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Order 2002-12-11



UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY
WASHINGTON, D.C.

Issued by the Department of Transportation
on the 10th day of December, 2002

Served: December 10, 2002

2002/2003 HONG KONG FIFTH-FREEDOM ALL-CARGO FREQUENCY PROCEEDING

Docket OST-2002-14049 - 1

Applications of

Air Transport International, L.L.C.
Atlas Air, Inc.
Evergreen International Airlines, Inc.
Federal Express Corporation
Kalitta Air, L.L.C.
Northwest Airlines, Inc.
Polar Air Cargo, Inc.
United Parcel Service Co.

Dockets OST-2002-13754 - 4
-13761 - 4
-13753 - 4
-13758 - 4
-13755 - 3
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for all-cargo Hong Kong fifth-freedom frequencies
& other authorities

ORDER INSTITUTING PROCEEDING

SUMMARY

By this order, we institute the *2002/2003 Hong Kong Fifth-Freedom All-Cargo Frequency Proceeding* to select carriers to operate the newly acquired fifth-freedom all-cargo weekly frequencies under the October 19, 2002 U.S.-Hong Kong Memorandum of Understanding.

BACKGROUND

Under the October 19, 2002, Memorandum of Understanding between the United States and the Hong Kong Special Administrative Region of the People's Republic of China (Hong Kong), U.S. carriers may operate additional all-cargo frequencies on a three-year phase-in basis. Specifically, U.S. carriers may immediately operate an additional 24 weekly all-cargo frequencies with fifth-freedom traffic rights in conjunction with their U.S.-Hong Kong services. Beginning October 26,

2003, U.S. carriers may operate an additional 16 frequencies. In 2004, carriers may operate yet another 16 frequencies. These frequencies may serve up to 13 countries (three named and 10 to be chosen by the United States) on a phased-in basis.¹ There are no limitations on the number of U.S. carriers that may be designated to serve the market.

The frequencies at issue in this proceeding are those immediately available and those that become available as of October 26, 2003.² As we stated in our Notice, served October 29, 2002, soliciting applications, we are not considering at this time allocation of the additional frequencies that become available in 2004.

Under the MOU, specific frequency limitations apply for each fifth-freedom point served in intermediate/beyond countries, in addition to the overall frequency limit.³ Under the specific arrangements agreed between the United States and Hong Kong, each flight segment on which fifth-freedom rights are to be exercised -- whether intermediate to, or beyond Hong Kong, and whether on a one-way or round-trip basis -- requires the allocation of a round-trip frequency; *e.g.*, a flight that includes the exercise of fifth-freedom rights both intermediate to and beyond Hong Kong requires two round-trip frequencies and a flight that exercises fifth-freedom traffic rights in only one direction also requires a round-trip frequency.

SUMMARY OF APPLICATIONS

The Department's October 29 Notice requesting applications called for them to be filed by November 5, 2002. In response to that Notice, eight U.S. carriers (Air Transport International, Atlas Air, Evergreen, Federal Express, Kalitta Air, Northwest, Polar Air Cargo, and UPS) filed applications, and their combined requests exceed the number of frequencies permitted under the MOU. One of the applicants, Air Transport International, subsequently filed a motion to withdraw its application.⁴ However, the remaining applicants continue to seek more frequencies than are available under the new agreement. *See Exhibit A* for a summary of the applications filed.

Polar Air Cargo and Kalitta Air each filed a separate consolidated answer to the applications on file. Each notes that, because the frequencies are oversubscribed, a comparative proceeding needs to be instituted. Polar urges that such a proceeding be instituted quickly. Kalitta states its opposition to applications for fifth-freedom frequencies to the extent that they are mutually exclusive with Kalitta's application.

¹ The Philippines, France, and Germany are specifically named in the MOU as intermediate/beyond points, and the U.S. Government may select ten other countries. Korea, which is already being served, is one of those countries.

² The Department has previously allocated eight weekly all-cargo frequencies for U.S.-Hong Kong fifth-freedom services. (See Order 96-8-35, allocating five weekly frequencies to Federal Express to serve the Hong Kong-Subic Bay market and three weekly frequencies to Air Micronesia to serve the Hong Kong-Manila market. Air Micronesia subsequently ceased operating its three frequencies, and Order 2001-10-15 allocated Polar Air Cargo three weekly frequencies for fifth-freedom all-cargo service between Hong Kong and Seoul, Korea.). These previously allocated eight frequencies are not subject to the proceeding being instituted here.

³ See Attachment to the Department's Notice inviting applications, served October 29, 2002, for specific limitations.

⁴ We will grant the motion.

Four carriers—Federal Express, Northwest, Polar, and UPS—filed separate applications for *pendente lite* authority for immediate use of some of the available frequencies. By Notice of Action Taken, dated November 22, 2002, the Department granted interim use of a total of 19 frequencies among these carriers.⁵ Consistent with our standard practice in the grant of *pendente lite* authority, the *pendente lite* decisions will be without prejudice in our decisions on long-term authority.

DECISION

We have decided to institute the *2002/2003 Hong Kong Fifth-Freedom All-Cargo Frequency Proceeding* to select carriers to operate the newly acquired frequencies for weekly Hong Kong fifth-freedom service.

Whether authorizing carriers for this service is consistent with the public convenience and necessity will not be at issue. The subject fifth-freedom all-cargo traffic rights constitute valuable resources obtained in exchange for granting Hong Kong opportunities for its airlines. The introduction of additional U.S. carrier service will provide new service options to the shipping public and will enhance competition in the U.S.-Hong Kong and Hong Kong-third-country markets. In these circumstances, we find that the public interest clearly calls for the use of these rights.

Since the seven remaining applicants for use of these limited opportunities seek more frequencies than are available, we believe that the public interest is best served by instituting a comparative proceeding to determine how these frequencies should be allocated. We intend to award frequencies for immediate use (first year) and frequencies for use after October 26, 2003 (second year) in the proceeding being instituted here. We believe that the public interest is best served by conducting a single proceeding for the allocation of these frequencies.

As we have already solicited applications from U.S. carriers interested in allocation of these frequencies, we will not solicit further applications to use the available frequencies. We will consolidate the already filed applications into the proceeding we are instituting here. **All documents hereafter should be filed in the newly assigned docket for this proceeding—not in the dockets assigned to the individually filed applications of the carriers.** Given the specifications provided above on exactly how frequencies are to be counted, we will permit applicants to supplement their existing applications, if necessary, in order to amend or clarify their routings (including whether flights will operate one-way or round trip) and/or the count of frequencies for proposed operations.⁶ Carriers that have only listed countries in their applications should amend their applications to identify specific cities in said countries since the MOU has provisions for frequencies for specific cities within countries and has additional

⁵ See, Dockets OST-2002-13737, OST-2002-13795, OST-2002-13804, and OST-2002-13816.

⁶ If carriers do not hold the underlying authority to perform scheduled all-cargo services, they should also amend their applications to seek such authority. Carriers must hold underlying authority to conduct scheduled service to all points requested in their proposals. The supplemental submissions should be submitted in accordance with the procedural schedule set forth in the text of this order.

provisions for cities not named in the MOU (see footnotes to Attachment in Notice, served October 29, 2002, soliciting applications). Carriers should clarify how, if they are not selected for first-year frequencies, they would use an award of second-year frequencies or how they would use an award if they are not chosen for all points on a multi-stop itinerary.

In allocating the available frequencies, our principal objective will be to maximize the public benefits that will result from award of the authority in this case. In this regard, we will consider which applicants will be most likely to offer and maintain the best service for the shipping public. We will also consider the effects of the applicants' service proposals on the overall competitive environment, including the market structure and the level of competition in the U.S.-Asia market, and on any other market shown to be relevant, and, where relevant, the positive effect on each applicant's operations. In addition, we will consider other factors historically used for carrier selection where they are relevant.

We will not place at issue the selection of backup carriers for these frequencies. We caution carriers, however, that frequencies may not be held indefinitely if not used.⁷ Consistent with our current practice, the frequencies allocated in this proceeding will be for an indefinite term, provided that the carrier continues to hold the underlying economic authority for the specific markets authorized and the frequencies are used. The frequencies to be awarded will also be subject to a startup condition and to our standard 90-day dormancy condition, whereby any frequencies not operated for a period of 90 days (once inaugurated) would be deemed dormant, except where service in the market is seasonal. In all such instances of seasonal service, however, a carrier must notify the Department that its operations are of a seasonal nature; otherwise, the dormancy condition will apply. Under the dormancy condition if any of the flights allocated are not used for 90 days (once inaugurated), the frequency allocation with respect to each unused frequency would expire automatically and the frequency would revert to the Department for reallocation.⁸

PROCEDURES AND EVIDENCE

We believe that written, non-oral show-cause procedures under Rules 207 and 210 of our regulations (14 CFR 302.207 and 302.210) are appropriate and that by using these procedures we can establish a complete evidentiary record and make a selection with the least possible delay and without unnecessary costs to the applicants. We find no material issues of fact that would warrant an oral evidentiary hearing in this case, and we note that none of the applicants before us has requested oral, evidentiary procedures. We are confident that the issues in this case can be addressed adequately on a written record.

⁷See, e.g., Order 2000-9-14, *U.S.-Brazil All-Cargo Frequencies & Designation* (Docket OST-2000-7559); Order 2001-3-10, *2001 Hong Kong Fifth-Freedom All-Cargo Frequencies*. (Docket OST-95-764).

⁸Frequencies available for allocation represent valuable rights obtained in exchange for rights for Hong Kong carriers. We remind the applicants that frequencies to be awarded are for weekly operations. A scheduled carrier may not bank frequencies from one week to the next. Failure to use the frequencies on a weekly basis will result in the forfeiture of unused frequencies.

We have appended to this order an evidence request for the benefit of the parties to this case.⁹

This evidence request generally follows the evidence request used in the last Hong Kong fifth-freedom cargo case.¹⁰ Those evidentiary submissions proved useful in developing a complete record in the last proceeding, and we believe that the comparable evidence we are now requesting similarly will help generate an adequate decisional record in the present proceeding. As before, we will require all applicants to provide detailed schedules of their transpacific and intra-Asian services. Those applicants that are proposing service to other areas (*e.g.*, Middle East, Europe, or trans-Atlantic routings) should also provide detailed schedules for those areas.

We emphasize that the evidence request includes specific instructions regarding the type and format of the information to be submitted and, in some instances, the sources of information to be used. We view adherence to these directives as critical to our consideration of the proposals in carrier selection cases. We put all applicants in this case on notice that we expect full compliance with the evidence request appended in this order. Any carrier not complying in any material respect with our request will be subject to elimination from consideration for an award in this case.

In addition to the material requested, applicants and any other parties may submit any additional information that they believe will be useful to us in reaching a decision.

PROCEDURAL TIMETABLE

In view of our desire for a timely decision in this case, we intend to conduct the proceeding instituted here according to the following schedule:

Amended/Supplemented applications:	December 13, 2002
Petitions for Reconsideration:	December 17, 2002
Direct Exhibits:	January 7, 2003
Rebuttal Exhibits:	January 24, 2003
Briefs:	February 7, 2003

We believe that the schedule provided affords all applicants ample opportunity to prosecute their applications, properly balances the interests of all parties to the case, and will enable the Department to make a timely decision awarding the frequencies.

All dates are delivery dates and all submissions must be filed in the docket assigned to this proceeding. An original and five copies of all submissions are to be received by the Department of Transportation Dockets no later than the dates indicated.¹¹ In the alternative, filers are encouraged to use the electronic submission capability through the Dockets DMS Internet site (<http://dms.dot.gov>) by following the instructions at the web site. For the convenience of the

⁹ Carriers' evidentiary materials are not expected until the Direct Exhibit stage of this proceeding.

¹⁰ Order 2001-3-10, *2001 Hong Kong Fifth-Freedom All-Cargo Frequencies* (Docket OST-95-764).

¹¹ The original filing should be on 8½" x 11" white paper using dark ink (not green) and be unbound without tabs, which will expedite use of our docket imaging system.

parties, service by facsimile is authorized. Parties should include their fax numbers on their submissions and should indicate on their certificates of service the methods of service used.

ACCORDINGLY,

1. We institute the *2002/2003 Hong Kong Fifth-Freedom All-Cargo Frequencies Proceeding*, Docket OST-2002-14049, to be decided by non-oral, show-cause procedures under Rules 207 and 210 of our regulations (14 CFR 302.207 and 302.210);
2. The proceeding instituted in ordering paragraph one will consider which carrier(s) should be granted the available Hong Kong fifth-freedom cargo frequencies and (as necessary) underlying exemption authority, and what terms, conditions, and limitations, if any, should be imposed on any authority awarded in this proceeding;
3. We consolidate the applications filed in Dockets OST-2002-13761, OST-2002-13753, OST-2002-13758, OST-2002-13755, OST-2002-13762, OST-2002-13765, and OST-2002-13757 into the *2002/2003 Hong Kong Fifth-Freedom All-Cargo Frequencies Proceeding*, Docket OST-2002-14049;
4. We grant the Motion of Air Transport International, LLC. to withdraw its application filed in Docket OST-2002-13754; and
5. We will serve this order on Air Transport International, L.L.C.; Atlas Air, Inc.; Evergreen International Airlines, Inc.; Federal Express Corporation; Kalitta Air, L.L.C.; Northwest Airlines, Inc.; Polar Air Cargo, Inc.; United Parcel Service Co.; the Hong Kong Economic and Trade Office in Washington, DC; the U.S. Department of State (Office of Aviation Negotiations); and the Federal Aviation Administration.

By:

READ C. VAN DE WATER
Assistant Secretary for Aviation
and International Affairs

(SEAL)

*An electronic version of this document is available on the World Wide Web at:
http://dms.dot.gov/reports/report_aviation.asp*

HONG KONG FIFTH-FREEDOM ALL CARGO FREQUENCIES^{1 2}

Carrier	Total Frequencies Requested	Routings As Stated in Application for Yr One— (Available Now)	Routings As Stated in Application for Yr Two (Available October 26, 2003)	Aircraft	Startup Date
Atlas Air	2	None	Atlanta- Paris -Doha-Hong Kong-Anchorage-Atlanta ³	B-747F	October 27, 2003
Evergreen	4 ⁴	Flight A: JFK-Anchorage- Seoul -Hong Kong-Singapore-Hong Kong- Seoul -Anchorage-JFK Flight B: JFK-Cologne- Sharjah -Bombay-Hong Kong-Bombay- Sharjah -Cologne-JFK	Flight A: JFK-Anchorage- Seoul -Hong Kong-Singapore-Hong Kong- Seoul -Anchorage-JFK Flight B: JFK-Cologne- Sharjah -Bombay-Hong Kong-Bombay- Sharjah -Cologne-JFK	B-747-200	Some services immediately; other services 10/26/03.

¹ The information provided below is based on materials submitted in response to our October 29 Notice. Numbers may change in light of supplements submitted in response to the present order (see page 3 of the order).

² In the Routing columns for both Year One and Year Two, points where fifth-freedom rights will be exercised are shown in bold type.

³ Atlas also seeks underlying exemption authority and any government designations that may be necessary. Atlas also seeks authority to integrate the authority sought here with its other certificate and exemption authorities.

⁴ Evergreen states that it holds underlying certificate authority for its proposed services, and it seeks to integrate the authority in its certificate for Route 190F with its existing certificate and exemption authority.

Carrier	Total Frequencies Requested	Routings As Stated in Application for Yr One— (Available Now)	Routings As Stated in Application for Yr Two (Available October 26, 2003)	Aircraft	Startup Date
Federal Express	12 ⁵	<p>Anchorage-Seoul-Hong Kong-Subic Bay-Anchorage⁶ (7 frequencies)</p> <p>US-Japan-Manila-Hong Kong (5 frequencies)</p>	<p>US-Hong Kong-Subic Bay (1 frequency)</p> <p>Eastbound: US-Paris-Subic Bay-Hong Kong-Seoul (five freq)</p> <p>Eastbound: US-Paris-Frankfurt-Bombay-Subic Bay-Hong Kong-Seoul (1 freq)</p> <p>Westbound: Seoul-Hong Kong-Moscow-Paris-US (6 frequencies)</p> <p>US-Tokyo-Manila-Hong Kong-Singapore-Hong Kong-US (5 frequencies)⁷</p>	<p>MD-11/A-310 (year one)</p> <p>MD-11 (year two)</p> <p>MD-11/A-310</p>	<p>Year one: 11/1/02</p> <p>Year two: 11/1/03</p>

⁵ FedEx seeks twelve frequencies for the two years; however, it states it will adjust its services in the second year to make full use of the new opportunities that become available for that year. FedEx states that it holds underlying authority for its proposed operations.

⁶ Exhibit FX-1 indicates routing would be Anchorage-Tokyo-Seoul-Taipei-Hong Kong Subic Bay-Hong Kong-Anchorage on some flights and Anchorage-Seoul-Hong Kong-Subic Bay-Hong Kong-Anchorage on other flights.

⁷ In year two, FedEx states it would continue to offer 5 weekly flights from Manila to Hong Kong year-round, with full traffic rights; would change gauge at Hong Kong to A-310 equipment and add five weekly round trips between Singapore and Hong Kong year round with full traffic rights. In eastbound direction, FedEx would change gauge at Hong Kong to an MD-11 and return directly to Anchorage.

Carrier	Total Frequencies Requested	Routings As Stated in Application for Yr One— (Available Now)	Routings As Stated in Application for Yr Two (Available October 26, 2003)	Aircraft	Startup Date
Kalitta Air ⁸	9	US-Seoul-Hong Kong (4 frequencies) US-Hong Kong-Dubai (3 frequencies)	US-Seoul-Hong Kong (1 frequency) US-Hong Kong-Kuala Lumpur (1 frequency)	B747F	Year One: Immediately upon award Year Two: 10/26/03
Northwest	8	US-Tokyo-Manila-Hong Kong (4 frequencies) ⁹	US-Seoul-Hong Kong (4 frequencies)	B747F	Year One: Immediately upon award Year Two: 10/26/03
Polar Air	10	US-Seoul-Hong Kong (2 frequencies) US-Melbourne-Manila-Hong Kong-Seoul-US ¹⁰ (2 frequencies)	US-Manila-Hong Kong (1 frequency) US-Seoul-Hong Kong (2 frequencies) New York-Prestwick-Liege-Mumbai-Penang-Hong Kong-Penang-Chennai-Dubai-Liege-New York (3 frequencies)	B747F	Year One: Seoul-HK immediately Manila-Hong Kong 1/8/2003 or sooner if permitted Year Two: Manila-HK 10/27/03 Seoul-HK 10/27/03 Mumbai/Chennai-Penang-HK 10/27/03

⁸ Kalitta states that it holds exemption authority to serve between New York, Chicago and Los Angeles, on the one hand, and Hong Kong, on the other, and that it has filed contemporaneously an exemption application for authority to serve Seoul, Dubai and Kuala Lumpur (See Docket OST-2002-13756). Kalitta requests that the Seoul, Dubai and Kuala Lumpur authority be integrated with its New York/Chicago/Los Angeles-Hong Kong authority. It further states that by separate letter it requests a designation to provide scheduled all-cargo service to those points.

⁹ Northwest also requests allocation of a single U.S.-Philippines Route 2 frequency under the terms of the U.S.-Philippines Air Transport Agreement. Northwest further states that it holds underlying authority to conduct its proposed operations.

¹⁰ Polar notes that its certificate for Route 651 allows it to combine services under its U.S.-Hong Kong authority with all services authorized by DOT certificates or exemptions, subject to our prior notification in the case of limited entry markets. Because the Philippines and Hong Kong are limited-entry markets, Polar gives notice of its intent to combine service to both countries with its route integration authority.

Carrier	Frequencies Requested	Routings As Stated in Application for Yr One— (Available Now)	Routings As Stated in Application for Yr Two (Available October 26, 2003)	Aircraft	Startup Date
UPS	18	Anchorage-Hong Kong- Clark¹¹ (Philippines) (6 frequencies)	Anchorage-Hong Kong- Mumbai-Dubai-Cologne (6 frequencies) Anchorage-Hong Kong- Singapore-Clark (6 frequencies)	MD-11/ B-767 (til 10/03) 747-200/ MD-11/ 757-200	First Year: Immediately Second Year: 10/03

¹¹ The former Clark Air Force Base airport has been renamed Diosdado Macapagal International Airport.

EVIDENCE REQUEST

In responding to this evidence request, all parties are advised to heed the admonitions and notice regarding compliance contained in the attached order. The base year for developing forecast data should be the 12-month period ended **June 30, 2002**. Submission of the following evidentiary information should be for the forecast year ending **December 31, 2003**, for first-year proposals and the year ending **December 31, 2004**, for second year proposals:¹

- Proposed schedules showing startup dates, complete routings (including all intermediate points) from origin to destination of all single-plane service that would operate in the fifth-freedom Hong Kong markets, days scheduled, equipment types, available capacity for the through routing, and variation of frequencies/routings by traffic season, if applicable.
- Historical schedules with complete routings from origin to destination for all U.S.-Asia and intra-Asian services (applicants proposing services to other areas, *e.g.* Middle East, Europe, or trans-Atlantic routings, should also provide detailed schedules for those areas) over the two-year period ending **September 30, 2002**, including days scheduled, equipment types, available capacity for the through routing, and variation of frequencies/routings by traffic season, if applicable. Carriers should indicate whether services were on a round-trip basis.
- A cargo traffic forecast for each fifth-freedom Hong Kong market proposed to be served based on the intended schedules. Such forecast should also specify the amount of traffic originating in or destined for the United States that will also be transported on the proposed single-plane flights, permitting the Department to determine by direction the amount of cargo forecasted for each single-plane market, including U.S.-Hong Kong, U.S.-third-country, third-country to third-country, and Hong Kong fifth-freedom traffic on all proposed flights. The traffic forecasts must clearly provide the source and basis for the traffic projections. **Carriers already in the market should distinguish between traffic generated under current allocations and incremental traffic anticipated under additional frequency allocations.**
- A statement specifying whether the carrier would accept partial grant of its frequency allocation application, how such allocation would be used, and the start-up for such services if different than above. Also state whether there is a minimum number of frequencies that the carrier will accept. **Carriers should also rank in terms of priority their immediate and second-year requests as well as points they would serve should not all points be granted.**

¹Any financial data provided must be given in U.S. dollars, and all weights must be in U.S. pounds. The term "first-year proposals" makes reference to use of frequencies immediately available. The term "second-year proposals" makes reference to use of frequencies that become available October 26, 2003.

- A description of cooperative arrangements currently undertaken and anticipated by the applicants in each of the third/fourth and fifth-freedom markets at issue.
- If cooperative arrangements are involved, state the percentage of total capacity currently sold in each such market by the applicant for existing arrangements; and state the percentage of total capacity to be sold in each such market by the applicant upon receipt of the frequencies at issue in this case.