May 11, 2004

Ms. Deborah L. McCoy
Sr. Vice President, Flight Operations
Continental Airlines, Inc.
1600 Smith Street HQSFI
Houston, TX 77002

Dear Ms. McCoy:

The Administrator has asked me to respond to your letter of January 22, 2004, requesting that the Federal Aviation Administration rescind certain letters of interpretation that were issued without industry coordination. Your letter suggests that the FAA improperly issued legal interpretations of its regulations under Title 14 of the Code of Federal Regulations (14 CFR) Part 121 Flight and Duty Time Limitations and Rest Requirements, without engaging in rulemaking under the Administrative Procedure Act ("APA"). Continental specifically cites two interpretations from this office, a November 7, 2003, letter signed by the Assistant Chief Counsel for Regulations and a November 20, 2000, letter signed by the Deputy Chief Counsel (commonly referred to as the "Whitlow Letter") as examples, in your opinion, of the FAA circumventing the rulemaking process. You also ask that the agency reinstate procedures announced in 1980 for receiving public comment on such interpretive questions.

As explained below, we are not rescinding the Whitlow Letter, which remains an important part of our regulatory regime designed to ensure safety in flight and represents at this point settled agency interpretation. We have decided, however, after receiving comment from industry and labor organizations, to clarify the November 7, 2003, letter, which we believe has been misconstrued. Finally, we believe that your request to reinstitute the 1980 procedures has considerable merit, and we plan to follow those procedures henceforth.

A. Administrative Procedure Act

Section 553 of the APA exempts "interpretative rules" and `"general statements of policy" from notice and comment procedures. 5 U.S.C. § 553(b)(3)(A). Although the distinction between a substantive rule and an interpretative rule is not always bright line, it is well established that APA's exemption applies to (1) an

interpretation that "spells out a duty fairly encompassed within the regulation that the interpretation purports to construe" and (2) an interpretation that further clarifies previous interpretations but does not significantly revise those interpretations. *Air Transport Ass 'n of America, Inc. v. Federal Aviation Administration,* 291 F.3d 49, 56 (D.C. Cir. 2002). In my judgment, both the Whitlow Letter and the November 7, 2003, letter are consistent with applicable legal authority, and meet the APA's criteria under §553(b)(3)(A) as interpretative rules specifically exempt from notice and comment rulemaking.

B. Whitlow Letter

As you are aware, the Air Transport Association of America, Inc. ("ATA") and the Regional Airline Association ("RAA") petitioned the United States Court of Appeals for the District of Columbia Circuit for judicial review of the Whitlow Letter in 2001.[1] ATA (on behalf of its member carriers including Continental) and RAA argued that the FAA was required to comply with notice and comment procedures under the APA in issuing the Whitlow Letter. ATA and RAA alleged that the interpretation was a substantive rule and represented a departure from prior FAA interpretation. The Court did not agree.

One item at issue was FAA's interpretation of the phrase "scheduled completion of any flight segment," as used under § 121.471(b). The Court held that the FAA's interpretation of the phrase, requiring airlines to schedule *and actually give* certain minimum hours of rest time for crewmembers during the 24 consecutive hours preceding the "scheduled completion of any flight segment" so as to include re-scheduled flight time based on actual flight conditions, was fairly encompassed within the language of the regulation, and thus was not a "substantive rule" that required promulgation in accordance with notice and comment requirements of the APA. *Air Transport Ass 'n,* 291 F.3d at 55 and 56. Further, the Court held that in requiring carriers to recalculate previously computed rest periods based on the actual flight schedules, i.e., actual expected arrival time that meets "look back" rest requirements, the FAA was

not departing from any definitive prior FAA interpretation, such that the Whitlow Letter should have been promulgated in accordance with notice and comment requirements of the APA. *Id.* at 56.[2]

Continental has provided no data to substantiate a claim that the Whitlow Letter creates a "new regulatory and cost burden" on the industry, and we see no reason for the FAA to rescind the letter as you requested. In fact, were we to rescind the letter, we would be departing from what is now an established agency position. Under applicable law, if we were to grant your petition, the FAA would have to engage in notice and comment rulemaking. *Air Transport Ass 'n,* 291 F.3d at 56; *see also Paralyzed Veterans of America v. D.C. Arena L.P.,* 117 F.3d 579, 586 (D.C. Cir 1197), *cert denied,* 523 U.S. 1003 (1998) (agency violates the APA if it makes a "fundamental change in its interpretation of a substantive regulation without notice and comment").

C. November 7, 2003 Letter

The November 7, 2003, letter was not intended to, and does not establish, a new policy or a new rule by the FAA with respect to the rest requirements under Part 121. Because our issuance of that interpretation has created confusion within the aviation community, we are today clarifying the interpretation. A letter of clarification was issued today to ALPA and is attached. I do not agree that the November 7, 2003, letter was subject to APA notice and comment requirements. But, after reading the attached, if you have further concerns about the November 7, 2003, letter, please contact me.

Air Transport Ass 'n of America, Inc. v. Federal,Aviation Administration, 291 F.3d 49 (D.C. Cir. 2002).

[2] It is beyond the scope of this letter to reiterate all the arguments advanced by each party in the Whitlow Letter debate. In addition to the ATA decision, please see the Petition for Reconsideration of the July 18, 1985 Final Rule, Flight Time Limitations and Rest Requirements, submitted to the Administrator by the Air Transport Association of America (Aug. 16, 1985); and Letter from David G. Leitch, Chief Counsel, FAA. to Michael S. Sundermeyer, Williams & Connolly LLP (July 10, 2001). Mr. Leitch's letter pointed out that the so-called Whitlow Letter was "... consistent with how ATA itself interpreted the rule in 1985." Leitch Letter at page 3 (copy attached).

D. Flight and Duty Time Regulations, Interpretation Procedures

Continental also proposes that the FAA reinstate the Flight and Duty Time Regulations, Interpretation Procedures, first described and announced on May 8, 1980. *See 45 Fed. Reg.* 30424. You ask that those procedures be used for all requests for interpretation of flight, duty and rest regulations. Under those procedures, when the FAA received certain requests for interpretation of the flight and duty time regulations, the FAA was to provide an opportunity to interested persons outside the FAA to present additional facts and to offer their expertise on flight, duty and rest issues.

Public coordination and review of issues under Flight and Duty Time Limitations rules could be beneficial to the FAA and industry alike. For example, several air carriers recently ceased applying the pilot flight, duty and rest rules to flight attendants (as they are permitted to do under FAA rules) and have announced that they have switched to using the flight attendant specific duty and rest rules (i.e., sections 121.467 and 135.273), and as a result, several questions and complaints have been filed with the FAA. In general, those questions and complaints relate to whether air carriers are acting in compliance with the flight attendant specific duty and rest rules. Although we have already received comments from one carrier that was the subject of some of the complaints, we have been considering whether it would be beneficial to seek comments from the entire industry on the issues, that is, from air carriers, pilot groups and flight attendant groups. We intend to follow the procedures announced in 1980, but note the following:

1. Because implementation of the procedures themselves could prove to be extremely time consuming and labor intensive, the FAA intends to observe them in cases presenting new issues, i.e., not for "repetitive type questions." *45 Fed Reg.* at 30425.

2. Even in situations not involving repetitive type questions, the agency specifically recognized that an interpretation could be issued immediately, without pre-issuance comments. *Id* In such a situation, post-issuance comments would be solicited.

3. Finally, again as noted in the 1980 document, the agency reserves the right to modify or discontinue the use of the procedures at any time at the election of the Office of the Chief Counsel. *Id.*

I trust that this responds to your questions and comments.

Sincerely,

Andrew B. Steinberg
Chief Counsel