**UNITED STATES COURT OF APPEALS**
**DISTRICT OF COLUMBIA CIRCUIT**

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| INDEPENDENT PILOTS ASSOCIATION,<br><br>Petitioner,<br><br>v.<br><br>FEDERAL AVIATION ADMINISTRATION,<br><br>Respondent. | Case No. 11-1483 |

**MOTION OF CARGO AIRLINE ASSOCIATION**
**TO INTERVENE IN SUPPORT OF THE RESPONDENT**

Pursuant to Rule 15(d) of the Federal Rules of Appellate Procedure and Rule 15(b) of this Court, the Cargo Airline Association ("CAA" or the "Association") respectfully moves to intervene on behalf of Respondent in the above-captioned matter.

## I. Background And Interests Of Proposed Intervenor.

On December 21, 2011, the Federal Aviation Administration ("FAA") issued the rulemaking that is the subject of this proceeding. *See Flightcrew Member Duty and Rest Requirements*, 77 Fed. Reg. 330 (Jan. 4, 2012) (hereafter, "Rule" or "Duty and Rest Rule"). The Rule

amended the FAA's existing flight, duty and rest regulations applicable to certificate holders and their flightcrew members. *See id.* at 330. The Rule added a new Part 117 to the FAA's regulations that alters the limits for flight and duty time for many air carriers.

The Rule exempted all-cargo operations from the new duty and rest requirements, and continued such carriers under the existing Part 121 rules. *See id.* Among other things, the FAA explained that it "removed all-cargo operations from the applicability section of the new part 117 because their compliance costs significantly exceed the quantified societal benefits." *Id.* at 332; *see also id.* at 336 ("[T]he FAA has determined that this rule would create far smaller benefits for all-cargo operations than it does for passenger operations. Consequently, the FAA is unable to justify imposing the cost of this rule on all-cargo operations."). The FAA also noted that it had "in the past . . . excluded all-cargo operations from certain mandatory requirements due to the different cost-benefit comparison that applies to all-cargo operations," and that such "past precedent" further justified different treatment for all-cargo operations. *Id.* at 336.

On December 22, 2011 (one day after the Rule was issued), petitioner — a pilots' union with members who are employed by an all-cargo carrier — filed a petition for review with this Court. On the same day, the Court issued a Scheduling Order establishing the date for initial filings. Under the Court's Order, the parties are to submit certain initial filings by January 23, 2012.

Although petitioner did not file a Statement of Issues to be Raised along with the Petition, it issued a public release stating that petitioner, by its filing, "seeks to have cargo operations included in the scope" of the Rule. *Additional Points Relating to the IPA Court of Appeals Challenge to FAA Final Flight and Duty Time Rule*, *available at* http://www.ipapilot.org/petition_nprm/AdditionalPointsIPAFAA Challenge.pdf. The release suggests that petitioner intends to challenge the FAA's decision not to extend its new Part 117 regulations to all-cargo operations.

CAA is an association that is the nationwide voice for members of the all-cargo air carrier industry and those in the air cargo marketplace that depend on cargo services. CAA has a total of seven all-cargo air carrier members. CAA also has expanded associate membership to

include airports that generate a significant amount of air freight and other industry members with a stake in the air cargo marketplace.* CAA participated in the Rulemaking by filing extensive comments in response to the FAA's notice of the proposed rule.

Consistent with its comments before the FAA, CAA respectfully disagrees with petitioner. CAA has a strong interest in defending the rational, cost-benefit justified approach that the FAA adopted with regard to flightcrew member duty and rest requirements for the all-cargo industry.

## II. Reasons For Granting Intervention.

CAA should be permitted to intervene because (a) it has a significant, direct interest in the outcome of this case, where the FAA's new final rule excluded all-cargo carriers in favor of maintaining other, existing rules applicable to them; (b) CAA's interest will not be adequately represented by the existing parties, inasmuch as the FAA did not accept all of the comments submitted to it by CAA, and

* CAA's all-cargo air carrier members are: ABX Air, Inc., Atlas Air, Inc., FedEx Express, United Parcel Service, Capital Cargo International, DHL Express, and Kalitta Air. CAA also has the following airport associate members: Ft. Wayne International Airport, Louisville International Airport, and Memphis-Shelby County Airport Authority. And CAA has the following associate members: Bristol Associates, Inc., Campbell-Hill Aviation Group, and Keiser & Associates.

petitioner has publicly announced its challenge to an aspect of the Rule that directly concerns CAA's members; and (c) CAA's intervention motion is timely, such that granting intervention will not adversely affect any party or the prompt resolution of the case. In addition, CAA can provide this Court with information regarding the all-cargo airline industry that may assist the Court in understanding the issues in this litigation.

### A. CAA Has A Direct And Substantial Interest In the Outcome Of This Case.

CAA seeks to intervene because it has a direct and substantial legal interest in the case. Several factors demonstrate CAA's interest in this case. ***First***, Petitioner appears to intend to argue that the Rule should be vacated insofar as the FAA considered the unique characteristics of the all-cargo airline industry. Should Petitioner prevail in its suit, CAA and its members obviously would be "directly affected." *Yakima Valley Cablevision, Inc. v. FCC*, 794 F.2d 737, 744-45 (D.C. Cir. 1986). ***Second***, CAA "fully participated in the proceedings" at the agency level, further confirming that permitting intervention is appropriate. *Synovus Fin. Corp. v. Bd. of Governors*, 952 F.2d 426, 433 (D.C. Cir. 1991).

Here, during the notice-and-comment process, CAA and petitioner disagreed on the appropriate hour and duty time requirements for pilots within the cargo airline industry. *See Duty and Rest Rule*, 77 Fed. Reg. at 335-36. Petitioner — the party dissatisfied with the FAA's cost-benefit analysis and resolution of the policy issue — has now brought a challenge to the FAA's rule. It is proper to permit CAA's intervention to place the private adversaries on equal terms now that the dispute has been carried to the court of appeals.

Under comparable circumstances, this Court has often allowed industries — including industries represented by their trade associations — that benefit from or are protected by provisions in final rules to intervene to defend those rules against challenges by other parties. *See, e.g.*, *Military Toxics Project v. EPA*, 146 F.3d 948, 953-54 (D.C. Cir. 1998); *Consumer Union of U.S., Inc. v. FTC*, 801 F.2d 417, 419 (D.C. Cir. 1986).

In this regard, there is no requirement that a party seeking to intervene as a defendant demonstrate Article III standing. *See Roeder v. Islamic Republic of Iran*, 333 F.3d 228, 233 (D.C. Cir. 2003). Even if, however, this Court were to require a demonstration of standing, CAA

plainly meets the Article III standing requirements in this instance: (a) CAA's members would have standing in their own right, as they are directly impacted by the rulemaking; (b) the interests at stake in this litigation are germane to CAA's purpose; and (c) participation of the individual members in this litigation is not required. *See Military Toxics*, 146 F.3d at 953-54.

Accordingly, CAA has "a substantial interest in the outcome of the petition," and should be allowed "to intervene pursuant to Fed. R. App. P. 15(d)." *Bales v. NLRB*, 914 F.2d 92, 94 (6th Cir. 1990).

### B. CAA's Interests Are Not Adequately Represented By Existing Parties.

Intervention is also necessary to adequately protect CAA's interests. It is readily apparent that CAA can meet the "minimal" burden of showing that its representation by FAA "may be" inadequate. *Dimond v. District of Columbia*, 792 F.2d 179, 192 (D.C. Cir. 1986). As this Court has explained, "governmental entities do not adequately represent the interests of aspiring intervenors." *Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 736-37 (D.C. Cir. 2003). Because "[t]he government must represent the broader public interest, not just the economic concerns of the [relevant] industry," relying on "the

government's representation of [a private] intervenors' interest is inadequate." *Sierra Club v. Espy*, 18 F.3d 1202, 1208 (5th Cir. 1994); *see also Utahns for Better Transp. v. U.S. Dep't of Transp.*, 295 F.3d 1111, 1117 (10th Cir. 2002); *Natural Res. Def. Council v. Costle*, 561 F.2d 904, 912-13 (D.C. Cir. 1977).

### C. The Requested Intervention Is Consistent With The Orderly Administration Of The Case.

Finally, allowing CAA to intervene is fully consistent with the orderly administration of this litigation. This intervention Motion is timely, having been filed within 30 days of the docketing of the Petition. *See* Fed. R. App. P. 15(d). None of the parties have tendered their initial submissions. The briefing schedule has been deferred pending a further Order. Accordingly, no party will be prejudiced from CAA's intervention.

## III. Conclusion

For all these reasons, CAA's Motion to Intervene should be granted.

Respectfully submitted,

/s/ Jeffrey A. Rosen, P.C.

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January 18, 2012

## CERTIFICATE OF SERVICE

Pursuant to Rule 25(c)(2) of the Federal Rules of Appellate Procedure and this Court's CM/ECF procedures, I, Aaron L. Nielson, hereby certify that on January 18, 2012, I electronically filed the foregoing Motion to Intervene with the Court by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system. As to non-CM/ECF users, I have caused a copy of the foregoing document to be served via First-Class Mail, postage-prepaid on the following individual:

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I have also caused a courtesy copy of the foregoing document to be served via First-Class Mail, postage prepaid on the following individuals:

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