Before the

DEPARTMENT OF TRANSPORTATION

Washington, DC 20590

APPLICATION FOR APPROVAL OF AN AGREEMENT (RESOLUTION 787) BY THE INTERNATIONAL AIR TRANSPORT ASSOCIATION **(Docket No. OST-2013-0048)**	**COMMENTS OF EDWARD HASBROUCK**

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1. Introduction

I am a travel expert and consultant, consumer advocate for travellers, author of two books of consumer advice for travellers on issues including airline ticket pricing and shopping technology, author/publisher of a Web site and blog of consumer advice and information for travellers, affiliate of an Internet travel agency, and policy analyst for the Consumer Travel Alliance (which has also submitted comments in this docket). I have testified on travel issues before U.S. government agencies and the Canadian and European Parliaments, and have served as an expert witness in lawsuits and arbitration related to airline ticket sales and technology.[1]

(These comments are submitted strictly on my own behalf, and do not necessarily represent the opinions or beliefs of the publisher of my books, the travel agency with which I am affiliated, or any of my past or present employers or consulting clients.)

I welcome this opportunity to comment on the application of the International Air Transport Association (IATA) for approval of IATA's Resolution 787 regarding proposed changes to airline pricing, price information disclosure, and ticket sales technology and business practices, described as a "New Distribution Capability" (NDC) for airline tickets.

By its application in this docket, IATA seeks to have it both ways.

IATA claims that its Resolution 787 does not yet, in and of itself, require Department of Transportation (DOT) approval or any changes to treaties or international agreements to which the U.S. is a party, Federal statutes, or Department of Transportation (DOT) regulations. IATA claims that Resolution 787 is merely "aspirational", and that, "IATA is not seeking an endorsement of the stated business requirements or marketplace aspirations of NDC and recognizes that any additional conference agreements on standardization of distribution practices would need to be filed with DOT before becoming effective."

Yet IATA is formally seeking DOT "approval" of Resolution 787, despite ITA's not yet having defined or publicly disclosed what changes to regulations, statutes, or treaties might be required for IATA and its members to realize these "aspirations".

The only reason for IATA to seek such (premature) approval of a proposal whose legal implications have not yet been fully disclosed, discussed, or reviewed would be in order to be able later to claim, when the necessary regulatory, statutory, and treaty amendments are made explicit, that Resolution 787 has already been approved, at least in concept, and that the changes required to implement it should therefore be subjected to only minimal, if any, DOT review.

DOT should decline to put the cart before the horse, or approve this scheme too hastily. DOT should not approve IATA Resolution 787 without explicit disclosure by IATA, opportunity for public comment on, and consideration by DOT of its legal implications.

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1 See my professional biography at <http://hasbrouck.org/bio/>.

To the extent that Resolution 787 is, in fact, purely "aspirational", and does not require DOT approval, DOT should reject IATA's application as outside DOT's regulatory jurisdiction.

To the extent that implementation of Resolution 787 will require any changes to DOT regulations (which it will, as discussed below), DOT should reject the application as premature and as failing to provide sufficient specificity to enable adequate review of those changes.

However, since IATA has, by this application for DOT approval, opened the door to DOT review of Resolution 787, DOT should take this opportunity to issue guidance to IATA and its members clarifying and reinforcing DOT's continued commitment, and the continued legal obligation of IATA members, to sell airline tickets in accordance with publicly accessible tariffs applicable equally to all would-be passengers, in a transparent and non-discriminatory manner which respects the public right to travel by air and the status of airlines as common carriers.

2. IATA Resolution 787 and "personalized pricing"

The essential "aspiration" implicit in IATA's Resolution 787 is the replacement of published tariffs of airline fares (a "fare" consisting of a price associated with a set of rules), applicable to all would-be passengers on a non-discriminatory basis, with "personalized pricing".

Nothing in IATA's application for approval of Resolution 787 explicitly discloses an intention to abandon reliance on published tariffs as the basis for pricing of airline tickets. The word "tariff" never appears in the application, the resolution, or the descriptions of the pricing process they contemplate. Instead, the application and the resolution describe standards and technologies for airlines to make personalized ticket price "offers" to individual customers.

This would be a fundamental change in, and reduction of, the choices offered by airlines to consumers. At present, airlines are free to *advertise* or *promote* only a subset of their fares, but they are required to *offer* tickets for sale at *all* fares in their tariff. Publicizing a fare without actually making any seats available which would permit a would-be purchaser to avail herself of the fare would constitute a deceptive practice prohibited by law and DOT regulations.

IATA's application for approval of Resolution 787 grossly misstates the process currently used for determining the prices of airline tickets. "For decades," IATA claims, "airline shopping has been based on only two factors; schedule and price, using 'low fare search engines' to find only a single, often restricted, fare."

In fact, "low-fare search engines" and the display of only a single fare in response to a customer inquiry are recent airline innovations which are intended to, and are effective for, reducing the numbers of choices displayed to potential ticket purchasers or travel agents.

For decades, travellers and travel agents have had access – first through printed tariff books and later through what were called first Computerized Reservation Systems (CRSs) and then Global Distribution Systems (GDSs) – to *all* fares published and thereby offered by airlines,

not merely to a single fare. Travellers and travel agents have been able to browse, sort, and search fares by a wide variety of fare attributes including routings, stopovers, minimum and maximum stay, seasonality, etc. – not merely by schedule and price.

The change contemplated by IATA Resolution 787 is thus a change in the direction of *less price transparency* and *fewer choices* for airline ticket purchasers.

As discussed further below, airlines have been and still are required by law to make their complete tariffs available to the public, and to provide conspicuous public notice of this at all airports and other places where tickets are sold. Airlines are required to offer each consumer the option to purchase a ticket at any fare in the tariff with the rules of which the customer is willing to comply. Offering a customer only a single fare, which IATA claims has been the norm for "decades", is both a recent and an illegal airline practice.

3. The legal basis for airlines' obligation to impersonal pricing

Airlines are required to sell tickets according to publicly-disclosed, impersonal tariffs as a consequence of the status of air travel as a right guaranteed by international treaties and U.S. law, as an aspect of airlines' status as common carriers under international treaties and U.S. law, and pursuant to tariff requirements in international treaties, U.S. law, and DOT regulations.

Travel is a right guaranteed by Article 12 of the International Convention on Civil and Political Rights (ICCPR), as ratified by and binding on the U.S. as a party: "Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement."

With respect to air travel, Article 12 of the ICCPR has been effectuated by 49 USC §40101 and 49 USC § 40103, which provide that, "A citizen of the United States has a public right of transit through the navigable airspace", and require that, "the Administrator … shall consider... the public right of freedom of transit through the navigable airspace."

As a right, air travel cannot be arbitrarily interfered with, and any restrictions or conditions on the right to air travel – including the right to air travel by common carrier – are subject to strict scrutiny. To the extent that it would permit airlines to set prices on any basis other than on impersonal, nondiscriminatory rules, personalized pricing would fail to respect the rights of would-be travellers to equal treatment, and would fail to satisfy such strict scrutiny.

Numerous bilateral and multilateral aviation treaties and international agreements to which the U.S. is a party specify that airlines operate as common carriers, and/or explicitly require adherence to published tariffs as the sole permissible basis for airline ticket pricing. An entity which reserves the right to refuse service, or to charge an arbitrarily high price on an individual basis to effectively refuse service, does not satisfy the definition of a common carrier. By definition, a common carrier offers to provide service to all customers willing to pay the price and comply with the rules specified in its published tariff of fares. Common carrier and tariff and tariff publication requirements in international aviation treaties preclude the U.S.

government from approving personalized non-tariff based (or non-public tariff based) airline ticket pricing without withdrawing from or amending those treaties.

Adherence to a tariff is categorically and explicitly required by Federal law for all international air transportation by common carriers, pursuant to 49 USC § 41510: "An air carrier, foreign air carrier, or ticket agent may not — (1) charge or receive compensation for foreign air transportation that is different from the price specified in the tariff of the carrier that is in effect for that transportation." Any personalized price not based on a tariff would be a *per se* violation of 49 USC § 41510. DOT has no discretion to approve any such price or pricing practice. The prohibition on off-tariff pricing applies to all prices for international transportation (49 USC § 41510(a)(1)) and to the price of any other "privilege or facility related to a matter required by the Secretary of Transportation to be specified in a tariff" (49 USC § 41510(a)(3)).

For both domestic and international passenger transportation by air common carriers, DOT regulations at 14 CFR 221, Subpart K, require that all airlines "must make tariff information available to the general public" (14 CFR 221.100). Each airline is required either to make its complete tariff available for inspection at each place where tickets are sold (14 CFR 221.101-221.105), or to "display continuously in a conspicuous public place at each airport or other ticket sales office of the carrier a notice printed in large type reading as follows:... [A] file of all tariffs of this company, with indexes thereof, ... is maintained and kept available for public inspection at. (Here indicate the place or places where tariff files are maintained, including the street address and, where appropriate, the room number.)" (14 CFR 221.107).

4. The public policy basis for requiring adherence to published tariffs

The switch from impersonal tariffs to personalized pricing of airline tickets would require changes to treaties, statutes, and regulations which IATA has neither acknowledged nor justified, and most of which are beyond the scope of DOT's administrative authority to approve by regulation. But since IATA has chosen to raise these issues through this application, it's important to note for the record that there are sound public policy reasons why, as discussed above, personalized pricing is illegal, and why it should remain so.

Laws regulating places of public accommodation for travellers such as inns and hotels, including requirements for them to post and adhere to posted tariffs, are among the oldest laws designed to protect consumers against predatory pricing and exploitation by providers of essential travel services who typically have a local monopoly or oligopoly. These principles later found expression in legal requirements for common carriers including railroads and later airlines.

Even in international markets where airfares have been deregulated and airlines are allowed to set their own prices without the need for government approval, Congress has properly continued to require airlines to sell tickets only in accordance with publicly-disclosed tariffs.

Under the present pricing rules, travellers are entitled to insist that an airline justify any fee or demand for payment by reference to some specific provision of an applicable

publicly-accessible tariff. Without the requirement for adherence to a tariff, travellers would be subject, even after committing themselves to a journey or in the middle of their trip, to arbitrary, extortionate, or perhaps discriminatory "personalized" demands for additional payments.

Maintaining the current tariff and tariff publication requirements is an essential check on exploitative, discriminatory, and/or collusive airline behavior. Without the full price transparency which only adherence to a public tariff can provide, it's impossible for members of the public, consumer advocates, independent watchdogs, or the government itself to exercise effective oversight over these violations of travellers' economic and civil rights. Without the ability to compare charges to a tariff, it would be almost impossible to determine whether price discrimination (the goal of personalized pricing) was based on invidious and prohibited factors.

5. The privacy of personal information obtained by airlines and their agents

Even were it not otherwise prohibited, as discussed above, personalized pricing as contemplated by IATA Resolution 787 would greatly increase the risk of invasion of travellers' privacy and misuse of personal information related to travellers obtained by airlines, their agents, and/or their contractors and service providers including providers of personalization data.

These risks would pertain both to information provided by travellers themselves, and to information about them acquired from commercial data brokers for purposes of price personalization, price optimization, and price discrimination.

IATA claims disingenuously that anonymous price quotes would still be permitted under its contemplated "New Distribution Capability" (NDC). But IATA makes no commitment with respect to the price premium that IATA member airlines might charge for anonymity.

Disclosure of personal information as a condition of obtaining a lower price under such a system, where the price for withholding personal information could be prohibitively high, would not in any meaningful sense remain "voluntary". Such a proposal should properly be evaluated as a proposal to allow airlines to condition the exercise of the public right of transit by air on a coerced disclosure of personal information to airlines, and a coerced grant of "permission" to airlines to monetize that information for themselves or third parties.

This prospect is particularly problematic because there are not currently any sector-specific privacy rules applicable to personal data obtained by airlines, and because personal information obtained, held, and/or used by travel companies often falls through gaps in enforcement due to a lack of interdepartmental jurisdictional coordination between the Department of Transportation (which has jurisdiction over airlines and their agents, including over their compliance with the U.S.-E.U. Safe Harbor Framework), the Federal Communications Commission (which has partial jurisdiction over CRSs/GDSs when they act as electronic

communication service providers), and the Federal Trade Commission (which has jurisdiction over most other travel companies including airline IT vendors and data brokers).[2]

Before considering regulatory, statutory, or treaty changes such as would be required for approval of any "personalized pricing" scheme, DOT should conduct an interdepartmental review and issue issue guidance, in coordination with the FTC and other agencies, clarifying the boundaries of each agency's jurisdiction, the applicable laws and regulations, and the available complaint and enforcement mechanisms, for the various industry sectors involved in the collection, storage, and use of personal information related to air travel and travellers.

Based on that review, DOT and the other agencies with jurisdiction over the protection of personal information related to travellers should consider what new legislation may be needed to close jurisdictional gaps and/or extend adequate personal data protection to air travellers.

Only after such a review of the privacy polices and the legal framework for enforcement of privacy protection for travel data would it be appropriate to consider a proposal with such sweeping implications for air travellers' privacy as IATA's Resolution 787.

Respectfully submitted,

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2 See Edward Hasbrouck, the Consumer Travel Alliance, Consumer Federation of America, and Center for Financial Privacy and Human Rights, "Comments to the Federal Trade Commission Privacy Roundtables – Project No. P095416" (November 6, 2009), available at <www.ftc.gov/os/comments/privacyroundtable/544506-00025.pdf> and <http://hasbrouck.org/articles/Hasbrouck_et_al-FTC-6NOV2009.pdf>.