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Order 2003-2-27



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

Issued by the Department of Transportation  
on the 28<sup>th</sup> day of February 2003

Served: February 28, 2003

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

Docket OST-2002-14049 - 30

**ORDER ON RECONSIDERATION**

**Summary**

By this order, we address various issues raised in three separate petitions for reconsideration to the instituting order, as well as a motion and related requests in the above-referenced proceeding. We deny the relief requested by Federal Express in its petition for reconsideration and request for decision by the Secretary of Order 2002-12-11 which instituted the proceeding. We deny the motion of Federal Express requesting the limited intervention of the Office of Aviation Enforcement and Proceedings, and also deny the requests for antitrust immunity in relation to the Federal Express motion. We grant the petitions of Federal Express and Polar Air Cargo concerning the evidence request, and, upon reconsideration, modify, in part, the evidentiary material to be filed by the applicants. We also establish revised procedural dates for processing this case.

**Background**

By Order 2002-12-11, the Department instituted the *2002/2003 Hong Kong Fifth-Freedom All-Cargo Frequency Proceeding*, Docket OST-2002-14049, to select carriers to operate newly acquired fifth-freedom all-cargo roundtrip weekly frequencies under the October 19, 2002 Memorandum of Understanding (MOU) between the United States and the Hong Kong Special Administrative Region of the People's Republic of China (Hong Kong). Under the MOU, U.S. carriers may operate additional all-cargo frequencies on a three-year phased-in basis, with an additional 24 frequencies immediately available and an additional 16 frequencies available October 26, 2003.<sup>1</sup> Since the seven applicant

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<sup>1</sup>Sixteen additional frequencies available in winter 2004 are not at issue in this proceeding.

carriers seek more frequencies than are available, the Department instituted the proceeding to determine how the frequencies should be allocated in the public interest.

The instituting order established the basic principles for the proceeding<sup>2</sup> and set forth a procedural schedule for submission of documents.<sup>3</sup> The order also explained the specific arrangements that were agreed to by representatives of the United States and Hong Kong concerning fifth-freedom services, specifying that

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.<sup>4</sup>

The instituting order also attached an evidence request for the benefit of the parties to the case.

We received three petitions for reconsideration of the instituting order as well as a motion from one of the parties. The matters raised in these documents fall into three categories: one concerning an interpretation of the Memorandum of Understanding; one concerning a request for the intervention of the Office of Aviation Enforcement and Proceedings (OEP) and a related request for antitrust immunity; and one concerning various technical issues regarding the evidence request. We address these matters separately below.

**I. Petition of Federal Express for Reconsideration and Decision by the Secretary of Order Instituting Proceeding**

Federal Express objects to what it characterizes as the Department's "unnecessarily narrow interpretation" of how to count fifth-freedom frequencies under the MOU. Federal Express argues that "[T]here was nothing in either the negotiating history of the agreement or its text that suggested that there were special rules for counting 'round trip frequencies with full traffic rights' under the agreement."<sup>5</sup> It also states that it submitted its initial application under the "commonly accepted methodology for counting

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<sup>2</sup> The order permitted carriers to supplement or amend previously filed applications, given the specifications provided on exactly how frequencies are to be counted. Evergreen, Federal Express, Northwest, and UPS supplemented their previously filed applications. Federal Express' supplement was accompanied by a motion for leave to late file. We will grant the motion.

<sup>3</sup> Subsequently, by Notice, dated December 23, 2002, the Department, responding to a request from a number of the applicants for additional time, amended the procedural schedule in the case. By Notice, dated January 16, 2003, the Department stayed the revised procedural schedule, pending resolution of issues before the Department regarding this case.

<sup>4</sup> Order 2002-12-11, at 2.

<sup>5</sup> Petition of Federal Express for Reconsideration and Decision by the Secretary of Order Instituting Proceeding, at 7.

frequencies” used in other bilateral agreements, citing a 1996 U.S.-Japan MOU and the 1994 U.S.-Germany agreement. It argues that “instead of providing a significant expansion of opportunities, the agreement, under the Department’s interpretation, “reflects a step backward from decades of progress in this area.” Saying that the case involves important national policy issues, Federal Express asserts that review by the Secretary is warranted.

Evergreen, Northwest, and UPS filed answers opposing Federal Express’ petition.

Evergreen states that Federal Express has presented no valid support for its petition and that Evergreen does not believe the issues warrant review by the Secretary. It maintains that the Department’s interpretation requiring an allocation of one round-trip frequency for each one-way service is consistent with prior practice.<sup>6</sup> Evergreen, citing the *Hong Kong Fifth Freedom All-Cargo Proceeding*, decided in 1996, argues that, indeed, such was Federal Express’ own prior position on this issue. Evergreen notes that the Department in that case used the same interpretation (which was adverse to Evergreen), as it has used here, and Evergreen maintains, “FedEx not only did not dispute the interpretation, but indeed filed in support of it.”<sup>7</sup> It also argues that Federal Express, after seeing the applications of other carriers and being aware that the frequency requests already outnumber the number available, amended its application to request in total more frequencies than are available during the first two years to all carriers under the MOU and is now seeking to remedy the situation by seeking an interpretation for which there is no support.

Northwest and UPS contend that the Department’s interpretation comports with their understanding of the formula that was on the table and agreed to between the United States and Hong Kong authorities.<sup>8</sup> Northwest argues that if the United States were to expand the formula as suggested by Federal Express,

such an exercise would lead to a DOT decision allocating more frequencies than are permitted under the MOU and certain rejection by the Hong Kong authorities when the selected carriers would seek to exercise their rights conferred by the DOT Final Order. The only result from such a unilateral attempt to enlarge the number of available frequencies would be confusion among the carriers and their shippers.... It conceivably could compel the DOT to undertake a second allocation proceeding, since the first one would have been tainted by false premises as to the total number of available frequencies.<sup>9</sup>

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<sup>6</sup> December 23, 2002 Answer of Evergreen, at 2.

<sup>7</sup> *Id.*

<sup>8</sup> December 23, 2002 Answers of Northwest, at 2, and of UPS, at 2.

<sup>9</sup> December 23, 2002 Answer of Northwest, at 3.

Both Evergreen and Northwest request that the Department append to an order on the petition a definitive count of the number of frequencies that each applicant would need for its proposal.

On reply, Federal Express argues that the answers of UPS, Northwest and Evergreen confirm that there is no certainty concerning whether the Department correctly interpreted the U.S.-Hong Kong Memorandum of Understanding. Federal Express argues that while "it may be true that the Department best knows what it agreed to orally, ...the language of the MOU speaks for itself, and does not support the restrictive interpretation set forth in the instituting order."<sup>10</sup> Thus, Federal Express maintains that the confusion of the parties' answers requires the Department to reconsider its interpretation of the MOU frequency limitation.

After review of the Federal Express petition and responsive comments, we have decided to grant the petition, but upon reconsideration, to deny the relief sought.

With respect to the methodology of counting, carrier representatives were briefed at the end of each session of the chairmen's meetings at the negotiations on matters discussed in those sessions, and all carrier representatives received the same briefing. As demonstrated not only by the answers of Evergreen, Northwest, and UPS to this petition, but also in Kalitta's application for authority, the U.S. Government's position on the counting of fifth-freedom frequencies was known by these carriers and should have been known to all the participants.

While Federal Express maintains that it filed its application using commonly accepted methodology for counting frequencies,<sup>11</sup> UPS correctly notes that each bilateral agreement is negotiated separately. Thus, for example, we would not regard the U.S.-Japan and U.S.-Germany agreements cited by Federal Express as in any way dispositive here. Any agreement must be understood in its specific context. The context of the U.S.-Hong Kong discussions reflected a mutual recognition on the part of the respective governments that in this agreement increases in the number of fifth-freedom operations, while substantial, had been carefully negotiated. The Department's interpretation in this proceeding is fully consistent with this understanding. That interpretation was communicated to the carrier representatives at the negotiations.

Although we share Federal Express' desire to maximize opportunities for U.S. airlines, we believe that to conduct a case based on an interpretation of available round-trip frequencies that is not the understanding of the government parties to the agreement would be an ill-served use of time and resources, not only for the Department, but also for the applicants. It could well delay substantially the ability of U.S. carriers to

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<sup>10</sup> December 27, 2002 Reply of Federal Express, at 2.

<sup>11</sup> Petition at 7-8.

implement the newly negotiated rights, thereby depriving the carriers and the public of the benefits we worked to secure. Against this background, we reaffirm our methodology of counting fifth-freedom frequencies as expressed in the instituting order as being wholly consistent with the understandings reached with the Government of Hong Kong and memorialized in this MOU.<sup>12</sup>

As a final matter, Federal Express has presented no persuasive argument to grant discretionary review by the Secretary of its request. Under the Department's regulations, 14 CFR 302.14(b), a request seeking such review must

describe in detail the reasons for such request and specify any important national transportation policy issues that are presented. If the petition is based, in whole or in part, on allegations as to the consequences that would result from the final order, the basis of such allegations shall be set forth. If the petition is based, in whole or in part, on new matter, such new matter shall be set forth, accompanied by a statement to the effect that petitioner, with due diligence, could not have known or discovered such new matter prior to the date the case was submitted for decision.

We find that while making references to U.S. policy regarding agreements, Federal Express has not presented compelling issues "of important national transportation policy" for several reasons which have already been discussed. First, each bilateral agreement is negotiated separately and reflects the specific context of aviation relations between parties to that agreement. Our interpretation of the Hong Kong agreement must be viewed in that light. Moreover, our interpretation of this agreement is consistent with our negotiating policy with respect to Hong Kong. Second, as regards concerns about the consequences of using this interpretation as the basis for a decision in this case, we view as positive the significant gains for U.S. carriers achieved in the recent discussions with the Hong Kong Government.<sup>13</sup> Further, we note from the record of this proceeding the manifest U.S. carrier interest in making use of these new rights, as we have interpreted them. Finally, this petition can hardly be said to represent a "new matter...that the petitioner, with due diligence, could not have known or discovered...." As has been

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<sup>12</sup> While Federal Express argues that the various answers confirm confusion among the parties and such confusion thus supports its position, we disagree. We will, however, honor the requests of Evergreen and Northwest for an attachment to this order on the individual count for the applications (as amended or supplemented, if applicable). The appended chart notes frequencies required for the applications now before us. If need be, applicant carriers may adjust their proposals at the Direct Exhibit stage of this proceeding. Parties to the proceeding will have ample time to discuss such adjustments at the Rebuttal and Brief stages of this proceeding.

<sup>13</sup> Contrary to Federal Express' position, we view the fifth-freedom rights obtained for U.S. all-cargo carriers as a significant expansion of those rights and not a mere "modest" gain. Prior to the MOU concluded October 26, 2002, only eight fifth-freedom frequencies were available for U.S. all-cargo carrier services. By this MOU, all-cargo U.S. carriers may operate, over a phased-in period, a total of 64 frequencies, thus providing greater opportunities not only for U.S. shippers, but for U.S. carriers as well. Thus, while there are limits within the MOU, we certainly do not view them as a "backward step." Rather, we view the opportunities within the MOU as a positive step in our relationship with the Hong Kong Government.

previously discussed, representatives of the interested carriers were briefed on the issues discussed in the negotiations, including the methodology used for counting frequencies, and, therefore, that interpretation should have been known to each of these carriers, including Federal Express. For all of these reasons, Federal Express has not convinced us that the situation presents the type of policy concerns demanding Secretarial intervention.

**II. Federal Express Motion Requesting Limited Intervention of the Office of Aviation Enforcement and Proceedings (Enforcement Office or OEP)**

Federal Express requests the limited intervention of the Department's Enforcement Office to "assist the parties in developing a proposed allocation of the frequencies at issue in this proceeding."<sup>14</sup> Federal Express states that it and other applicants believe

there is a reasonable possibility the applicants can develop a proposal to allocate these valuable route rights fairly and expeditiously for the Department's consideration. Although these discussions would not create antitrust liability, [footnote omitted] the presence of the Enforcement Office will not only facilitate discussions to resolve the issues before the Department, but it will alleviate concerns of potential antitrust liability.<sup>15</sup>

UPS, Kalitta Air, Polar and Atlas filed comments on Federal Express' motion.

UPS supports the Federal Express motion and believes that "a settlement among the parties to the proceeding, supervised and ultimately approved by the Department, would save the carrier applicants and the U.S. Government a great deal of time and valuable resources."<sup>16</sup> Kalitta Air supports the motion and states that the process proposed by the applicants is "little different than discussions authorized by the Department or Civil Aeronautics Board in the past" (citing Order 88-12-12, which authorized discussions concerning scheduling adjustments to relieve congestion at O'Hare International Airport).<sup>17</sup> Polar Air states it does not object to intervention by the Enforcement Office if the Department deems such intervention as necessary, but states "any such intervention should be accompanied by appropriate action insulating OEP [Office of Enforcement] personnel from those OGC [Office of the General Counsel] and other staff members who will participate in the decisionmaking process, if any such process is ultimately necessary."<sup>18</sup>

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<sup>14</sup> December 24, 2002 Motion of Federal Express, at 1.

<sup>15</sup> *Id.*, at 1-2.

<sup>16</sup> December 17, 2002 Answer of UPS, at 2.

<sup>17</sup> January 2, 2003 Answer of Kalitta Air, at 1-2.

<sup>18</sup> January 6, 2003 Answer of Polar Air Cargo, at 2.

In their respective answers to the Motion, both Polar and Atlas raise the issue of granting antitrust immunity to the applicants for such discussions. Polar says that any order permitting OEP intervention should also be accompanied by “a grant of antitrust immunity to all applicants for participation in the settlement process.”<sup>19</sup> Atlas maintains that the Department should take action to alleviate antitrust concerns that are standing in the way of settlement discussions. Atlas notes that it “is reluctant to accept a risk of antitrust challenge by participating in settlement discussion in the absence of antitrust immunity or some other meaningful type of comfort.”<sup>20</sup> Atlas maintains that the Department needs to grant approval to the carriers’ oral agreement to discuss settlement under 49 USC §41309.

We have decided to deny both the Motion of Federal Express for the limited intervention of the Enforcement Office and also the ensuing requests for antitrust immunity.

Congress has given us the responsibility to allocate the frequencies at issue in this proceeding in accordance with the applicable statutory standards. In almost all cases where frequency allocations and route rights are being awarded, we analyze the competing carrier applications and determine which ones should be granted and under what conditions. We have made such decisions in many cases. Here the applicants have proposed that we assist them in developing an agreed-upon allocation of frequencies, which would then be formally submitted to us for our review. We do not object to the parties’ efforts in this case to agree on a joint allocation proposal that would then be filed with us. The parties’ agreement on a joint proposal could result in a reasonable allocation of the frequencies without the procedures that would ordinarily be required if we had to allocate frequencies on the basis of competing proposals. Of course, we would remain obligated to review any such proposal to see whether it met the statutory standards for an award of frequency rights.

We will not, however, grant Federal Express’ request that we designate the Office of Enforcement as a facilitator for the applicants’ proposed discussions on the allocation of valuable route rights. The parties’ ability to agree upon a mutually satisfactory joint proposal should not require the presence of Department staff. The role envisaged by Federal Express is not part of the usual duties of OEP, and that Office would not be in a position to present the Department’s tentative views or opinions in any such discussions. If the parties are unable to agree without OEP intervention, we will carry out our statutory obligation to decide how the frequencies should best be allocated. We would in any event have to review any joint proposal by the applicants to determine whether it was consistent with the public interest.

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<sup>19</sup> *Id.*, at 2-3.

<sup>20</sup> January 3, 2003 Answer of Atlas Air, at 2, fn. 2.

In these circumstances, we see no reason why we should intervene in any settlement talks by the parties. We, therefore, deny the relief sought in the Federal Express Motion.

Several of the parties have suggested that we should grant antitrust immunity to such discussions. We will not do so. We may approve an agreement or discussions among airlines if we determine that doing so is not adverse to the public interest. We may not approve an intercarrier agreement that substantially reduces or eliminates competition unless the agreement is necessary to meet a serious transportation need that cannot be met, or to achieve important public benefits that cannot be achieved, by reasonably available alternatives that are materially less anticompetitive.<sup>21</sup> We do not believe that the transportation need and public benefit findings can be made in this case. Moreover, there are clearly available materially less anticompetitive alternatives. The carriers either can proceed collectively without antitrust immunity, or can individually file their independently developed service proposals. The Department is fully prepared in that case, as in all other similar cases, to make a determination on what frequency allocation will best meet the public interest. Therefore, we find that grant of antitrust immunity is not warranted, and we will not grant the requests for antitrust immunity.<sup>22</sup>

### **III. Petitions for Reconsideration of Portions of the Evidence Request<sup>23</sup>**

The instituting order in this case attached an Evidence Request for the parties to the proceeding. Among other things, the request (a) requires the carriers to submit historical schedules over a two-year period ending September 30, 2002; (b) establishes as the base year for developing traffic forecasts the 12-month period ending June 30, 2002, and a forecast year ending December 31, 2003, for the first-year proposals and the year ending December 31, 2004, for second-year proposals; and (c) requires forecasts to specify the amount of traffic that will be transported on the proposed single-plane flights, permitting the Department to determine by direction the amount of cargo forecasted for each single-

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<sup>21</sup> 49 U.S.C. Section 41309(b)(1)(A) and (B).

<sup>22</sup> The situation here is not the same as the situation in Order 88-12-12, cited by Kalitta Air. Order 88-12-12 authorized discussions on schedule adjustments to relieve congestion at O'Hare International Airport "with the FAA to provide guidance for the agency in determining how it should modify conditions under which the carriers serving O'Hare may continue to use their slots outside the half-hour time periods permitted by the high density rule." The discussions were expected to result in an FAA modification of its administration of the slot rules at O'Hare, not in an agreement among the airlines on a joint position to be presented to the FAA. (Order 88-12-12 at 2). The authority was granted, subject to stringent conditions, whereby the carriers could not discuss schedules in particular city pairs and they could not submit information concerning their proposed services or schedules, and the carriers were prohibited from determining the maximum number of flights that could be operated within any specified time. In contrast, the applicants here do not need discussion authority to present their views to us. Each can submit its own application and its own pleadings in support of that application, and we do not need a joint proposal from the applicants to allocate the frequencies.

<sup>23</sup> Petition of Federal Express (filed December 17, 2002 but dated December 18, 2002) for Reconsideration of Technical Issues in Order Instituting Proceeding and Petition of Polar Air Cargo for Reconsideration of Order 2002-12-11, dated December 17, 2002.

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.<sup>24</sup>

Federal Express and Polar Air Cargo each filed separate petitions for reconsideration concerning the Evidence Request attached to the instituting order.

### **Federal Express Petition**

Federal Express maintains that the amount of material requested in the evidence request regarding historical schedules is too voluminous to produce and, thus, it requests that carriers be permitted to provide schedules at the beginning of the IATA traffic season (which Federal Express refers to as “snapshots” of schedules). It also requests that the Department clarify what it means by “schedules,” arguing that

For some carriers, like Federal Express, service is rendered with frequency and regularity. Any shipper seeking transportation services can tender goods to an integrated carrier like FedEx (whether to FedEx Express or to a forwarder) for transportation on those scheduled services, on an individually waybilled basis.

Other cargo carriers may operate on a schedule, but are not prepared to accept individually waybilled cargo. In this case, their “schedules” are not the traditional published schedules of a common carrier. Instead, the schedules are little more than prearranged plans for operating under a contract for a very few customers, and may include charters and ACMI contracts. These services cannot be compared directly with the schedules of an integrated carrier.<sup>25</sup>

In addition, Federal Express notes that the evidence request asks applicants to specify the amount of traffic to be carried only on proposed single-plane flights. Federal Express questions the Department’s basis for assuming flights will be single-plane, since the MOU permits carriers to operate using multiple changes of gauge, which might be single-flight number, but would not be single-plane, and suggests that the Department review the scope of this requirement.

Evergreen and Northwest filed answers in support of Federal Express’ request regarding historical schedules. Evergreen also supports the request that the Department clarify what data are encompassed by its reference to “schedules.” Northwest supports Federal Express’ request that traffic forecasts not be limited to single-plane flights, noting that “the MOU contains significant aircraft routing flexibility, making calculation of single plane traffic largely irrelevant.”<sup>26</sup>

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<sup>24</sup> Appendix A to Order 2002-12-11.

<sup>25</sup> December 17, 2002 Petition of Federal Express (Technical Issues), at 2. (Note document date says December 18 but document was officially filed December 17.)

<sup>26</sup> December 23, 2002 Consolidated Answer of Northwest, at 4.

### Polar Petition

Polar requests revisions to certain dates required in the evidence request. Polar maintains that using the base period (12-month period ended June 30, 2002) as specified in the instituting order would create serious evidentiary problems. Polar argues that the T-100 data, on which carrier applicants normally rely for determining market shares and load factors, are not now available and will not become available in time to be used in the proceeding. Polar states that it understands that T-100 data are available only through March 2002 and that “because of delays in carrier reporting and subsequent data corrections, it often takes a substantial amount of time following the reporting of data to DOT for the database to be considered reasonably accurate and to be released to the public...[and that] there is virtually no chance that the applicants will have timely access to reliable data for first six months of 2002.”<sup>27</sup> To remedy the situation, Polar requests that the base year period be changed to the 12 months ending December 31, 2001, and that the historic schedules required in the evidence request be modified to be for the two-year period ending December 31, 2002. Polar maintains that this modest modification will result in submission of the most up-to-date historic schedule information available at the time of submission.

Evergreen and Northwest filed in support of Polar’s requests to change the base-year period to Calendar Year 2001 and the historic schedules to the two-year period ending December 31, 2002.<sup>28</sup>

We grant the petitions of Federal Express and Polar for reconsideration of certain aspects of the evidence request, and, upon reconsideration, we modify, in part, the material to be submitted by the applicants.

We have reviewed the requests of Federal Express and Polar as they relate to the requirement that carriers provide historical schedules in their exhibits. As we stated in the instituting order, this requirement is similar to that requested in the last Hong Kong fifth-freedom cargo case, *i.e.*, detailed schedules of transpacific and intra-Asian services. However, in this proceeding, we did modify the requirement to include Middle East, Europe or trans-Atlantic routings for those applicants proposing service to those areas. Federal Express argues that submission of such material is too voluminous. In this regard, we note that, in response to a comparably-worded provision in our evidence request in the previous Hong Kong case, Federal Express presented, and we accepted, the type of schedule “snapshots” it has referred to in its present petition.<sup>29</sup>

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<sup>27</sup> December 17, 2002 Petition of Polar Air Cargo, at 2.

<sup>28</sup> Northwest states that it supports Polar’s request on the historic schedule; however, it states the schedules should be for the two-year period ending December 31, 2001, rather than December 31, 2002 as stated in Polar’s petition.

<sup>29</sup> Direct Exhibits of Federal Express Corporation, Exhibit FX-112, in the *2001 Hong Kong Fifth Freedom All-Cargo Frequencies Case*, Docket OST-95-764.

Guided by that history, as well as by our desire to limit the evidentiary burden on parties to the extent possible consistent with our need to develop an adequate record, we have decided to permit carriers to follow a similar course of action here and to present such “snapshots” of their schedules. We have also decided to scale back the amount requested to a one-year period. We will require carriers to submit the information requested for historical schedules for the Winter 2001-2002 and Summer 2002 IATA traffic seasons, or the equivalent thereof (*i.e.*, November 2001 – October 2002) for carriers not participating in the IATA conferences.<sup>30</sup> Carriers not proposing services to the Middle East, Europe or via trans-Atlantic routings are not expected to provide schedules for those areas.

As requested, we now also clarify that the services at issue in this proceeding are for “scheduled” authority, not for charter or ACMI operations. Carriers should report historical schedules (*i.e.*, those for which they have published schedules, *e.g.*, web site, *Official Airline Guide*, trade publications, and other official publications). Carriers should exclude flights on which individually waybilled traffic could not be tendered. To the extent carriers operate part charters, those flights should be identified separately as flights on which less than full capacity is available for individually waybilled traffic and should indicate the percentage of space allocated for such cargo on scheduled flights. We will require historical schedules for all scheduled services whether they were operated as single-plane or change of gauge services. Carriers should clearly identify which services are single-plane and which services are operated as a change-of-gauge.

Federal Express and Northwest state that they do not understand why the evidence request calls for proposed single-plane schedules and forecast traffic when the MOU has provisions for change of gauge services. We recognize that cargo may be transported in many ways, including single-plane or change-of-gauge services. However, in past all-cargo selection cases, including the previous Hong Kong fifth-freedom case, the Department has used single-plane operations and the amount of traffic carried on the various segments of single-plane services as a means to evaluate the value to the shipping public of the various proposed services. While we would not want to conclude here how much weight, if any, this factor will receive in this proceeding, given our past experience, we would certainly regard it as necessary for an adequate record to have the parties submit the requested information. As regards information on change of gauge services, we would emphasize that the parties are in no way precluded from submitting it and arguing its appropriate weight in our analysis. As we said in our instituting order in connection with the Evidence Request, “In addition to the material requested, applicants and other parties may submit any additional information that they believe will be useful to us in making a decision.” Order 2002-12-11 at 5. To the extent that carriers include

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<sup>30</sup> We note that Polar has requested a different time frame for historical material. We have decided not to adjust the historical material time frame as suggested by Polar; but to permit carriers to present such information as outlined above (submission of materials as presented at IATA Scheduling Coordination Conferences) or equivalent thereof.

change of gauge services in their proposed schedules and traffic forecasts, they should clearly and separately identify the composition of traffic on those flights in a comparable manner as required by the evidence request for single-plane services.

We remind carriers already in the market that they should distinguish between traffic generated under current permanent allocations and incremental traffic anticipated under additional frequency allocations. Also carriers that have such existing services in the market should be certain that their presentation of their schedules clearly distinguish those flights encompassed by existing permanent frequencies from those flights for which they are seeking new frequencies. Similarly, if a flight operates, *e.g.* seven days a week and only four of those flights carry fifth-freedom traffic and the other three are “blind-sector,” the schedules should clearly identify such operations.

Finally, we have decided to amend the base-year period for developing forecast data as requested by Polar. The base year for developing forecast year data will be the 12-month period ending December 31, 2001.

#### **Miscellaneous**

In view of our decisions above, we are revising the remaining procedural schedule for this proceeding as follows:

Direct Exhibits: March 21, 2003  
Rebuttal Exhibits: April 4, 2003  
Briefs: April 14, 2003

We believe that this schedule will afford the parties to this proceeding an appropriate amount of time to complete their evidentiary submissions in compliance with the instituting order as revised herein.

#### **Accordingly,**

1. We grant the Petition of Federal Express Corporation for reconsideration of the instituting order and review by the Secretary; and upon reconsideration, deny the relief requested;
2. We deny the Motion of Federal Express Corporation for limited intervention of the Office of Aviation Enforcement and Proceedings and the related requests by Polar Air Cargo, Inc. and Atlas Air, Inc. for antitrust immunity;
3. We grant the separate petitions of Federal Express Corporation and Polar Air Cargo, Inc. for reconsideration of portions of the evidence request; and upon

reconsideration, we modify, in part, the material to be submitted by the carriers in this proceeding, as discussed in the text of this order.

4. We grant the motion of Federal Express Corporation to file an otherwise unauthorized document; and
5. We will serve this order on all parties to this proceeding.

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\\_aviation.asp](http://dms.dot.gov/reports_aviation.asp)*

**APPLICATIONS AS AMENDED AND SUPPLEMENTED  
(Fifth-freedom points in bold)**

<b>Carrier</b>	<b>Year 1 Routings</b>	<b>Frequencies Required</b>	<b>Year 2 Routings</b>	<b>Frequencies Required</b>	<b>Total Year 1+Year 2</b>
Atlas Air	None	None	Atlanta- <b>Paris</b> -Doha-Hong Kong-Anchorage-Atlanta (2x per week)	2 Paris	2 year 2 <b>Total 2</b>
Evergreen	JFK-Anchorage- <b>Seoul</b> -Hong Kong- <b>Seoul</b> -Anchorage-JFK (2x per week)	2 Seoul	JFK-Anchorage- <b>Seoul</b> -Hong Kong- <b>Seoul</b> -Anchorage-JFK (2x per week)  JFK- <b>Cologne</b> -Sharjah-Bombay- <b>Singapore</b> -Hong Kong- <b>Singapore</b> -Bombay-Sharjah- <b>Cologne</b> -JFK (2x per week)	(Year 1 continuation)  2 Cologne via Singapore	2 Year 1  2 Year 2 <b>Total 4</b>
Federal Express	<b>Manila</b> (5x per week)-Hong Kong- <b>Seoul</b> (4x per week plus 1 blind sector)-Tokyo-Anchorage  Anchorage- <b>Seoul</b> (4x per week plus three blind sector)-Hong Kong- <b>Subic</b> (12x per week)  <b>Subic</b> (12x per week)-Hong Kong- Anchorage	5 Manila  4 Seoul  7 Subic (plus 5 "old")  Total 16	<b>Manila</b> (5x per week)-Hong Kong- <b>Seoul</b> (5x per week)-Tokyo-Anchorage  Anchorage- <b>Seoul</b> (5x per week plus two blind sector)-Hong Kong- <b>Subic</b> (7x per week plus 5 "old")  <b>Subic</b> (7x per week plus 5 "old")-Hong Kong- Anchorage  Memphis/Indianapolis/Newark-Stansted- <b>Paris</b> -Frankfurt- <b>Bombay</b> -Subic-Hong Kong- <b>Singapore</b> (1x per week)  Memphis/Indianapolis/Newark-Stansted- <b>Paris</b> -Subic-Hong Kong- <b>Singapore</b> (5x per week)  <b>Singapore</b> -Hong Kong- <b>Moscow</b> - <b>Paris</b> -Memphis (6x per week)	(Manila Year 1 continuation)  1 Seoul (plus Year 1 continuation)  (Subic Year 1 continuation)  6 Paris via intermediates  5 Singapore  Total 12	Manila 5 Year 1  Seoul 4 Year 1 1 Year 2  Subic 7 Year 1  Paris 6 Year 2  Singapore 5 Year 2  <b>Total 28</b> <b>16 Year 1</b> <b>12 Year 2</b>

Carrier	Year 1 Routings	Frequencies Required	Year 2 Routings	Frequencies Required	Frequencies Required (Y1+Y2)
Kalitta Air	JFK-Chicago-Anchorage- <b>Seoul</b> -Hong Kong- <b>Dubai</b> -Hong Kong- <b>Seoul</b> -Anchorage-Chicago-JFK (3x per week)	3 Seoul  3 Dubai	JFK-Chicago-Anchorage- <b>Seoul</b> -Hong Kong- <b>Kuala Lumpur</b> - <b>Dubai</b> - <b>Kuala Lumpur</b> -Hong Kong- <b>Seoul</b> -Anchorage-Chicago-JFK (4x per week)	1 Seoul (plus Year 1 continuation)  1 Dubai via Kuala Lumpur (plus Year 1 continuation)	Seoul 4 Year 1 1 Year 2  Dubai 3 Year 1 1 year 2
	JFK-Chicago-Anchorage- <b>Seoul</b> -Hong Kong- <b>Seoul</b> -Anchorage-Chicago-JFK (1x per week)	1 Seoul  Total 7	JFK-Chicago-Anchorage- <b>Seoul</b> -Hong Kong- <b>Seoul</b> -Anchorage-Chicago-JFK (1x per week)	(Seoul Year 1 continuation)  Total 2	<b>Total 9</b> <b>7 Year 1</b> <b>2 Year 2</b>
	Northwest	Anchorage-Narita- <b>Manila</b> -Hong Kong (4x per week)	4 Manila	Anchorage-Narita- <b>Manila</b> -Hong Kong (4x per week)	(Manila Year 1 continuation)
Polar	Chicago/New York- <b>Anchorage</b> - <b>Seoul</b> -Hong Kong- <b>Seoul</b> -Anchorage-Chicago-New York (5x per week)	2 Seoul (plus 3 "old")	Chicago/New York/Los Angeles- <b>Anchorage</b> - <b>Seoul</b> -Hong Kong- <b>Seoul</b> -Anchorage-Chicago-New York (7x per week)	2 (plus Year 1 continuation and 3 "old")	Seoul 2 Year 1 2 Year 2
	NYC-Atlanta/Chicago-LA-Honolulu-Melbourne- <b>Manila</b> -Hong Kong- <b>Seoul</b> -Anchorage-Chicago-NYC/Los Angeles (2x per week)	2 Manila	NYC-Atlanta/Chicago-LA-Honolulu-Melbourne- <b>Manila</b> -Hong Kong- <b>Seoul</b> -Anchorage-Chicago-NYC/Los Angeles (3x per week)	1 (plus Year 1 continuation)	Manila 2 Year 1 1 Year 2
			NYC-Prestwick-Liege- <b>Mumbai</b> - <b>Penang</b> -Hong Kong- <b>Penang</b> - <b>Chennai</b> -Dubai-Liege-Prestwick-New York (3x per week)	3 Mumbai via Penang <sup>1</sup>  3 Chennai via Penang <sup>1</sup>  Total 9 <sup>1</sup>	Mumbai 3 Year 2  Chennai 3 Year 2  <b>Total 13</b> <b>4 Year 1</b> <b>9 Year 2</b>

<sup>1</sup> Polar requested 3 "India" frequencies; however, since the furthest points served on the inbound and outbound flights are different, each requires an allocation from the overall frequency pool. Therefore, the number of additional frequencies required in Year 2 is 9, rather than the 6 requested in Polar's application.

Carrier	Year 1 Routings	Frequencies Required	Year 2 Routings	Frequencies Required	Frequencies Required (Y1+Y2)
UPS	Anchorage-Hong Kong- <b>Clark-Hong Kong-Clark-</b> Anchorage (6x per week)	6 Clark	Anchorage-Hong Kong- <b>Clark-</b> Hong Kong- <b>Clark-</b> Anchorage (6x per week)  Anchorage-Hong Kong- <b>Singapore-Clark-Singapore-</b> Hong Kong-Anchorage (6x per week)  Anchorage-Hong Kong- <b>Mumbai-Dubai-Cologne-</b> <b>Mumbai-Hong Kong-</b> Anchorage (2x per week)  Anchorage-Hong Kong- <b>Mumbai-Dubai-Cologne-</b> Hong Kong-Anchorage (4x per week)	(Clark Year 1 continuation)  6 Clark via Singapore  2 Cologne via intermediates  4 Cologne via intermediates	Clark 6 Year 1 6 Year 2   Cologne 6 Year 2   <b>Total 18</b> <b>6 Year 1</b> <b>12 Year 2</b>
		Total 6		Total 12	