



Order 2017-8-26

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

Issued by the Department of Transportation  
on the 29<sup>th</sup> day of August, 2017

Served: August 29, 2017

Applications of

AMERICAN AIRLINES, INC.

DELTA AIR LINES, INC.

FEDERAL EXPRESS CORPORATION

JETBLUE AIRWAYS CORPORATION

MESA AIRLINES, INC.

SOUTHWEST AIRLINES CO.

UNITED AIRLINES, INC.

in the matter of 2016 U.S.-Cuba Allocation  
Proceeding

Docket DOT-OST-2016-0021

**ORDER INSTITUTING PROCEEDING**

**Summary**

By this order the Department institutes the *2017 U.S.-Cuba Frequency Allocation Proceeding* to allocate available frequencies for scheduled services between the United States and Havana, Cuba.<sup>1</sup>

**Background**

Under the terms of the Memorandum of Understanding (MOU) between the United States and Cuba, signed February 16, 2016, U.S. carriers may operate up to twenty (20) daily combination or all-cargo

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<sup>1</sup> On June 16, 2017, the President announced a change in the United States' policy toward Cuba. The announced policy change does not alter the ability of the Department to authorize U.S. airlines to provide scheduled services between the United States and Cuba.

scheduled round-trip frequencies between the United States and Havana, Cuba.<sup>2</sup> By Order 2016-8-38, issued August 31, 2016, the Department allocated the 20 available U.S.-Havana daily frequencies as shown in the chart below:

<b>Carrier</b>	<b>Routing</b>	<b>Frequency</b>
Alaska Airlines, Inc. (Alaska)	Los Angeles-Havana	Once daily
American Airlines, Inc. (American)	Miami-Havana	4 times daily
	Charlotte-Havana	Once daily
Delta Air Lines, Inc. (Delta)	New York (JFK)-Havana	Once daily
	Atlanta-Havana	Once daily
	Miami-Havana	Once daily
Frontier Airlines, Inc. (Frontier)	Miami-Havana	Once daily
JetBlue Airways Corporation (JetBlue)	Fort Lauderdale-Havana	Twice daily (except once on Saturday)
	New York (JFK)-Havana	Once daily
	Orlando-Havana	Once daily
Southwest Airlines Co. (Southwest)	Fort Lauderdale-Havana	Twice daily
	Tampa-Havana	Once daily
Spirit Airlines, Inc. (Spirit)	Fort Lauderdale-Havana	Twice daily
United Airlines, Inc. (United)	Newark-Havana	Once daily
	Houston-Havana	Once weekly (Saturday)

### **Applications and Responsive Pleadings**

Between April 20 and May 30, 2017, seven U.S. carriers -- American, Delta, Federal Express Corporation (FedEx), JetBlue, Southwest, and United and Mesa Airlines, Inc. (Mesa) – filed applications and other responsive pleadings seeking frequency allocations to support new or additional scheduled services between the United States and Havana.<sup>3 4</sup>

The applicant carriers took note of reports and schedule data indicating that Frontier and Spirit planned to discontinue their respective U.S.-Havana services. The carriers stated that Frontier would end its once daily scheduled round-trip service between Miami and Havana, effective June 4, 2017, and Spirit would end its twice daily scheduled round-trip service between Fort Lauderdale and Havana, effective

<sup>2</sup> The MOU also provides that, for scheduled combination or all-cargo services to and from each of the other nine (9) international airports in Cuba, U.S. carriers may operate up to ten (10) daily round-trip frequencies, for a total of ninety (90) daily non-Havana U.S.-Cuba round-trip frequencies. The MOU also allows for unlimited charter services to and from any point in Cuba, in accordance with the regulations of each country. The MOU does not place limits on the number of carriers that may provide U.S.-Cuba services, nor does it limit aircraft capacity for scheduled or charter services.

<sup>3</sup> United and Mesa filed their application and other responsive pleadings jointly. As discussed below, they state that Mesa is not independently seeking any frequencies but only underlying exemption authority to operate the Houston-Havana route as a United Express carrier.

<sup>4</sup> The Department grants all motions for leave to file otherwise unauthorized documents.

May 31, 2017. Frontier and Spirit each subsequently confirmed in communications to the Department that they were in fact terminating their Havana services on June 4 and May 31 respectively, with no plans to make further use of, nor any objection to the reallocation of, the frequencies they had been awarded.<sup>5</sup>

The applicant proposals are summarized in the chart below.

<b>Carrier</b>	<b>Proposed Routing</b>	<b>Proposed Frequency</b>
American	Miami-Havana	Once daily <sup>6</sup>
Delta	Miami-Havana	Once daily
FedEx	Miami-Havana	Five weekly (Monday-Friday)
JetBlue	Boston-Havana	Once weekly (Saturday)
	Fort Lauderdale-Havana	Six weekly (not Saturday)
Southwest	Fort Lauderdale-Havana	Once daily
United and Mesa	Houston-Havana	Six weekly (not Saturday)

In addition to the U.S.-Havana route proposals noted above, carriers also have raised various other issues on the record. United and Mesa state that, for the proposed Houston-Havana service, they will use either Boeing B737 aircraft from United’s existing fleet or Embraer E175 aircraft from Mesa’s existing fleet, whereby the Mesa-operated flights would be operated under the “United Express” brand pursuant to a capacity purchase agreement. United also requests flexibility to use its B737 aircraft or Mesa’s E175 aircraft on United’s existing Saturday-only Houston-Havana flight to tailor capacity to meet demand on this route.<sup>7</sup>

JetBlue argues that a frequency can be awarded to United or Mesa, but not to both carriers. JetBlue states that, for licensing purposes, the Department has treated separate airlines as distinct entities, even for regional partner carriers operating pursuant to a capacity purchase or code-share agreement.<sup>8</sup> JetBlue also objects to United’s request for flexibility to use either United or Mesa aircraft on United’s existing Saturday-only Houston-Havana service. JetBlue argues that the Department cannot unilaterally transfer the frequency to Mesa or otherwise grant the relief United seeks. Should the Department entertain United’s request, JetBlue argues that the *Ashbacker* doctrine requires the Department to consider other competing applications for that Saturday frequency.<sup>9</sup>

In their joint reply, United and Mesa state that JetBlue mischaracterizes their proposal by alleging first that both United and Mesa are seeking frequencies, and second that United intends to effectuate a transfer of its Saturday frequency to Mesa. United/Mesa state that Mesa is not independently seeking frequencies, and that under the proposal United will hold the awarded frequencies and market the Houston-Havana service, while Mesa will operate these flights with its own E175 aircraft using United’s frequencies under the United Express trade name. When demand warrants, United/Mesa state that

<sup>5</sup> See Notice of Communication dated June 6, 2017, in this docket.

<sup>6</sup> In its April 24 application, American indicates that in the event of an allocation proceeding, it would revise its request upwards.

<sup>7</sup> May 5, 2017 Joint Answer and Application of United and Mesa, at 3.

<sup>8</sup> May 16, 2017 Reply and Consolidated Answer of JetBlue, at 4.

<sup>9</sup> *Id.*, at 5-6, citing *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945).

United's mainline aircraft will operate on the route in place of Mesa's aircraft. United/Mesa assert that Mesa simply requires underlying exemption authority to operate on this route.<sup>10</sup>

Carriers also raised procedural matters regarding how the Department should move forward in this case. In this regard, JetBlue asks the Department to institute a frequency allocation proceeding.<sup>11</sup> Southwest opposes JetBlue's motion, arguing that there is no need for the Department to institute a new, formal proceeding, as each applicant has the opportunity to respond to each other carrier's application in the normal course of filing answers and other pleadings under the Department's procedural rules.<sup>12</sup> Furthermore, Southwest asserts that the voluminous pleadings submitted in the Department's 2016 U.S.-Cuba Frequency Allocation Proceeding by the same applicants who are applying again here means that the record is already extremely well developed, and that a new proceeding would be an inefficient use of Department and applicant resources.<sup>13</sup>

FedEx supports JetBlue's motion, but asserts that a frequency allocation proceeding would be premature if it occurred before Spirit and Frontier either formally surrendered their Havana frequencies or the 90-day dormancy period for those frequencies has elapsed.<sup>14</sup> American agrees with JetBlue that the Department should institute a frequency allocation proceeding, and urges the Department to use the proceeding to examine new information, such as data concerning the performance of the carriers' existing U.S.-Havana services.<sup>15</sup> The City of Houston also filed a reply and surreply stating that a fresh record is required to address the requests and other related matters.

## **Decision**

Having confirmed the availability of three daily U.S.-Havana frequencies, and recognizing that the applicants seek more frequencies to serve Havana than are now available, the Department must engage in carrier selection. To do so, the Department is instituting the *2017 U.S.-Cuba Frequency Allocation Proceeding*.

In finalizing our initial Havana frequency allocations, we said, "Should any of the selected carriers not begin or maintain their proposed services, the Department believes that the public interest would be best served by allowing it to award those unused rights on the basis of a fresh record and in light of the circumstances presented at that time."<sup>16</sup> That is precisely the situation before us, and we see no persuasive basis to follow a different procedural course. While the Department is not indifferent to concerns about the efficient use of resources, we do not regard the 2016 case record as adequate for reaching a decision. For example, a record informed by developments in the market following our initial allocations, including the applicants' own experience, would be highly beneficial to our decision-making.

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<sup>10</sup> May 25, 2017 Joint Reply of United and Mesa, at 1-2.

<sup>11</sup> Consolidated Answer and Motion of JetBlue dated May 2, 2017.

<sup>12</sup> May 5, 2017 Consolidated Answer of Southwest, at 7-8.

<sup>13</sup> *Id.*

<sup>14</sup> May 5, 2017 Consolidated Answer of FedEx, at 2.

<sup>15</sup> May 12, 2017 Consolidated Response of American, at 1.

<sup>16</sup> Order 2016-8-38, at 12.

## **Proceeding**

As discussed above, the Department has decided to institute this proceeding to allocate the three available daily round-trip frequencies that may be used for scheduled combination or all-cargo services between the United States and Havana, Cuba. The proceeding will also consider whether, as to any Houston-Havana frequencies currently held by, or awarded in this proceeding to United, the public interest calls for approving the request of United and Mesa for operational flexibility to use United's aircraft or Mesa's aircraft, as conditions warrant.<sup>17</sup>

The Department's principal objective in this proceeding will be to maximize public benefits. In this regard, the Department will consider which applicants will be most likely to offer and maintain the best service for the traveling and shipping public. The Department will also consider the effects of the applicants' service proposals on the overall competitive environment, including effects on market structure and competition in the U.S.-Cuba market, and any other market(s) shown to be relevant. In addition, where relevant, the Department will consider other factors historically used for carrier selection.<sup>18</sup>

The Department expects to allocate the frequencies for an indefinite term, subject to a start-up condition and the Department's standard 90-day dormancy condition. For any frequency not used for a period of 90 days, the allocation with respect to that frequency would expire automatically and revert to the Department for reallocation.

The Department believes that written, non-oral procedures under Part 302 of the Department's regulations (14 CFR 302) are appropriate and that, by using these procedures, the Department can establish a complete evidentiary record and make timely awards with the least possible delay and without unnecessary costs to the applicants. In the interest of expediting the award of these valuable route rights, the Department may proceed directly to a final order where the record in this proceeding justifies such action. The Department finds no material issues of fact that would warrant an oral evidentiary hearing. The Department intends to resolve issues and award the subject authority on the basis of pleadings filed in this proceeding. If, however, upon review of the record, the Department determines that additional information is required and/or modified procedures are necessary for the adjudication of this case, the Department reserves the right to request additional information and/or to modify the procedures used in this matter.

## **Evidentiary Requirements**

The Department intends to conduct this proceeding in a manner that will facilitate the Department's reaching a prompt final decision.

Except for procedural dates, applications should conform to Part 302, Subpart C of the Department's regulations (14 CFR Part 302). All pleadings should be filed with the Department of Transportation, 1200 New Jersey Avenue, S.E., West Building Ground Floor, Room W12-140, Washington, D.C.

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<sup>17</sup> Because we are including this matter as an issue in the case, we are not dismissing the United/Mesa application as JetBlue had proposed in its May 16, 2017 submission at 4-6.

<sup>18</sup> Carriers are reminded that a number of significant limitations and requirements remain in place concerning air transportation between Cuba and the United States. Nothing in the Department's award of authority in this proceeding will relieve parties from complying with all applicable regulations and requirements of other U.S. agencies and with all applicable laws of the United States.

20590, in the captioned Docket for the *2017 U.S.-Cuba Frequency Allocation Proceeding*, and should include, at a minimum, the following information for each frequency requested.<sup>19 20</sup>

1. Provide a firm date for instituting service, and single-plane and nonstop-to-nonstop connecting schedules proposed to be operated in the applicable year, with a break-down for peak and off-peak seasons. When responding to this evidence request, use the 12 months ending December 31, 2018, as the reference period. Identify days of the week the proposed service would be offered. Identify all seasonal service, if any, and specify the period during which the seasonal services would be offered;

Proposed schedules should contain flight numbers, complete routings from origin to destination (including behind-gateway and beyond-gateway points<sup>21</sup> and elapsed time for services), airports served, departure and arrival times, equipment types (including seat configuration by class of service and the available cargo capacity in U.S. pounds), days scheduled, and classes of service offered;

Should parties seek to justify a proposed service based on forecast traffic, they should provide as much detail as possible, including data sources and methodologies, on how they arrived at their forecast traffic levels;

2. Carriers should be specific in listing preferences for their proposed services. For example, for each city-pair proposal, carriers should indicate their order of preference for days of the week proposed, and they should indicate the minimum number of frequencies that the carrier would accept to institute service for each city pair (including the specific days of the week those frequencies would be used). Similarly, if the carrier seeks authority to serve more than one city-pair market and/or multiple frequencies in any city-pair market, indicate the carrier's order of preference for selection amongst those city-pair proposals;<sup>22</sup>
3. A brief description of the scheduled and charter service the applicant currently provides, if any, between the United States and Cuba, including frequency levels (including seasonality) by city-pair market. To the extent that such information is available, carriers should also provide traffic

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<sup>19</sup> 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 the Department's docket imaging system. In the alternative, parties are encouraged to use the electronic submission capability available through the Dockets FDMS Internet site (<http://www.regulations.gov>) by following the instructions on the web site. Additionally, service by facsimile or electronic mail is authorized.

<sup>20</sup> Applications and responsive pleadings should contain sufficient detail, including sources, bases, assumptions and methodologies, so that, without further clarification, any party can derive the final results from the basic data. To the extent necessary, applicants for frequency allocations should also file corresponding requests for exemption authority.

<sup>21</sup> The Department notes that the MOU does not contemplate fifth-freedom operations.

<sup>22</sup> The MOU provides for a cap on the number of daily flights, rather than a cap on the number of weekly flights that has been commonly used in other limited-entry markets. Therefore, in this proceeding, the Department will allocate daily frequencies rather than weekly frequencies. In this regard, the record of the proceeding might ultimately warrant that certain frequency awards be made on the basis that the service be operated on specific days of the week. Carriers are, therefore, instructed to provide enough specificity in their proposals, including days of the week proposed and their order of preference for selection of those days of the week, so that the Department can best maximize use of the limited frequencies.

data (e.g., Origin and Destination information) and load factors pertaining to their existing services. Carriers are asked that any such data be provided for the period beginning January 1, 2015, through the most recent date for which such data is available; and

4. Should the Department decide to make backup awards in this proceeding, provide a statement as to whether the carrier will accept backup authority with a condition that (a) permits it to implement the authority within the first year should the primary carrier withdraw from the market; and (b) should the authority not be activated, the authority expires at the end of one year.

Applicants may submit any additional information beyond that requested if they believe it would be useful to the Department in reaching a decision.<sup>23</sup>

The Department views adherence to these directives as critical to its consideration of the proposals in carrier selection cases. The Department puts the applicants in this case on notice that it expects full compliance with the evidence request in this order. Any carrier not in full compliance in any material respect with the Department's request will be subject to elimination from consideration for an award in this case.

### **Procedural Timetable**

In light of our stated goal of reaching a prompt final decision, the Department is establishing the following procedural schedule for submissions:

Petitions for Reconsideration:	September 1, 2017
Answers to Petitions:	September 7, 2017
Applications:	September 12, 2017
Answers:	September 19, 2017
Replies:	September 26, 2017

In consideration of the procedural schedule, as discussed above, the Department authorizes service by facsimile or electronic mail. Parties should include their fax numbers and/or e-mail addresses on their submissions and should indicate on their certificates of service the methods of service used. Applicants not using facsimile or electronic mail must provide an original and five copies of all submissions to the Department of Transportation, Dockets, no later than the dates indicated. Please also provide an electronic copy of all responsive pleadings to [Brett.Kruger@dot.gov](mailto:Brett.Kruger@dot.gov).

### **ACCORDINGLY,**

1. The Department institutes the *2017 U.S.-Cuba Frequency Allocation Proceeding* in Docket DOT-OST-2016-0021, to be decided by written, non-oral procedures under Part 302 of the Department's regulations (14 CFR Part 302);
2. This proceeding will consider (1) which carrier or carriers should be selected to operate the three (3) available daily round-trip frequencies that may be used to serve Havana, Cuba and, to the extent

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<sup>23</sup> Such additional information could include, for example, what, if any, impact the carriers believe that the change in the United States' policy toward Cuba, as announced by the President on June 16, 2017, would have on the operations they propose in this proceeding and, if so, the nature of any such impact.

necessary, for underlying exemption authority to provide the service; and (2) the request of United Airlines, Inc. for flexibility to use its aircraft or Mesa Airlines, Inc.'s aircraft on the Saturday-only Houston-Havana frequency allocated by Order 2016-8-38 or any such other Houston-Havana frequencies as may be allocated to United in this proceeding;

3. Applications and responsive pleadings should be filed in accordance with the procedural schedule set forth in the body of this order; and

4. The Department will serve this order on all certificated U.S. carriers operating large aircraft; the U.S. Department of State (Office of Aviation Negotiations); the Federal Aviation Administration; and the Ambassador of Cuba in Washington, D.C.

By:

**SUSAN McDERMOTT**  
Deputy Assistant Secretary  
for Aviation and International Affairs

(SEAL)

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