

FEB 1 1979

Bert W. Rein, Esquire  
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Washington, D. C. 20006

Dear Mr. Rein:

Registration of Aircraft

This is in reply to your letter of January 26, supplemented by your letter of January 31, asking for our opinion on whether an aircraft can be registered in the name of National Airlines (National) under circumstances which, in pertinent part, we understand to be as follows:

The aircraft is purchased from a domestic manufacturer by Canadian Pacific Limited (CP), a Canadian corporation; CP assigns its purchase contract to Japanese interests (Mitsui) and takes back a lease with purchase option which (we assume for present purposes) constitutes a conditional sale to CP. CP assigns to National, not the contract of conditional sale but only some of its rights thereunder, namely, an "indefeasible right of user" (IRU) for about one year. In the terminology of your letter, such an IRU is "an ownership interest . . . greater than mere possession," but "equitable ownership" remains in CP, a "technical title interest" remains in CP, yet "equitable title" would be in National. National would receive a right to possession and use with safeguards against CP's exercising an arbitrary and capricious dominion over the aircraft. National's right is "to exercise its totally independent judgment with respect to all decisions involving the aircraft," yet "subject to terms protecting any reversionary interest in the grantor." With respect to lease and IRU, it appears from the FCC decision in Matter of American Telephone & Telegraph Co., 48 FCC 2d 965 (1974), which you cited, that "the major difference between the two forms of acquisition is the payment made"

for the property acquired (para. 43, p. 980), acquisition by IRU being "on an investment basis" (para. 41, p. 979). The IRU here involved would be for a fixed term, like a lease, at the end of which the interest would revert to CP and National would receive back its investment, less depreciation.

The question is whether National's rights under an IRU granted by CP amount to "ownership" for purposes of sec. 501 of the Federal Aviation Act. We must answer that question in the negative for the reasons that an IRU, even if granted by the title owner, does not create a beneficial ownership interest in the property that can be regarded as "ownership" under sec. 501, and that in this case the beneficial equitable interest of CP in the aircraft cannot be split between it and National.

For sec. 501 purposes there is only one "owner" (allowing, of course, for co-owners) of an aircraft, and only he is entitled to registration. Ownership under sec. 501, not defined in the Act, has always been construed as legal title to the aircraft, except that since O'Connor - Registration of Aircraft, 1 C.A.A. 5 (1939) the conditional vendee of an aircraft has been recognized as the "equitable or beneficial owner" thereof and entitled to registration instead of the holder of the legal title "for the purpose of security only." Otherwise, where legal title is split from the beneficial interest (guardians, executors, trustees), the holder of the legal title is entitled to registration.

The assignee of the vendee's full rights under a conditional sale agreement becomes himself the conditional vendee (whether or not the vendor releases the original vendee from liability) and thus is entitled to registration, (Federal Aviation Regulation Part 47, sec. 47.5(e)). CP appears to be such an owner and if National, a United States citizen, were the assignee of CP's conditional sale contract as a whole it would, by all appearances, be entitled to registration of the aircraft. But your proposal involves an assignment to National of only some of CP's rights under

the conditional sale agreement with Mitsui; CP's equitable interest, already a second tier under the legal title, is again to be split. I am of the opinion that under the Act the Federal Aviation Administration cannot register an aircraft in the name of one who neither has legal title nor all the rights of a conditional vendee.

We have no difficulty understanding that if the grantee of an IRU pays the "capital cost" of the property, which he gets back (less depreciation) upon termination of the IRU, the IRU is a temporary investment in the property and therefore, from an economic point of view, in some respects analogous to ownership. An undersea cable, even if it is regarded as personal property, is sui generis and you have not cited us to instances of recognition of IRUs in mobile personal property. In any event, we cannot hold that this ownership concept qualifies under sec. 501.

You refer to the analogy of life estates which are freeholds, yet subject to the rights of the remainderman. If the law of a State recognizes life estates in an aircraft, we might have to register it in the name of the life tenant as "owner," but the closest analogy in traditional real property law to an IRU seems an estate for years, always called a leasehold and never deemed a freehold. Similarly, sec. 503 of the Federal Aviation Act treats leases as affecting an interest in an aircraft, not as conferring title or ownership on the lessee.

Our conclusion thus is that we cannot register the aircraft in the name of National under the legal set-up proposed by you. But nothing we have said implies that we find the transaction as such inconsistent with the public interest, and we are ready to consider other proposals that might conform to the present law on registration of aircraft.

Sincerely,

Clark H. Onstad

Clark H. Onstad  
Chief Counsel

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January 31, 1979

John T. Stewart, Jr.  
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Federal Aviation Administration  
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Dear Mr. Stewart:

We appreciate your prompt and careful attention to our letter request, dated January 26, 1979, on behalf of National Airlines to Mr. Onstad for an opinion that an Indefeasible Right of User (IRU) in an aircraft is an ownership interest registrable under the Federal Aviation Act.

As stated in our earlier letter, a favorable opinion on this matter is critical to National to obtain the use of aircraft to meet pressing service requirements. Recently, National has made an extensive global search and has not found any alternative source for aircraft. The IRU from CP Limited, then, is a unique opportunity.

Before answering in detail the questions posed by Mr. Krassa to Mr. Bailey of our office, it is important to note that the word "'own' is a generic term, varying in its significance according to its use and designating a great variety of interests in property." 73 C.J.S. Property § 13(a)(17) (1951). Thus, the concept of ownership embodied in § 501 of the Federal Aviation Act is quite broad and general, and any doubt about the meaning of the concept should be resolved by generous and imaginative consideration of how the public interest goals of the Act may be accomplished. See id.; U.S. National Bank v. Lake Superior Terminal R.R., 170 Wis. 539, 174 N.W. 923.

As shown in our earlier letter, the public interest will clearly be served by registration of an IRU ownership interest. Any restrictive interpretation of the Act would merely have the effect of denying aircraft to American

carriers by creating an artificial barrier to the free market and, hence, inflating the price of the restricted number of aircraft which are available to U.S. carriers.

We hope the following answers to your questions will be helpful in further clarifying the IRU concept.

Q.1. If an infeasible right of user could be written into a lease, how does the IRU concept create "ownership?"

A.1 The concepts of lease and IRU are simply inconsistent, and it would not be possible to write an infeasible right of user into a lease. An infeasible right of user conveys an ownership interest. Thus any purported "lease" which contained an effective grant of IRU as proposed by National would transfer ownership and would not be a lease at all. It is true that under some statutory schemes even a lease conveys an "ownership" interest. See generally, 49 Am.Jur.2d Landlord and Tenant § 3 (1970) ("owner" as including tenant). Thus, for example, the FARs recognize that writing an option to purchase into a lease can create an ownership interest. However, a lease, by its essential nature, implies a term, rental payments, and a reversion to the owner. Id. § 1. The grant of an IRU, by contrast, is a sale at a certain price of an interest which does not necessarily imply a term and a reversion and, therefore, transfers a greater interest in the res, ab initio. When an IRU agreement contains provisions setting a term and return of the interest to the grantor, as National proposes, these are contractual provisions to convey the interest back, and do not arise out of the nature of the IRU itself. Hence, ownership lies with the holder of the IRU until the conveyance of the interest at the specified future date.

Q.2. How can the right of disposition be reconciled with the right of the remainderman?

A.2. The holder of the IRU who is under a contractual obligation to sell back his interest at a future date would be liable for damages if he made any disposition which would not permit him to perform his obligation to sell.

Under present FAA practice, any owner of a registered aircraft may contract to sell the aircraft at a future date and retain possession and use of the aircraft. It is undisputed that the aircraft would remain eligible for registration in the name of the seller until the sale is consummated, regardless of any ancillary provisions in the contract to sell designed to protect the buyer's future interest.

Q.3. Normally, co-owners are joint venturers sharing in the loss or gain of the property. How can these concepts be squared with the IRU concept?

A.3. The IRU interest is not ownership in common, whereby each co-owner has the right to partition the property and receive a share of the proceeds from a judicial sale. Instead, the holder of the IRU has rights which are infeasible by those with other interests in the property. In some IRU agreements, sharing of loss or gain in the property is expressly established by payments for the IRU based on cost or assessed value at the time of sale. In the transaction contemplated by National, where National will hold the IRU for only one year, it is expected that the anticipated risks of profit or loss will be considered by the parties, and will be fully reflected in the initial agreement providing for payment by National.

Q.4. Do we know of any decision squarely holding that an IRU is a capital asset?

A.4. The concept of the IRU as a capital asset has not been a controversial one in the telecommunications industry, and we are not aware of the issue ever having been litigated in court or before the FCC. Accordingly, we do not know of any formal decision on this point. The recognition of the IRU as a capital asset by the FCC is clearly implied in the CANTAT-II decision, 48 F.C.C.2d 965 (1974), referred to on page five of our January 26, 1979 letter. In paragraph 41, for example, the FCC speaks of "circuits acquired on an investment basis, such as by IRU." Moreover, the price for IRU's is routinely accounted for on a carrier's books as capital, subject to depreciation and allowed a return on investment. Maintenance charges on the equipment granted by IRU, which are usually included in IRU agreements, are expensed. See 48 F.C.C.2d ¶43.

Q.5. How can the U.S. recognize an equitable ownership by National in the aircraft if the Canadian government will not part with its recognition of equitable ownership by CP Limited?

A.5. We do not understand the Canadian government position to be that CP Limited must retain "ownership" within the meaning of § 501 of the Federal Aviation Act. Our understanding is that CP Limited would face undesirable Canadian tax consequences if it were to forgo Canadian use of the aircraft for longer than one year, or if it were to establish a subsidiary corporation domiciled in the U.S. to hold an interest in the aircraft. It is contemplated that the IRU agreement between National and CP Limited would grant National an ownership interest, and pro tanto, CP Limited would not have such an interest, but only its contractual right to purchase National's IRU interest at a future date.

Q.6. Suppose National were to purchase the aircraft subject to an executory interest to sell to CP Limited, and CP Limited protected its interest in the aircraft by recording its executory contract as an interest in the aircraft with the FAA. Compare this arrangement with the IRU proposal.

A.6. The hypothetical arrangement would not be possible as stated because technical legal title will be held by Mitsui, and CP's original "ownership" interest will be one of lease with purchase option from Mitsui. Within the framework of the agreement between CP Limited and Mitsui, however, the hypothetical arrangement is similar in some respects to the contemplated IRU arrangement. The recording of the IRU agreement would have the simultaneous effect of recording National's ownership interest and protecting CP Limited's future interest in the aircraft. The parties would consider implementing the IRU arrangement by means of two documents (a grant of the IRU by CP Limited to National, and a contract by National to convey the interest back to CP Limited) if this would be a preferable method to the FAA.

Q.7. How will National treat ownership under the IRU arrangement for tax purposes?

A.7. At present, National plans to treat the IRU as a capital asset for income tax purposes. Obviously, however, National would desire to take advantage of the most beneficial possible lawful treatment, and this may depend on business facts and circumstances, as well as IRS requirements, which have not yet been fully analyzed. National's ownership interest will require it to bear any taxes on the aircraft itself, which are levied on the owner.

Q.8. Is the IRU agreement consistent with the merger agreement with Pan American?

A.8. Yes. The merger agreement does not specifically contemplate an IRU type of arrangement, and does not expressly limit or prohibit it. Moreover, since the agreement allows National both to purchase aircraft up to \$50 million and to lease aircraft for up to a year, there can be no doubt that the acquisition of a one-year IRU which, with other purchases, is less than \$50 million, will present no difficulty under the merger agreement.

Q.9. Can the IRU be viewed as less than an "ownership" interest in property, i.e., is it an inchoate interest which could be traded?

A.9. The IRU is clearly an ownership interest because it is a right to possess, use, and enjoy and exercise dominion over property to the exclusion of all others. See 73 C.J.S. Property § 13 (1951). Specifically, "ownership" of a res is a right which organized society, through courts as its agents, will give one individual, to the exclusion of others, to take or keep possession of it. Brown v. State, 74 Ga. App. 880, 41 S.E.2d 912, 914. The IRU agreement will give such enforcement rights in the res to National. The IRU is not an inchoate interest because it is a present vested interest. See Wells v. Joseph, 95 So.2d 843 (La. App.).

Q.10. Please explain the quotation in FCC's TAT-4 decision which speaks of carriers obtaining cable facilities by "ownership, indefeasible rights of use, lease, or by other means." 37 F.C.C. at 1157.

A.10. In this context, the FCC is following its usual terminology, where the word "ownership" is used to refer specifically to common ownership with a right to partition and a vote on undersea cable management. The quotation does not imply that the IRU is not ownership in the general sense, and the IRU's obtained by carriers under this FCC decision are treated as capital assets by their holders. It is also important to note that the quotation distinguishes the IRU from a lease, which has the inherent incidents of reversion and rent, with the rent payments being treated by the FCC as current expenses.

Q.11. Does the remainderman in the case of mobile aircraft need greater protection than the holder of an undersea cable? Does this distinction destroy the usefulness of IRUs in aircraft?

A.11. Obviously, the holder of a future executory interest in any property will wish to bind the owner having possession and control to contractual terms to protect the property; reasonable terms will differ depending on the nature of the property. The holder of a future interest in an undersea cable may well require different, not necessarily "greater," protection of his interest. For example, undersea cables are subject to natural deterioration by their environment calling for continuous maintenance, and to surprisingly frequent damage caused by trawling activities on the continental shelf. Also, the cable circuits can be damaged by improper signalling. Thus, the holders of future interests in both undersea cable and aircraft could reasonably require the owner to provide maintenance, repair, insurance, and careful use to protect the property. It does not seem that the specific differences in how these protective measures will be implemented in any way destroys the IRU as a method of transferring ownership rights in an aircraft which should come within the meaning of § 501 of the Federal Aviation Act, any more than do the protective measures commonly included in lease-option agreements.

John T. Stewart, Jr.  
January 31, 1979  
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It would be true, however, that the ownership interest conveyed by an IRU is more substantial, because infeasible, than the interest granted by a mere lease. Consequently, we would not anticipate that IRUs would be granted to irresponsible parties, but that this type of arrangement would present an acceptable business risk only where the grantee of the IRU is a major U.S. air carrier or other very responsible party.

\* \* \*

We trust the above information will answer your questions about the IRU proposal, but if you have any additional questions, please feel free to call me or my partner, Michael Yourshaw.

Also, we are enclosing for your reference a copy of the FCC's TAT-6 decision, 35 F.C.C.2d 801 (1972), which is referred to in the CANTAT-II decision.

Very truly yours,

*Bert Rein*  
Bert W. Rein

Enclosure

cc: Clark H. Onstad, Esq.  
Dewey Roark, Esq.  
Gerald F. Krassa, Esq.  
(w/o enclosure)

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January 26, 1979

Clark H. Onstad, Esq.  
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800 Independence Avenue, S.W.  
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Dear Mr. Onstad:

This letter requests your opinion that the purchase by National Airlines of an Indefeasible Right of User (IRU), as described below, in a McDonnell Douglas DC-10 aircraft, will result in the aircraft being owned and eligible for registration by National within the meaning of Section 501(b) of the Federal Aviation Act of 1958 and Part 47 of the Federal Aviation Regulations (FARs). National's suggestion that an IRU be regarded by the FAA as an ownership interest derives from the use of this ownership concept for many years in the regulated telecommunications field. The FCC has consistently recognized that an IRU is ownership interest distinct from a lease, which includes property rights in addition to those comprehended by a lease.

## 1. National's Commercial Need for the Aircraft

As you know, public demand for airline service is growing at a rapid pace. To meet the needs of the flying public, National has plans for substantial increases in its routes and services. Particularly noteworthy are National's plans to implement service from Miami to Zurich and Tel Aviv, and from Miami to San Juan all within the next few months. National also plans to expand its transatlantic services this coming summer between its southern gateways and Frankfurt, London, Amsterdam, and Paris. It hopes to achieve these service improvements while maintaining its highly profitable, low-fare services in the Washington/New York/Amsterdam market. The immediate acquisition of additional aircraft capacity is thus critically important if National is to satisfy anticipated public demand for these services.

To meet these imminent service requirements, National is at present negotiating with Canadian Pacific Limited for rights for one year in each of two McDonnell DC-10 - Series 30 aircraft, which are now being manufactured for CP Limited. The first of these aircraft is expected to be delivered in March of 1979; the second, several months later. This letter specifically requests your opinion in order to complete arrangements for the first aircraft, but National anticipates that, if your opinion is favorable, it will rely on similar arrangements to acquire rights in the second aircraft.

National expects to use these aircraft chiefly, but not exclusively, on its international routes. As a practical matter, it would be extremely burdensome and economically inefficient to segregate these aircraft for international only, or domestic only, service.

National's ability to acquire rights to the first aircraft depends on National's having your assurance that it will be in a position to register the aircraft, and National may be unable to continue with negotiations for the aircraft if it does not have your opinion soon, and, if possible, by February 2.

## 2. Prior Arrangements Regarding the Aircraft

This section of our letter will briefly summarize the prior arrangements for ownership and financing of the aircraft, which will have been made before an interest is conveyed to National. National understands that these arrangements have largely been settled, subject only to possible minor variations prior to execution, and that the parties, for various reasons under the laws of their countries, are not in a position to restructure the basic arrangements in order to accommodate National.

Canadian Pacific Limited, a Canadian Corporation, entered a purchase agreement on November 12, 1977 with McDonnell Douglas Corporation for four DC-10 - Series 30 commercial aircraft.

CP Limited will assign its agreement with McDonnell Douglas for one of the aircraft to Mitsui & Co., Ltd., a Japanese corporation (and, possibly, additional Japanese corporations).

Mitsui will lease the aircraft back to CP Limited for ten years. Mitsui will retain technical legal title in Japan, but CP Limited will have equitable ownership and total operational control over the aircraft. The payments by CP Limited to Mitsui will represent substantially the value of the aircraft, plus interest. Mitsui will grant CP Limited the option to purchase the aircraft at the end of the ten-year period for one dollar.

CP Limited will have the right to assign its rights under the lease-option agreement, subject to Mitsui's consent. It is CP Limited's intention, for the most part, to assign its rights in the aircraft to its subsidiary, Canadian Pacific Airlines, Limited, a Canadian corporation; however, CP Air does not require the aircraft during the first year.

Upon consummation of these arrangements, and delivery of the aircraft, CP Limited plans to register the aircraft in Canada and have the aircraft flown from the McDonnell Douglas plant in the United States to Canada.

### 3. Proposed Agreement Between CP Limited and National

CP Limited, with the full consent of Mitsui, proposes to sell to National Airlines, a United States corporation, an Indefeasible Right of User (IRU) in the aircraft. The IRU will become effective on a specified date after the aircraft is in Canada, and will have a duration of approximately one year. Upon execution of the IRU agreement between CP Limited and National, the aircraft's Canadian registration will be cancelled, and the aircraft will be registered in the United States. Then a National crew will fly the aircraft to the United States. Upon termination of the IRU, the process will be reversed, with ownership and registration returning to Canada.

The IRU concept is novel, as far as we know, in aviation, but it is, as explained below, a long recognized form of ownership in the area of international communications. Essentially, CP Limited will grant National the "indefeasible right of user" in the aircraft by means of an agreement analogous to the agreement regarding an undersea cable between Canadian Overseas Telecommunications Corporation, American Telephone and Telegraph Company, and Eastern Telephone and Telegraph Company, dated April 1, 1974, which is attached

to this letter, and is representative of dozens of such IRU agreements routinely accepted by the FCC as establishing ownership rights.

An important additional feature of the contemplated IRU agreement between CP Limited and National, not found in those for undersea cables, is that National will have possession of the aircraft and the right to exercise its totally independent judgment with respect to all decisions involving the aircraft. Of course, the contemplated IRU agreement will also contain payment terms for both the IRU and maintenance (analogous to the undersea cable sample agreement), together with additional ancillary commercial terms not directly bearing on the ownership interest and provisions, e.g., for insurance and maintenance, to protect CP Limited's future interest in the aircraft after the IRU terminates.

4. The IRU Concept as Long Recognized by the FCC

An "indefeasible right of user" (IRU) property interest has, since at least 1953, been recognized by the Federal Communications Commission. This form of ownership was used to allocate rights in the first trans-Atlantic telephone cable and continues to be used for various communications facilities such as undersea cables and satellite earth stations. An examination of the full development of the concept under the precedents of the FCC will serve to illustrate the value of restructuring legal forms to allow for the adaptation of regulation to changed business and technological environments.

During the last two decades, the competing international telecommunications common carriers subject to FCC regulation have come to recognize the benefits of sharing high-capacity facilities. However, economic and political constraints generally do not favor outright multiple ownership by the different common carriers of international transmission facilities. First, the carriers generally are unwilling to hold non-capitalized leasehold interests in major transmission facilities; an economic premium is placed on capital expenditures, such as the IRU (vs. mere expense items) by the prevailing public utilities theory of rate base/rate of return regulation. Moreover, the carriers are generally unwilling to be mere leasees, or subleasees, of their chief business competitors. Finally, foreign governments, whose cooperation in the construction and

operation of international communications facilities is essential, typically refuse to deal with a multiplicity of owners in a facility in decided preference for contracting with a single American entity. Thus, the FCC has consistently recognized and approved the use of the concept of an IRU, which creates separate and distinct capital property rights in favor of the users of a common facility (rights of user), with the added assurance that the sole holder of the technical title interest in the facility is made incapable of exercising an arbitrary and capricious dominion over the whole of the property.

The FCC consistently approves agreements calling for the acquisition of IRUs as capital investments by American carriers, either from another American carrier or from a foreign entity. See generally In re American Telephone and Telegraph, 37 F.C.C. 1151 (1964). Further, the Communications Commission has indicated, on at least one occasion, that it prefers American carriers to acquire needed overseas transmission facilities on an IRU capital property basis rather than through the mechanism of a mere lease, because of the superior benefits accruing to the public from the creation of an IRU property right. See, e.g., In re American Telephone and Telegraph, 48 F.C.C.2d 965, 980-81 (1974).

##### 5. Legal Analysis of the IRU Concept

The property interest established by an IRU, although not widely used, is well recognized as an ownership interest rather than a mere lease interest. Indeed, the ownership interest conveyed by an IRU gives greater rights in a res than an owner in common would have. Specifically, the words "indefeasible right of user" are used in an agreement in explanation of the property interest of the holder in a res. The words are intended to describe an ownership interest in property which could not be defeated by the unilateral action of one party, but only by the action of all parties concerned. This ownership interest of the grantee is an interest in the property itself which, when coupled with the right to possession, permits the holder to exercise independent dominion and control over the property, subject to terms protecting any reversionary interest in the grantor. An indefeasible right of user is a right which, if one of the parties should refuse to recognize it, would be specifically enforced, at the suit of the party aggrieved, in an

appropriate proceeding in a court of appropriate jurisdiction, or breach of which would at the option of the aggrieved party entitle him to a judgment for damages in such a court. Indeed, an agreement with respect to a res that is specifically enforceable creates a right in rem.

In the context of National's proposed agreement with CP Limited, the grant of indefeasible right of user and of possession will transfer all of CP Limited's ownership rights in the aircraft to National for a one-year period. This transfer is intended by the parties to be a sale of Canadian Pacific's property interest in the aircraft during the term. Thus, National may exercise the independent dominion and control of an owner over the aircraft. In this respect, National's position would be similar to that of a buyer in possession under a contract of sale not yet executed, who holds equitable title although legal title remains in the vendor. Jennison v. Leonard, 88 U.S. 302, 22 L.Ed. 539; Stevahn v. Meidinger, 79 N.D. 323, 57 N.W.2d 1. Such a purchaser generally can exercise dominion over the property and would be liable for taxes and would bear the risk of loss. See, e.g., Miller v. Waddingham, 3 Cal. Unrep. 375, 25 P. 688 (use and enjoyment of the property); National Bank of Athens v. Danforth, 80 Ga. 55, 64, 7 S.E. 546, 551 (1887) (taxes); Appleton Electric Co. v. Rogers, 200 Wis. 331, 228 N.W. 505 (1930) (risk of loss). The purchaser in possession also normally bears the risk of deterioration or loss of value in the property. Brady v. Welsh, 200 Iowa 44, 204 N.W. 235.

The indefeasible right of user is to be distinguished from the ownership in common of an undivided share of the same subject matter. Ownership in common permits each common owner to possess the whole of the property subject to the ownership interest of the other common owner, Sayers v. Pyland, 139 Tex. 57, 161 S.W.2d 769, but the indefeasible right of user describes an ownership interest in the holder that excludes possession by other parties, including the grantor, pursuant to the terms of the agreement creating the IRU. Moreover, one of two common owners normally has the right, through appropriate legal proceedings, to seek a "partition," that is, a division of the property in question or, where physical division is not feasible, a sale of such property and a division of the proceeds of sale. See, e.g.,

Strait v. Fuller, 184 Kan. 120, 334 P.2d 385; Hotchkin v. Hotchkin, 105 N.J. Super. 475, 253 A.2d 184. The early common law favored divisions in kind where practicable, but the preference now is for judicial sale and division of the proceeds.

An indefeasible right of user is also an ownership interest in the subject property different from a leasehold interest. In a lease transaction, the owner of the property retains legal title and a reversionary interest in the property, while the lessee receives the right to possession of the property, subject to the payment of rent. See W. J. Wetherill & Co. v. Scheffel, 144 Pa. Super. 165, 18 A.2d 680; 8 Am. Jur. 2d Bailments § 28 (1963); see also 1 American Law of Property §§ 3.1-3.12, 3.64 (A. J. Casner ed. 1952). An indefeasible right of user is intended to describe the transfer of an ownership interest in the property greater than mere possession, and not subject to rules for lease transactions governing creation of a lease interest, the interest of the lessor, use of the property, and termination of the lease. The parties creating an indefeasible right of user intend to transfer equitable title to the holder of the right. A distinction between a sale or lease of an interest in property has been recognized for tax purposes. Cf. Benton v. Commission, 197 F.2d 745 (5th Cir. 1952) (emphasizing intent of parties); Watson v. Commissioner, 62 F.2d 35 (9th Cir. 1932).

The mere fact that an indefeasible right of user interest may be limited in time does not defeat its status as an ownership interest in property, nor convert it into a leasehold interest. For example, the common law life estate is a freehold estate whose owner holds seisin during his lifetime. Although the rights of the life tenant are subject to those of the remaindermen who would take after his death, during his lifetime the life tenant possesses substantially the same rights as an owner in fee. See 1 American Law of Property §2.16 (A. J. Casner ed. 1952).

6. National Will Have an "Ownership" Interest Under the Federal Aviation Act and FARs

Registration of the aircraft by National based on an IRU interest as proposed, will be in full compliance with the Federal Aviation Act and the relevant FARs, including those

revisions of FAR § 47.5 presently proposed for future effectiveness. 1/

First, under the broad language of § 501(b) of the Act, an aircraft is eligible for registration if it is "owned" by a United States citizen. The IRU interest to be conveyed is an ownership interest in every sense and, accordingly, is registrable under the Act by National, which is a U.S. citizen. 2/ This comports with the underlying policy of the Act and of the Chicago Convention against dual registration. The interest conveyed by CP Limited, with Mitsui's full consent, will clearly deprive both of these parties of an ownership interest which, for the duration of the IRU, could not be registered in either Canada or Japan.

The enumeration in FAR § 47.5 of types of interests which are included within the meaning of "owner" cannot be read to be an inclusive listing of all of the registrable ownership interests cognizable under Section 501(b) of the Act, so as to exclude the consideration of the instant proposal. For example, the listing of acceptable definitions of "owner" in the present and proposed rule § 47.5 does not include the most obvious case of "ownership": an outright and unencumbered legal title in a United States citizen. Accordingly, you should consider National's proposal without necessarily attempting to fit it within the bare language of the extant or proposed FAR; instead, the contours of the Act and the realities of current administrative policy should be the principal criteria of the lawfulness of the proposal under the statute.

Analysis of FAR § 47.5 shows that the interest National will have under an IRU is properly an ownership interest within the general framework of that regulation. It must be conceded that under the lease-option agreement between CP Limited and Mitsui, CP Limited is the owner of the aircraft under Section 501(b) of the Act, as interpreted by present FAR § 47.5(c), which specifies that "'owner' includes . . . a lessee of an aircraft under a contract of conditional

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1/ See Notice of Proposed Rulemaking (NPRM), Eligibility for Aircraft Registration, Docket No. 18604, 44 Fed.Reg. 63 (January 2, 1979).

2/ Similarly, FAR § 47.3(b) repeats this broad eligibility language, and in no way limits the eligibility of an IRU interest for registration.

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sale." Thus, but for the incidental fact of CP Limited's Canadian citizenship, it holds what is in every sense a registrable ownership interest. CP Limited's interest also fully comes under the substantially clarified definition of "owner" in the proposed FAR § 47.5(b)(2): 3/

"47.5 Applicants.

- (a) A person that wishes to register an aircraft in the United States must submit an application for Aircraft Registration under this part.
- (b) An aircraft may be registered only by and in the legal name of its owner. In this part, 'owner' includes

\* \* \*

(2) A bailee or lessee under a contract for the bailment or leasing of an aircraft by which it is agreed that

(i) The bailee or lessee will pay as compensation a sum substantially equivalent to the value of the aircraft . . . , and,

(ii) The bailee or lessee is bound to become, or has the option of becoming, the owner of the aircraft upon full compliance with the terms of the contract; and

(3) The assignee of a person described in paragraphs (b)(1) and (b)(2) of this section."

44 Fed.Reg. at 66 (emphasis added).

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3/ The NPRM notes that the revision of the definition of "owner" in the proposed rule change "is not intended as a substantive change, but rather as a clarification of current at 66.

Because CP Limited will be the "owner" of the aircraft under the Act, as interpreted, it is clear that the rules contemplate that it may transfer its interest to a party otherwise entitled to full rights of registration. See § 47.5(c) of the present rules and § 47.5(b)(3) of the proposed clarification of the present rules referring to "assignees" of owners. Thus, when National acquires possession, control, and an IRU property interest in the aircraft from CP Limited, and with Mitsui's consent, it will take for the specified term, as by assignment, the property interests presently held in the aircraft by the party deemed to be its "owner." National will have this ownership interest for the duration of the IRU. Accordingly, because National is a United States citizen, the IRU agreement will vest in National the full registration rights of an "owner" under the Act.

#### 7. Public Interest Considerations

Although the question of whether the proposed IRU agreement will give National a registrable ownership interest under the Act appears to be one of legal analysis, National recognizes that your interpretation of the rather broad language of the Act must necessarily be influenced by public interest considerations.

Of primary concern, the contemplated possession, control and use of the aircraft by National clearly places the real locus of the aircraft in the United States and U.S. registration by National as owner would more appropriately reflect these realities than would an alternative, and clearly permissible, trust arrangement involving foreign parties. 4/ Responsibility for compliance with all airworthiness and safety requirements, as well as complete authority to comply, would be in the hands of a responsible, experienced U.S. air carrier. Moreover, the aircraft will be a new one of American manufacture.

The IRU granted to National, with Mitsui's consent, will be, as the term specifies, indefeasible, and the agreements among the parties will clearly reflect that National cannot be deprived of its property interest and right to U.S. registration by separate or concerted acts by CP Limited and/or

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4/ Such a trust arrangement would not be feasible under the circumstances of this case, however.

Clark H. Onstad  
January 26, 1979  
Page Eleven

KIRKLAND & ELLIS

Mitsui. Conflicting ownership claims, and the possibility of dual registration, simply will not exist under the IRU agreement.

Because the proposed agreement is for IRU ownership by a United States citizen, your favorable opinion will not create the possibility that U.S. registration will become a "flag of convenience." Indeed, the citizenship, domicile, and use safeguards in the Act, as recently amended, are abundantly adequate to prevent such an abuse.

Moreover, the rights in the aircraft conveyed by an IRU agreement are much greater than those held by a mere lessee, and do not give the grantor of an IRU the same degree of continuing supervision and control that a lessor typically retains. Consequently, as a practical matter, it may be assumed that IRU's will only be granted to very responsible parties, obviating any concern that marginal users of aircraft will obtain IRUs and register aircraft in their own name rather than operate under leases where the aircraft is registered to the lessor.

Finally, an important component of the public interest must be the "promotion, encouragement, and development of civil aeronautics." See § 103(b) of the Federal Aviation Act. The recognition of the IRU as an ownership interest will permit National to acquire needed aircraft capacity to serve the public in a situation where there appears to be no other reasonably feasible alternative. A narrow and restrictive interpretation of the Act, under these circumstances, would not be responsive to the needs of the flying public and the American carriers who serve them.

\* \* \*

We sincerely appreciate your sympathetic consideration of this matter. If you or your staff have any questions, please do not hesitate to call me (857-5080) or my partner, Michael Yourshaw (857-5028).

Very truly yours,

*Bert Rein*

Bert W. Rein

Enclosure

cc: Dewey Roark, Esq.  
John T. Stewart, Esq.

KIRKLAND & ELLIS

ATTACHMENT

TO

LETTER TO CLARK H. ONSTAD

January 26, 1979

ILLUSTRATIVE AGREEMENT FOR UNDERSEA CABLE

Mary S. Lenard  
Attorney



AT&T Long Lines

32 Ave. of the Americas  
New York, N. Y. 10013  
Phone (212) 393-6015

August 15, 1974

RECEIVED BY FCC  
FACILITIES DIVISION  
AUG 16 1974

RECEIVED

AUG 26 1974

Mr. Vincent J. Mullins, Secretary  
Federal Communications Commission  
Washington, D. C. 20554

FACILITIES DIVISION  
COMMON CARRIER BUREAU

Re: P-C-8276, 8277

Dear Mr. Mullins:

In its letter to the Commission dated March 1, 1974 filed in compliance with the fifth ordering paragraph of the Commission's Memorandum Opinion, Order and Authorization adopted July 7, 1972, as amended, File No. P-C-8276, American Telephone and Telegraph Company (AT&T) stated that a copy of an agreement between AT&T and Canadian Overseas Telecommunication Corporation (COTC) relating to AT&T's acquisition, on an IRU basis, of 150 circuits in the CANTAT-II Cable and COTC's acquisition, on an IRU basis, of 150 circuits in the TAT-6 Cable would be filed with the Commission when negotiations between the parties were completed.

We send you herewith a copy of this agreement which has now been finalized.

Very truly yours,

*Mary S. Lenard*

Attachment

RECEIVED

CANTAT-2 and TAT-6  
CABLE CIRCUIT AGREEMENT

THIS AGREEMENT is made as of the 1st day of April one thousand nine hundred and seventy four between CANADIAN OVERSEAS TELECOMMUNICATION CORPORATION, a corporation organized and existing under the laws of Canada and having its principal place of business in the City of Montreal (hereinafter called "COTC" which expression shall include its successors), AMERICAN TELEPHONE AND TELEGRAPH COMPANY, a corporation organized and existing under the laws of the State of New York and having its principal place of business in the City and State of New York (hereinafter called "AT&T" which expression shall include its successors), and EASTERN TELEPHONE AND TELEGRAPH COMPANY, a corporation organized and existing under the laws of Canada and having an office in the City of Halifax (hereinafter called "Eastern" which expression shall include its successors),

W I T N E S S E T H:

WHEREAS, pursuant to an agreement (hereinafter called the "CANTAT-2 Cable Agreement") made the 26th day of March 1971, the Post Office, a public authority established in the United Kingdom of Great Britain and Northern Ireland pursuant to the Post Office Act 1969

(hereinafter called the "BPO"), of the one part, and COTC, of the other part (hereinafter collectively called "the owners"), are constructing a submarine cable system (hereinafter called the "CANTAT-2 Cable System") between the United Kingdom and Canada, consisting of the segments shown in Schedule A attached hereto and forming part hereof, and

WHEREAS the CANTAT-2 Cable System is designed to have a capacity of one thousand eight hundred and forty (1,840) voice-grade circuits, each having a nominal bandwidth of three kilohertz (kHz), and

WHEREAS COTC and the BPO have agreed to sell the indefeasible right of user in certain circuits in the CANTAT-2 Cable System to administrations and authorized private operating agencies wishing to establish communications via Canada with the United Kingdom or points beyond the United Kingdom, and

WHEREAS, pursuant to an agreement dated May 2, 1973, entitled "TAT-6 (SG) Cable Construction and Maintenance Agreement," AT&T and other United States international communications carriers, together with several European communication companies and administrations, are constructing a submarine cable system, consisting of the segments shown in Schedule B attached hereto and forming part hereof, between Green Hill, Rhode Island in the

United States of America and St. Hilaire de Riez in France (hereinafter called the "TAT-6 Cable System"), which will be capable of providing four thousand (4,000) voice-grade circuits, each having a nominal bandwidth of three (3) kilohertz, and

WHEREAS, in order to diversify routing and better protect their joint services, AT&T and the BPO have agreed to use, for a limited period, one hundred and fifty (150) circuits in the CANTAT-2 Cable System and COTC and the BPO have agreed to use one hundred and fifty (150) circuits in the TAT-6 Cable System for a limited period for their joint services, and

WHEREAS, in order to effectuate this arrangement, COTC has agreed to grant to AT&T and Eastern the indefeasible right of user of one hundred and fifty (150) whole voice-grade circuits in the portion of the CANTAT-2 Cable System owned by COTC (i.e., that portion of the cable system from the midpoint of Segment B thereof to and including Segment A, as defined in Schedule A), for a limited period commencing at the time said system becomes operational, and AT&T has agreed to grant to COTC the indefeasible right of user of a half interest in one hundred and fifty (150) equivalent voice-grade circuits in the TAT-6 Cable System (as defined in Schedule B attached hereto) assigned to AT&T, for a limited period commencing at the time said system becomes operational, and

WHEREAS it is now desired to define the terms on which the indefeasible right of user of circuits in COTC's portion of the CANTAT-2 Cable System will be granted to AT&T and Eastern and the indefeasible right of user of circuits in the TAT-6 Cable System will be granted to COTC,

NOW, THEREFORE, the parties hereto, in consideration of the mutual covenants herein expressed, covenant and agree with each other as follows:

1. Subject to the terms and conditions of this Agreement, COTC grants to AT&T and Eastern the indefeasible right of user in 150 whole voice-grade circuits in the portion of the CANTAT-2 Cable System owned by COTC, as follows:

(a) To Eastern, 150 circuits in that portion of the System from the limit of the territorial waters of Canada to and including Segment A;

(b) To AT&T, 150 circuits in that portion of the System from the midpoint of Segment B to the limit of the territorial waters of Canada.

Said circuits will be used by AT&T and the BPO, in conjunction with the portion of such circuits in the part of the CANTAT-2 Cable System owned by the BPO (i.e., from

provide through circuits between Canada and the United Kingdom for their joint communications services between points in or reached via the United States and points in or reached via the United Kingdom. Said circuits shall not be used for services originating or terminating in Canada.

2. Subject to the terms and conditions of this Agreement, AT&T grants to COTC the indefeasible right of user in one hundred and fifty (150) equivalent voice-grade half circuits in the TAT-6 Cable System as described in Schedule B hereof. The circuits will be used by COTC in furnishing jointly with the BPO, or with telecommunications entities on the European continent or beyond which may acquire the BPO's half interest in some of the circuits, communications services between points in or reached via Canada and points in or reached via the United Kingdom or countries in Europe or beyond.

3. (a) The indefeasible right of user of the circuits in the CANTAT-2 and TAT-6 Cable Systems granted pursuant to this Agreement shall be effective with respect to the circuits in each system on the date the particular cable system becomes operational and, unless otherwise agreed by the parties, shall continue in effect until the cognizant United States governmental authority's decision on an application for a trans-atlantic submarine facility between the United

States subsequent to the TAT-6 Cable System is issued or the end of 1980, whichever first occurs. Upon termination of the indefeasible right of user of any of the circuits in the CANTAT-2 Cable System granted to AT&T and Eastern by COTC hereunder or of any of the circuits in the TAT-6 Cable System granted to COTC by AT&T hereunder, the circuits involved will revert to COTC or AT&T, respectively, and all rights and obligations of the relinquishing party or parties hereunder with respect to the circuits shall terminate as of that time, except for any costs incurred prior to the termination of the indefeasible right of user of the circuits for which the relinquishing party or parties are liable but have not paid. Upon such termination, the party recovering any such circuit shall pay to the party or parties relinquishing it an amount equal to the portion of the capital cost of the appropriate cable system allocable to the circuit involved, less depreciation computed, unless otherwise agreed by the parties, at the rate of 4.2% per annum to the time of such termination. For the purpose of this Agreement, a cable system shall be deemed operational when it is ready and available for commercial use as a system.

(b) In the event that the total number of equivalent voice-grade circuits each cable system is

capable of providing upon its completion is less than assumed hereinafter, or in the event that the total number of equivalent voice-grade circuits either cable system is capable of providing is reduced during the term of this Agreement as a result of physical deterioration, or for other reasons beyond the control of the parties to the construction agreement covering the particular system, the number of voice-grade whole circuits in CANTAT-2 to which AT&T and Eastern are entitled hereunder, and the number of voice-grade half circuits in TAT-6 to which COTC is entitled hereunder, shall be reduced in the same proportion as the total capacity of the cable system involved is reduced, except that such reduction shall not extend to fractions of whole circuits in the case of CANTAT-2 and to fractions of half circuits in the case of TAT-6. For the purpose of this clause, the total capacity of the cable systems is assumed to be 1,840-3 kHz whole circuits, in the case of CANTAT-2, and 4,000-3 kHz whole circuits, in the case of TAT-6.

(c) If, subsequent to the time either cable system becomes operational, the number of equivalent voice-grade circuits in CANTAT-2 is increased by the parties to the construction agreement covering that system to more than 1,840-3 kHz whole circuits, or the number of equivalent voice-grade half circuits in TAT-6 is

increased by the parties to the construction agreement covering that system to more than 8000-3 kHz half circuits, AT&T and Eastern, on the one hand, and COTC, on the other hand, shall have the option, upon payment of their proportionate shares of any additional cost involved, of having the number of circuits or half circuits in the respective cable systems made available to them hereunder increased in the same proportion as the capacity of the system involved is increased, except that such option shall not extend to fractions of whole circuits in the case of CANTAT-2 or fractions of half circuits in the case of TAT-6. Such option in each case shall be exercised in writing within three (3) months after receipt by the optionee of written notice from the optionor of a proposed increase in the capacity of the cable system involved.

(d) In the event of a change in the ratio of the number of whole circuits in CANTAT-2 to be acquired by AT&T and Eastern to the total number of circuits in that cable system, or in the ratio of the number of equivalent half circuits in TAT-6 to be acquired by COTC to the total number of half circuits in that cable system, indicated in subparagraphs 4(a) and (b) and subparagraphs 5(a) and (b), respectively, due to the application of the exceptions with respect to fractional circuits provided for in

subparagraphs 3(b) and (c) or the election of a party not to exercise all or part of the option provided for in subparagraph 3(c), appropriate adjustments will be made in AT&T's and Eastern's share of the costs of CANTAT-2 provided for in subparagraphs 4(a) and (b) and in COTC's share of the costs of TAT-6 provided for in subparagraphs 5(a) and (b), as the case may be.

(e) COTC agrees to participate in the reviews of the assignment of circuits in the TAT-6 Cable System provided for in subparagraph 12(k) of the TAT-6 (SG) Cable Construction and Maintenance Agreement to which AT&T is committed while this Agreement is in effect, with the same rights and obligations with respect thereto, and for no other purpose, that COTC would have if it were a party to said agreement. It is understood that any reassignment of circuits resulting from the reviews referred to in subparagraph 12(k) of the TAT-6 (SG) Cable Construction and Maintenance Agreement will affect only circuits not in use at the time such reviews and reassignments are made.

(f) Except as otherwise agreed by the parties hereto, AT&T and Eastern agree that all circuits taken into use by them in the CANTAT-2 Cable System shall be utilized in such a way that:

(i) The distribution of voice frequency (V.F.) circuits used for telegraph carriers does not exceed twenty-five percent (25%) of the total quantity, i.e., twenty (20) such circuits in any one supergroup, and the level of each telegraph carrier within such V.F. circuits does not exceed -24 DBMO.

(ii) The resulting average channel load does not exceed the limits outlined in the CCITT White Book Recommendation M.111 and that the use of such equipment does not cause any interruption of or interference to any other channel on the cable system and in its associated rearward microwave facilities.

(g) The communication capability of any circuits in CANTAT-2 made available to AT&T and Eastern hereunder may be increased by the use of equipment in conjunction with those circuits which will make more efficient use of the circuits, if AT&T and Eastern so determine; provided that the provisions of subparagraph 3(f) are complied with and that the use of such equipment does not cause any interruption of, or interference to, any other channel in the cable system and facilities associated therewith. In the event such equipment is used, the cost of providing, operating and maintaining that equipment shall be borne by AT&T and Eastern.

(h) The communication capability of any circuits in TAT-6 made available to COTC hereunder may be increased by the use of equipment in conjunction with those circuits which will make more efficient use of the circuits, if COTC so determines; provided that the provisions of subparagraph 3(f) are complied with and that the use of such equipment does not cause any interruption of, or interference to, any other channel in the cable system and facilities associated therewith. In the event such equipment is used, the cost of providing, operating and maintaining the equipment shall be borne by COTC.

(i) Unless otherwise agreed by AT&T and COTC, commencing at the time the TAT-6 Cable System becomes operational and thereafter during the time this Agreement is in effect, the number of CANTAT-2 circuits acquired and held by AT&T and Eastern pursuant hereto and the number of TAT-6 Cable System circuits acquired and held by COTC pursuant hereto shall be the same.

4. Subject to the provisions of paragraph 3 hereof, for the indefeasible right of user in the 150 voice-grade whole circuits granted to them in paragraph 1 hereof, AT&T and Eastern, as their interests may appear, shall pay to COTC:

(a) An amount equal to the portion of the capital cost of the CANTAT-2 Cable System (as hereinabove defined), allocable to such circuits on a pro rata basis. Such amount shall be determined by multiplying the total capital cost of Segment A and 50% of the capital cost of Segment B by  $\frac{150}{1840}$ , or such other fraction as may be applicable in accordance with paragraph 3 hereof. The costs shall include those costs specified in the definition of capital costs contained in paragraph ten (10) of the CANTAT-2 Cable Agreement, a copy of which paragraph is set forth in Schedule C attached hereto and forming a part hereof, and shall include the original cost of CANTAT-2 together with simple interest thereon at the rate of 8% per annum from the date of payments made by COTC during and in respect to the construction of the CANTAT-2 Cable System plus the capital costs of such additional property as may be incorporated therein during the term of this Agreement.

(b) An amount equal to the portion of the maintenance and operating costs of the CANTAT-2 Cable System (as hereinabove defined) incurred during the term of this Agreement, allocable to such

circuits on a pro rata basis. Such amount shall be determined by multiplying the cost of maintaining and operating Segment A and 50% of the cost of maintaining and operating Segment B by  $\frac{150}{1840}$ , or such other fraction as may be applicable in accordance with paragraph 3 hereof. The costs shall include those costs set forth in the definition of maintenance and operating costs contained in subparagraph 13(2) of the CANTAT-2 Cable Agreement, a copy of which subparagraph is set forth in Schedule C.

5. Subject to the provisions of paragraph 3, for the indefeasible right of user of the 150 half circuits in the TAT-6 Cable System granted to it in paragraph 2 hereof, COTC shall pay to AT&T:

(a) An amount equal to the portion of the capital cost of the TAT-6 Cable System (as herein defined) allocable to such circuits on a pro rata basis. Such amount shall be determined by multiplying the total capital cost of the TAT-6 Cable System (including Segments A, B and C) by  $\frac{150}{8000}$ , or such other fraction as may be applicable in accordance with paragraph 3 hereof. The costs shall be those costs included in the definition of

capital costs contained in paragraph 11 of the TAT-6 (SG) Cable Construction and Maintenance Agreement, a copy of which paragraph is set forth in Schedule D attached hereto and forming a part hereof, and shall include the original cost of TAT-6 plus the capital costs of such additional property as may be incorporated therein during the term of this Agreement, together with such interest charges thereon as applicable under paragraph 6 hereof.

(b) An amount equal to the portion of the maintenance and operating costs of the TAT-6 Cable System (as herein defined) incurred during the term of this Agreement, allocable to such circuits on a pro rata basis. Such amount shall be determined by multiplying the total cost of maintaining and operating the TAT-6 Cable System (including Segments A, B and C) by  $\frac{150}{8000}$ , or such other fraction as may be applicable in accordance with paragraph 3 hereof. The costs shall include those costs set forth in the definition of maintenance and operating costs contained in subparagraph 15(b) of the TAT-6 (SG) Construction and Maintenance Agreement, a copy of which subparagraph is set forth in Schedule D.

6. (a) Not later than ten (10) days after the execution of this Agreement by all the parties, COTC, on the one hand, will render to AT&T and Eastern, as their interests may appear, on the other hand, and AT&T will render to COTC, bills for the billed parties' or party's share of the capital costs of the CANTAT-2 and TAT-6 Cable Systems, respectively, incurred by the billing party prior thereto. Upon receipt of such bill from the other party, each party will compare the amount of the bill rendered to the other party and the amount of the bill received from the other party. Except as otherwise provided in subparagraph 6(c), the party owing a net balance of the amounts of said bills will pay such net balance to the creditor party not later than thirty (30) days after receipt of the other party's bill.

(b) After the initial billing, COTC will render to AT&T and Eastern, as their interests may appear, and AT&T will render to COTC monthly accounts of the billed parties' or party's share of the costs incurred by the billing party for the provision, construction, installation and laying of CANTAT-2 and TAT-6, respectively. Employing the netting procedure mentioned in subparagraph 6(a), except as otherwise provided in subparagraph 6(c), the party or parties owing a net balance to the creditor party will pay that balance by the end of the calendar month following the month in which the account was rendered.

(c) If the cable system in respect of which the creditor party is entitled to payment under subparagraphs 6(a) and 6(b) is not then operational, the party owing a net balance may defer payment until the operational date of such cable system, provided that simple interest will accrue and be payable on the net balance at the rate of 8% per annum from the date such net balance would have been payable, but for this subparagraph, to the date of payment.

(d) As COTC incurs costs in connection with the maintenance and operation of CANTAT-2, it will bill AT&T and Eastern, as their interests may appear, monthly for their shares of such costs incurred during the preceding month. Such bills shall be paid by AT&T and Eastern by not later than the end of the calendar month following the month in which the bill is rendered. When TAT-6 becomes operational, AT&T will bill COTC monthly for its share of such costs incurred during the preceding month. The parties will then net the monthly maintenance and operating bills, in accordance with the netting procedure provided for in subparagraph 6(a), and the party or parties owing the net balance will pay that balance by the end of the calendar month following the month in which the other party's bill was received.

(e) Accounts not paid when due shall accrue interest at the rate of 8% per annum from the date the account was due until the account is paid. Bills rendered pursuant to this paragraph 6 may be on the basis of actual costs will be appropriately adjusted in later billings

promptly after actual costs are determined. In computing net balances for purposes of this Agreement, the average official rate of exchange between the currencies of the United States and Canada for the month or other period covered by the bills shall be used, except that, for purposes of the initial net balance provided for in subparagraph 6(a), the official rate of exchange at the close of business on the last business day before the day on which payment is made shall be used.

7. COTC, on the one hand, and AT&T and Eastern, on the other hand, shall keep and maintain, for a period of not less than five years from the date the applicable bill is rendered, such books, records, vouchers and accounts of all their costs with respect to the provision, construction, operation and maintenance of the CANTAT-2 Cable System and the TAT-6 Cable System, respectively, as may be appropriate to support their bills to one another hereunder and shall make them available at all reasonable times for the inspection of the other party or parties.

8. None of the parties shall be liable to the other parties for any loss or damage sustained by reason of any failure in or breakdown of facilities associated with the CANTAT-2 Cable System or the TAT-6 Cable System, or for any interruption of service, whatsoever shall be the cause of such failure, breakdown or interruption, and however long it shall last.

9. (a) Payments due under this Agreement from one party to another party shall be made in the currency of the country of the payee.

(b) For all purposes of this Agreement, including the places where payments are to be made, the addresses of the parties shall be as follows; unless otherwise designated in writing by the respective parties:

Canadian Overseas Telecommunication Corporation  
625 Belmont Street  
Montreal 101, Canada H3B 2M2

American Telephone and Telegraph Company  
5 World Trade Center  
New York, New York 10048

Eastern Telephone and Telegraph Company  
c/o American Telephone and Telegraph Company  
5 World Trade Center  
New York, New York 10048

10. (a) During the term of this Agreement, COTC will furnish and maintain, or cause to be furnished and maintained, for Eastern for use by AT&T such circuit facilities in Canada as may be required to extend the CANTAT-2 Cable System circuits covered by this Agreement from the terminal of the cable system at Beaver Harbour, Nova Scotia to the United States/Canada border. Such circuit facilities shall be suitable for the intended use and shall be furnished and maintained on reasonable and nondiscriminatory terms and conditions which shall not be inconsistent with applicable governmental regulations in Canada. The charges for such facilities shall be billed to Eastern in accordance with such billing and payment procedures as COTC and Eastern may agree.

(b) During the term of this Agreement, AT&T will furnish and maintain, or cause to be furnished and maintained, for COTC such circuit facilities in the United States as may be required to extend the TAT-6 Cable System circuits covered by this Agreement from the terminal of the cable system at Green Hill, Rhode Island, to the United States/Canada border. Such circuit facilities shall be suitable for the intended use and shall be furnished and maintained on reasonable and non-discriminatory terms and conditions which shall not be inconsistent with applicable governmental regulations in the United States. The charges for such facilities shall be billed by AT&T to COTC in accordance with such billing and payment practices as AT&T and COTC may agree.

11. (a) The performance of this Agreement by the parties is contingent upon:

(i) The provision and continued operation of the CANTAT-2 and TAT-6 Cable Systems after they become operational.

(ii) The obtaining and continuance of such approvals, consents and governmental authorizations as may be required or deemed necessary for this Agreement by the parties and as may be satisfactory to them. The parties shall use their best efforts to obtain and continue such approvals, consents and governmental authorizations.

If one of these contingencies is absent and the performance of this Agreement is thereby frustrated for reasons other than the termination of the operational life of the cable system involved for technical reasons, the provisions of subparagraph 3(a) hereof shall apply as if the condition for termination therein set out applied.

(b) In the event the operational life of the CANTAT-2 Cable System is terminated for technical reasons while this Agreement is still in effect with respect to all or part of the 150 whole circuits in that system made available to AT&T and Eastern hereunder, this Agreement will terminate with respect to any such circuits as to which the Agreement is then still operative and COTC will refund to AT&T and Eastern, as their interests may appear, the proportionate part of the capital cost of the CANTAT-2 Cable System allocable to such circuits, less depreciation accrued to the date of such termination. In the event the operational life of the TAT-5 Cable System is terminated for technical reasons while this Agreement is still in effect with respect to all or part of the 150 equivalent half circuits in that system made available to COTC hereunder, this Agreement will terminate with respect to any such circuits as to which this Agreement is then still operative and AT&T will refund to COTC the proportionate part of the capital cost of the TAT-6 Cable System allocable to such circuits, less depreciation accrued to

12. The relationship between the parties hereto shall not be that of partners and nothing herein contained shall be deemed to constitute a partnership between them, and the common enterprise among the parties shall be limited to the express provisions of this Agreement.

13. (a) Subject to subparagraph 13(b) hereof, no party hereto shall without the consent of the others sell, assign, transfer or dispose of its rights or obligations under this Agreement, except to a legal successor or subsidiary of, or a corporation controlling or under the same control as, such party.

(b) AT&T and Eastern shall have the right to grant to the BPO the indefeasible right of user of a half interest in the 150 whole circuits in COTC's portion of the CANTAT-2 Cable System west of the midpoint of Segment B thereof granted to AT&T and Eastern hereunder, in order that AT&T and the BPO may jointly use said portion of the 150 circuits west of the midpoint of Segment B in conjunction with the matching portion of the 150 circuits east of the midpoint of Segment B for providing communication services between points in or reached via the United States and points in or reached via the United Kingdom.

14. This Agreement and any of the provisions thereof may be altered or added to by any other agreement in writing signed by a duly authorized person on behalf of each party.

15. This Agreement shall become effective on the day and year first above written and shall, unless otherwise agreed by the parties hereto, continue in effect until terminated in accordance with the relevant provisions of this Agreement.

16. If any difference shall arise between the parties respecting the interpretation or effect of this Agreement or any part or provision thereof or their rights and liabilities thereunder, and by reason thereof the question shall require to be decided by what municipal or national law this Agreement or such part or provision thereof is governed, the following facts shall be excluded from consideration, namely, that it is made in a particular country and that it may appear by reason of its form, style, language or otherwise to have been drawn preponderantly with reference to a particular system of municipal or national law; the intention of the parties being that the said facts shall be regarded by the parties and all courts and tribunals wherever situate as irrelevant to the question aforesaid and to the decision thereof.

17. This Agreement shall cancel and supersede the two letter agreements between AT&T and COTC, dated December 8, 1972, relating to the subject matter of this Agreement.

IN WITNESS WHEREOF the parties have severally subscribed these presents, or caused them to be subscribed in their names and behalf by their respective officers thereunto duly authorized.

CANADIAN OVERSEAS TELECOMMUNICATION CORPORATION

By *[Signature]*  
President and General Manager

*[Signature]*  
Secretary and General Counsel

*[Handwritten initials]*

AMERICAN TELEPHONE AND TELEGRAPH COMPANY

RECEIVED  
AT&T  
Legal Dept  
By *[Signature]*

By *[Signature]*  
Vice President  
Long Lines Department

EASTERN TELEPHONE AND TELEGRAPH COMPANY

By *[Signature]*  
President

Schedule A

Description of the CANTAT-2 Submarine Cable System

Paragraph 1. of the CANTAT-2 Cable Agreement dated March 26, 1971 describes the CANTAT-2 Cable System as follows:

"Segment A That part of CANTAT-2 Cable System in Canada between the beach joint at Beaver Harbour, Nova Scotia and the supergroup distribution frame in the cable terminal station at Beaver Harbour including:

(i) An appropriate share of the land, building and common services including but not limited to the transmission equipment power supply frequency generating equipment and test equipment (not wholly associated with the submerged system terminal equipment)

(ii) All transmission power feeding and special test equipment directly associated with the submerged plant as far as and including the supergroup distribution frame

(iii) The power equipment provided wholly for use with power feeding equipment associated with the submerged plant

(iv) The land cable route between the terminal station and the beach joint point including any special construction required for land based repeaters and/or equalizers

(v) The beach joint the transmission cable equipped with appropriate repeaters and sea earth land cables between the terminal and the beach joint point

(vi) The sea earth cable and electrode system or land earth system associated with the terminal power feeding equipment.

Segment B The submarine cable equipped with appropriate repeaters and equalizers and joint housings between the beach joint at the landing point in Canada and the beach joint at the landing point in the United Kingdom.

Schedule A (Cont'd)

Segment C That portion of CANTAT-2 Cable System in the United Kingdom between the beach joint at Widemouth, Cornwall and the supergroup distribution frame at the cable terminal station at Widemouth including:

(i) An appropriate share of the land, building and common services including but not limited to the transmission equipment power supply frequency generating equipment and test equipment (not wholly associated with the submerged system terminal equipment)

(ii) All transmission power feeding and special test equipment directly associated with the submerged plant as far as and including the supergroup distribution frame

(iii) The power equipment provided wholly for use with power feeding equipment associated with the submerged plant

(iv) The land cable route between the terminal station and the beach joint point including any special construction required for land based repeaters and/or equalizers

(v) The beach joint the transmission cable equipped with appropriate repeaters and sea earth land cables between the terminal and the beach joint point

(vi) The sea earth cable and electrode system or land earth system associated with the terminal power feeding equipment. . . ."

Schedule B

Description of TAT-6 (SG) Submarine Cable System

Paragraph 1(a) of the TAT-6 (SG) Submarine Cable Construction and Maintenance Agreement dated May 2, 1973 describes the Cable System as follows:

"SEGMENT ONE: Comprising the following sub-segments:

Sub-Segment 1A: Land and buildings appropriate for the cable landing and for the cable station equipment at Green Hill, Rhode Island, and station power equipment (other than station power equipment associated solely with the cable) at that location.

Sub-Segment 1B: Frequency generating and testing equipment (other than equipment provided for inland connections) at the cable station at Green Hill, Rhode Island, solely associated with the cable and not included in SEGMENT TWO.

SEGMENT TWO: The whole of the submarine cable system provided between and including supergroup distribution frames at Green Hill, Rhode Island and St. Hilaire de Riez, France, comprising the following sub-segments:

Sub-Segment 2A: The system terminal transmission, cable terminating, hypergroup and supergroup translating, power feeding and special test equipment and any special power equipment solely associated with the submerged plant as far as and including the supergroup distribution frame installed in the cable station at Green Hill; the land cable between the cable station at Green Hill and the beach joint, including the beach joint itself; any land based submersible repeaters which may be required; and the power feeding earth system.

Sub-Segment 2B: The submarine cable equipment with intermediate submerged repeaters and equalizers between the beach joints located at the landing points in the United States and France.

Sub-Segment 2C: The system terminal transmission, cable terminating, hypergroup and supergroup translating, power feeding and special test equipment and any special power equipment solely associated with the submerged plant as far as and including the supergroup distribution frame installed in the cable station at St. Hilaire de Riez; the land cable between the cable

Schedule B (Cont'd)

station at St. Hilaire de Riez and the beach joint, including the beach joint itself; any land based submersible repeaters which may be required; and the power feeding earth system.

SEGMENT THREE: Comprising the following sub-segments:

Sub-Segment 3A: Land and buildings appropriate for the cable landing and for the cable station equipment at St. Hilaire de Riez, France, and station power equipment (other than station power equipment associated solely with the cable) at that location.

Sub-Segment 3B: Frequency generating and testing equipment (other than equipment provided for inland connections) at the cable station at St. Hilaire de Riez, solely associated with the cable and not included in SEGMENT TWO."

Schedule C

Definition of Capital Cost of CANTAT-2 Cable System  
and of Maintenance and Operating Costs of  
Segments A and B of CANTAT-2

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Paragraph 10 of the CANTAT-2 Cable Agreement dated March 26, 1971 provides:

"10 FOR the purpose of Clauses 4 and 9(4) "Capital cost" means all expenditure incurred which the Parties agree to be fair and reasonable in amount and either to have been directly and reasonably incurred for the purpose of or to be properly chargeable in respect of the constructing laying and installing of the cable system including but not limited to amounts incurred for development engineering design material manufacturing procurement approval inspection and testing associated with laying or installation customs duties (or an allowance in lieu of) taxes (except tax imposed on the income or profits or capital gains of a party hereto) supervision overheads and insurance or a reasonable allowance in lieu of insurance if either party elects to carry a risk himself or itself being a risk which is similar to one against which the other party hereto has insured or against which insurance is usual or recognised or would have been reasonable but does not include any interest on such expenditure This clause does not preclude the parties from charging interest on costs incurred during constructing to purchasers of indefeasible rights of user in the cable system"

Paragraph 13(2) of the CANTAT-2 Cable Agreement dated March 26, 1971 provides:

"13(2) For the purpose of this Clause costs of maintenance include (but are not limited to) the cost of attendance testing adjustment repairs and replacements customs duties (or an allowance in lieu of) taxes (except income tax imposed upon the net income of a party hereto) paid in respect of the Segment concerned and cost and expenses reasonably incurred on account of claims made by or against other persons in respect of such Segment or any part thereof and damages or compensation payable by the party concerned on account of such claims Costs and expenses and damages or compensation payable to a party on account of such claims shall be shared by them in the same proportions Each party shall render to the other quarterly bills of the expenditures and bills when rendered"

Schedule D

Definition of Capital Cost and of Maintenance and Operating Costs of TAT-6 (SG) Submarine Cable System

Paragraph 11 of the TAT-6 (SG) Submarine Cable Construction Agreement dated May 2, 1973 provides:

"11. Costs, or capital cost, as used herein with reference to providing and constructing facilities for the TAT-6 Cable System, including land, access roads and buildings, or causing them to be provided and constructed, or to laying or causing to be laid cables, repeaters and equalizers, or to installing or causing to be installed cable station equipment, shall include all expenditures incurred which shall be agreed by the parties to be fair and reasonable in amount and either to have been directly and reasonably incurred for the purpose of, or to be properly chargeable in respect of, such provision, construction, installation and laying, including, but not limited to, the purchase price and purchase costs of land, building costs, amounts equal to sixty percent (60%) of the development costs incurred by AT&T, the Post Office and the French PTT relating to cable and repeaters, and fifty percent (50%) of the development costs incurred by said parties relating to terminal equipment for the SG type submarine cable system pursuant to the agreement referred to in paragraph 2 hereof, engineering, design, materials, manufacturing, procurement and inspection, installation, removing (with appropriate reduction for salvage), cable ship and other ship costs, testing associated with laying or installation, customs duties, taxes (except income tax imposed upon the net income of a party), appropriate interest attributable to other parties' shares of costs incurred by a party, supervision, overheads and insurance or a reasonable allowance in lieu of insurance if any party elects to carry a risk itself, being a risk which is similar to one against which another party has insured or against which insurance is usual or recognized or would have been reasonable."

Subparagraph 15(b) of the TAT-6 (SG) Submarine Cable Construction and Maintenance Agreement dated May 2, 1973 provides:

"(b) The maintenance and operating costs to which subparagraph 15(a) refers are the costs reasonably incurred in maintaining and operating the facilities involved, including, but not limited to, the cost of attendance, testing, adjustments, repairs and replacements (except income tax imposed upon the net income of a party) paid in respect of such facilities,

Schedule D (Cont'd)

and costs and expenses reasonably incurred on account of claims made by or against other persons in respect of such facilities or any part thereof; and damages or compensation payable by the parties concerned on account of such claims. Costs and expenses and damages or compensation payable to the parties on account of such claims shall be shared by them in the same proportions as they share the costs of maintaining and operating the segments of the TAT-6 Cable System under subparagraph 15(a)."

STUART M. WARREN  
General Attorney and  
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January 23, 1979

Federal Aviation Administration  
Office of the Chief Counsel  
Attention Rules Docket (AGC-24), Docket 18604  
800 Independence Avenue, S. W.  
Washington, DC 20591

Gentlemen:

The following comments are made with regard to Docket No. 18604 Notice No. 78-18 by The Flying Tiger Line Inc. ("FTL") a Delaware corporation providing all-cargo transportation services pursuant to certificates issued by the Civil Aeronautics Board.

From time to time, for sound business reasons FTL has found it advantageous to enter into a program whereby it leases aircraft to and from other air carriers on a seasonal basis so that both air carriers can better match equipment availability with seasonal demands. On these occasions, it would be helpful if FTL could lease aircraft from as well as to foreign air carriers.

Recent amendments of Section 501(b) of the Federal Aviation Act of 1958 would permit a foreign air carrier to organize a corporation under the laws of the United States or any state thereof and lease such aircraft to a U. S. air carrier such as FTL "so long as such aircraft is based and primarily used in the United States". The proposed Section 47.9(b) definition of "based and primarily used in the United States" does not adequately deal with the situation of U. S. air carriers who provide international service because each aircraft is normally operated by such operators over their entire domestic and international route system. In such a case the aircraft would indeed be based in the United States, in that the U. S. air carrier would maintain the aircraft in the United States and the aircraft would regularly return to and operate in the United States; however, the aircraft would also be used as part of the air carrier's international operations and probably would not operate 60% of its flight hours between points in the United States.