costs

FAA Response: The Air Traffic Services (ATS) organization maintains the Telecommunications Information Management System (TIMS) that tracks each circuit to a facility (Center, Tower, radar, navigational device, etc). Each facility has been assigned to one of the four Services. Based on this information, the cost of each leased line is assigned to a Service. The Costing Methodology Report (Docket item 6, Section 4.2.2.4, pages 28–29) includes an explanation of the process used to assign these costs.

In addition to leased telecommunications costs, there are certain non circuit-based telecommunications costs provided by contract support in the Oceanic airspace. The cost of these items were determined and assigned to the Oceanic Service based on actual invoices.

34. KPMG, Supported by Other Commenters, Requests the FAA To Provide Historical Data Regarding Workers Compensation Claims To Determine the Nature of Their Distribution Between the Services

FAA Response: The table below illustrates how the CAS allocated FAA's historical Workers Compensation costs in FY 1998 and FY 1999. The FAA began implementing the CAS in FY 1998; therefore, Workers Compensation costs were not allocated among the four ATS Services prior to that time. The Department of Labor (DOL) administers the Workers Compensation program for Federal agencies, and reports the amount of payments made on behalf of the FAA each fiscal year. The Office of Management and Budget requires Federal agencies to report a current year expense in the amount of the payments made each year by the DOL. This practice is in accordance with generally accepted accounting principles (accrual accounting) that requires the recognition of liabilities, and the corresponding expense, in the period in which they are incurred. Congress appropriates and makes the funds available to pay the accrued liability in the second subsequent year after the liability is recorded.

WORKERS' COMPENSATION COSTS

ATS service	FY 1997	FY 1998	FY 1999
Enroute	CAS was not in use in FY 1997	$28,700,281	$29,646,139
Oceanic		572,090	659,104
Terminal & Flight Services		40,699,213	40,927,320
Totals		69,971,584	71,232,563

The FAA will provide additional information regarding the statistical study to interested parties upon request. Contact Randall Fiertz in the FAA's Office of Cost and Performance Management, (202) 267–7140.

35. KPMG, Supported by Other Commenters Including Air New Zealand, Asks the FAA To Provide Sufficient Information To Determine the Validity of the Statistical Study Used To Establish the Ratios of Enroute to Oceanic On-Position Time

FAA Response: The FAA believes the statistical study to be valid. As stated in the Costing Methodology Report Addendum (Docket item 98, Section 4, page 7):

The FAA decided, subsequent to the release of the Costing Methodology Report (CM), that additional detail was necessary to more fully explain the treatment of certain cost pools with the CAS. The pools include Oceanic Air Traffic labor and capital costs.

As described in the CM Report (see Section 4.3), to assign AT labor costs between Enroute and Oceanic, the FAA conducted a statistical analysis of controller sign-in/sign-out (SISO) data. Arthur Andersen assisted the FAA in this statistical analysis to confirm the validity of the sampling techniques. This analysis was performed at the request of the DOT IG's office, which also reviewed the methodology and final results. This data, captured at the employee/controller level, represented the time each person spent ''on-position'' working either domestic enroute or oceanic air traffic (a single controller may be

certified to work both environments). Data was collected at each of the four Enroute Centers that provide Oceanic service for purposes of the CAS (New York, Houston, Oakland, and Anchorage).

The sampling strategy was designed to estimate the average Oceanic labor fraction of total controller labor at each Center to within a relative error of ±5%, with a 95% statistical confidence. A sample size of 40 days was calculated, which meets the FAA's relative error and confidence requirements. Forty random dates were then selected between February 19th and September 6th, 1999.

Following the IG's review of the statistical analysis, the resulting percentages were used in the CAS to assign a portion of the Enroute labor cost to the Oceanic Service at each of the four Enroute Centers that also provide Oceanic Service.

36. KPMG and Several Others Request the FAA To Provide Additional Information on the Use of a Single Set of On-Position Time Ratios To Allocate a Broad Spectrum of Costs Between the Enroute and Oceanic Environments

FAA Response: The single set of on-position time was a random sample intended to represent a full year. Labor makes up the vast majority of the costs allocated in this manner. The Costing Methodology Report (Docket item 6, Section 4.3, page 40) states:

For AT-related costs, historical Oceanic on-position time as a percentage of total ARTCC on-position time was considered the most appropriate basis. This is because this measure reflects the work effort required to provide the Oceanic service. To determine approximate Oceanic on-position time as a percentage of total on-position time, a statistically valid analysis [as explained in the previous response] was conducted on a sample of sign-in, sign-out time records logged by controllers in the normal course of performing their duties at each of the four Oceanic SDPs.

As indicated above in the FAA response to the comment that there may have been an ''over-allocation'' of costs to the Oceanic cost pool, the FAA believes it has used a reliable accounting methodology to reasonably allocate costs between the Enroute and Oceanic environments. To capture costs accurately in the CAS, the FAA performed a statistical analysis (see the Arthur Andersen Costing Methodology Report Addendum; Docket item 98, Section 4, page 7) to allocate labor costs between the Enroute and Oceanic Services. Since different systems are used to provide services in the Oceanic and Enroute environments, the task of allocating all other costs between these two Services was fairly straightforward. Where systems could be identified with provision of Oceanic Services only, those costs were assigned directly to Oceanic. Where systems could not be specifically identified with the provision of Oceanic Services only, costs were allocated on bases that represent the best available information. Labor data were used to allocate costs between the Oceanic and Enroute environments only in cases where no better information was available.

FASAB 4 states (in paragraph 124) that, ''In principle costs should be assigned to outputs in one of the methods listed below in the order of preference: (a) Directly tracing costs wherever economically feasible; (b) assigning costs on a cause-and-effect basis; and (c) allocating costs on a reasonable and consistent basis.'' It further states (in paragraph 128) that, ''Direct cost tracing often minimizes distortion and ensures accuracy in cost assignments. However, it can be a relatively costly process. It should be applied only to items that account for a substantial portion of the cost of an output and only when it is economically feasible.'' The FAA uses labor statistics to assign labor costs on a cause-and-effect basis. The FAA use of labor statistics to assign costs other than labor costs was deemed appropriate since these costs do not account for a substantial portion of the cost of Overflight services. In addition, development of bases to enable direct tracing was considered economically prohibitive.

37. KPMG, ATAC, and Other Commenters Request the FAA To Provide Further Information on the Allocation of Capital Investment Costs Based on Project or Program Coding, and the Assumptions Made in Making Such Allocations

FAA Response: FAA subject matter experts, who are familiar with the capital projects and the functions they are intended to support (e.g., Enroute surveillance, Terminal navigation, etc.), assigned each project to the appropriate Service. This method of assigning costs is referred to as ''direct tracing'' (see the Costing Methodology Report, Docket item 6, Section 4.1, page 20) and is the most preferred method to assign costs as described in FASAB 4. FASAB 4 indicates (in Paragraph 124) that, ''In principle costs should be assigned to outputs in one of the methods listed below in the order of preference: Directly tracing costs wherever economically feasible; Assigning costs on a cause-and-effect basis; and Allocating costs on a reasonable and consistent basis.''

38. KPMG, Supported by Other Commenters, Asks the FAA To Provide Documentation on the Percentages Used To Allocate Certain Individual Cost Elements, Such as Contract Maintenance

FAA Response: The FAA contracts-out the maintenance of several large systems. These contracts span multiple years but are funded yearly. Each contract is attributable to one and only one piece of equipment or system. Each piece of equipment or system has already been assigned to a Service (as described in the Costing Methodology Report, Docket item 6, Section 4.2.2.7, page 30 and Appendix B, Section B.12, page B–6). Percentages were then calculated to allocate actual costs incurred to pay for these maintenance contracts to the Services. The percentages were based on the anticipated funding of each contract. The work papers supporting the derivation of these percentages may be obtained upon request from Randall Fiertz in FAA's Office of Cost and Performance Management, (202) 267–7140.

39. The ATAC Requests an Explanation of How the FAA Will Ensure That Its Costing Methodology Is Consistent for All ATS Services and Other Lines-of-Business Within the FAA

FAA Response: The Costing Methodology Report Addendum (Docket item 98) refers to how Terminal and FSS Services will be assigned costs in the same manner as Enroute and Oceanic to ensure that costs are assigned to the proper Service. Additional information regarding the allocation of costs can be found in the Costing Methodology Report (Docket item 6, Sections 4.2.1.1, 4.2.1.2, 4.2.5.1, and 4.2.5.4) and the Costing Methodology Report Addendum (Docket item 98, Section 3, paragraphs 3 to 5).

The FAA currently uses a consistent costing methodology in allocating agency overhead costs. In so doing, the FAA determines each LOB's direct cost and allocated overhead on the basis of each LOB's direct cost to total FAA direct cost. This same methodology is used within the ATS. The FAA determines the cost and allocated overhead for each of the four ATS Services on the basis of each Service's cost to total ATS cost. In the future, the FAA intends to use this methodology to allocate agency overhead to each LOB as the CAS is implemented in that LOB.

The costing methodology used for other LOB-specific costs (i.e., costs other than overhead) will likely be very different, since the various LOBs and

Services are different (e.g., ATS versus Aircraft Certification services). Costing methodologies for all services do not have to be the same in CAS for the costs to be considered valid. The FAA is working to develop allocation methodologies for its various services in ways that respond to the specific manner in which each particular service is provided.

40. Air New Zealand and Other Commenters Ask What Assets Have Been Included in the Overflights Cost Base and What Were the Depreciation Policies Adopted

FAA Response: The location of FAA's capitalization policy was provided in the Costing Methodology Report Addendum, Section 4, page 7. According to FASAB No. 10, items that are typically depreciated are commonly referred to as Plant, Property, and Equipment, or PP&E. Based on FAA policy, PP&E is defined as real property (land, buildings, and other structures) and personal property (installed facilities equipment, spare parts, aircraft and aircraft engines, administrative information systems, and equipment furnished to others or Government Furnished Property and Contractor Acquired Property. FAA policy also requires depreciable items to have an estimated useful life of at least two years and a unit cost in excess of $25,000.

41. Lufthansa, ATAC, KPMG, British Airways, and Other Commenters Claim That the FAA Did Not Provide Sufficient Detail on the Overhead Costs Removed From the Overflight Fee Calculations, or Explain What Types of Costs Are Included in the Overhead Category

FAA Response: The FAA acknowledges that it needs to provide a fuller explanation of the excluded overhead costs; that information is provided in the two tables below. The CAS has the capability to identify and track the source and target of overhead costs. While the FAA has been able to link these costs directly to the specific cost categories or functions of the Air Traffic System they support, the agency has taken an extremely conservative approach in determining ''directly related'' costs by removing all overhead costs from the Overflight Fee calculations in addition to excluding all Terminal and Flight Service costs. The following tables show the extraction and removal of overhead costs:

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Enroute Costs (Fiscal Year 1999):

Cost Categories	Enroute Full Costs	Removal of Overhead Costs	Enroute Costs without Overhead
Air Traffic Operations			
Field Labor	$999,426,809	$0	$999,426,809
Field Non-Labor	$944,334	$0	$944,334
ATCSCC	$18,040,176	$1,086,159	$16,954,017
Contract Weather	$8,176,488	$0	$8,176,488
Contract Training	$10,814,599	$0	$10,814,599
Academy Training	$5,785,261	$0	$5,785,261
Aviation Medical	$7,060,379	$1,445,545	$5,614,833
Aviation Security	$3,219,936	$205,924	$3,014,011
Workers Compensation	$26,445,389	$0	$26,445,389
Subtotal	$1,079,913,370	$2,737,629	$1,077,175,741
Airway Facilities Operations			
SSC Field Labor	$172,510,218	$0	$172,510,218
SMO Field Labor	$35,322,498	$0	$35,322,498
Accruals & Adjusted Labor	$724,261	$0	$724,261
Nat'l Network Control Center	$7,753,579	$1,631,801	$6,121,779
Na'tl Maint. Command Center	$1,197,837	$52,492	$1,145,345
Field Non-Labor	$27,095,741	$0	$27,095,741
Telecommunications	$118,444,991	$0	$118,444,991
Flight Inspection	$14,948,854	$0	$14,948,854
Utilities	$24,260,336	$0	$24,260,336
Maintenance Contracts	$25,175,337	$179,658	$24,995,679
Logistics	$40,749,294	$785,737	$39,963,557
Academy Training	$15,095,316	$0	$15,095,316
Workers Compensation	$3,200,750	$0	$3,200,750
SMP/Compliance	$1,092,338	$0	$1,092,338
Subtotal	$487,571,351	$2,649,687	$484,921,664
Overhead Allocations			
ATS Regional Overhead	$77,116,590	$77,116,590	$0
ATS Headquarters Overhead	$119,896,795	$119,896,795	$0
FAA Regional Overhead	$30,967,716	$30,967,716	$0
FAA Headquarters Overhead	$69,467,114	$69,467,114	$0
Subtotal	$297,448,215	$297,448,215	$0
Capital Investment			
AF Exp F&E Lab/Non-Lab	$34,600,810	$0	$34,600,810
ARA Exp F&E Lab/Non-Lab	$421,196,901	$10,168,096	$411,028,805
ATS RE&D Exp Lab/Non-Lab	$33,123,471	$7,646,432	$25,477,039
Depreciation	$213,706,687	$0	$213,706,687
Subtotal	$702,627,869	$17,814,528	$684,813,340
Other Costs			
Gain/Loss	($79,279,026)	$0	($79,279,026)
Accrued Liabilities	($11,055,626)	$0	($11,055,626)
Subtotal	($90,334,652)	$0	($90,334,652)
Total	$2,477,226,152	$320,650,059	$2,156,576,094

Oceanic Costs (Fiscal Year 1999):

Cost Categories	Oceanic Full Costs	Removal of Overhead Costs	Oceanic Costs without Overhead
Air Traffic Operations			
Field Labor	$23,261,737	$0	$23,261,737
Field Non-Labor	$6,763	$0	$6,763
ATCSCC	($14)	$0	($14)
Contract Weather		$0	
Contract Training	$252,204	$0	$252,204
Academy Training	$225,914	$0	$225,914
Aviation Medical	$164,327	$33,644	$130,682
Aviation Security	$74,942	$4,793	$70,150
Workers Compensation	$615,503	$0	$615,503
Subtotal	$24,601,377	$38,437	$24,562,940
Airway Facilities Operations			
SSC Field Labor	$2,354,522	$0	$2,354,522
SMO Field Labor	$547,056	$0	$547,056
Accruals & Adjusted Labor	($3,200)	$0	($3,200)
Nat'l Network Control Center	$167,103	$374	$166,729
Nat'l Maint. Command Center	$11,186	$490	$10,695
Field Non-Labor	$367,806	$0	$367,806
Telecommunications	$24,356,126	$0	$24,356,126
Flight Inspection	$0	$0	
Utilities	$638,945	$0	$638,945
Maintenance Contracts	$2,272,851	$15,657	$2,257,194
Logistics	$117,783	$2,271	$115,512
Academy Training	$140,886	$0	$140,886
Workers Compensation	$43,601	$0	$43,601
SMP/Compliance	$2,741	$0	$2,741
Subtotal	$31,017,404	$18,793	$30,998,612
Overhead Allocations			
ATS Regional Overhead	$1,893,255	$1,893,255	$0
ATS Headquarters Overhead	$1,966,879	$1,966,879	$0
FAA Regional Overhead	$742,678	$742,678	$0
FAA Headquarters Overhead	$1,671,104	$1,671,104	$0
Subtotal	$6,273,915	$6,273,915	$0
Capital Investment			
AF Exp F&E Lab/Non-Lab	$515,536	$0	$515,536
ARA Exp F&E Lab/Non-Lab	$13,082,745	$0	$13,082,745
ATS RE&D Exp Lab/Non-Lab	$3,154,610	$728,232	$2,426,378
Depreciation	$5,622,672	$0	$5,622,672
Subtotal	$22,375,563	$728,232	$21,647,331
Other Costs			
Gain/Loss	($5,235,049)	$0	($5,235,049)
Accrued Liabilities	$2,484,921	$0	$2,484,921
Subtotal	($2,750,128)	$0	($2,750,128)
Total	$81,518,132	$7,059,377	$74,458,755

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For information on the types of costs included in the Overhead category, see Sections 4.2.4, 4.2.4.1, and 4.2.4.2 (pages 33–35) of the Costing Methodology Report (Docket item 6).

42. Lufthansa States That the FAA Did Not Explain the ''Unidentified F&E Projects'' That Are Part of Oceanic Costs

FAA Response: Unidentified F&E projects are projects that could be attributed to the ATS LOB based on their project coding structure in the CAS, but could not be attributed to any particular Service within the ATS LOB. In most cases, the ''Unidentified'' projects were a result of the FAA changing one or more of the known F&E project numbers to indicate a change in the project(s)' capitalization status. In order to account for these costs, the FAA developed the following methodology to allocate these costs to Enroute, Flight Service, or Terminal Services. Using two years of cost data (FY 1998 and 1999), the FAA computed the total cost of identified F&E projects for these three Services. The percentage of these projects' costs that were attributed to Enroute, Flight Services, and Terminal was then computed. These percentages were then applied to the total unidentified project cost to compute the unidentified project cost to be attributed to each of those three ATS Services. This method conforms to paragraph 124 of the Statement of Federal Financial Accounting Standard #4 ''Managerial Cost Accounting Standards,'' which states that such costs should be of allocated on a reasonable and consistent basis.

None of the costs of the unidentified projects have been allocated to the Oceanic Service. This is because the costs of only three types of ''Capabilities'' (as described in the Costing Methodology Report; Docket item 6, Section 2.2, page 13) are allocated to the Oceanic Service: Mission Support, Infrastructure, and Communications. None of the ''Unidentified'' projects are attributed to these Capabilities; therefore, none of the associated costs are allocated to the Oceanic Service.

The costs of these ''unidentified'' projects have very little impact on this rulemaking. Approximately $13 million, from the total of about $25 million of unidentified projects, were allocated to the Enroute Service. Overflights account for only approximately 1.23% of gross Enroute GCD miles. Therefore, the total ''Unidentified F&E Labor/Non-Labor'' costs attributable to Overflights are estimated to be about $160,000, which amounts to only about 2 cents per 100 nautical miles in the Enroute environment.

43. Japan Airlines, Iberia Airlines, and Others Comment That FAA's FY 1999 Costs Have Not Been Revalidated

FAA Response: The FAA disagrees with this comment. The Costing Methodology Report Addendum (Docket item 98, Section 2, paragraphs 1–3, page 4) provides information on this topic. The Addendum points out that the FAA's financial statements for FY 1999 were audited by the Department of Transportation Office of Inspector General prior to the FAA's publication of the Overflight Fee IFR in June 2000. The FAA received an unqualified or ''clean'' audit opinion (meaning no significant issues were identified) from the IG. The FAA believes that this constitutes more than sufficient ''revalidation'' of its FY 1999 cost data. This FY 1999 cost data was then used by the FAA to derive its Overflight Fees.

As noted previously in the Discussion of Comments section under the comment, ''The FAA expensed costs that should have been capitalized,'' it was discovered subsequent to issuance of the Overflight Fee IFR that certain FY 1999 costs that should have been capitalized and depreciated were in fact mistakenly ''expensed'' by the FAA. The FY 1999 cost data has been revised to correct these items, and the Overflight Fees, which are derived from this cost data, have been recalculated. The result is a reduction in the unit rate of the Overflight Fees (of approximately 10 percent for Enroute and approximately 20 percent for Oceanic, compared to the Interim Final Rule) in this Final Rule. The FAA will provide credits and refunds for this as detailed below.

44. Distribution of Costs Based on Staffing Standards

Japan Airlines and Iberia Airlines express concerns that the IG determined that the CAS had caused the FAA to rely on unreasonable proxies in allocating costs between Services. For example, the FAA assigned FY 1998 maintenance labor and other (non-labor) costs to Enroute and Oceanic Services based on labor standards rather than on an actual distribution of costs. The IG found those standards to be outdated and over-inflated.

FAA Response: The FAA disagrees with this comment. The FAA updates staffing standards for new equipment on a continuous basis. However, the FAA does acknowledge that it does not routinely update the staffing standards for existing equipment. The fact that the FAA does not routinely update staffing standards for existing equipment does not render them unreliable. The FAA conducts a significant amount of on-site research and analysis at the time its staffing standards are initially developed, and therefore does not need to reexamine them continuously.

When the IG reviewed the FAA's financial data in 1999, the IG acknowledged the staffing standards as the best available data. The Costing Methodology Report Addendum provides the following explanation in response to this comment (Docket item 98, Section 2, page 5):

> In place of actual time recording, the FAA is relying on staffing standards to assign AF labor costs to projects and SDPs. This approach has been discussed with the IG. These discussions have resulted in agreement that staffing standards represent the best available data source for allocating these costs at the present time.

This agreement came with the understanding that the FAA would update the staffing standards on a timely basis, and would work toward a more direct, time recording-based method of assigning these costs. The FAA recently provided a report to the IG outlining a plan to implement labor distribution agency-wide. This plan is available on the Internet at http://www.faa.gov/aba/html_performance/initiatives/ldr/files_doc/final_ldr_timeline_rpt.doc.

The FAA is working aggressively to implement this new Labor Distribution System for the entire agency. This system will eventually allow the FAA to capture the actual labor costs for all agency services. Both Airway Facilities and Air Traffic controller workforces are currently in an implementation status. The FAA expects to be collecting actual time from these workforces by the end of FY 2002.

Additional information regarding the use of staffing standards is provided in the Costing Methodology Report, Section 4.2.2.1 and Fig 4–2.

45. Several Commenters, Including Air New Zealand, Lufthansa, Iberia Airlines, Japan Airlines and Others, Request the FAA To Provide Additional Information on One or More of the Following Items: The Structure and Functioning of Its Air Traffic Control Centers, a Breakdown and Explanation of Activities Performed by Each of Those Centers, and the Number of People Working on Oceanic and Enroute Services, Their Salaries and Positions, the Optimal Staffing Numbers, and the Number of Hours They Work on Each Service

FAA Response: As explained in the Costing Methodology Report (Docket item 6), all Air Route Traffic Control Centers (ARTCCs), or SDPs, provide

Enroute Services. Of the 21 ARTCCs, there are four that provide Oceanic Services for purposes of the CAS and this Rulemaking. The following table shows which Centers provide only Enroute Services and which Centers also provide Oceanic Services.

Since the FAA uses aggregate, actual end-of-year labor costs to assign or allocate costs to the various ATS Services, it does not use the detailed information requested on the number of people working on Oceanic and Enroute Services, their salaries, positions, and optimal staffing numbers. The FAA believes it has chosen an appropriate methodology by using actual, end-of-year labor costs as the basis for cost assignment or allocation. The following table provides a list of SDPs, the type of services provided by each SDP, and actual AT and AF labor costs for FY 1999 for each SDP:

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SDP	Enroute Services	Oceanic Services	AT Labor FY 1999 Enroute (E) Oceanic (O)	AF Labor FY 1999 Enroute (E) Oceanic (O)
Albuquerque, NM	X		$39,546,131	$9,485,031
Anchorage, AK	X	X	E - $16,765,903 O - $977,671	E - $8,168,192 O - $583,099
Atlanta, GA	X		$61,586,983	$11,549,867
Boston, MA	X		$44,231,568	$9,673,354
Chicago, IL	X		$75,856,930	$11,025,329
Cleveland, OH	X		$63,023,016	$9,181,706
Denver, CO	X		$45,827,821	$10,545,404
Ft. Worth, TX	X		$57,852,633	$10,864,973
Houston, TX	X	X	E - $49,179,119 O - $1,500,105	E - $10,977,398 O - $232,195
Indianapolis, IN	X		$54,707,357	$8,703,799
Jacksonville, FL	X		$46,167,206	$9,655,958
Kansas City, KS	X		$52,696,351	$11,584,724
Los Angeles, CA	X		$44,456,401	$9,391,023
Memphis, TN	X		$48,674,960	$9,805,760
Miami, FL	X		$38,924,611	$8,416,043
Minneapolis, MN	X		$47,130,856	$11,533,501
New York, NY	X	X	E - $49,258,693 O - $11,637,206	E - $9,494,439 O - $1,113,836
Oakland, CA	X	X	E - $39,897,505 O - $9,146,754	E - $9,235,189 O - $969,248
Salt Lake City, UT	X		$31,145,586	$9,995,070
Seattle, WA	X		$32,210,096	$8,794,426
Washington, DC	X		$60,287,082	$10,475,791

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Functions Performed by ARTCCs for Purposes of the CAS and This Rulemaking

Enroute Services: Generally refers to ATC and related services provided to aircraft operating primarily under instrument flight rules in controlled airspace between airport terminal areas. In some cases, Enroute services may be provided to aircraft operating under visual flight rules. Enroute services are also provided to overflights that transit U.S.-controlled airspace. As shown above, 21 SDPs provide this service. The typical SDP has responsibility for more than 120,000 square miles of airspace.

Oceanic Services: ATC and related services provided in airspace where oceanic separation and procedures prescribed by ICAO are available. These services (with a few exceptions) are defined by specific designated Flight Information Region (FIR) boundaries and generally begin just prior to the limits of the radar coverage. Generally, within Oceanic FIR airspace, no radar service is available. Therefore, oceanic air traffic separation standards (position reports at selected time/geographic intervals) are used, rather than enroute separation standards (position reports based on radar/transponder activity—although, for some flights, such service is not practicable or appropriate).

Assignment of Controller Positions to Services

Because of the cost allocation methodology used to allocate labor costs, the FAA does not need the number of hours each employee works on each ATC service. For SDPs that provide only Enroute Services, all labor incurred at the SDP is attributed to Enroute. For SDPs that provide both Enroute and Oceanic Services, AT labor is allocated based on a percentage of actual on-position time worked by controllers (as explained previously in the discussion of the KPMG comments asking the FAA ''to provide sufficient information to determine the validity of the statistical study used to establish the ratios of Enroute to Oceanic on-position time'').

Other positions that are assigned at the SDP level are the positions that provide ATC maintenance services (provided by the Airway Facilities organization). As explained earlier, AF (ATC maintenance) labor costs are assigned to facilities based on staffing standards. Subject matter experts assign each facility to the Services based on the functionality of each facility. For the four SDPs that provide Oceanic Services, the FAA uses the ratio of Oceanic sectors to total sectors to allocate maintenance costs.

46. Labor for Oceanic Services

The AAPA comments that labor charges for Oceanic Services primarily reflect staffing in the four facilities located in Anchorage, Houston, New York, and Oakland and claims that the FAA provides no justification that these labor rates are identical in each facility.

FAA Response: The labor rates at each SDP are not identical. The labor costs allocated to Oceanic Services reflect staffing and Oceanic workload since on-position time was used as the basis. The Oceanic labor costs are assigned to each SDP based on the actual labor costs incurred at that particular SDP, and are not identical. Actual labor costs for each of the four Oceanic SDPs are shown in the table presented in the discussion of the preceding comment.

47. Use of a Weight-Based Formula To Determine Overflight Fees

The National Business Aircraft Association (NBAA) and the International Business Aviation Council, Ltd. (IBAC) ask that the FAA consider modifying its fee formula to account for aircraft weight, as is done in other countries. NBAA notes, ''In addition to ICAO, countries such as Canada, the United Kingdom, France, Germany, and other European Union states, ATC facilities charge users for the service provided. In determining the ATC charge, all of these countries use weight as a basis for determining fees.''

On a similar note, the IBAC expresses its concern that the U.S. does not use weight as a factor in the calculation of its Overflight Fees, stating its concern that ''failure by the United States to do so will encourage other States to do likewise, to the ultimate detriment of the interests of U.S. operators operating internationally.''

FAA Response: The FAA generally agrees with these comments. Indeed, as the NBAA and the IBAC point out, weight is widely used around the world as a factor in the setting of fees for ATC services. The FAA is statutorily constrained, however, from using weight, or any other measure of value, in the derivation of its Overflight Fees. The previously discussed requirement that the fees be ''directly related'' to the FAA's costs of providing the services has been interpreted by the Court of Appeals in the *Asiana* case (the prior Overflight Fee litigation) to preclude the use of any measure of value by the FAA in setting its fees.

48. KPMG Comments That FAA's Consultant, Capital Economics, Not Only Did Not Conclude That FAA's Fees Satisfied the Statutory Standard; It Apparently Never Considered the Question

FAA Response: The FAA agrees. Although Capital Economics' review (See the Capital Economics Report, ''A Review of FAA Overflight Fees,'' Docket item 99) touched on some aspects of the statute, the report was not intended to address the requirements of the law authorizing the Fees. Capital Economics focused its analysis on whether the fee development methodology was reasonable and within the guidelines of commonly accepted economic principles as applied in a practical, real-world setting. The other principal findings of the Capital Economics report are as follows:

- The FAA's reliance on a mileage-based fee structure complies with the requirement that the Overflight Fees be based on cost rather than value,
- Due to high metering costs of other alternative methods, the mileage-based metric is most likely the cheapest way to assign costs on an individual flight basis,
- There is no better alternative allocation mechanism than the mileage-based method, and
- The fee structure is ''subsidy-free,'' which many economists consider to be a desirable property.

The determination that these fees meet the statutory standard of being ''directly related'' to the FAA's cost of providing or making available the ATC and related services was made by the FAA and not by Capital Economics.

49. KPMG States That Capital Economics Gives No Empirical Basis for Its Assertion That Controller Time Is ''Largely (and Perhaps Completely) Common'' to Overflights and Non-Overflights

KPMG further expresses the view that Capital Economics offers no support from any air traffic control expert, either internal or external to the FAA. Moreover, KPMG states that there is no information in the Capital Economics report establishing that the firm is itself qualified to render an opinion as to how air traffic controllers perform their duties.

FAA Response: The Capital Economics report is based on discussions with FAA experts regarding the structure and functioning of the FAA, mainly the Air Traffic Services organization that provides ATC services. Through these discussions, Capital Economics received information

regarding, but not limited to, the services provided within each ATC environment, the treatment of fixed and common costs, ATC services provided to Overflights and non-Overflights, duties of air traffic controllers, and the treatment of specific costs associated with this rulemaking. Capital Economics also used information that is publicly available. This includes a book, *Fundamentals of Air Traffic Control* (M.S. Nolan, Fundamentals of Air Traffic Control. Second Edition, Wodsworth, Belmont, Calif., 1994), information contained in the docket of this rulemaking, the estimated stand-alone costs of Overflights provided as Attachment 1 of the Capital Economics report (docket item 99), and the FAA CAS service definitions provided as Attachment 2 of the same report. But ultimately any use of the Capital Economics report and its conclusions was determined by the FAA in its exercise of agency expertise in air traffic.

50. Joseph A. Beaudoin, on Behalf of the ATAC, Asserts, ''The Controller Manpower Required To Service Overflights and Non-Overflights Is Not 'Common' ''

He states that in the Enroute environment, the FAA divides its Air Route Traffic Control Centers (''Centers'') into low-altitude sectors, high-altitude sectors, and ultra-high-altitude sectors. He states that Overflights operate almost exclusively within the High-Altitude Sector, or the Ultra-High-Altitude Sector, where one exists. He asserts that, during any particular period of time, controllers normally will not be simultaneously handling aircraft in both or all three Sectors. Thus, Mr. Beaudoin states, ''there is a difference between the manpower requirements of the two types of flights. The typical non-Overflight requires far greater controller time than the typical overflight.''

KPMG, also on behalf of the ATAC, states, ''Of course, because both overflights and non-overflights use the high and ultra-high altitude sectors, it would be necessary to apportion controller time in those sectors between the two types of flights. This could be done based on the relative mileage flown by overflights vis-à-vis non-overflights in the high altitude sectors, as that would provide a reasonable estimate of the relative burden of the two types of flights on the controller work force in those sectors.''

FAA Response: The FAA disagrees. The FAA has determined that the costs incurred in servicing Overflights and non-Overflights are quite similar for the following reasons:

- The same ATS infrastructure is used to make services available to both Overflights and to non-Overflights.
- Overflights use many different altitudes where there are many other non-Overflight aircraft. Many flights departing or landing in the U.S. also reach such altitudes at some point during their flight. Air Traffic Controllers working those sectors have to manage non-Overflight and Overflight traffic just the same in providing safe air transportation in U.S.-controlled airspace.
- Controllers do not treat Overflights any differently than non-Overflights. Overflights can be anywhere in the ATC system at any given point requesting all ATC services to be available. The FAA doesn't provide services to Overflights based on their altitudes. The FAA does not in any way restrict or limit Overflights by altitude or by the level of services they receive while transiting through U.S.-controlled airspace. Also, the assertions of Mr. Beaudoin ignore the full spectrum of Overflights.
- The FAA acknowledges that although there may be a small difference in the marginal cost of making services available to Overflights and non-Overflights, this difference is negligible compared to the significant fixed and common costs incurred in making ATC and related services available to both Overflights and non-Overflights. Also, each flight is different in the services it uses. It cannot be said with certainty whether any given Overflight or non-Overflight will cost more or less.

See the first comment, ''The cost of providing air traffic services to Overflights versus non-Overflights'' for additional information on the FAA's rationale for treating all flights the same in a particular operational environment (i.e., either Enroute or Oceanic).

51. KPMG Disagrees With Capital Economics' Farm Analogy

KPMG says:

* * * this simple analogy is more analogous to the overflight fee situation if one supposes that the farmer has two pastures—high and low. A few sheep (overflights) graze in the high pasture, along with some cows (non-overflights). The high pasture is sparsely populated, however, and all the animals there are placid. As a result the high pasture fence needs little repair. The low pastures consist only of cows; it is heavily congested, and the cows there are ornery and active. Consequently the lower fence needs constant repair. It is clear that the farmer's mending costs must be primarily assigned to the cows. The fact that some cows are also in the upper pasture, and the same farmer does the mending of both fences (and needs the same training to do so), does not alter this conclusion.

FAA Response: The FAA disagrees. The FAA has acknowledged from the beginning that the marginal cost of serving Overflights versus non-Overflights may be slightly different. But the metering costs of identifying any such differences in marginal costs would be substantial for the very small number of Overflights compared to the total number of flights in U.S.-controlled airspace. In addition, due to the particular cost characteristics of providing Overflight service (as outlined in the earlier comments on ''The cost of providing air traffic services to Overflights versus non-Overflights''), it is the allocation of the large fixed and common costs that make up most of the costs upon which the Overflight Fees are based.

52. Based on the Declarations of Mr. Beaudoin and Mr. Jengo, KPMG States That the Labor Costs That FAA Incurs To Provide ATC Services Are Not ''Fixed''; Rather, They State That the Number of Controllers ''Varies Depending on the Volume of Aircraft Operating Within the Particular Geographical Area or Sector, and the Nature of Those Aircraft Operations'' (See Supplemental Declaration of Joseph Beaudoin, Docket Item 107, Paragraph 10)

Thus, KPMG asserts, if there are a large number of aircraft operating within a particular area, the FAA may need to assign additional controllers to handle the flights. Mr. Beaudoin adds, ''Generally speaking more controllers are necessary to handle a given number of flights in the lower-altitude sectors than are necessary to handle the same number of flights in the higher-altitude areas.'' Mr. Jengo similarly states that the ''number of controllers needed in a given sector varies according to the volume of traffic in that sector and the type of traffic.'' (See Declaration of Michael Jengo, Jr., Docket item 106.)

FAA Response: The FAA disagrees. The FAA has a set number of controllers to provide ATC services nationwide. Every SDP has a set number of controllers assigned to it to manage its workload. Every SDP also mostly has a set amount of overtime, training, and other such funding provided to it. These numbers do not change daily to manage an additional Overflight, or a non-Overflight. Controllers are assigned to sectors to manage all air traffic, not Overflights and non-Overflights separately. Overflights can be anywhere, at any altitude, in the ATC system at any given point in time. The FAA incurs a great deal of cost by simply making

services available to Overflights. Also, controllers do not treat Overflights any differently than non-Overflights. These factors support the analysis by Capital Economics that the marginal cost of serving an individual Overflight is nearly zero.

The FAA agrees with the Capital Economics analysis that the marginal cost of serving an additional flight is very small. This includes the labor costs involved in serving any particular additional flight. The rationale for this position is outlined in the previously cited discussion of the comment regarding ''The cost of providing air traffic services to Overflights versus non-Overflights.''

53. KPMG Disagrees With Capital Economics' Conclusion That the Absolute Difference Between the Costs of Servicing Overflights and Non-Overflights Is Small Compared to the Large Fixed and Common Costs That Must Be Allocated. KPMG Further Disagrees With Capital Economics' View That the FAA Acted Appropriately in ''Ignoring'' the Cost Differences Between Overflights and Non-Overflights

KPMG further states:

This argument is contrary to FAA's own data. According to the FAA's Fee Development Report, on which the overflight fees are based, 'Field Labor' assigned to 'Air Traffic Operations' accounts for 37 percent of the $2.7 billion in total costs FAA incurs to provide air traffic control services in the enroute environment, and 23 percent of the $101 million that FAA incurs in the oceanic environment. (Fee Development Report at page 8, Table 1.) In total, these controller costs amount to more than one billion dollars annually. Air traffic control experts Beaudoin and Jengo have submitted uncontradicted evidence that the per-hour controller manpower devoted to an overflight is much less than that devoted to a non-overflight.

FAA Response: The FAA disagrees. The KPMG comment simply restates the FAA's labor costs. These FAA numbers do not show a difference between the costs of providing services to Overflights versus non-Overflights. The FAA agrees with Capital Economics that the marginal cost of an Overflight is nearly zero, and the same is true of a non-Overflight. The FAA already has responded to both the Beaudoin and Jengo declarations, which do not characterize correctly the many types of flights that transit U.S.-controlled airspace without either taking off or landing in the United States (Overflights). The FAA's cost data cited by KPMG does not show any differences between the costs of providing services to Overflights versus non-Overflights, and the FAA's fee development methodology is reasonable and consistent with the Act.

54. KPMG Complains That the ''Stand-Alone Cost Test'' Conducted by Capital Economics Is Irrelevant Because It Does Not Establish That the Fees Are ''Directly Related'' to Costs. KPMG Argues That the FAA Has the Ability To Measure Actual Costs, and That Capital Economics' Use of ''Stand-Alone Costs'' As a Test for the FAA's Overflight Fees Simply Has No Relevance Under the Actual Cost Standard

FAA Response: The FAA disagrees. The ''stand-alone cost'' test is not a test of whether fees are directly related to costs. Capital Economics included the ''stand-alone cost'' test in their analysis to demonstrate that the fee structure is ''subsidy free.'' This means that there are no cross-subsidies between Overflights and non-Overflights in the fee structure. In fee development, this is widely considered to be a desirable property by economists. Capital Economics conducted a variety of analyses in examining whether the fees are within the guidelines of commonly accepted economic principles as applied in a practical, real-world setting. For additional information in response to this comment, see the earlier comments, ''The definition of fees ''directly related'' to costs as used by the Act,'' and ''Whether Overflight Fees are subsidizing other costs or services.''

55. KPMG Complains That the Arthur Andersen Addendum Does Not Attempt To Rebut the Statement That the FAA Incurs Substantially Greater Costs To Provide Air Traffic Services to a Typical Non-Overflight Than to a Typical Overflight

Instead, KPMG complains that the Addendum offers only general support for the FAA's use of ''best available data'' to make certain cost allocations, and the FAA's decision to ''expense'' rather than ''capitalize'' certain costs. KPMG elaborates that the Arthur Andersen Addendum asserts that FAA's decisions to expense rather than capitalize certain cost items conform to ''the relevant accounting standards.'' However, KPMG asserts that the Andersen Addendum ignores the statutory directive that each Overflight Fee must be ''directly related'' to the FAA's costs of providing air traffic control services for that Overflight.

FAA Response: The FAA agrees that the Arthur Andersen Addendum does not address the costs of Overflights and the statutory directive that the Fees must be ''directly related'' to the FAA's costs. Arthur Andersen's role related to the Overflight Fees was limited to assisting the FAA with development of a CAS that adheres to Federal accounting standards. The FAA then used the CAS data to derive the Overflight Fees.

The FAA, with Arthur Andersen's assistance, developed Enroute and Oceanic cost pools. Overflight Fees were derived based on these cost pools since Overflights use primarily Enroute and Oceanic Services. The FAA attributed an appropriate portion of these costs to Overflights based on miles flown in each (Enroute and Oceanic) environment. As noted previously, under the comment, ''The cost of providing air traffic services to Overflights versus non-Overflights,'' Capital Economics concluded that the FAA's methodology is a reasonable economic approach to setting fees when faced with the kind of cost characteristics confronting the FAA. Thus, the FAA has complied with the Act in establishing Overflight Fees that are directly related to the agency's costs, as determined by the CAS. The purpose of both the original Arthur Andersen Costing Methodology Report (Docket item 6) and the subsequent Addendum (Docket item 98) is to explain the FAA's decisions and methodology in assigning and allocating costs in the CAS.

56. Transparency of Fee Development Process and Data

According to a significant number of commenters, the FAA did not provide sufficient information to allow for a transparent process in charging Overflight Fees, and to allow interested parties to determine whether the Fees are ''directly related'' to FAA's costs.

In its later comments, KPMG points out that the Arthur Andersen Addendum states that allocations in CAS were made using the ''best available data'', but that the FAA almost never discloses the nature of the data available to it. KPMG complains that they and other commenters have no way of judging what information was available to the FAA when critical decisions were made, and therefore are unable to assess whether the ''best available data'' were in fact used.

FAA Response: The FAA has provided substantial evidence of its decisions herein, as well as throughout this rulemaking process, and believes it has been fully transparent in its Overflight Fee rulemaking. The FAA is required to clearly explain its reasoning in this rulemaking but not to obtain the users' agreement. Ultimately it is up to the agency, pursuant to Congress' direction in 49 U.S.C. 45301(b)(1)(A) and 49 U.S.C. 46110(c) to determine

what costs are in fact ''directly related'' for the purposes of Overflight Fees.

In addition, as explained more fully under the previous comment on ''lack of consultation,'' the FAA intends to pursue further contacts with the affected parties that will allow the FAA and the interested parties to have a dialogue regarding issues related to Overflight Fees to eliminate any remaining issue of transparency. The FAA hopes that, by taking this action, it will alleviate many concerns raised on the Interim Final Rule and continue to provide an opportunity to resolve issues in the future. The FAA intends to establish an Aviation Rulemaking Committee for Overflight Fees, which will be implemented shortly after issuance of the Final Rule, and will further reconfirm the transparent process by which the FAA establishes its Overflight Fees.

57. IATA Requests Additional Information With This Rulemaking. IATA Is Providing the FAA With Standard Performance & Productivity Indicators (PPI) Forms To Fill Out, as a Normal Practice With Other Air Navigation Service Providers

FAA Response: The FAA has not completed the IATA forms as they are beyond the scope of this rulemaking. The FAA is not charging fees for providing, or making available, air navigation services to all users. These Fees apply only to Overflights. The FAA will be available to work with IATA in the future to determine how their information needs could be accommodated.

The Inspector General's Assessment of Cost Accounting

On February 28, 2001, the Department of Transportation's Office of Inspector General (IG) issued a report (titled, ''Status Assessment of FAA's Cost Accounting System and Practices,'' Report No. FI–2001–023; Overflight Fee Docket No. FAA–00–7018, item 111) assessing the FAA's Cost Accounting System (CAS). This report was prepared pursuant to requirements of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR–21), which requires the IG to conduct an annual assessment of whether the FAA's methods for calculating and assigning costs to specific users are appropriate, reasonable, and understandable. The purpose of the IG report was to describe the status of CAS implementation, and to present the IG's findings to date in eight specific assessment areas required by AIR–21. The IG identifies several CAS-related issues in its assessment report. Because certain of these issues, as well as some criticisms of the CAS contained in the report, could be construed to have applicability to Overflight Fees, the FAA addresses the report below, and explains that the points raised in the IG report do not affect this rule.

As clarified in FAA's May 17, 2001, response to the report (Docket item 115), and in the IG's subsequent reply of June 4, 2001, to the FAA (Docket item 116), the central focus of the IG assessment was not on this rule but, rather, on the overall progress being made by the FAA in implementing the CAS on a phased basis throughout the agency. The report recommendations are aimed at accelerating the CAS implementation schedule, adding resources to assure the new implementation dates are met, and achieving efficiencies in the operation of the CAS.

The IG issued a separate audit report in December 1999 (titled, ''Cost and Flight Data for Aircraft Overflights,'' report # FE–2000–024; Docket item 10) for the explicit purpose of reviewing the implementation of the CAS within the Air Traffic Services (ATS) Line of Business (LOB), and the use of CAS data and aircraft flight activity data for the derivation of Overflight Fees. The FAA concurred with the IG findings and addressed the issues identified in that report prior to publication of the current Interim Final Rule on June 6, 2000. The FAA is using the same FY 1999 cost data for the Final Rule that were used for the Interim Final Rule, along with some accounting adjustments that result in reductions of approximately 10 percent in the Enroute fee and approximately 20 percent in the Oceanic fee.

The current IG assessment makes the following general statements regarding the CAS:

- ''The FAA's current cost accounting system, while capable of calculating cost agency-wide, will not produce accurate and reliable results for specific activities and services.'' (at 2, para 5).
- ''The cost accounting system will not be effective until the labor distribution system is operational.'' (at 8, para 4).
- ''* * * the cost accounting system will not be effective and credible without an adequate labor distribution system.'' (at 4, para 1).
- ''The cost accounting system should address the needs of FAA stakeholders such as the Congress, the aviation industry, and the taxpayers. If FAA is to become an effective results-oriented organization, the cost accounting system must produce cost information that satisfies the needs of external parties as well as FAA management.'' (at 11, para 3).

These statements in the IG report can easily be seen as affecting the basis of the FAA's Overflight Fees. Various references to the CAS as ''unreliable,'' ''inadequate,'' ''inaccurate,'' or ''not credible'' apply to specific issues within the CAS, and represent generalized opinions. For example, not having a detailed time reporting system in place at the employee level (Labor Distribution Reporting, or LDR) for certain ATS labor categories does not render the entire CAS unreliable or inadequate. The FAA is currently developing the LDR system to obtain actual labor costs directly from each employee, so that costs can soon be assigned to appropriate services.

The CAS has been under development within the FAA for several years now. It is being implemented on a phased basis throughout the agency, starting with the ATS LOBs. The FAA has stated repeatedly that, like all cost accounting systems, the FAA's CAS is an evolving and developing system, and that certain data elements, such as the LDR, will be improved and refined as implementation proceeds. In the meantime, as the CAS evolves, there are other ways, consistent with accepted accounting principles and practices, to reasonably allocate labor costs based on current capabilities. The FAA directly assigned much of the labor data; but where it could not, it used other methods as allowed under Federal Accounting Standards. For example, the FAA used a labor distribution system for the Research and Acquisitions organization and staffing standards for maintenance labor. In each instance, the FAA used the best available data to make such allocations. The IG, in fact, relied on such data in performing the fiscal year (FY) 1999 financial statement audit, and did not propose any adjustments to the financial statements related to the presentation of these costs.

Specific issues raised by the IG report are addressed as follows:

IG Statement: The IG report states, ''FAA's current cost accounting system, while capable of calculating cost agency wide, will not produce accurate and reliable results for specific activities and services. For example, FAA's actual cost for air traffic controller and airways facilities maintenance labor, estimated at $3.4 billion for FY 2001, cannot be tracked to specific activities and services, which would preclude FAA from developing potentially useful information such as the cost of a particular air traffic control or maintenance shift.'' (at 2, para 5). Further, the IG states, ''If FAA ever needs the actual cost of specific activities, and services, such as communication efforts related to En

Route and Oceanic services, the cost accounting system must be modified to accumulate cost at this level of detail. The system has not been designed to provide this type of information.'' (at 18, para 1).

FAA Response: This issue does not in any way affect the integrity of the CAS data for the costs upon which Overflight Fees are based. The IG concludes that the current CAS, while capable of calculating costs agency-wide, will not produce accurate and reliable results for specific ''activities and services'' at a level of granularity that the IG considers to be appropriate.

The FAA has defined the overall services provided by the ATS LOB as Enroute, Oceanic, Terminal, and Flight Services. While the CAS is designed to distribute the total costs of the ATS LOB among these four ''Services,'' it is not designed to determine the cost of a maintenance shift or an individual radio communication—which are actually individual activities within an overall Service. This is analogous to the case of an aircraft manufacturer, who may know the cost of installing an entire landing gear assembly for a particular aircraft but does not know the cost of installing one individual part. Similarly, while the FAA knows the cost of Enroute and Oceanic Services for the purposes of Overflight Fees, the CAS does not provide the costs of specific, individual activities.

The FAA uses the total cost of Enroute and Oceanic Services and the total miles flown in each ATC environment to derive unit rates for its Overflight Fees. The ATC and related services made available to all flights within each ATC environment are highly similar and are primarily characterized by the significant shared costs involved in the provision of such services. Therefore, the FAA charges the same unit rate to all Overflights within the Enroute environment and a single (lower) unit rate to all Overflights within the Oceanic environment.

The IG report states that the FAA should consider designing the CAS to provide useful management information, such as the cost of a particular air traffic control shift or an activity within a Service, such as the specific costs for providing communications as a stand-alone function. The FAA addressed this comment in its response (Docket item 115) to this report. The FAA said that the CAS is a tool designed to provide an understanding of the costs of providing ATC and related services at specified Service Delivery Points. When FAA began discussing system design of the CAS, careful consideration was given to what would be required of the system. In the process of determining the requirements of the CAS, including its use for Overflight Fees, things like the cost of a particular air traffic control shift and the cost of communications were carefully considered, but rejected, as they were too detailed to define and would have added a great deal of unnecessary complexity to the developing system—one that the IG's report already cites as being too complex. In addition, as stated earlier, this level of detail is not necessary for the derivation of Overflight Fees.

IG Statement: The IG finds that, ''FAA's cost accounting system does not track actual labor cost of activities and services for its Air Traffic Services line of business. The cost accounting system will not be effective until the labor distribution system is operational. For example, FAA was unable to accurately report more than $424 million of actual air traffic controller and airway facilities maintenance labor and related cost by activities and services. Controller labor cost was assigned based on limited summary data for a 2- to 3-day period, and airway facilities labor cost was assigned and estimated based on outdated labor standards.'' (at 8, para 4).

The IG further states, ''Since FAA labor cost is more than half its total cost, the cost accounting system will not be effective and credible without an adequate labor distribution system.'' (at 4, para 1).

FAA Response: The IG report noted, ''FAA initially planned to use only 2 or 3 days of data and outdated maintenance standards to distribute $424 million of air traffic controller and maintenance technician labor and related costs between En Route and Oceanic services.'' As stated in the FAA's response to the IG report (Docket item 115), ''We agreed with the Office of the Inspector General's concern that the 2–3 day sample was not of sufficient size to distribute costs between the enroute and oceanic services when the issue was first raised by the IG in December 1999. FAA subsequently improved its costing methodology by using a 40-day, statistically valid, sample of actual sign-in/sign-off data at each oceanic facility to further allocate $25M of air traffic controller labor cost (out of the $1.2 billion of directly assigned air traffic labor).'' Accordingly, the labor data used in FY 1999 for CAS was based on the 40-day sample, not the 2–3 day sample. The IG accepted this revised approach, noting in the audit report, ''Cost and Flight Data for Aircraft Overflights (see Docket item 10, page 6) that it ''should result in a more accurate representation of air traffic controller labor costs by activity and service.'' The FAA used this FY 1999 data to derive its Overflight Fees. Once the FAA's LDR system is implemented, the agency will no longer need to use such sampling. But for now, the FAA has determined that the accounting approach taken is sufficient for determining the costs used to derive Overflight Fees.

The FAA used staffing standards to allocate $219M of actual maintenance payroll to pieces of equipment in the Enroute and Oceanic Services. We note that the IG report contains references to ''outdated maintenance standards'' and to ''outdated labor standards'' in the sections on Labor Costs, and a similar reference under Assessment Area 5 on Internal Controls. The FAA is concerned that these references could lead to an erroneous conclusion. While the FAA has not routinely updated its staffing standards for existing equipment, this does not mean that the standards are therefore unreliable. FAA conducts a significant amount of on-site research and analysis at the time its staffing standards are initially developed, and does not believe they need to be revisited every year or two to remain valid. The FAA has discussed this topic at length with the IG, with the resulting agreement that the current staffing standards represent the best available data source for allocating AF labor costs at the present time.

The IG specifically stated in its December 1999 report (Docket item 10, page 7), ''While FAA's labor standards currently provide the best available data for assigning the airway facilities maintenance costs to services, the revised standards should improve the accuracy of these costs.

The equipment inventory will be updated and revised standards will be estimated based on existing technology, which should improve the accuracy of labor estimates. However, for the long term, a labor distribution system or work order system would provide a better and more appropriate method of accounting for maintenance labor.'' Thus while the FAA is working on improving this data, these labor costs used as the basis for Overflight Fees are adequate for this rulemaking.

Based on a recent decision by the FAA to track actual labor, the agency is working aggressively to implement its new Labor Distribution System for the entire agency. This system should allow the FAA to capture actual labor costs for all agency services. Both Airway Facilities and Air Traffic workforces are currently in an implementation status. The FAA expects to collect actual time from these workforces by the end of FY 2002. As noted in the rule, the FAA

expects to revise the rule in future years to reflect improvements such as this in the CAS.

IG Statement: The IG report states:

- ''FAA's cost accounting system does not properly collect costs associated with facilities and equipment projects within its Research and Acquisitions line of business. FAA improperly combined production overhead cost and general and administrative cost into one overhead cost pool. As a result, about $63 million annually would not have been properly added to facilities and equipment values had we not informed FAA of this problem.'' (at 4, para 3).
- ''We have not audited the overhead bases in all of FAA's lines of business; however, we found that the overhead cost in the Research and Acquisitions line of business was allocated to projects using inappropriate allocation basis. (at 4, para 4)'' ''For example, during the first quarter of FY 2000, the FAA allocated over $1 million to project 11270101, one of the Wide Area Augmentation System [satellite navigation system] projects, when it should have allocated only about $59,000 if the correct base for allocating overhead cost had been used.'' (at 10, para 2).

FAA Response: The FAA agreed with the IG that it should have more accurately allocated overhead costs to the Research and Acquisition LOB. The FAA has taken appropriate steps to ensure that its CAS will track these costs more accurately in the future. However, since the FY 1999 cost basis for calculating Overflight Fees does not include overhead costs, the net impact of these adjustments would have resulted in slightly higher costs and fees for Overflights. Based on the IG's information, the FAA made the necessary accounting adjustment, and implemented procedures to ensure proper accounting treatment on a continuing basis in the future.

IG Statement: The IG concludes that the ''FAA's systems for tracking assets are not reliable, resulting in a material internal control weakness. (at 15, para 2)'' ''For example, in our FY 1998 audit, in a test of 117 items, we found 4 items valued at $50 million that should be removed from property records, one of which was a building that had been demolished 10 years earlier.'' (at 15, para 3).

FAA Response: This issue, while appropriate to raise within the context of an assessment of the CAS overall, is not relevant to the calculation of the current Overflight Fees. The FAA fixed these problems between FY 1998 and FY 1999, resulting in an unqualified audit opinion (meaning no significant issues were identified) for FY 1999. For this reason, the FAA chose not to use its FY 1998 cost data and waited instead for its FY 1999 costs as a basis for both the Interim Final Rule and the Final Rule for Overflight Fees. To further improve this data, the FAA is implementing an automated fixed asset valuation system that will be used as the basis for the FY 2001 audit. This system is being implemented to further streamline the depreciation process and increase management controls.

IG Statement: The IG reports, ''Our audit of the design of Research and Acquisitions'' cost accounting system included an evaluation of the results produced by the pilot labor distribution system. Because FAA does not have an adequate system of policies, procedures, practices, or internal controls established to detect or prevent errors in assigning costs, we found that about 36 percent of the first quarter FY 2000 labor cost, or $16 million, could not be tracked to specific projects, activities and services. Our audit disclosed significant labor cost reported as 'no project.' The 'no project' cost could not be identified with specific projects by the Research and Acquisitions cost accounting system, which uses data from the pilot labor distribution system. FAA plans to resolve the no project problem by June 2001.'' (at 9, para 2).

The IG says, ''Internal controls over timekeeping were weak. FAA personnel charged their labor cost to incorrect projects. For example, employees charged about $245,000 in labor cost to a project for the first quarter of FY 2000 although the project was completed in FY 1997.'' (at 9, para 3).

FAA Response: As the IG states, this was a pilot project intended to test the new labor distribution system, which provides the FAA with actual labor costs to be allocated to services. The FAA acknowledges that there were inaccuracies in data collection. This pilot project was a test to detect such procedural problems and take steps to fix them before implementing the system agency-wide. As stated in the report, the FAA is addressing the problems identified in the IG report. The current target date for resolving these concerns is February 2002.

In any event, the issue of some costs having been assigned to ''no project'' has little, if any, effect on the current Overflight Fees. These inaccuracies would have benefited Overflights, since all of the ''no project'' costs were allocated as overhead costs. The Overflight Fees do not include overhead costs. Therefore, correcting this problem would have resulted in slightly higher fees. As indicated earlier, the FAA will continue to improve future CAS cost allocations.

In sum, after thorough and careful consideration and analysis of the recent IG report on the CAS, the FAA has determined that the report has no substantive effect on this rulemaking.

Discussion of the Final Rule

This Final Rule completes the statutory task given to the FAA by Congress in 1996. Changes to the Final Rule from the Interim Final Rule are minimal and clarifying, except for the fee rates, where accounting adjustments have resulted in lower fees. As stated in the Interim Final Rule, for the purpose of this rulemaking, U.S.-controlled airspace includes all U.S. airspace either directly owned by the United States or allocated to the United States by the International Civil Aviation Organization (ICAO) or by other countries. This can further be defined in general as Enroute and Oceanic airspace. Enroute airspace is generally defined, for the purpose of this rulemaking, as airspace where primarily radar-based air traffic services are available. Oceanic airspace is generally defined, for the purpose of this rulemaking, as airspace where primarily procedural air traffic services are available. (Some Enroute services are also provided in certain oceanic areas near islands such as Bermuda and The Bahamas.) It is acknowledged that this division of airspace does not perfectly reflect all types of airspace, but is a simplification to allow for reasonable costs in tracking and billing users, as well as for the assignment of costs under the CAS. A description of the U.S.-controlled airspace by latitude and longitude has been placed in the public docket for this rulemaking (Docket item 5).

The Final Rule remains the same as the Interim Final Rule with the exception of a reduction in the fees attributable to accounting adjustments, better billing and collection cost estimates, and clarification of the language of certain sections of the rule. Upon further review of the FY 1999 financial statements, the FAA determined that it had expensed certain costs that should have been capitalized and depreciated over a number of years. This caused expenses to be overstated and depreciation costs to be understated. The net impact has been a reduction in FY 1999 Enroute costs of some $242 million and a reduction in Oceanic costs of some $20 million. The specifics of these adjustments are explained in the previous Discussion of Comments section under the comment ''The FAA expensed costs that should have been capitalized.'' Also, billing and collection costs were reduced by approximately 17 percent, based on more than 8 months of actual

operational experience under the Interim Final Rule. This also is discussed previously. The net result of these cost adjustments is a reduction of approximately 10-percent in Enroute fees and approximately 20-percent in Oceanic fees. The new rates are $33.72 per 100 miles flown in Enroute airspace, and $15.94 per 100 miles flown in Oceanic airspace.

Effective upon publication of this Final Rule, the FAA will implement the updated fees. The FAA will recalculate previous bills under the Interim Final Rule and provide credits or refunds, as appropriate, to users under 49 CFR part 89. The rule does not apply to military and civil aircraft operated by the U.S. Government or by a foreign government, or to Canada-to-Canada flights.

Aviation Rulemaking Committee for Overflight Fees

As explained in the Discussion of Comments section under ''Lack of consultation,'' the FAA intends to establish an Aviation Rulemaking Committee for Overflight Fees. The FAA anticipates publishing a Notice in the **Federal Register** within the next 90 days announcing details of this Committee. The purpose will be to provide a forum for information sharing between the FAA, the users, and the public on matters relating to the fees and to discuss future Overflight Fee rulemaking.

Canada-to-Canada Operations

Canada-to-Canada operations, as previously discussed, are defined for this rulemaking (hereafter ''Canada-to-Canada'') as flights conducted by any aircraft of any nationality that take off from and land in Canada without an intermediate stop outside of Canada that operate in U.S.-controlled airspace. Users are defined as operators of aircraft flights that neither depart from nor land in the United States.

Currently, many flights between two points in Canada transit U.S.-controlled airspace because of air traffic coordination between the United States and Canada. Routing through U.S.-controlled airspace by U.S. or Canadian ATC occurs because it is either the shortest route or it offers the most favorable flight conditions. This frequent and variable routing is done without regard to the border between Canada and the United States.

As stated in the Interim Final Rule, the FAA has a long-standing ATC relationship with the Canadian ATC authority known as NAV CANADA beginning with an exchange of notes between the U.S. and Canadian governments in 1963. The FAA has determined that assessing fees on Canada-to-Canada flights would be inconsistent with 49 U.S.C. 106(l), 40103, and 40105; and the FAA's agreements with Canada or its agent NAV CANADA (the most recent of which can be found in the docket, item 102). This determination gives maximum effect to all applicable statutes and agreements. Accordingly, the total potential annual billings of overflights are $43.2 million, but expected annual billings are approximately $33.5 million (the difference being attributed to the FAA's agreements with NAV CANADA). These totals reflect a reduction in fees from the Interim Final Rule of approximately 10 percent in Enroute airspace and 20 percent in Oceanic airspace. As discussed previously, the cost of fees not charged is being borne by the FAA.

The FAA has recently learned that NAV CANADA has sent invoices for enroute services covered by the agreement described above. These bills were accompanied by a letter from NAV CANADA that stated, ''Effective June 1, 2001, the NAV CANADA enroute charge will apply to flights between two points in the U.S. entering and exiting airspace controlled by NAV CANADA below 49°N, east of 95°W by turbojet aircraft in commercial service with maximum take-off weight (MTOW) of 20 metric tonnes or more.'' The FAA is currently considering the effect of this action on its agreement with NAV CANADA.

The Overflight Fee

The Fees for users (i.e., operators of flights meeting the definition of an Overflight) is calculated using the Great Circle Distance (GCD) for each segment of U.S.-controlled airspace that users transit, as follows:

$$R_{ij} = (DO_{ij} \times CO) + (DE_{ij} \times CE)$$

Where

R_{ij}= the fee charged to aircraft flying between entry point i and exit point j,

DO_{ij}= total GCD traveled in each segment of U.S.-controlled Oceanic airspace expressed in hundreds of nautical miles for aircraft flying between entry point i and exit point j for each segment in Oceanic airspace,

CO = $15.94 per 100 nautical miles flown in Oceanic airspace,

DE_{ij} = total GCD traveled in each segment of U.S.-controlled Enroute airspace expressed in hundreds of nautical miles for aircraft flying between entry point i and exit point j for each segment in Enroute airspace,

CE = $33.72 per 100 nautical miles flown in Enroute airspace.

This formula is based on entry and exit data available for individual flights in U.S.-controlled airspace. If actual data are not available, the FAA will use best available FAA flight data based on GCD within each type of airspace transited.

The fees have been derived in a logical and reasonable manner, and are directly related to the costs of the FAA services provided to Overflights. Also, the FAA has determined that the $250-per-month exemption, which was established in the Interim Final Rule, is still appropriate for the reasons detailed in that document. Therefore, no fee will be assessed unless the cumulative charges exceed $250 per calendar month, based on Greenwich Mean Time (GMT), by any particular user. The FAA intends to review this Final Rule at least once every 2 years and will issue an NPRM as needed.

The following table illustrates the fee schedule and its application to hypothetical flights.

BILLING CODE 8010–01–U

Origination	Destination	Enroute			Oceanic			Total	
		Rate 1/	Miles 2/	Charge	Rate 1/	Miles 2/	Charge	Miles 2/	Charge
Vancouver, Canada	Puerto Plata Dominican Republic	$33.72	2,582	$867	$15.94	- - - -	- - - -	2,582	$867
Tokyo, Japan	Vancouver, Canada	$33.72	1,899	$637	$15.94	433	$69	2,332	$706
Amsterdam, Netherlands	Montego Bay, Jamaica	$33.72	1,405	$472	$15.94	- - - -	- - - -	1,405	$472
London, England	Mexico City, Mexico	$33.72	1,365	$458	$15.94	- - - -	- - - -	1,365	$458
Seoul, South Korea	Sydney, Australia	$33.72	- - - -	- - - -	$15.94	1,092	$173	1,092	$173

1/ Rates are expressed per 100 nautical miles
2/ Miles are nautical miles

Notes:

1. This table is for illustrative purposes only.
2. Mileage will vary from flight to flight based on aircraft flight track.
3. Mileage is calculated on great circle distance between the entry and exit points in U.S. enroute and/or oceanic controlled airspace based on FAA data only. (For further details, see discussion under "The Overflight Fee.")

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Fee Collection Process and Enforcement

The FAA has established and maintains data from several sources, including but not limited to, flight plans and radar/radio data that identify the point of entry and exit, aircraft registration number, and the type of aircraft for all aircraft entering U.S.-controlled airspace. Information is extracted from the database and used, along with the fee formula, to compute each fee. The fee includes a charge to cover the cost of obtaining and processing the flight data, as well as the cost of billing and collection.

Under the Interim Final Rule, the FAA has been billing by sending a monthly statement to users pursuant to 49 CFR, part 89. Affected commercial users have been requested to designate and submit to the FAA the name and address of a U.S. agent for billing. Users not providing a billing address are billed at the address of record of the aircraft owner as maintained in the country where the aircraft is registered. If the FAA cannot identify a user, the registered owner of the aircraft is billed. This process will continue unchanged.

As provided in § 187.15(d), monthly remittance of fees of $1,000 or more are to be paid by electronic funds transfer. Monthly remittances of less than $1,000 may be paid by electronic funds transfer, check, money order, credit card, or draft. All payments must be in U.S. currency.

Invoices that become delinquent will be charged administrative charges and interest and will be collected according to 49 CFR, part 89. The FAA intends to pursue vigorously all delinquent balances to the extent provided by law. As noted above, the FAA will recalculate all bills under the Interim Final Rule and will give credits or refunds, as appropriate, for overpayment.

If any adjustments are necessary in the fees billed or collected, the FAA will follow the procedures in 49 CFR part 89 to settle debts of users. This includes issuing credits and refunds to users as appropriate and authorized by law.

Justification for Immediate Adoption

The Administrative Procedure Act (APA), 5 U.S.C. 553 *et. seq.*, requires that prior to the issuance of a final rule, an agency will give notice to the public and seek comment on a proposed rule. Also, when a rule is adopted immediately, justification is required under the APA. On June 6, 2000, the FAA published the Interim Final Rule without public notice, pursuant to specific Congressional authority (the Act, 49 U.S.C. 45301(b)(2)), which in itself has been recognized by the courts as a specific exception to the APA. At that time, the FAA sought comments, which are addressed in this document. Congress directed that after the FAA has obtained public comments, it should then issue a Final Rule. This Final Rule is issued, without further notice or request for comments, with immediate adoption because this action reduces fees and collection charges. No additional notice or request for comment is required by 49 U.S.C. 45301 or by the APA, since the only change in the rule is an administrative reduction of fees. To delay adoption would merely defer the reduction of the fees, and thereby increase the burden on the users. Furthermore, in light of the express direction from Congress, notice and comment would be inappropriate and not in the public interest.

Paperwork Reduction Act

In accordance with the requirements of the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)), the information collection requirements associated with this Final Rule were submitted to the Office of Management and Budget (OMB) for review and approval. The OMB control number associated with this collection is Number 2120–0618. There are no new requirements for the information collection associated with this Final Rule. Under the IFR, an estimated 300 to 600 aircraft operators were requested to provide the FAA the name, the address, and phone number of any operator obtaining Overflight services. This was a one-time collection unless the user needed to change any of the information provided to the FAA.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

International Compatibility

In keeping with U.S. obligations under the Convention on International Civil Aviation, it is FAA policy to comply with ICAO Standards and Recommended Practices to the maximum extent practicable. The FAA has reviewed the corresponding ICAO Standards and Recommended Practices and has identified no differences with these regulations.

Economic Evaluation Summary

Proposed changes to Federal regulations must undergo several economic analyses. First, Executive Order 12866 directs each Federal agency to propose or adopt a regulation only if the agency makes a reasoned determination that the benefits of the intended regulation justify its costs. Second, the Regulatory Flexibility Act of 1980 requires agencies to analyze the economic impact of regulatory changes on small entities. Third, the Trade Agreements Act (19 U.S.C. section 2531–2533) prohibits agencies from setting standards that create unnecessary obstacles to the foreign commerce of the United States. In developing U.S. standards, this Trade Act requires agencies to consider international standards. Where appropriate, agencies are directed to use those international standards as the basis of U.S. standards. And fourth, the Unfunded Mandates Reform Act of 1995 requires agencies to prepare a written assessment of the costs, benefits and other effects of proposed or final rules. This requirement applies only to rules that include a Federal mandate on State, local or tribal governments or the private sector, likely to result in a total expenditure of $100 million or more in any one year (adjusted for inflation).

In conducting these analyses, the FAA has determined that this rule: (1) has benefits which do justify its costs, is a ''significant regulatory action'' as defined in the Executive Order, and is ''significant'' as defined in DOT's Regulatory Policies and Procedures; (2) will not have a significant impact on a substantial number of small entities; (3) reduces barriers to international trade; and (4) does not impose an unfunded mandate on State, local, or tribal governments, or on the private sector. The FAA has placed these analyses in the docket (as part of the Regulatory Evaluation accompanying this Final Rule) and summarized them below.

Several benefits will be realized from the imposition of these fees. The fees establish a mechanism whereby the users pay for the cost of resources they use. These revenues (up to $50 million) will be made available to fund the Essential Air Service (EAS) program, as directed by Congress (49 U.S.C. 41742). For these reasons, charging Overflight Fees is expected to result in a more efficient allocation of scarce public resources. The more efficient allocation of resources will benefit the public at large because more resources will become available for other services demanded by the public and because EAS will be funded with fewer tax dollars.

The effect of the rule will be to collect the cost of providing and making available certain ATC services from the users of the services. The FAA estimates that the annual cost of billing and collections associated with this rule is $1.46 million. This includes a one-time development cost of $1.47 million

(which is being amortized over 2 years beginning with the implementation of the Interim Final Rule (IFR)) and an annual operating cost of approximately $725,000. This is a reduction from the IFR billing and collections costs.

The cost of billing and collections is expected to be reviewed at least once every 2 years and user fee rates will be subject to adjustment to reflect the current costs of providing Overflight services. The next review is expected no later than 2 years from the date of publication of the Final Rule.

Regulatory Flexibility Determination

The Regulatory Flexibility Act of 1980 (RFA) establishes ''as a principle of regulatory issuance that agencies shall endeavor, consistent with the objective of the rule and of applicable statutes, to fit regulatory and informational requirements to the scale of the business, organizations, and governmental jurisdictions subject to regulation.'' To achieve that principle, the Act requires agencies to solicit and consider flexible regulatory proposals and to explain the rationale for their actions. The RFA covers a wide-range of small entities, including small businesses, not-for-profit organizations and small governmental jurisdictions.

Agencies must perform a review to determine whether a proposed or final rule will have a significant economic impact on a substantial number of small entities. If the determination is that it will, the agency must prepare a regulatory flexibility analysis as described in the RFA.

However, if an agency determines that a proposed or final rule is not expected to have a significant economic impact on a substantial number of small entities, section 605(b) of the 1980 act provides that the head of the agency may so certify and an regulatory flexibility analysis is not required. The certification must include a statement providing the factual basis for this determination, and the reasoning should be clear.

The Overflight Fees primarily affect foreign users. Since the RFA applies to domestic entities and does not apply to foreign entities, the FAA certifies that this rule will not have a significant economic impact on a substantial number of domestic small entities. In addition, the FAA believes that the effect of the Final Rule on small domestic operators will be negligible.

International Trade Impact Assessment

The Trade Agreement Act of 1979 prohibits Federal agencies from engaging in any standards or related activities that create unnecessary obstacles to the foreign commerce of the United States. Legitimate domestic objectives, such as safety, are not considered unnecessary obstacles. The statute also requires consideration of international standards and where appropriate, that they be the basis for U.S. standards. In addition, consistent with the Administration's belief in the general superiority and desirability of free trade, it is the policy of the Administration to remove or diminish to the extent feasible, barriers to international trade, including both barriers affecting the export of American goods and services to foreign countries and barriers affecting the import of foreign goods and services into the United States.

In accordance with the above statute and policy, the FAA has assessed the potential effect of this final rule. The Final Rule will primarily affect foreign users, generally commercial users. Most commercial aircraft are designed to operate more efficiently at altitudes above 18,000 feet. All operations at altitudes at or above 18,000 feet controlled by the United States must use ATC. The FAA believes that it is highly unlikely that foreign commercial users will alter their behavior to avoid using ATC and related services (although there are some questions about foreign non-commercial users). In addition, to some extent, commercial users are able to pass the Overflight Fees on to their passengers and cargo customers.

The Final Rule may have a favorable competitive impact on U.S. commercial operators. Prior to the implementation of the June 6, 2000, Overflight Fee IFR, U.S. commercial operators were at a possible comparative disadvantage with foreign counterparts when users (U.S. and foreign) paid user fees to transverse other countries' airspace while foreign users did not have to pay a fee to transverse U.S.-controlled airspace. The Final Rule could enhance the competitiveness of domestic commercial operators in international markets.

Unfunded Mandates Assessment

The Unfunded Mandates Reform Act of 1995, enacted as Pub. L. 104–4 on March 22, 1995, is intended, among other things, to curb the practice of imposing unfunded Federal mandates on State, local, and tribal governments.

Title II of the Unfunded Mandates Reform Act of 1995 requires each Federal agency to prepare a written statement assessing the effects of any Federal mandate in a proposed or final agency rule that may result in a $100 million or more expenditure (adjusted annually for inflation) in any one year by State, local, and tribal governments, in the aggregate, or by the private sector.

This Final Rule does not contain such a mandate. Therefore, the requirements of Title II of the Unfunded Mandates Reform Act of 1995 do not apply.

Executive Order 13132, Federalism

The FAA has analyzed this Final Rule under the principles and criteria of Executive Order 13132, Federalism. We determined that this action will not have a substantial direct effect on the States, or the relationship between the national Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, we determined that this Final Rule does not have federalism implications.

Environmental Analysis

FAA Order 1050.1D defines FAA actions that may be categorically excluded from preparation of a National Environmental Policy Act environmental assessment or environmental impact statement. In accordance with FAA Order 1050.1D, appendix 4, paragraph 4(j), this rulemaking action qualifies for a categorical exclusion.

Energy Impact Determination

The energy impact of the Final Rule has been assessed in accordance with the Energy Policy and Conservation Act (EPCA), Pub.L. 94–163, and FAA Order 1053.1. It has been determined that the Final Rule is not a major regulatory action under the provisions of the EPCA.

List of Subjects in 14 CFR Part 187

Administrative practice and procedure, and Air transportation.

The Amendment

In consideration of the foregoing, the Federal Aviation Administration amends part 187 of title 14, Code of Federal Regulations as follows:

PART 187—FEES

1. The authority citation for part 187 continues to read as follows:

Authority: 31 U.S.C. 9701, 49 U.S.C. 106(g), 49 U.S.C. 106(l)(6), 40104–40105, 40109, 40113–40114, 44702.

2. In § 187.1, revise the last two sentences to read as follows:

§ 187.1 Scope.

* * * Appendix A to this part prescribes the methodology for computation of fees for certification services performed outside the United States. Appendix B to this part

prescribes the fees for certain aircraft flights that transit U.S.-controlled airspace.

3. In § 187.15, paragraph (d) is revised to read as follows:

§ 187.15 Payment of fees.

* * * * *

(d) The fees described in appendix B of this part are payable to the Federal Aviation Administration in U.S. currency. Remittance of fees of $1,000 or more are to be paid by electronic funds transfer. Remittance of amounts less than $1,000 may be paid by electronic funds transfer, check, money order, credit card, or draft.

4. In part 187, Appendix B is revised to read as follows:

Appendix B—Fees for FAA Services for Certain Flights

(a) *Applicability.* Except as provided in paragraphs (b) and (c) of this appendix, this appendix applies to any person who conducts a flight through U.S.-controlled airspace that does not include a landing or takeoff in the United States. U.S.-controlled airspace is defined as all U.S. airspace either directly owned by the United States or allocated to the United States by the International Civil Aviation Organization (ICAO) or by other countries. This is further defined, for this section only, as Enroute and Oceanic airspace. Enroute airspace is defined, for this section only, as airspace where primarily radar-based air traffic services are provided. Oceanic airspace is defined, for this section only, as airspace where primarily procedural air traffic services are provided.

(b) *Governmental flights.* This appendix does not apply to any military or civilian flight operated by the United States Government or by any foreign government.

(c) *Canada-to-Canada flights.* This appendix will not apply to any operator of a flight that takes off and lands in Canada, without an intermediate stop outside Canada, that operates in U.S.-controlled airspace.

(d) *Services.* Persons covered by paragraph (a) of this appendix must pay a fee for the FAA's rendering or providing certain services, including but not limited to the following:

(1) Air traffic management.

(2) Communications.

(3) Navigation.

(4) Radar surveillance, including separation services.

(5) Flight information services.

(6) Procedural control.

(7) Emergency services and training.

(e) *Methodology for the computation of fees.*

(1) For the services listed in paragraph (d) of this appendix, the fee is computed based on the distance flown in either enroute or oceanic airspace (U.S.-controlled airspace.) Distance flown is based on the great circle distance (GCD) for the point of entry and the point of exit of U.S.-controlled airspace based on FAA flight data. Fees are assessed using the methodology presented in paragraph (e)(2) of this appendix. Where actual entry and exit points are not available, the best available FAA flight data will be used to calculate the entry and exit points.

(2) A User (operator of an overflight) is assessed a fee for each 100 nautical miles (or portion thereof) flown in each segment and type of U.S.-controlled airspace. Separate calculations are made for transiting Enroute and Oceanic airspace. The total fee charged for an Overflight between any entry and exit points is equal to the sum of these two charges. This relationship is summarized as:

$$R_{ij} = \$15.94 * DO_{ij} + \$33.72 * DE_{ij},$$

Where

R_{ij} = the fee charged to aircraft flying between entry point i and exit point j,

DO_{ij}= total great circle distance traveled in each segment of U.S.-controlled oceanic airspace expressed in hundreds of nautical miles for aircraft flying between entry point i and exit point j for each segment of oceanic airspace.

DE_{ij} = total great circle distance traveled in each segment of U.S.-controlled enroute airspace expressed in hundreds of nautical miles for aircraft flying between entry point i and exit point j for each segment of enroute airspace.

(f) *Billing and payment procedures.*

(1) *Billing.* The FAA will send an invoice to each user that is covered by this appendix when fees are owed to the FAA. If the FAA cannot identify the user, then an invoice will be sent to the registered owner. No invoice will be sent unless the monthly (based on Greenwich Mean Time) fees for service equal or exceed $250. Users will be billed at the address of record in the country where the aircraft is registered, unless a billing address is otherwise provided.

(2) *Payment.* Payment must be made by one of the methods described in § 187.15(d).

(g) *Review of rule.* The rule prescribed in this appendix will be reviewed at least once every 2 years and adjusted to reflect the current costs of the services covered by this appendix.

Issued in Washington, DC, on August 13, 2001.

Jane F. Garvey,

Administrator.

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