Before the

DEPARTMENT OF TRANSPORTATION

Washington, DC 20590

APPLICATION OF THE INTERNATIONAL AIR TRANSPORT ASSOCIATION FOR APPROVAL OF AN AGREEMENT (RESOLUTION 787) OF THE PASSENGER SERVICES CONFERENCE **(Docket No. OST-2013-0048)**	**OBJECTIONS TO TENTATIVE DECISION AND ORDER TO SHOW CAUSE**

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On May 21, 2014, the Department of Transportation ("DOT") issued Order 2014-5-7 (Docket No. DOT-OST-2013-0048-0415):

> By this order, we tentatively find that, subject to certain conditions enumerated herein (and set forth in the attached Appendix), approval of IATA Resolution 787 would be in the public interest, and direct interested parties to show cause why the Department should not approve the resolution.

DOT should not approve IATA Resolution 787 because the sale of tickets at personalized prices, as contemplated by the resolution, rather than in accordance with published tariffs, is contrary to the explicit and unambiguous provisions of 49 U.S. Code § 41510; because DOT's tentative findings are based on an unsupported misreading of that statute, which would render it meaningless; because approval of the resolution would not be in the public interest for the same public policy reasons that motivated Congress to enact 49 U.S.C. § 41510, 49 U.S.C. § 40101(c)(2), and § 40103(a)(2); because DOT has failed to consider whether the resolution is compatible with 49 U.S.C. § 40101(c)(2) and § 40103(a)(2); and because DOT has failed to consider whether approval of the resolution is consistent with U.S. international obligations.

1. Pricing in accordance with published tariffs is required by statute.

Requirements for airlines, like other common carriers, to publish and adhere to tariffs are independent of, and serve public policy goals distinct from, requirements for filing of tariffs with, or approval of tariffs by, any government agency. They have been explicitly retained by Congress for airlines, as for other types of common carriers, when Congress has repealed requirements for those tariffs to be filed with or approved by DOT components.

49 U.S.C. § 41510 explicitly, unambiguously, and without exception prohibits the sale of international air transportation at any price not "specified in the tariff of the carrier that is in effect for that transportation". If no tariff is in effect, no transportation may lawfully be sold.

§ 41510 gives the Secretary of Transportation authority to specify "privilege[s] or facilit[ies]" in addition to prices for air transportation which must be included in tariffs. But the statute grants DOT regulatory discretion only with respect to additional matters required to be specified in the tariff. The statute grants DOT no discretion to waive the minimum statutory requirement for the prices of international air transportation to be specified in the tariff.

The grant of regulatory authority to DOT to extend the tariff requirement beyond prices to other privileges or facilities underscores the importance placed by Congress on full compliance with, and enforcement of, the tariff requirement for air transportation prices. DOT was given authority to require inclusion of other privileges or facilities in the tariff in order to preclude efforts by airlines to evade the tariff requirement by moving essential matters out of the tariff and into less readily accessible or entirely non-public general rules, conditions, etc.

(This concern was well-founded. Tariffs of IATA's member airlines are interpreted in accordance with IATA's general rules of fare construction, for example. But those general rules are not freely available. IATA's Web site at <http://www.iata.org/publications/Pages/pat.aspx> gives no price for the General Rules, stating only that the price is "Available upon request" from <customerservice.indp@iata.org>. In response to e-mail messages to that address, I received a reply stating that the price of a single printed copy of the most recent "General Rules" volume of the IATA/SITA Passenger Air Tariff (PAT) is EUR185 plus EUR25 for shipping to the USA from IATA's office in Geneva, Switzerland, for a total of EUR210 or approximately USD 290.[1])

According to DOT's "Order to Show Cause":

> We are tentatively not convinced by Mr. Hasbrouck's allegations that customized pricing offers would be illegal because statutory and regulatory provisions still prohibit carriers from charging any price not contained in publicly disclosed, published tariffs, notwithstanding the fact that the Department has exempted carriers from officially filing such tariffs with the Department. The clause in 49 U.S.C. § 41510 under which carriers are to charge only prices identical to those in the tariff "in effect for such transportation" presumed filing of those tariffs with the Department under § 41504 as part of a comprehensive economic regulatory regime. Domestic tariff filing was terminated by the Deregulation Act of 1978. With progressive liberalization of international air services, including implementation of over 100 open skies agreements, the Department has, under § 40109(c) and 14 CFR Part 293, progressively exempted carriers from filing tariffs in liberalized international markets.

The "Order to Show Cause" provides no support for the claim that 49 U.S.C. § 41510 "presumed" filing of tariffs with the government, or that even if it did, this would permit DOT to read the requirements of § 41510 out of existence. 49 U.S.C. § 41510 is concerned with adherence to a tariff. The statute does not mention tariff filing with, or approval by, DOT any other U.S. or foreign government agency. Congress retained § 41510, with its requirement for adherence to a tariff, when it enacted the Airline Deregulation Act of 1978, and when it granted DOT authority to define the scope of tariff filing requirements in § 41504. Standard principles of statutory construction require DOT to recognize that Congress did so for a reason.

§ 41504 requires filing of tariffs only "to the extent the Secretary requires by regulation". In the absence of any such regulations, the default would be that there would be no filing requirement. § 41510 is different: it does not depend on promulgation of regulations for its effect, and grants no discretion for waivers by DOT of its requirements. § 41510 is binding on DOT and airlines. Again, this reflects a deliberate judgment of Congress binding on DOT.

DOT's tentative decision would nullify what Congress required and treat § 41510 as meaningless, contrary to the basic rule that each provision of a statute be given meaning.

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1 E-mail message to Edward Hasbrouck from Lauriane Mercier, Team Leader, Customer Service INDP, <customerservice.indp@iata.org>, 26 May 2014.

Industry norms reflected in IATA's own "General Rules" confirm that publication is an essential element of the definition of both "fare" and "tariff". In contrast, filing with or approval by any government agency is not mentioned in, or "presumed" by, those definitions:

> **Fare** – The amount charged by the carrier for the carriage of a passenger and his allowable free baggage and is the current fare which a carrier *in the publication it normally uses to publish fares*, holds out to the public, or the appropriate segment of the public, as being applicable to the class of service to be furnished....
>
> **Tariffs** – The *published* fares, rates, charges and/or related conditions of the carrier.[2]

By IATA's own definitions, which accurately reflect the commonly-understood meanings of these terms, an unpublished price list or unpublished algorithm for generating prices or "offers" is not a "fare" or a "tariff", and does not satisfy 49 U.S.C. § 41510.

The distinction between requirements for publication of and adherence to tariffs, and for filing of tariffs with, and approval of tariffs by, DOT or other government agencies, is made clear by the precedent set by Congress and DOT in their treatment of common carriers in other modes of transportation. Statutes enacted by Congress and implemented by DOT regulations require tariffs for common carriers in other modes of transportation to be made available to the public, even when tariff filing and approval requirements have been repealed. For example, requirements for public availability of tariffs for rail transportation were retained by Congress in 49 U.S.C. § 11101 and implementing regulations promulgated by DOT's Surface Transportation Board at 49 CFR § 1300, even after requirements for filing and approval of those tariffs were repealed by the Interstate Commerce Commission Termination Act of 1995.

Neither the legislative history, the statutory language, industry norms and conventions, IATA's own standard definitions, nor the precedents set by Congress and DOT in relation to other modes of transportation, supports DOT's tentative decision, which wrongly presumes that 49 U.S.C. § 41510 can be read out of existence or ignored.

Providers of air transportation are not required to operate as common carriers subject to the requirements of 49 U.S.C. § 41510. If they prefer, they can choose to operate as air taxi services, charter operators, or private carriers. But if they want the benefits of common carrier status, airlines must comply with the applicable laws and treaties, unless and until Congress and national governments choose to repeal them.

If IATA or DOT believes that 49 U.S.C. § 41510 should be repealed, that is a matter for Congress – which would have to consider, inter alia, not only the public policy reasons § 41510 was enacted and has been retained, but whether § 41510 can be repealed without violating U.S. obligations pursuant to international aviation agreements.

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2 IATA/SITA Passenger Air Tariff, General Rules, § 1.2.1 (emphasis added).

2. Requiring adherence to published tariffs is in the public interest.

Historically, the requirement for pricing in accordance with a published tariff, as the essential element of the definition of a "common carrier", long predates, and serves public policy purposes independent of, any requirement for filing with or approval of tariffs by governments.

Common carrier laws were among the first consumer protection laws. They were based on legislative recognition of the inherently unequal bargaining position of an individual customer with respect to a transportation company, and the vulnerability to exploitation or extortion of a farmer whose produce will spoil if not promptly transported to market, a passenger in mid-journey or desperate to see a sick friend or family member before they die, and the like. They were intended to ensure access to transportation services by all customers at reasonable rates.

The types of "price discrimination" which tariff requirements were intended to prevent was not primarily, and certainly was not solely, limited to discrimination on the basis of race, national origin, or the like. Rather, tariff requirements for common carriers were intended to ensure meaningful access to transportation services for all members of the public at reasonable prices, and to prevent discrimination on the basis of personal animus or other personal factors.

Tariff adherence and publication requirements serve purposes of equity, transparency, and access to transportation, independent of the oversight purposes of tariff filing and approval.

In international markets in which international agreements required approval of fares by both governments, DOT justified a de facto policy of nonenforcement of the tariff adherence requirement of 49 U.S.C. § 41510 as benefiting the public by allowing airlines to sell tickets at off-tariff prices lower than those fares which some foreign government were willing to approve.[3]

That rationale no longer applies in deregulated markets in which fares are no longer subject to government approval. In such a market, an airline that wishes to offer a lower price can simply publish a lower fare. Price opacity, which serves no public benefit, is the only reason for the persistence of off-tariff airline ticket pricing in deregulated markets. Off-tariff pricing serves to hide real prices from both competitors and consumers, frustrating both competition and comparison shopping. Off-tariff pricing is especially damaging to the ability of third parties to provide comprehensive aggregated or comparative price information or shopping tools.

Moreover, the price transparency which is obtained through required adherence to published tariffs is more important, not less, when tariffs aren't required to be filed with or approved by DOT or any other government agency. Without the ability to verify whether the price demanded by the airline is in accord with the tariff, it's impossible for any individual to tell whether the "offer" has been determined, in whole or in part, on the basis of invidious factors.

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3 See Notice of Proposed Rulemaking, "Statement of Enforcement Policy on Rebating", Office of the Secretary of Transportation (OST) Docket No. 45884, 53 Federal Register 41353, 21 October 1988.

3. Requiring adherence to published tariffs is necessary to assure the statutory "public right of freedom of transit by air" by common carrier.

DOT has failed to consider whether the resolution is compatible with 49 U.S.C. § 40101(c)(2) and § 40103(a)(2), which guarantee and require DOT to consider, in the exercise of its regulatory authority, the "public right of freedom of transit by air".

Allowing a so-called "common carrier" to "offer" its services to disfavored customers, or to anonymous customers, only at prohibitive prices would defeat the fundamental goals of common carrier law and contravene the statutory "public right of freedom of transit by air". There is no meaningful distinction between a private carrier that claims "the right to refuse service to anyone" and a so-called "common carrier" that claims the right to "offer" anyone, for any reason or no reason, an arbitrarily high price for its services.

Approval by DOT of IATA Resolution 787 would effectively eliminate the "public right of freedom of transit by air" and violate 49 U.S.C. § 40101(c)(2) and § 40103(a)(2).

4. Approval of IATA Resolution 787 would contravene U.S. international obligations.

DOT has failed to consider whether the resolution is consistent with U.S. international obligations. Numerous multilateral and bilateral international aviation agreements commit the U.S. to ensure that airlines operate as "common carriers" and/or that airlines sell tickets only at prices determined from published tariffs in accordance with published fare construction rules.

A transportation provider that makes personalized ticket price "offers" not determined by a publicly-available tariff, as contemplated by IATA Resolution 787, would not meet the definition of a "common carrier" as that term is used in used in international agreements.

Indeed, one of the major reasons why Congress chose to retain the requirement for pricing only in accordance with a tariff in 49 U.S.C. § 41510 when it enacted the Airline Deregulation Act of 1978, and subsequently, was and has continued to be that enforcement of its requirements is necessary to fulfill U.S. obligations pursuant to those international agreements.

In 1988, DOT proposed to formalize its then-existing de facto policy of nonenforcement of the tariff adherence requirement of 49 U.S.C. § 41510.[4] That proposed rule was never finalized, possibly because DOT realized that it was not within DOT's regulatory authority to nullify, refuse to enforce, or grant general impunity for violations of a valid statute. When DOT finally official withdrew this proposed rulemaking in 2002, it noted that, "Other nations said that the Department should enforce the prohibition … more rigorously."[5] More precisely, other

4 Note 3, supra.

5 "Withdrawal of Proposed Rulemaking Action; Statement of Enforcement Policy on Rebating", Docket No. OST-96-1505, 67 Federal Register 234, 5 December 2002.

nations argued that enforcement of the tariff adherence requirement of 49 U.S.C. § 41510 was mandated by international aviation agreements to which the U.S. was, as it still is, a party.

Those objections remain equally valid today. DOT is barred by international agreements from approving IATA Resolution 787, which envisions and is intended to authorize a "New Distribution Capability" based on non-tariff pricing, for the same reasons that DOT was and is barred by those international agreements from approving any other off-tariff pricing. Congress could repeal 49 U.S.C. § 41510 only if the U.S. first withdrew from or negotiated and obtained approval by each other party for amendments of each such provision in each of these agreements.

DOT's tentative decision is based on an unsupported and erroneous conflation of tariff filing and approval requirements with tariff publication and adherence requirements. Requiring common carriers to adhere to published tariffs as the sole basis for determining ticket prices benefits the travelling public and is explicitly and unambiguously required by multiple Federal statutes and international agreements from which DOT has no authority to derogate.

For the reasons given above and in my previous submissions in this docket, DOT should disapprove IATA Resolution 787 and commit itself to full enforcement of 49 U.S.C. § 41510, in accordance with 49 U.S.C. § 41510, § 40101(c)(2), § 40103(a)(2), and U.S. obligations pursuant to applicable international aviation agreements regarding common carriers, fares, and tariffs.

Respectfully submitted,

/s/

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