In addition, one copy of any comments submitted to the FAA must be mailed or delivered to Mr. Mark VanLoh, Director of Aviation of the Kansas City Aviation Department at the following address: 601 Brasilia Avenue, Kansas City, Missouri 64153.

Air carriers and foreign air carriers may submit copies of written comments previously provided to the Kansas City Aviation Department under § 158.23 of Part 158.

FOR FURTHER INFORMATION CONTACT: Lorna K. Sandridge, PFC Program Manager, 901 Locust, Kansas City, Missouri 64106, (816) 329–2641. The application may be reviewed in person at this same location.

SUPPLEMENTARY INFORMATION: The FAA proposes to rule and invites public comment on the application to impose a PFC at Kansas City International Airport for use at Kansas City International Airport and Charles B. Wheeler Downtown Airport under the provisions of the 49 U.S.C. 40117 and Part 158 of the Federal Aviation Regulations (14 CFR Part 158).

On April 27, 2005, the FAA determined that the application to impose and use the revenue from a PFC submitted by the Kansas City Aviation Department was not substantially complete within the requirements of § 158.25 of Part 158. The following items were required to complete the application: Airspace determinations on the new aircraft rescue fire fighting facility, perimeter fencing replacement at MKC, and the upgrade of the glycol collection system. The Kansas City Aviation Department has submitted the supplemental information to complete this application. The FAA will approve or disapprove the application, in whole or in part, not later than February 9, 2006.

The following is a brief overview of the application.

Proposed charge effective date: January 1, 2015.

Proposed charge expiration date: February 1, 2017.

Level of the proposed PFC: $4.50.

Total estimated PFC revenue: $56,946,228.

Brief description of proposed project(s): Two new aircraft rescue fire fighting (ARFF) vehicles, extend Taxiways B and D, rehabilitate Taxiways M and L, update airport master plan and Part 150 study, New ARFF facility, inline baggage screening system, rehabilitate Taxiway D, airfield lighting rehabilitation, perimeter fencing replacement—MKC, terminal improvements—holdrooms, upgrade glycol collection system, airfield snow removal equipment building, new airfield sand & deicer storage building, triturator and garbage facility, fuel farm relocation—MKC.

Class or classes of air carriers which the public agency has requested not to be required to collect PFCs: Nonscheduled/On-Demand Air Carriers filing FAA Form 1800–31.

Any person may inspect the application in person at the FAA office listed above under **FOR FURTHER INFORMATION CONTACT** and at the FAA regional Airports office located at: 901 Locust, Kansas City, Missouri 64106.

In addition, any person may, upon request, inspect the application, notice and other documents germane to the application in person at the Kansas City Aviation Department.

Issued in Kansas City, Missouri on October 17, 2005.

George A. Hendon,

Manager, Airports Division, Central Region.

[FR Doc. 05–21227 Filed 10–24–05; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

[Docket No. FAA–2005–22765]

Wet Lease Policy Guidance

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice; request for comments.

SUMMARY: It has long been contrary to Federal Aviation Regulations for an air carrier to ''wet lease'' an aircraft from an individual or entity that is not separately authorized to engage in common carriage. By this notice, the Federal Aviation Administration (FAA) seeks comment on proposed policy guidance identifying those commercial arrangements that would be considered to be unlawful wet lease arrangements under these regulations as well as those that would be permissible. Additionally, we seek comment on our proposed treatment of certain other commercial arrangements between air carriers and aircraft owners that—while not amounting to illegal wet leases—could nevertheless result in the air carrier impermissibly ceding operational control of flight to non-certificated entities.

DATES: Send your comments on or before November 25, 2005.

ADDRESSES: You may send comments [identified by Docket No. FAA–2005–22765] using any of the following methods:

DOT Docket Web site: Go to *http://dms.dot.gov* and follow the instructions for sending your comments electronically.

Government-wide rulemaking Web site: Go to *http://www.regulations.gov* and follow the instructions for sending your comments electronically.

Mail: Docket Management Facility; U.S. Department of Transportation, 400 Seventh Street, SW., Nassif Building, Room PL–401, Washington, DC 20590. Fax: 1–202–493–2251.

Hand Delivery: Room PL–401 on the plaza level of the Nassif Building, 400 Seventh Street, SW., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Kent Stephens, Aviation Safety Inspector, Air Transportation Division, Flight Standards Service, Room 831, 800 Independence Avenue, SW., Washington, DC 20591, telephone: (202) 267–8166.

Comments Invited

The FAA invites interested persons to submit written comments, data and views on the draft guidance contained in Section D below. The most helpful comments reference a specific portion of the proposed guidance, explain the reason for any recommended change, and include supporting data. We ask that you send us two copies of written comments.

We will file in the docket all comments we receive, as well as a report summarizing each substantive public contact with FAA personnel concerning this proposed policy. The docket is available for public inspection before and after the comment closing date. If you wish to review the docket in person, go to the address in the **ADDRESSES** section of this notice between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. You may also review the docket using the Internet at the Web address in the **ADDRESSES** section.

Privacy Act: Using the search function of our docket Web site, anyone can find and read the comments received into any of our dockets, including the name of the individual sending the comment (or signing the comment on behalf of an association, business, labor union, etc.).

You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477–78) or you may visit *http://dms.dot.gov*. Before acting on this proposal, we will consider all comments we receive on or before the closing date for comments. We will consider comments filed late if is possible to do so without incurring expense or delay.

We may change this proposal in light of the comments we receive.

If you want the FAA to acknowledge receipt of your comments on this proposal, include with your comments a pre-addressed, stamped postcard on which the docket number appears. We will stamp the date on the postcard and mail it to you.

SUPPLEMENTARY INFORMATION:

A. Background

Federal Aviation Regulations provide that only entities properly certificated by the FAA may maintain operational control of any flight conducted for commercial purposes under 14 CFR parts 121 and 135. Recent information obtained by the FAA regarding certain arrangements in the on-demand air carrier industry has highlighted existing concern over whether the air carriers in such arrangements are consistently maintaining (as required) operational control of all flights purportedly conducted under the authority of their certificates. In some cases, air carriers have evidently allowed aircraft owners and lessees who hold no commercial certificates to conduct operations under the auspices of the air carrier's certificate, and in a few cases, falsely holding themselves out to the public as air carriers themselves. As a result, some members of the traveling public have paid for air transportation by persons that do not hold proper FAA certification and, just as important, do not necessarily comply with the more demanding safety rules for air carriers and other commercial operators.

The FAA has taken several actions to address this problem. We have begun enforcement proceedings to halt the effective franchising of air carrier certificates and the conduct of air carrier operations by unqualified persons. On June 10, 2005 the FAA's Flight Standards Service issued a notice to all inspectors directing them to contact each air carrier they oversee to make sure that these carriers understand their obligations to maintain operational control of flights conducted under their certificates. In addition, the FAA has sent out information request to air carriers to ascertain the types of arrangements under which they conduct their business so as to assess whether those arrangements comply with these obligations.

The guidance proposed in this notice is intended to assist air carriers and others in evaluating whether certain arrangements, including aircraft leases and related agreements, are consistent with operational control requirements.[1]

B. Operational Control

In connection with its safety oversight and investigatory responsibilities, the FAA must always be able to identify who is accountable for the safety of each flight, whether commercial or not. Central to this inquiry is determining which person or entity as a factual matter exercise operational control of any particular flight. Our regulations provide that operational control means ''with respect to a flight, * * * the exercise of authority over initiating, conducting or terminating a flight.'' See 14 CFR 1.1. We attempt to determine who has ''real-world'' control over an aircraft and its crew by evaluating all the facts and circumstances surrounding that flight operation. The FAA, the National Transportation Safety Board, the courts, and others look beyond the written provisions of contracts and other commercial documents and the parties' assertions regarding ''operational control'' to determine who—as a factual matter—controlled a flight operation.

For purposes of this guidance, a ''surrender of operational control'' by an air carrier means a situation in which an air carrier has inappropriately allowed an uncertificated person or entity to engage in air carrier operations under the carrier's name. See e.g., *Administrator* v. *Darby Aviation d/b/a Alphajet, Inc.*, NTSB Order Number E–5159 (2005). In FAA Notice N 8400.83 (issued on June 10, 2005), the Director of the Flight Standards Service cautioned air carriers and other commercial operators who are certificated under part 119, that they may not franchise or lease out their authority to engage in part 135 operations to third parties, as this constitutes a surrender of operational control.

A ''loss of operational control'' or ''inadquate operational control'' includes those situations in which the carrier has not surrendered control to another person or entity, but has inadequately exercised the necessary supervisory actions over the maintenance of aircraft listed on its operations specifications or has not adequately supervised and directed its own pilots. A carrier has inadequate operational control if it lacks either timely knowledge about the flight and duty status of its pilots, the means to communicate an order to the crew to delay, cancel, or divert a flight, or sufficient leverage or authority over its crews to assure compliance with the carrier's lawful instructions.[2]

In each case in which there is a question about operational control the FAA also must ultimately make a legal determination as to which person should have exercised such control. In some cases the FAA will determine that the operational control of a commercial flight was actually exercised—unlawfully—by an uncertificated person who did not comply with the more demanding safety rules that apply to commercial operations. In other cases, a properly certificated air carrier or commercial operator has actively participated or acquiesced in commercial arrangements that allowed the illegal operator to hold itself out to the public as a legitimate air carrier.

Sometimes unlawful arrangements become apparent only after a review of the written contracts between the parties and other evidence reveals that the relationship obfuscates which entity or person has ''operational control'' of a flight and, thus, which entity or individual should be held accountable for the overall safety of a flight. Where such operations end safely, it has been our experience that the carrier and the aircraft owner typically assert that the commercial operation was lawfully conducted by the air carrier under our regulations. Unfortunately for the public, where such flights involve safety violations, the carriers under whose auspices the flights were conducted may claim they were unaware that a commercial flight occurred under their certificate—even though that aircraft is on the part 135 operator's specifications. The carrier may point to the fact that it never had legal possession of the aircraft that was illegally flown in commercial operations, and thus the carrier will disclaim responsibility for the operation. The FAA deems arrangements that facilitate such confusion to be wholly at odds with the requirement that an air carrier must

[1] This proposed guidance concerns requirements related to safety regulation by the FAA. Carriers and others should note that it does not address economic regulatory requirements, which are separate and under the purview of the Office of the Secretary of the Department of Transportation.

[2] It is not considered a proper exercise of ''operational control'' for the carrier to delegate to the pilot in command the responsiblity for determining for the carrier whether the pilot in command and other flight crewmembers are qualified for the flight that day. The safety benefit in the FAA rules of having ''redundancy''—here, the carrier verifying the qualifications of the pilots for the flight—cannot be overstated. The carrier itself has to determine, for example, whether the flight crew meets rest period requirements and whether the flight crewmember has exceeded flight time limits. The safety benefits of having a redundant safety duty imposed—on both the carrier and the pilot—is lost if the carrier delegates its independent responsibility to the pilot.

clearly retain operational control of all its flights, and we will, at a minimum, act promptly to remove aircraft used in such arrangements from the air carrier's operations specifications.

Finally, it should be without saying that any air carrier must have in place personel who are knowledgeable about aviation, including FAA safety regulations, such that they can gather and review relevant information about the airworthiness of the aircraft and the condition of the crewmembers. If the air carrier does not have knowledgeable people in place, it is highly unlikely that the carrier will meet the stringent safety standards necessary to satisfy the statutory ''duty * * * to provide service with the highest possible degree of safety in the public interest.'' See 49 USC Section 44701(d)(1).

C. Affected Commercial Arrangement

Commercial arrangements between U.S. air carriers and others must ensure effective operational control by an air carrier over its flights. Beyond avoiding wet leases with non-certificated entities (discussed below), a carrier must generally ensure that all business arrangements provide its management personnel with not only the contractual authority to direct the crewmembers to terminate, delay, divert or modify the carrier's flights, but also with effective authority by virtue of their relationship with the crewmembers. It is not enough simply to assert in a contract that the carrier has ''operational control'' if other aspects of the parties' agreements undermine or otherwise nullify effective means of control by the carrier.

1. Wet Leases

The FAA prohibits ''wet leases'' between a certificate holder under part 119 and a foreign air carrier or another foreign person or any other person not authorized to engage in common carriage. See 14 CFR 119.53(b). To understand a ''wet lease,'' one must first understand the meaning of a ''dry lease.'' In aviation, a dry lease occurs when legal possession of an aircraft transfers from the owner to another person (whether that person is the first lessee or a sublessee). A ''wet lease,'' under the Federal Aviation Regulations, is any leasing arrangement whereby a person agrees to provide an entire aircraft and at least one crewmember. See 14 CFR 119.3

The agency adopted the prohibition on wet leases in § 119.53(b), in part, because we were concerned that the air carrier might not exercise operational control over the crew leased from the other (non-certificated) entity, with the result that the entire operation would not be under the direction and control of the certificated air carrier. In a true dry lease, the lessee is fully accountable for the safety of the flight operations it conducts with the aircraft in its possession. In contrast to a dry lease situation, in a wet leasing arrangement, although the lessee nominally has legal possession of the aircraft, the actual control of the aircraft is with the entity directing the crewmembers. Where only one of the parties has been certificated to engage in common carriage operations, the other's agreement to provide the crew raises significant issues as to who really has control over the crew: the lessor or the air carrier.

2. Permissible Use of the Aircraft Owner's Crew

The FAA is well aware that many aircraft owners lease their aircraft to part 135 on-demand operators so as to recover overhead expenses when the owner does not need to use the aircraft. Nothing in this guidance is intended to bar these arrangements or to prohibit any air carrier from dry leasing an aircraft from its owners or lessor. The FAA has no safety objections to this practice so long as the air carrier—and no one else—exercises actual operational control of the for-hire flights. To satisfy this requirement, the carrier must have effective mechanisms in place to make sure the crews will adhere to the carrier's instructions. Moreover, the carrier cannot participate in an arrangement that allows the aircraft owner to interfere with the carrier's ability to make and implement safety decisions needed to comply with FAA air carrier safety rules. In particular, we think it inappropriate for an aircraft owner or other non-certificated entity to determine who will be the pilots assigned to a part 135 flight. Thus, the carrier may not enter into any contract by which it agrees directly or indirectly to utilize only the aircraft owner's or lessor's pilots when conducting part 135 flights.

By this notice the FAA does not intend to prohibit air carriers from using a pilot in part 135 operations simply because that pilot also is employed by the owner of the aircraft. A key question in such commercial arrangements is whether the carrier is obligated directly or indirectly to use the aircraft owner's crew. In this regard, a critical factor would be written acknowledgements by the carrier, the aircraft owner, and the pilots that the crew serves as the agents of the air carrier during all part 135 operations. An acknowledgement that the pilots are the carrier's agents (even where the pilots remain the employees of the owner, as evidenced, for example, by the owner's issuance of IRS Form W–2's) helps reduce any confusion as to which party has the authority and the responsibility to conduct a safe for-hire flight. We believe that such an acknowledgement may cause air carriers to exercise greater oversight of aircraft placed on their operations specifications and to take whatever steps are necessary to ensure the aircraft owners do not hold themselves out as conducting commercial flights under the auspices of the air carriers' certificates.

3. Other Arrangements

Operational control issues do not arise solely in the context of wet leases to air carriers from people not authorized to engage in common carriage. Even in situations where it is legal for a carrier to enter into a wet lease (e.g., a U.S. carrier can wet lease from another U.S. carrier), operational control issues arise and thus the FAA requires that such leases be submitted to the FAA for an assessment as to which FAA-certificated carrier has operational control. See 14 CFR 119.53(a) and 119.53(c). Typically, in such agreements, the wet lessor will have operational control instead of the lessee primarily because of the former's business relationship with the crew. We permit these arrangements because there is an assurance that all the parties know that the revenue flights must be flown under part 121 or 135, and both parties have been certificated for air carrier operations.

D. Proposed Guidance

When our Flight Standards Service discovers contractual language or other evidence of wet leasing prohibited under section 119.53(b), our current policy is to take two actions. First, we will not add aircraft to a carrier's operations specifications to the extent such aircraft are subject to wet leases. Second, we will begin an investigation as to the carrier's use of other aircraft already on its operations specifications to ascertain whether they involve an improper wet lease under section 119.53(b).

1. Wet Leases

a. If an air carrier and an aircraft owner (or someone having legal possession of the aircraft) enter into an agreement whereby legal possession of a specific aircraft is transferred from the owner (or first lessee) to the air carrier and if the owner (or first lessee) provides a crewmember as part of the lease, then such an arrangement constitutes a wet lease.

b. If an air carrier and an aircraft owner enter into an agreement

captioned as a ''dry lease'' of an aircraft from the owner to the air carrier, and in a separate document the same parties agree that the owner will provide a crewmember to the carrier, such an arrangement would still constitute a wet lease. The FAA would evaluate the two documents together. Such an arrangement (assuming the owner is not a certified air carrier) also would be contrary to section 119.53(b). An air carrier does not have actual operational control of the carrier flight operations if a person other than the air carrier can determine who the pilots of the aircraft will be or can exercise control over those pilots.

c. If an air carrier and an aircraft owner enter into an arrangement labeled as a ''dry lease'' of an aircraft from the owner to the carrier but in a separate document the parties give the owner the right to consent to or approve of the selection of crew, then such an arrangement might be treated as a wet lease depending on the particular circumstances. If in practice only the owner's pilots would be approved (as shown, for example, by evidence that all other pilots had been vetoed for use by the owner), the FAA would deem this leasing arrangement to be a ''wet lease'' in contravention of § 119.53(b). A carrier cannot be said to enjoy actual operational control of its flight operations if an aircraft owner (non-carrier) can effectively veto the carrier's proposed pilot assignments, where those pilots are otherwise qualified and appropriately certificated and trained to conduct carrier flights.

d. The following example would be considered a wet lease by the FAA. Although the carrier is not formally obligated to use the owner's pilots, it is clear from that business arrangement between the carrier and the aircraft owner that the aircraft owner's pilots are provided with the aircraft. Certain aircraft leases contain penalty clauses that provide that if the aircraft owner's pilots are not available to fly the aircraft for the part 135 carrier, then the aircraft owner must compensate the part 135 carrier for any costs the carrier incurs in getting other pilots to fly the aircraft. Because the parties contemplated that the owner would provide both the aircraft and crew, this too constitutes a wet lease, even though the carrier ultimately may use pilots who did not come from the aircraft owner. This type of arrangement is contrary to the provisions of section 119.53(b) of the Federal Aviation Regulations.

2. Other Arrangements Raising Serious Concern as to Operational Control of Flight

a. Operational control issues may arise in situations where there are no leases whatsoever. On occasion an air carrier may make arrangements with an aircraft owner to use its aircraft without entering into a real lease, and thus, the carrier never gets legal possession of the aircraft. This sort of informal arrangement will raise significant legal concerns over inadequate operational control when the carrier has no contractual arrangements with the crew, does not directly pay the crew for their service in air carrier operations, and receives no direct compensation by the customers for transporting passengers or property.

b. Another arrangement raising serious legal concern arises when a certificated air carrier receives a flat ''certificate use'' fee from the aircraft owner regardless of the number of commercial flights conducted per month, and the transportation customer pays the aircraft owner directly. Absent evidence to the contrary showing that the air carrier exercised actual and legal operational control of all flights, such arrangements constitute an inappropriate franchising of an air carrier certificate.

c. Some air carriers only occasionally lease aircraft from particular owners, who may enter into similar arrangements with multiple carriers. Although our rules do not forbid this practice, each carrier must ensure in all of its leasing arrangements that there are mechanisms in place to avoid confusion over who is using the aircraft and when. Similarly, the carrier must have procedures that ensure that the crewmembers adhere to the instructions of the carrier, not the aircraft owner.

E. Conclusion: Recommended Carrier Review of Existing Leasing Arrangements

The foregoing discussion is intended to provide the public, including air carriers and aircraft owners, with a better understanding of the FAA's concerns about the key safety issues linked to operational control of flights made under the authority of FAA certificates. The discussion is also intended to encourage air carriers to closely consider whether their business arrangements comport with the requirements for maintaining operational control. The FAA urges all air carriers to review the leasing and other arrangements they have with aircraft owners to ensure compliance with the regulations. In this regard, the FAA encourages carriers to consider whether they have sufficient controls in place that they have timely knowledge to answer the following questions:

1. What is the actual location of each aircraft listed on the carrier's operations specifications?

2. Who has the carrier authorized to fly the aircraft?

3. Does the carrier have mechanisms in place to prevent unauthorized use of the aircraft?

4. Who or what is being transported on the aircraft?

5. Is a given flight for compensation or hire?

6. If the flight is for compensation or hire, are the crewmembers properly certificated and trained?

7. Are the crewmembers loyal to the air carrier (as opposed to the aircraft owner or some other entity) so that they will adhere to the carrier's instructions not to fly or to delay a flight or to divert a flight?

8. What procedures and mechanisms are in place so that the carrier can fulfill its duty to ensure that the aircraft is airworthy and meets all of the carrier's maintenance programs?

Issued in Washington, DC on October 19, 2005.

James J. Ballough,

Director, Flight Standards Service.

Andrew B. Steinberg,

Chief Counsel.

[FR Doc. 05–21226 Filed 10–19–05; 3:13 pm]

BILLING CODE 4910–13–M

DEPARTMENT OF TRANSPORTATION

Federal Transit Administration

Preparation of Environmental Impact Statement for the Downtown Birmingham/University of Alabama Birmingham Activity Centers (a.k.a. In-town Transit Partnership Project)

AGENCY: Federal Transit Administration, DOT.

ACTION: Notice of Intent to prepare an Alternatives Analysis (AA) and Environmental Impact Statement (EIS).

SUMMARY: The Federal Transit Administration and the Regional Planning Commission of Greater Birmingham are conducting an alternatives analysis and preparing a Draft Environmental Impact Statement (DEIS) for transit improvements in the Downtown Birmingham/University of Alabama Birmingham Activity Centers. The FTA is the lead federal agency and the DEIS will be prepared in accordance with National Environmental Policy Act (NEPA) and the applicable regulations