U.S. Department
of Transportation
Federal Aviation
Administration

Office of the Chief Counsel

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Washington, D.C. 20591

APR - 7 2014

Robert P. Silverberg
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Dear Mr. Silverberg,

This is in response to your March 13, 2014, letter asking the FAA to reverse its interpretations finding that deicing procedures that take place after an aircraft moves under its own power constitute flight time. For the reasons discussed below, we decline to reverse our prior interpretations.

The FAA's regulations define "flight time" in pertinent part as "[p]ilot time that commences when an aircraft moves under its own power for the purpose of flight and ends when the aircraft comes to rest after landing."[1] The amount of flight time that a pilot in a part 121 operation can accumulate is limited by the flight, duty, and rest rules of 14 C.F.R. part 117 (for passenger operations) and Subparts Q, R, and S of part 121 (for all-cargo operations).

In a letter of interpretation issued to James W. Johnson in 2000, the FAA considered whether deicing procedures that take place after an aircraft moves under its own power constitute flight time.[2] In that letter, the FAA examined its prior interpretations and enforcement cases, and concluded that these deicing procedures do in fact constitute flight time. The *Johnson* interpretation stated that:

> In our opinion, the logic and principles of the enforcement cases and our prior interpretation support the conclusion that FAA required de-icing procedures are "preparatory to flight," and when the aircraft taxies under its own power from the gate to the de-icing pad, it is "for the purpose of flight." Thus, we further conclude that flight time starts at the moment when the aircraft taxies under its own power from the gate to the de-icing pad, and flight time continues until the moment the aircraft comes to rest at the next point of landing.[3]

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[1] 14 C.F.R. § 1.1.
[2] Letter to James W. Johnson from Donald Byrne, Assistant Chief Counsel (June 22, 2000).
[3] *Id.*

As your letter acknowledges, the FAA has repeatedly followed the *Johnson* interpretation's analysis of flight time in subsequent flight, duty, and rest interpretations.[4] However, your letter asks us to reverse these interpretations and find that deicing procedures do not constitute flight time.

Your letter presents two arguments in support of this request. First, it argues that the FAA's prior deicing interpretations did not consider the regulations in 14 C.F.R. § 121.629 that prohibit an aircraft in a supplemental operation from being released for flight in icing conditions unless and until it is first properly treated with deice and/or anti-ice agents. Your letter asserts that an aircraft cannot have an intent to move for the purpose of flight until a flight release is issued because a flight release is a condition precedent for commencing flight.

The *Johnson* interpretation considered the provisions of § 121.629 in reaching its legal conclusion that deicing is conducted for the purpose of flight. The *Johnson* interpretation specifically noted that "section 121.629(c) requires a certificate holder to have in place, in its operations specifications, an approved ground de-icing/anti-icing program that must be complied with before the dispatch, release and takeoff of an aircraft any time conditions are such that frost, ice, or snow may reasonably be expected to adhere to the aircraft."[5] In considering this issue, the *Johnson* interpretation determined that the pertinent enforcement caselaw held that an unairwothy aircraft could still be operated "incident to flight and an integral part of it" even though the aircraft was not airworthy and could not safely be flown in the air.[6] As a result of its examination of the pertinent caselaw, the *Johnson* interpretation did not find that an aircraft must be in an airworthy condition in order for flight time to commence. Because the *Johnson* interpretation considered § 121.629, we decline to use the regulatory provisions of § 121.629 as a basis for reversing the *Johnson* line of interpretations.

Your second argument is that the *Johnson* interpretation's reading of "flight time" is too broad and would result in all airport movements of an aircraft being considered flight time. This argument is incorrect, as there are airport movements of an aircraft that would not be conducted for the purpose of flight and would not be considered flight time. For example, in a recent flight, duty, and rest clarification, the FAA found that post-flight taxiing of an aircraft from the customs gate to a domestic gate would not constitute flight time, as that taxiing is not done for the purpose of flight.[7] Accordingly, we are

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[4] *See, e.g.,* Letter to Timothy Slater from Rebecca MacPherson, Assistant Chief Counsel (Sep. 12, 2012); Letter to Randall C. Kania from Rebecca MacPherson (Apr. 29, 2004).

[5] Letter to James W. Johnson.

[6] *Id.* (citing *Daily v. Bond*, 623 F.2d 624 (9th Cir. 1980)). Indeed, there would be no purpose *other than* flight for taxiing an aircraft to a deicing station since the purpose of deicing is to allow an aircraft to take off safely within a given "holdover time" based on the carrier's approved deicing program. Given the high cost of deicing operations, air carriers do not deice aircraft just to remove accumulations of ice and snow unless the aircraft is intended to depart.

[7] *Clarification of Flight, Duty, and Rest Requirements*, 78 FR 14166, 14171 (Mar. 5, 2013). We note that this clarification focused on 14 C.F.R. part 117, which regulates part 121 passenger operations. However, both part 117 and Subparts Q, R, and S of part 121 use the same definition of "flight time" found in 14 C.F.R. § 1.1. Accordingly, we would expect the legal analysis of "flight time" to be similar for both of these regulatory schemes.

unpersuaded by your arguments for reversing the *Johnson* line of interpretations, and we decline to reverse that precedent.

We appreciate your patience and trust that the above responds to your concerns. If you need further assistance, please contact my staff at (202) 267-3073. This response was prepared by Alex Zektser, Attorney, Regulations, Legislation, and International Law Division of the Office of the Chief Counsel, and coordinated with the Air Transportation Division of Flight Standards Service.

Sincerely,

Mark W. Bury
Assistant Chief Counsel for Regulations, Legislation, and International Law, AGC-200