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VIA EMAIL: ***consultations@otc-cta.gc.ca***
Canadian Transportation Agency
15 Eddy Street
Gatineau, Quebec K1A 0N9

Dear Madam or Sir:

Re: Consultation on the requirement to identify a basic fare

Please accept the following submissions concerning the "Consultation on the requirement to identify a basic fare."

I. Overview

A basic fare is one that has no restrictions and allows for the transportation of a reasonable amount of baggage at no additional cost. The statutory requirement that a basic fare be identified in every domestic carrier's tariff is a consumer protection measure that serves two objectives:

(a) guaranteeing access to an unrestricted fare **in addition** to any other discount fare that the carrier may offer, and thereby increasing the choices available for the travelling public; and

(b) providing a benchmark for reviewing fare complaints on monopoly routes.

These objectives were established by Parliament, and notwithstanding the emergence of different business models for airlines, Parliament chose not to amend or repeal the requirement to identify a basic fare during the recent review and amendments to the *Canada Transportation Act*.

It is submitted that the Agency must respect the policy choice made by Parliament.

The statutory requirement to identify a basic fare has material benefits for travellers by increasing the choices available to them and allowing for prompt and meaningful comparison between the fares offered by different carriers. There is no compelling reason to exempt carriers from these consumer protection measures based on the business model the carriers have chosen to follow.

The Agency's conduct in relation to the basic fare issue leaves one with the apprehension that the Agency has already made up its mind to exempt all ultra-low-cost carriers [ULCC] from the requirement to identify a basic fare in their tariffs, and that the sole purpose of the present consultation is to create an air of legitimacy to weakening the protection available to consumers.

II. The requirement to identify a basic fare is a consumer protection measure

Paragraph 67(1)(b) of the *Canada Transportation Act* [*Act*] provides that:

> 67 (1) The holder of a domestic licence shall
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> (b) in its tariffs, specifically identify the basic fare between all points for which a domestic service is offered by the licensee;

Subsection 55(1) of the *Act* provides that:

> ***basic fare*** means
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> (a) the fare in the tariff of the holder of a domestic licence that has no restrictions and represents the lowest amount to be paid for one-way air transportation of an adult with reasonable baggage between two points in Canada, or
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> (b) where the licensee has more than one such fare between two points in Canada and the amount of any of those fares is dependent on the time of day or day of the week of travel, or both, the highest of those fares; (*prix de base*)

Paragraph 67(1)(b) of the *Act* requires all domestic carriers to comply with two requirements:

(a) establish on each route at least one unrestricted fare that includes the transportation of a reasonable amount of baggage for no additional charge; and

(b) make the existence and availability of such a fare known to the public by specifically identifying this fare in the tariff.

Paragraph 67(1)(b) of the *Act* **does not** require the carrier to include the price of the basic fare in its tariff, but rather to ensure that such a fare is available to the public for a price that may vary from time to time. This is precisely what major carriers, such as Air Canada or WestJet, are currently doing without any difficulty.

Paragraph 67(1)(b) of the *Act* **does not** limit or otherwise restrict the carrier's ability to offer, in addition to the statutorily prescribed basic fare, other fares (discounted or otherwise) that are subject to restrictions.

The purpose of the requirement to identify a basic fare is twofold:

(a) guaranteeing access to an unrestricted fare that includes a reasonable amount of baggage **in addition** to any other discount fare that the carrier may offer, and thereby increasing the choices available for the travelling public, and thus fostering competition; and

(b) providing a benchmark for reviewing fare complaints on monopoly routes.[1]

It is submitted that both of these purposes are manifestly consumer protection-centred: to protect the travelling public from the dominant position occupied by airlines, which establish their fare structures unilaterally.

(a) Increased choice and competition, and a meaningful way to compare

The statutory requirement that each domestic carrier must offer an unrestricted fare that includes a reasonable amount of baggage increases choice for consumers, fosters fair competition, and provides consumers a meaningful way to compare the prices of different carriers.

First, while price is an important consideration for consumers of air transportation, in many cases so is flexibility and the ability to cancel the travel for a full refund. The effect of paragraph 67(1)(b) of the *Act* is that the travelling public has more choice from all carriers: passengers may choose between a discounted fare that is subject to many restrictions, and a basic fare that is unrestricted and includes a reasonable amount of baggage.

Second, since paragraph 67(1)(b) of the *Act* leaves the choice of the fare type they prefer to purchase to the passengers, it allows "competition and market forces" to carry out their natural roles.[2] Exempting some or all carriers from paragraph 67(1)(b) of the *Act* would shift the choice from passengers to the carriers, contrary to the objectives set out in s. 5 of the *Act*.

Third, Parliament's policy choice to require airlines to advertise fares in a manner to "enable a purchaser of the service to readily determine the total amount to be paid for the service"[3] must be fully carried out. When services are "unbundled," there are so many extra charges that passengers cannot "readily determine" the total amount they would end up paying for the service. Thus, in the context of "unbundled" services, the basic far may be the only meaningful way for consumers to know how much they ultimately have to pay and to meaningfully compare the prices offered by carriers.

Therefore, the requirement to identify a basic fare is of special importance for consumers in the context of the ULCC's business model, which focuses on unbundling of fares.

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1 Bill C-14, Clause-by-Clause, clause 55(1).
2 *Act*, s. 5(a).
3 *Act*, s. 86.1(2).

(b) Benchmark for fare complaints on monopoly routes

The notion of "basic fare" dates back to ss. 67(1) and 80 of the *National Transportation Act*, the predecessor of the *Canada Transportation Act*, which allowed the Agency to review fare complaints on monopoly routes. The Agency's regulatory powers were limited to the "basic fare."

In 1996, when the *Canada Transportation Act* was enacted, section 66 of the *Act* was modelled on s. 80 of the *National Transportation Act*. Under s. 66 of the *Act* (as of 1996), the Agency's regulatory powers were still confined to complaints relating to the "basic fare." The Clause-by-Clause of the *Canada Transportation Act* (Bill C-14) states that:

> "basic fare" establishes the unrestricted one-way economy fare as the benchmark for reviewing fare complaints on monopoly routes.[4]

In 2000, Parliament passed Bill C-26, which amended section 66 of the *Canada Transportation Act* to expand the Agency's regulatory oversight over all air fares. Since 2000, the Agency's powers under section 66 are no longer limited to complaints relating to the "basic fare."

Parliament's choice to retain the requirement imposed on domestic carriers to identify a basic fare in their tariffs, set out in paragraph 67(1)(b), indicates the legislative intent to continue using the basic fare as a benchmark for complaints under s. 66.

Subparagraph 66(3)(b) of the *Act*, in its current form, sheds further light on the importance of the basic fare for determining fare complaints:

> **66 (3)** When making a finding under subsection (1) or (2) that a fare, cargo rate or increase in a fare or cargo rate published or offered in respect of a domestic service between two points is unreasonable or that a licensee is offering an inadequate range of fares or cargo rates in respect of a domestic service between two points, the Agency may take into consideration any information or factor that it considers relevant, including
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> (b) fares or cargo rates applicable to similar domestic services offered by the licensee and one or more other licensees, including terms and conditions related to the fares or cargo rates, the number of seats available at those fares and the cargo capacity and cargo container types available at those rates;[5]

In particular, the basic fare offered by Carrier A on a given route is a factor that must be considered by the Agency when determining a fare complaint against Carrier B on a similar but different route.

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[4] Bill C-14, Clause-by-Clause, clause 55(1).

[5] *Canada Transportation Act*, s. 66(3)(b) (emphasis added).

Therefore, the purpose of requiring Carrier A to identify a basic fare in its tariff is not merely to protect passengers travelling on Carrier A, but also to protect passengers travelling on a monopoly route operated by Carrier B.

(c) Practical benefits for the travelling public

It follows from the foregoing that the benefit and purpose of the requirement to identify a basic fare transcend the relationship between an individual airline and its passengers, and affect users of the entire transportation network.

As a practical example, if Swoop had identified a basic fare, as required by law, then it could be used, pursuant to s. 66(3), to determine a fare complaint on Air Canada with respect to a route on which Air Canada is the only provider of a domestic service. Thus, Swoop's compliance with the law would benefit not only Swoop's own passengers, but also Air Canada's passengers.

III. No disadvantage to ULCCs

Compliance with paragraph 67(1)(b) of the *Act* is not onerous at all. The requirement is to "identify" the basic fare, and not to fix its price in the tariff. Consequently, there is no need to update the tariff when the price of the "basic fare" changes.

ULCCs suffer no disadvantage by being required to comply with paragraph 67(1)(b) of the *Act* like all other carriers are. ULCCs are free to offer and advertise as many restricted fares as they wish—as long as they also offer at least one "basic fare."

IV. Commercial considerations do not trump the law

Nearly a decade ago, the Agency held that:

> The Agency is of the opinion that a carrier's commercial obligation to be profitable, and to generate earnings for shareholders, is not a compelling argument to justify a term and condition of carriage which may be unreasonable and the Agency rejects this argument. To argue, as WestJet does, that maintenance of an industry-leading level of profitability trumps a regulatory requirement of tariff reasonability would be to elevate maintenance of profitability to a status of defence to any failure to meet a regulatory requirement. This goes well beyond the balancing requirement between a carrier's statutory, commercial and operational obligations and the rights of passengers to reasonable terms and conditions of carriage as set out in the CTA.[6]

[6] *Lukács v. WestJet*, Decision No. LET-C-A-51-2010 (emphasis added); affirmed in Decision Nos. 313-C-A-2010 and 483-C-A-2010 (leave to appeal refused; FCA File No. 10-A-42).

These findings of the Agency are equally applicable with respect to the requirement to identify a basic fare. Profitability does not trump regulatory requirements. The choice of a particular business model by a carrier does not justify exempting the carrier from this or any other requirement that all carriers must comply with. It follows that the choice of a carrier to follow the ULCC model is not a basis for exempting the carrier from the statutory requirement of paragraph 67(1)(b) of the *Act*.

In Decision No. A-2019-14, the Agency incorrectly suggested that the following are specific to the ULCC model: (a) dynamic price setting, (b) non-refundable fares with restrictions on changes; and (c) the unbundling of fares so that travellers select the services for which they want to pay.[7]

First, dynamic price setting means that the air fare varies according to the season, day of the week and time of day, and other similar considerations. Dynamic price setting is not a new phenomenon. It is as old as electronic ticketing, if not older. It is the implementation and efficiency of dynamic price setting that has changed over the past decade due to technological developments. As of 2019, all major airlines, including Air Canada and WestJet, use dynamic price setting of some form. As such, dynamic price setting does not set the ULCC model apart from other business models.

Second, both Air Canada and WestJet offer many non-refundable fares that come with varying levels of restrictions. Again, this does not set ULCCs apart from other business models.

Third, unbundling of fares is a trend that is followed by Air Canada and WestJet too, and it is not specific to the ULCC business model either.

In short, there is nothing special about the ULCC business model that would justify in any way exempting ULCCs from the statutory requirement to identify a basic fare.

V. Factors for granting an exemption should be narrow

The source of the Agency's power to grant an exemption from provisions of the *Act* is s. 80. The phrase "a person" in s. 80(1) indicates that Parliament intended the Agency to grant exemptions on a case-by-case basis. It follows that the Agency's power under s. 80 of the *Act* must be used sparingly, and cannot be used to effectively alter the scheme of the *Act* by exempting all carriers from a statutory requirement.

Any request for an exemption from s. 67(1)(b) of the *Act* must be examined in light of the purpose for which this provision was enacted: the basic price serves as a benchmark for reviewing fare complaints on monopoly routes, and the requirement to establish a basic fare ensures public access to unrestricted fares. Parliament chose to maintain the requirement of identifying a basic fare even after the amendments implemented by Bill C-26 (in 2000). It is inappropriate for the Agency to second-guess Parliament and decide that, after all, this requirement is impractical and carriers are no longer required to comply with it.

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[7] Decision No. A-2019-14, para 11.

The mere choice of a carrier to follow a business model that offers only restricted fares is not a legitimate basis for granting an exemption, because such a choice is not permitted by the *Act*, and as such it is unlawful. Accepting such an argument would reduce s. 67(1)(b) of the *Act* to a mere recommendation. Insofar as exemptions are concerned, it is the business models that have to conform to the *Act*, and not the other way around.

This is not to say that the Agency should never grant an exemption from s. 67(1)(b) of the *Act*; however, the basis for the exemption must be more than a mere preference or commercial decision of the carrier seeking the exemption. Furthermore, the exemption must be based on a careful analysis of the impact of granting the exemption on the objectives that s. 67(1)(b) of the *Act* serve.

VI. Concern about the integrity of the consultation and institutional bias

The Agency's conduct in relation to the basic fare issue leaves one with the apprehension that the Agency has already made up its mind to exempt all ULCCs from the requirement to identify a basic fare in their tariffs, and that the sole purpose of the present consultation is to create an air of legitimacy to weakening the protection available to consumers.

(a) The Agency is shielding Swoop from scrutiny

1. Since February 2018, the Agency has been aware of Swoop's non-compliance with paragraph 67(1)(b) of the *Act*.[8]

2. There is no publicly available record to indicate that the Agency made any effort to bring Swoop into compliance with paragraph 67(1)(b) of the *Act*.

3. On September 19, 2018, Dr. Lukács filed a complaint with the Agency about Swoop's non-compliance with the statutory requirement to specifically identify a "basic fare" in its tariff and its practice of charging extra fees for all baggage, contrary to paragraph 67(1)(b) of the *Act*.

4. On September 19, 2018 at 10:49 am Atlantic Time, that is, at 09:49 am Eastern Time, the Agency acknowledged receipt of Dr. Lukács's complaint, and advised him that the complaint was assigned case number **18-05228**.[9]

5. In response to Dr. Lukács's complaint, Swoop made a cross-application to the Agency for an exemption from paragraph 67(1)(b) of the *Act*. Swoop's cross-application was sent by email on an unknown date and at an unknown time by Mr. Mackenzie to Mr. Leslie Siegman, Director of Monitoring and Compliance at the Agency, and was **backdated** to September 18, 2018.

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[8] Agency's email to Dr. Lukács, dated February 26, 2018.

[9] Agency's email to Dr. Lukács, dated September 19, 2018.

6. The Agency knew or should have reasonably known that Swoop's cross-application was backdated. Swoop's cross-application was assigned Case No. **18-05254**, which **comes after** Dr. Lukács's complaint's Case No. 18-052**28**.

7. The Agency concealed Swoop's cross-application from Dr. Lukács. Dr. Lukács had no knowledge of Swoop's cross-application while the Agency was considering it. Neither the Agency nor Swoop provided Dr. Lukács with notice of the cross-application. Dr. Lukács was unable to oppose Swoop's cross-application, nor was he able to make submissions to the Agency on the cross-application's impact on his complaint.

8. On January 30, 2019, the Agency released two decisions:

   (a) In Decision No. A-2019-14, the Agency granted Swoop a 180-day exemption from paragraph 67(1)(b) of the *Act*.

   (b) In Decision No. 6-C-A-2019, the Agency declined to hear Dr. Lukács's complaint based on the exemption that was granted to Swoop and in anticipation of the present consultation.

The overall effect of these actions of the Agency is that Swoop remains shielded from scrutiny. Swoop's failure to comply with the law between February 2018 and January 30, 2019 has gone without consequences, and more importantly, Swoop's evidence in support of the requested exemption is not subjected to scrutiny in an adversarial setting.

(b) Deadline was extended for the sake of a single stakeholder

1. Originally, the deadline for submissions in the present consultation was April 13, 2019.

2. On March 29, 2019, the Association of Canadian Travel Agencies [ACTA] advised the Agency of its intent to make submissions and sought an extension. ACTA is known for its airline-friendly views. For example, with respect to the consultation on the proposed *Air Passenger Protection Regulations*, ACTA made submissions that are adverse to the interests of the travelling public and favourable to the airline industry.

3. There is no record of any other stakeholder seeking an extension.

4. Sometime in early April 2019, at the request of ACTA, the Agency extended the deadline of the present consultation to April 30, 2019.

5. The Agency has been ignoring the requests of Dr. Lukács to confirm:

   (a) which Member(s) made the decision to extend the deadline; and

   (b) on the basis of which criteria was the deadline extended.

The decision to extend the deadline to accommodate a single stakeholder that is known for is pro-airline views and the lack of transparency surrounding the decision to extend the deadline lends further support to the apprehension that the Agency's sole purpose in the present consultation is to shore up submissions to support the decision to exempt all ULCCs from s. 67(1)(b) of the *Act*—a decision that the Agency is predetermined to make.

VII. Conclusion

There is no compelling reason to exempt ULCCs from the statutory requirement to identify a basic fare in their domestic tariffs. This requirement continues to serve a practical purpose, and is necessary to carry out Parliament's policy objectives.

Whether this purpose is desirable is a matter for Parliament to decide, and is best addressed through legislative changes.

Sincerely yours,

Dr. Gábor Lukács