



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

Issued by the Department of Transportation on **February 13, 2004**

NOTICE OF ACTION TAKEN -- DOCKET OST 2003-16444

This serves as notice to the public of the action described below, taken by the Department official indicated (no additional confirming order will be issued in this matter).

Joint Application of: **AMERICA WEST AIRLINES, INC. (America West), and MESA AIRLINES, INC. (Mesa)**, filed **10/30/03** for:

XX Exemption for two years for America West and Mesa under 49 U.S.C. §40109 to provide the following service:

Scheduled foreign air transportation of persons, property, and mail between (1) the terminal point Phoenix, Arizona, and the terminal point San Jose del Cabo, Mexico; and (2) the terminal point Phoenix, Arizona, and the terminal point Puerto Vallarta, Mexico. The joint applicants state that they will use the requested authority to permit Mesa to offer service in the subject markets with regional-sized aircraft (CRJ-900s), placing the code of America West on its flights. The applicants state that America West will also provide year-round service in the markets with its own B757 and/or B-737 aircraft, in addition to Mesa's new direct-carrier service (own-aircraft) flights.^{1 2}

Applicant rep: **Joanne W. Young (202) 861-1532** DOT Analyst: **Linda L. Lundell (202) 366-2336**

DISPOSITION

XX Granted Mesa exemption request, subject to conditions (see below)

XX Granted request to convert America West's current exemption to serve the Phoenix-San Jose del Cabo/Puerto Vallarta markets from seasonal to year-round service (see below)

XX Granted code-share authorizations for the services proposed, subject to conditions (see below)

The actions to grant Mesa's exemption request, along with the America West/Mesa code-share authorizations, above, were effective when taken: **February 13, 2004**, through **February 13, 2006**.

The action to convert America West's exemption authority, as described above, from seasonal to year-round service was effective when taken: **February 13, 2004**, through **October 29, 2004**.

**Action taken by: Paul L. Gretch, Director
Office of International Aviation**

XX Authority granted is consistent with the aviation agreement between the United States and the Mexico.

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¹ America West already holds authority to provide scheduled foreign air transportation service in the Phoenix-San Jose del Cabo/Puerto Vallarta markets (see Notice of Action Taken dated October 29, 2002, in Docket OST-1995-736). Based on information provided by America West at that time, however, that authority was issued for seasonal services. Under these circumstances, and in light of the proposed year-round America West/Mesa services described above, we will handle the America West exemption request herein as a request, instead, to convert its current exemption authority in Docket OST-1995-736 to serve the Phoenix-San Jose del Cabo/Puerto Vallarta markets from seasonal to year-round service. Our action here has no effect on the duration of the exemption authority granted in Docket OST-1995-736 (set to expire October 29, 2004).

² The applicants also seek designation authority for Mesa to provide direct-carrier service in the subject markets (America West is already designated to provide direct-carrier service on the routes). In this regard, the applicants request that the Department withdraw, for reasons of dormancy, the designation of Alaska Airlines, Inc. (Alaska), to serve the subject markets and to designate Mesa in its place.

Except to the extent exempted or waived, this authority is subject to the terms, conditions, and limitations indicated:

XX Holder's certificates of public convenience and necessity
XX Standard Exemption Conditions (attached)

Special Conditions: The U.S.-Mexico exemption authority granted is subject to the dormancy notice requirements set forth in condition 7 of Appendix A of Order 88-10-2. Consistent with our policy, the dormancy notice period will begin April 1, 2004, the applicants' proposed startup date for these services.

The code-share operations conducted under this authorization are subject to the following conditions: (a) the code-sharing operations conducted under this authority must comply with 14 CFR 257 and with any amendment to the Department's regulations concerning code-share arrangements that may be adopted. Notwithstanding any provisions in the contract between the carriers, our approval here is expressly conditioned upon the requirements that the subject foreign air transportation be sold in the name of the carrier holding out such service in computer reservation systems and elsewhere; that the carrier selling such transportation (*i.e.*, the carrier shown on the ticket) accept responsibility for the entirety of the code-share journey for all obligations established in its contract of carriage with the passenger; and that the passenger liability of the operating carrier be unaffected; and (b) the authority granted here is specifically conditioned so that neither America West nor Mesa shall give any force or effect to any contractual provisions between themselves that are contrary to these conditions.

Responsive Pleadings: Alaska filed an answer to the application. America West and Mesa filed a joint reply to Alaska's answer, and United Air Lines, Inc. (United), filed a reply to Alaska's answer. Continental Airlines, Inc. (Continental), and ExpressJet Airlines, Inc. (ExpressJet) each filed a surrepley.³

Alaska opposes the application, stating that, although its authority to serve the markets (seasonally) is currently dormant, its authority is protected under the Department's blanket dormancy waiver Order 2003-4-18, which gives carriers until February 15, 2004, to state whether or not dormant services could be resumed by April 1, 2004. Alaska states that, in this regard, it is in the process of reviewing a number of service options for next winter, but that it can now state that it does not plan to resume Phoenix-San Jose del Cabo/Puerto Vallarta services by April 1 or, otherwise, during the off-peak period.

Alaska requests that, even though it is not in a position to offer off-peak service in the markets, the Department not withdraw its designation but instead consider less anticompetitive alternatives for handling the America West/Mesa application here. In this regard, Alaska suggests the following options: (1) interpret the proposed America West/Mesa proposed operations as a wet-lease arrangement so that designations are not required for both carriers; (2) engage in full discussions with the Government of Mexico regarding the need to eliminate the practice of requiring two designations for such affiliated-carrier services and, if this fails, use only one designation opportunity for the America West/Mesa proposed service, temporarily withdrawing and reassigning the designation between them as needed to meet the seasonal demand; or (3) assign Alaska's designation to Mesa temporarily through October 31, 2004, to permit Mesa to begin service on April 1, if America West can demonstrate that it has in the past and will continue to operate year-round service in both markets. Alaska states that it would be prepared to advise the Department by April 30, 2004, whether it will resume seasonal operations for the 2004-2005 winter season, and that option #3, above, would allow Mesa to begin the proposed service on April 1, while preserving the possibility that competitive services could be reintroduced by Alaska in the Phoenix-San Jose del Cabo/Puerto Vallarta markets.

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³ Continental and ExpressJet each accompanied their surrepley with a motion for leave to file an otherwise unauthorized document. We grant the motion of each carrier here.

In their joint reply, America West/Mesa state that each of the proposed alternatives is unworkable. America West/Mesa state that Alaska has confirmed that it will not resume service in the markets by April 1, and that its authority in the markets is dormant and, thus, the designations are available. America West/Mesa state that its proposed service is not a wet lease, nor like a wet lease; that reallocation of Alaska's designation to Mesa does not effect a *de facto* and *de jure* monopoly for a single U.S. carrier, as U.S. carriers can put their code on Mexican carrier flights in the markets, or any U.S. carrier can, in the future, petition the Department like America West/Mesa are doing here, to withdraw a designation and reallocate it; and that Alaska's proposed option to have America West/Mesa share one designation is unworkable, as America West and Mesa intend to operate year-round mainline and CRJ service concurrently. America West/Mesa state, further, that Alaska historically operated only seasonal winter service, four days weekly with 140-seat aircraft, and that the proposed America West/Mesa service provides many more benefits with year-round, mixed fleet service.

In its reply, United states that a separate designation for Mesa for the type of services proposed should not be needed, and that the proposed commuter services should be considered a "wet lessor." United states that, while the Department has granted similar affiliated-carrier requests, such practice turns an agreement that was intended to assure the opportunity for at least two U.S. carriers to compete in a given city-pair market into one where a single carrier can preempt its competitors by supplementing its own service with some commuter service. United states that the best solution would be, as Alaska has proposed, to treat such services like a wet lease and include the commuter in the designation of the carrier whose designator code appears on the flights.

In their surreplies, both Continental and ExpressJet state that they engage in similar U.S.-Mexico services as those proposed by America West/Mesa, and that they oppose any change in the Department's policy to allow for such services, unless and until interpretations permitting such operations using only one designation are agreed upon between Mexico and the United States. In this regard, ExpressJet explains that, if the Department were to accede to the Alaska/United position, ExpressJet's service on several U.S.-Mexico routes would be jeopardized and the public would be deprived of the combination of service with ExpressJet's regional jets and Continental's large jets, which allow the carriers to meet public demand which fluctuates by season, day of week, and hour of the day, with appropriate service. Continental and ExpressJet maintain that neither Alaska nor United has proposed any flights in the subject markets here, and that valuable services offered by code-share partners should not be disrupted because Alaska and United might someday want to offer flights of their own on the routes. ExpressJet states that, if and when Alaska or United propose direct-carrier service on a U.S.-Mexico route where two affiliated airlines are already designated, the Department can then consider the relative merits of the affiliated-carrier designations and the Alaska and/or United proposal(s) in accordance with normal procedures.

Decision: We have carefully examined the evidence presented in this case, and have decided that it is in the public interest to (1) grant the exemption request of Mesa for the proposed services, along with the requested America West/Mesa code-share authorizations; (2) withdraw the dormant designation authority of Alaska to serve the Phoenix-San Jose del Cabo/Puerto Vallarta markets; (3) designate Mesa for direct-carrier service in the Phoenix-San Jose del Cabo/Puerto Vallarta markets; and (4) convert America West's current exemption authority to provide direct-carrier service in the subject markets from seasonal service to year-round service.

Under the U.S.-Mexico aviation agreement, up to two U.S. carriers may be designated to operate direct-carrier service in a given city-pair market.⁴ Mesa needs a designation for the services proposed here. As discussed above, both America West and Alaska are already designated to provide scheduled direct-carrier service in the Phoenix-San Jose del Cabo/Puerto Vallarta markets. However, Alaska is not now using its authority and has provided no firm plans to resume services.

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⁴ Code-share authorizations are also required for certain of the services proposed here. Pursuant to the aviation agreement, up to four U.S. carriers may be authorized to provide code-share services in a given city-pair market. Currently, Northwest is the only carrier authorized to provide code-share service in the Phoenix-San Jose del Cabo/Puerto Vallarta markets. Thus, there are three additional code-share authorizations available at this time.

It is not our policy to allow valuable operating rights to go unused, particularly when another carrier is interested in serving the routes and has firm plans to do so. While Alaska maintains that its authority is protected under the Department's blanket dormancy waiver Order 2003-4-18, it has clearly stated that it will not meet the resumption of service deadline for the Phoenix-San Jose del Cabo/Puerto Vallarta markets specified in that order.⁵ In the circumstances presented, with carriers ready and willing to use the authority at issue, we find that the public interest calls for withdrawing Alaska's designation.⁶

With respect to United, we appreciate the concerns raised here regarding the use of two designations for affiliated-carrier services in U.S.-Mexico markets. Indeed, we have sought Mexican aviation authorities acceptance of such services without the need for separate designations. However, such an arrangement has not been forthcoming. We will continue our efforts in this regard. However, under the circumstances, we believe that the public interest is best served by granting the requested authority here for the proposed services while we continue to work on this issue with the Mexican aviation authorities.⁷ Notwithstanding this, however, should a competing U.S. carrier present a proposal to provide regularly-scheduled service in the subject city-pair markets with its own aircraft, we would be prepared to reconsider whether, in the circumstances presented, award of the authority granted here continues to be in the public interest.

On the basis of data officially noticeable under Rule 24(g) of the Department's regulations, we found the applicant qualified to provide the services authorized.

Under authority assigned by the Department in its regulations, 14 CFR Part 385, we found that (1) our action was consistent with Department policy; (2) grant of the application was consistent with the public interest; and (3) grant of the authority would not constitute a major regulatory action under the Energy Policy and Conservation Act of 1975. To the extent not granted, we denied all requests in the referenced Docket. We may amend, modify, or revoke the authority granted in this Notice at any time without hearing at our discretion.

Persons entitled to petition the Department for review of the action set forth in this Notice under the Department's regulations, 14 CFR §385.30, may file their petitions within seven (7) days after the date of issuance of this Notice. This action was effective when taken, and the filing of a petition for review will not alter such effectiveness.

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

⁵ By Order 2003-4-18, the Department granted temporary blanket dormancy waivers to U.S. combination carriers serving limited-entry markets through March 31, 2004. Pursuant to that order, carriers have until February 15, 2004, to file a notice with the Department listing each limited-entry market in which it will not resume service beginning April 1, 2004.

⁶ Given the clear evidence of record that Alaska is not using the authority and has demonstrated no firm plans to do so, we see no persuasive reason to reach the merits of its suggested alternatives to withdrawal of its designation. We note, however, as we discuss below in the context of United's comments, that we have engaged in efforts with the Mexican Government to secure a change in Mexican policy on the need for separate designations in situations such as this.

⁷ See Notice of Action Taken dated January 14, 2004, in Docket OST-2003-16529, in the matter of the application of Mesa for Phoenix-Mazatlan exemption authority.

APPENDIX

U.S. Carrier Standard Exemption Conditions

In the conduct of the operations authorized, the U.S. carrier applicant(s) shall:

- (1) Hold at all times effective operating authority from the government of each country served;
- (2) Comply with applicable requirements concerning oversales contained in 14 CFR 250 (for scheduled operations, if authorized);
- (3) Comply with the requirements for reporting data contained in 14 CFR 241;
- (4) Comply with requirements for minimum insurance coverage, and for certifying that coverage to the Department, contained in 14 CFR 205;
- (5) Except as specifically exempted or otherwise provided for in a Department Order, comply with the requirements of 14 CFR 203, concerning waiver of Warsaw Convention liability limits and defenses;
- (6) Comply with all applicable requirements of the Federal Aviation Administration and with all applicable U.S. Government requirements concerning security. To assure compliance with all applicable U.S. Government requirements concerning security, the holder shall, before commencing any new service (including charter flights) to or from a foreign airport, contact its Principal Security Inspector (PSI) to advise the PSI of its plans and to find out whether the Transportation Security Administration has determined that security is adequate to allow such airport(s) to be served; and
- (7) Comply with such other reasonable terms, conditions, and limitations required by the public interest as may be prescribed by the Department of Transportation, with all applicable orders and regulations of other U.S. agencies and courts, and with all applicable laws of the United States.

The authority granted shall be effective only during the period when the holder is in compliance with the conditions imposed above.

8/2003