

257071



UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY
WASHINGTON, DC

Order 2003-10-20

Issued by the Department of Transportation
on the 17th day of October, 2003

Served: October 17, 2003

2002/2003 Hong Kong Fifth-Freedom All-Cargo
Frequency Proceeding

Docket OST-2002-14049 - 94

ORDER

Summary

By this order, we address the matter of transition from *pendente lite* authority to implementation of the authorities awarded to U.S. carriers in the above-captioned proceeding.

Background

By Order 2003-9-9, we decided the long-term awards for all-cargo operations in the Hong Kong fifth-freedom market.¹ In order to provide the opportunity for some service in the Hong Kong fifth-freedom market pending the conduct of this proceeding, we earlier made several awards of *pendente lite* authority.²

At the show-cause stage of the long-term proceeding, Federal Express (FedEx) raised a question of transition from *pendente lite* authority to long-term authority in the affected markets. In order to address this matter, in Order 2003-9-9, we asked each recipient of a long-term award to notify us by September 19, 2003, of its plans for the institution of service. We received responses from all carriers receiving awards. We summarize these submissions in Appendix B. We also have now received several new applications for *pendente lite* interim awards. These are also summarized in Appendix B.

Disposition

In the Notice of Action Taken awarding *pendente lite* authority, we made clear that the purpose of the awards was to introduce new service into markets while we conducted our proceeding. To the extent that we provided termination dates for the *pendente lite* awards, we did so with the design of facilitating a smooth transition from the temporary awards to the long-term awards that would be forthcoming at the end of our proceeding. We have now completed our proceeding and based on the submissions we have received regarding institution of service, we have a sufficient basis to conclude that, with the sole exception of the situation involving Fed Ex as discussed below, all of the award recipients in the markets for which *pendente lite* authority was awarded are in a position to exercise long-term authority in those

¹ See Appendix A for awards made in Order 2003-9-9.

² By Notice of Action Taken, November 22, 2002, *pendente lite* authority was awarded to the following carriers in the markets specified: Federal Express, 2 weekly frequencies for Hong Kong-Seoul, 2 weekly frequencies for Hong Kong-Manila, and 2 weekly frequencies for Hong Kong-Subic Bay; Northwest, 3 weekly frequencies for Hong Kong-Manila; Polar, 2 weekly frequencies for Hong Kong-Manila and 2 weekly frequencies for Hong Kong-Seoul; and UPS, 6 weekly frequencies for Hong Kong-Macapagal (formerly Clark Air Force Base).

markets now. Since, with the exception of FedEx's non-Subic Bay awards, the same carrier receiving the long-term award also held the *pendente lite* award, there are no real transition concerns, as contemplated in awarding the *pendente lite* authority. We thus see no persuasive public interest reason not to have the long-term award recipients operate pursuant to that more recently awarded authority. Therefore, we have decided that, as of the effective date of this order, the *pendente lite* authority of those carriers will be terminated immediately and supplanted by the long-term awards they have received.

As to FedEx, its long-term award in part is different from its *pendente lite* award. FedEx was not awarded long-term authority for its two *pendente lite* frequencies for Seoul and did not request long-term authority for its two *pendente lite* frequencies for Manila.³ Authority for these cities went to other carriers. Based on the carrier submissions regarding startup dates for their services, and taking into account the overall year-one and year-two frequency limits for U.S.-carrier services, we calculate that FedEx could maintain use of all four of its remaining *pendente lite* frequencies until November 9, 2003, at which time FedEx must take down one of the four *pendente lite* frequencies. FedEx must take down a second *pendente lite* frequency by November 30, 2003; a third *pendente lite* frequency by December 10, 2003; and the final *pendente lite* frequency by January 23, 2004.

Except as noted above, to the extent carriers have sought a continuation of *pendente lite* frequencies or have sought new awards for *pendente lite* frequencies, based on our decision above, we deny these requests.

ACCORDINGLY,

1. Effective on the issuance date of this order, the *pendente lite* authority of FedEx for Subic Bay services, Northwest for Manila services, Polar for Seoul and Manila services, and UPS for Macapagal (formerly Clark Air Base) services will be terminated and immediately supplanted by the long-term authority awarded to these carriers by Order 2003-9-9 in these markets;
2. Effective November 9, 2003, FedEx must terminate one of its *pendente lite* frequencies; effective November 30, 2003, FedEx must terminate one of its *pendente lite* frequencies; effective December 10, 2003, FedEx must terminate one of its *pendente lite* frequencies; and effective January 23, 2004, FedEx must terminate one of its *pendente lite* frequencies;
3. To the extent not granted, we deny all other requests; and
4. We will serve this order on all parties to this proceeding.

By:

SUSAN MCDERMOTT
Deputy Assistant Secretary for
Aviation and International Affairs

(SEAL)

³ FedEx did, however, receive both *pendente lite* and long-term awards for Subic Bay.

Appendix A

Authority Awarded by Order 2003-9-9 in the 2002/2003 Hong Kong Fifth-Freedom All-Cargo Frequency Proceeding, Docket OST-2002-14049

	For Immediate Availability (24 available under MOU)	For Availability on October 26, 2003 (16 available under MOU)
FedEx	6 Subic Bay	6 Paris (via Moscow and Mumbai) ¹ 1 Subic Bay
UPS	6 Macapagal, Philippines	6 Cologne (via Mumbai and Dubai) ²
Evergreen	1 Seoul	1 Seoul
Kalitta	1 Seoul 2 Dubai	1 Seoul (via Kuala Lumpur) ³
Northwest	4 Manila	none
Polar	2 Seoul 2 Manila ⁴	1 Delhi (via Penang)

¹ The parentheticals shown in this column identify cities that are part of the selected carrier's routing and that count against the MOU city caps. Because of the city-caps in the MOU, the carriers' operations must conform with their routings as modified here.

² We authorize UPS to exercise fifth-freedom traffic rights for Dubai on five of its six allocated frequencies. If UPS serves Dubai on all six frequencies, it must operate on a blind-sector basis on one of the allocated frequencies.

³ In the second year, Kalitta stated it would operate all of its Dubai services via Kuala Lumpur.

⁴ The two Manila frequencies granted for first-year services will not carry over to the second year. At the beginning of the second year (*i.e.* October 26, 2003) the two first-year Manila frequencies allocated to Polar will be transferred to Delhi (via Penang) service. Therefore, at the beginning of the second year (October 26, 2003), Polar will have 2 Seoul frequencies and 3 Delhi (via Penang) frequencies.

Carrier Responses on Inaugural Dates for Proceeding Allocated Frequencies

Pursuant to the Department's directive in Order 2003-9-9, all carriers awarded frequencies in the proceeding submitted responses, with Evergreen, FedEx, and Polar subsequently clarifying and modifying their earlier responses. Subsequently, UPS filed a new application for an immediate, interim allocation of frequencies, commenting on Polar's supplemental response. (See below) Kalitta Air filed a response to the supplemental notice and request of Polar and UPS' application.

Evergreen, in its original response, did not give specific dates as to inaugural dates for the awarded frequencies in the proceeding. In its supplemental response, Evergreen states that it will institute its first flight to Seoul and Hong Kong on December 11, 2003, and will operate the second Seoul-Hong Kong flight beginning January 24, 2004.

For year one services, FedEx states that it will begin services between Subic Bay and Hong Kong September 29, 2003, specifying that "incremental services" are four frequencies in addition to the two *pendente lite* frequencies it is presently operating. It further states that one of the four "incremental" frequencies will be operated only on a one-way basis between Subic Bay and Hong Kong.

Regarding its second-year awards, Federal Express states that it will institute the single additional Year Two Subic Bay-Hong Kong flight on October 27, 2003. It also states that it will begin its Paris-Hong Kong flights on October 27, 2003, but states it will be unable to include a traffic stop at Moscow, as originally planned, because of "formidable burdens" that will be imposed by the Russian Federation. Consequently, FedEx states that it will operate the Paris-Hong Kong flights via Almaty, Kazakhstan, on a second-freedom refueling stop basis and that this does not affect the Hong Kong-Moscow city cap negatively but actually frees up one point. FedEx further states that routing the flight via Almaty on a second-freedom basis has nothing to do with the fifth-freedom allocation or FedEx' proposal to offer fifth-freedom services.

Kalitta states that it expects to begin its allocations during the week of November 10, 2003, subject to receipt of government authority.

Northwest acknowledges that it operates three Hong Kong-Manila frequencies on a *pendente lite* basis and that it intends to continue those flights. The fourth awarded frequency in the proceeding will be implemented December 1, 2003.

Polar, in its initial response, only gave information regarding second-year awards. It stated that all five of its frequencies effective October 26, 2003, would be operated as follows: 2 frequencies for Seoul, Korea-Hong Kong and 3 frequencies Delhi, India, via Penang, Malaysia-Hong Kong.

In the supplemental response, Polar states that

Polar has been allocated four (4) frequencies on a *pendente lite* basis and will continue to use those frequencies for currently scheduled services until October 26, 2003, when Polar's permanent allocation becomes effective. Polar uses these *pendente lite* frequencies to operate the following services:

Seoul, Korea-Hong Kong: 2 frequencies
Manila, Philippines-Hong Kong: 2 frequencies.

The Seoul-Hong Kong frequencies will continue to be operated after October 26, 2003, as indicated in Polar's original application. The two frequencies now used for Manila-Hong Kong fifth-freedom service will be used to operate Polar's new Delhi-Hong Kong services via Penang after October 26, 2003. Polar will ...continue to operate services between Manila and Hong Kong on a blind-sector basis after October 26, 2003.

Polar then proceeds to request that effectiveness of its temporary allocation of two weekly frequencies for Manila-Hong Kong service continue until Evergreen and/or Kalitta are prepared to start using their frequencies. Thus, Polar requests that it be allowed to continue using two out of the total six frequencies allocated to Evergreen and Kalitta to continue Polar's twice-weekly Manila-Hong Kong service on a temporary basis. It further requests that, if this is allowed, the Department should require notice from Evergreen or Kalitta, as the case may be, 30 days in advance of that carrier's intention to start using these frequencies so that Polar may effect an orderly withdrawal of service from the market. In response to this latter request, Kalitta states that it already has provided required notification and need not present additional notification.

UPS states that the six Hong Kong-Macapagal Diosdado Airport frequencies (formerly Clark Air Force Base) have already begun under a *pendente lite* exemption and that UPS will continue to operate those frequencies. It states that the six Hong Kong-Cologne frequencies via Mumbai and Dubai will begin October 26, 2003.

UPS Application for Immediate, Interim Allocation of Frequencies

On September 30, 2003, UPS filed a new application for an immediate, interim allocation of frequencies to be able to provide scheduled all-cargo fifth freedom air transportation between Hong Kong and Seoul. UPS also states that this application serves as a responsive document to Polar's request for extension of temporary allocation (see Polar's supplemental response above). In the September 30 application, UPS states that two carriers have notified the Department that they will not begin services immediately upon the availability of the awarded frequencies but would start at some point within the 90-day startup window; thus, six frequencies will go unused for some period of time and UPS would like to make full and effective use of those valuable public resources in the interim. UPS requests that award of such authority remain in effect until the date on which Evergreen or Kalitta begin service under their awards in Order 2003-9-9.

Kalitta filed in response to UPS' application stating that it does not object in principle to use of its frequencies awarded but not immediately used, so long as the Department provides a cut off date of November 10, 2003, for use of Kalitta's frequencies and does not impose an additional advance notification requirement.

Polar filed a joint response to this application and to Northwest application. See description below.

Northwest Application for Interim Frequency Allocation

On October 2, 2003, Northwest filed a new application for the temporary, interim allocation of one Hong Kong fifth-freedom frequency in order to provide all-cargo service between Hong Kong and Seoul, Korea. Northwest also states that this pleading serves as a response to Polar's request for interim allocation of two frequencies (see Polar above). Northwest states that the responses of the carriers in the proceeding indicate a total of six weekly frequencies would go unused for temporary periods. Northwest requests use of one of the unused frequencies (preferably one of Evergreen's two frequencies). It states that it would use the frequency until such as Evergreen (or Kalitta) commences service using the

frequency in question. Northwest states that the competing requests of Polar, UPS and Northwest for temporary allocation of the six unused frequencies can be accommodated fairly and equitably.

Polar filed a joint answer to this application and to the application of UPS described above. See description below.

Answer of Polar Air Cargo to *Pendente Lite* Requests of United Parcel Service Co. and Northwest Airlines, Inc.

On October 3, 2003, Polar filed an answer to the requests of UPS and Northwest for interim authority. Polar states that it does not oppose an interim award of the four frequencies held by Kalitta Air to UPS and Northwest provided that Polar receives a concurrent award of two frequencies held by Evergreen. Polar agrees with Northwest that the competing requests of Polar, Northwest and UPS can be accommodated fairly and equitably but states that it believes allocating Evergreen two frequencies to Polar for continued Manila services and dividing Kalitta's four amongst Northwest and UPS for Seoul services would best achieve that goal. Polar argues that absent an interim frequency allocation, it must withdraw services from Manila in a matter of weeks and that shippers and consignees currently using that service will lose this transport option at that time. It further argues that extending its Manila-Hong Kong service into December and January would offer optimal public benefits from the two frequencies allocated Evergreen in the proceeding.

Application of Federal Express Corporation for Interim Frequency Allocation

On October 3, 2003, FedEx filed an application for interim authority for six frequencies to Incheon International Airport at Seoul, Korea and also responded to the applications filed by Polar, UPS, and Northwest for interim frequency allocations. FedEx states that the *pendente lite* award entitles the recipients of those frequencies to operate until December 11, 2003; that FedEx is operating two *pendente lite* frequencies to Manila and two to Incheon and that it has the right to continue to operate those frequencies until 30 days' notice from the permanent awardee or ninety days after the final order, whichever occurs first. To the extent that other parties seek to curtail those rights earlier awarded FedEx, FedEx states that those requests should be denied. FedEx also requests that the termination dates for the *pendente lite* operations be confirmed as soon as possible.

Regarding the analysis of Polar and UPS that six frequencies are temporarily available, FedEx accepts that analysis. FedEx departs however from the assumption that these six frequencies should be restricted to the points that will ultimately be used by the final awardees and maintains that the Department should put these temporary rights to the best use by eliminating blind-sector operations between Hong Kong and Incheon. To this end, FedEx states that it should be awarded six Incheon frequencies and maintains that of the present applicants for temporary authority no other applicant has more consistently sought to serve Incheon. FedEx states that it joins Polar's request that the user of the temporary authority be given 30 days' notice of intent to initiate services.