



Order 2016-8-38

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

Issued by the Department of Transportation  
on the 31<sup>st</sup> day of August, 2016

**Served: August 31, 2016**

***2016 U.S.-CUBA FREQUENCY ALLOCATION PROCEEDING***

**DOCKET DOT-OST-2016-0021**

**FINAL ORDER**

**Summary**

By this order the Department makes final its tentative decision to allocate 20 daily frequencies to U.S. air carriers for scheduled passenger services between the United States and Havana, Cuba.

**Background**

On February 16, 2016, the United States and Cuba signed a Memorandum of Understanding (MOU) that allows for the resumption of scheduled air services between the United States and Cuba. For scheduled combination or all-cargo services to and from Havana, under the terms of the MOU, U.S. carriers may operate up to twenty (20) daily round-trip frequencies. 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.<sup>1</sup>

Also on February 16, 2016, by Order 2016-2-12, the Department instituted the *2016 U.S.-Cuba Frequency Allocation Proceeding* to allocate the 20 daily round-trip frequencies that may be used for scheduled combination or all-cargo services between the United States and Havana, Cuba, to the carrier or carriers selected, and to allocate the 10 daily round-trip frequencies that are available for scheduled combination or all-cargo service at each other point in Cuba to the carrier or carriers selected. The order set forth evidentiary requirements for applicant carriers,

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<sup>1</sup> The nine airports, other than Havana's José Martí International Airport (HAV), that are authorized for international services are: the Ignacio Agramonte International Airport in Camagüey (CMW); the Jardines del Rey Airport in Cayo Coco (CCC); the Vilo Acuña Airport in Cayo Largo (CYO); the Jaime González Airport in Cienfuegos (CFG); the Frank País Airport in Holguín (HOG); the Sierra Maestra Airport in Manzanillo (MZO); the Juan Gualberto Gómez Airport in Matanzas (VRA); the Abel Santamaría Airport in Santa Clara (SNU); and the Antonio Maceo Airport in Santiago de Cuba (SCU). The MOU does not place limits on the number of carriers that may provide U.S.-Cuba services.

directed applicants to indicate their order of preference for selection among multiple city-pair proposals, and established a procedural schedule for the proceeding. The Department stated its intention to award carriers that receive allocations underlying exemption authority to support their services. The Department also recognized the eagerness of U.S. carriers to take advantage of these new Cuba opportunities and the benefits to the traveling and shipping public of enabling them to do so, and stated its intention to reach a final decision in this matter as promptly as possible.<sup>2</sup>

Twelve U.S. carriers proposed scheduled passenger services to Havana. Each carrier requested an allocation of frequencies and underlying exemption authority to support its proposed services. Most of the applicant carriers and a number of civic parties filed answers and replies, and a number of parties submitted various supplemental materials for the record, culminating in an extensive record for the proceeding.

### **Tentative Decision**

After examining the complete record of applications and responsive pleadings, by Order 2016-7-4, issued on July 7, 2016, the Department tentatively allocated the 20 available U.S.-Cuba daily frequencies as shown in the chart below:

<b>Carrier</b>	<b>Proposed Routing</b>	<b>Frequency / Carrier Priority Ranking</b>
Alaska Airlines	Los Angeles-Havana	Once daily (#1)
American Airlines	Miami-Havana	4 times daily (#1, 2, 3, & 4)
	Charlotte-Havana	Once daily (#8) <sup>3</sup>
Delta Air Lines	New York (JFK)-Havana	Once daily (#1)
	Atlanta-Havana	Once daily (#2)
	Miami-Havana	Once daily (#3)
Frontier Airlines	Miami-Havana	Once daily (#1)
JetBlue Airways	Fort Lauderdale-Havana	Twice daily (except once on Saturdays) (#1 & 2)
	New York (JFK)-Havana	Once daily (#3)
	Orlando-Havana	Once daily (#5)
Southwest Airlines	Fort Lauderdale-Havana	Twice daily (#1 & 2)
	Tampa-Havana	Once daily (#7) <sup>4</sup>
Spirit Airlines	Fort Lauderdale-Havana	Twice daily (#1 & 2)
United Airlines	Newark-Havana	Once daily (#1)
	Houston-Havana	Once weekly (Saturdays) (#2)

<sup>2</sup> By Order 2016-6-5 and Notices of Action Taken dated July 15, 2016 and July 22, 2016, the Department addressed the requests of U.S. carriers to serve cities in Cuba other than Havana.

<sup>3</sup> American submitted 14 route proposals for Havana, and 10 of those 14 proposals were for Miami-Havana service. Charlotte was American's first-ranked non-Miami proposal.

<sup>4</sup> Southwest ranked Fort Lauderdale-Havana service as its top 6 requests.

In its tentative decision, the Department stated that this proceeding provides an opportunity to introduce scheduled service to Havana after more than fifty years of U.S.-Cuba services being either absent altogether or limited only to charters. In that regard, the Department tentatively decided to approach this proceeding in a manner similar to previous cases where the Department has had an opportunity to introduce U.S. carrier service to a market that has long been unavailable or significantly restricted, by attempting to address a variety of public interest needs in selecting carrier proposals for the award of the available rights.<sup>5</sup> The Department tentatively found that such an approach would best meet the Department's stated goal of maximizing public benefits.

The Department tentatively found that it could best maximize public benefits by addressing the service needs of the substantial communities that are most likely to benefit -- primarily centers of Cuban-American population -- while, at the same time, creating a framework for a competitive market structure. It is worth remembering that authorized travel to Cuba is limited to 12 categories under regulations established by the U.S. Department of Treasury's Office of Foreign Assets Control,<sup>6</sup> and that the statutory ban on travel to Cuba for tourist activities remains in place.<sup>7</sup>

Recognizing that the opening of the U.S.-Havana scheduled service market is still at a developmental stage, the Department tentatively decided, to the extent possible and within the constraints presented, to give a range of U.S. carriers the chance to develop the market consistent with the public interest. The Department also tentatively found that the public would benefit from a wide array of travel choices: choices in terms of type of carrier, specifically, network, low-cost, ultra-low-cost; choices of airport; choices of nonstop or connecting service. The importance of having service available from certain carrier hubs was a factor in the tentative decision, as was the applicants' own ranking of their proposals.

### **Responsive Pleadings**

**Alaska, American, Delta, Southwest, Spirit, United, and the City of Houston** filed responses that generally support the Department's tentative decision and urge the Department to issue a final order confirming its tentative selections.

**Eastern** objects to the Department's tentative decision. Eastern states that the Department proposes to deem Eastern ineligible to be considered for Cuba scheduled authority because Eastern does not already hold economic authority to provide scheduled service in some other

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<sup>5</sup> See e.g., *2010 U.S.-Havana Combination Services Allocation Proceeding*, Order 2010-7-2, issued July 6, 2010; and *2007/2008 U.S.-Colombia Combination Frequency Allocation Proceeding*, Order 2008-5-27, issued May 21, 2008.

<sup>6</sup> The existing authorized travel categories include: (1) family visits; (2) official business of the U.S. government, foreign governments, and certain intergovernmental organizations; (3) journalistic activity; (4) professional research and professional meetings; (5) educational activities; (6) religious activities; (7) public performances, clinics, workshops, athletic and other competitions, and exhibitions; (8) support for the Cuban people; (9) humanitarian projects; (10) activities of private foundations or research or educational institutes; (11) exportation, importation, or transmission of information or information materials; and (12) certain export transactions. See 31 CFR § 515.560.

<sup>7</sup> 22 U.S.C. § 7209.

market. Eastern argues that this artificial distinction is not required by Department policy and is inconsistent with the Department's obligations under *Ashbacker Radio Corp. v. Federal Communication Comm'n*, 326 U.S. 327, 333 (1945), to grant comparative consideration to *bona fide*, mutually exclusive applications.<sup>8</sup>

Eastern asserts that, in its March 21, 2016 Reply, it highlighted Department precedent where the Department granted carriers new types of authority by exemption, without further licensing steps, when the services proposed were not markedly different from those they already provided. Eastern asserts that it already operates some 20 weekly Cuba flights on a charter basis, and the Department can rely on data officially noticeable to confirm Eastern's continuing fitness.<sup>9</sup> Eastern further asserts that the extraordinary U.S.-Cuba opportunities warrant the special consideration of new entrants regardless of their existing economic authority, similar to when slot exemptions became available to expand New York air services in the 1990s.<sup>10</sup>

Eastern asserts that it proposes service in the most important U.S.-Cuba market, Miami-Havana, and that its proposal would add a Miami-based competitor to a market that otherwise would be dominated by American. Eastern also asserts that there is no practical reason not to grant the non-Havana authority it requested, as sufficient frequencies remain available for its proposed service to Camagüey and Holguín.<sup>11</sup>

In response, Spirit argues that the Department's tentative decision was not arbitrary, nor did it violate *Ashbacker*, because Eastern did not have scheduled authority and did not have any prospect of obtaining such authority to meet the Department timeline for new service.<sup>12</sup> American states that Eastern fails to demonstrate that the Department should reverse its well-supported findings.<sup>13</sup>

**Frontier** objects to the Department's tentative allocation as between Fort Lauderdale (FLL) and Miami (MIA). Frontier states that it is logical to allocate a substantial portion of Havana frequencies to Florida given that such a substantial majority of the Cuban-American population lives in Florida, but the Department did not continue on that path in the distribution of those frequencies among the airports in Florida. Frontier argues that the disparity as between FLL and MIA is particularly stark, as MIA is effectively at the center of the major Cuban-American population, and MIA is the most convenient airport for that population.<sup>14</sup> Frontier argues that Fort Lauderdale is not geographically comparable for the Southeast Florida Cuban-American population.<sup>15</sup>

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<sup>8</sup> Objection of Eastern, at 2.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*, at 3.

<sup>11</sup> *Id.*, at 5.

<sup>12</sup> Consolidated Reply of Spirit, at 6.

<sup>13</sup> Response of American, at 6.

<sup>14</sup> Objection of Frontier, at 3-4.

<sup>15</sup> *Id.*, at 5.

Frontier states that among the six Havana frequencies allocated to Miami, 83% of the flights and 81% of the seats would be operated by the highest fare operators.<sup>16</sup> Frontier asserts that transferring one frequency from FLL for a second daily MIA flight operated by Frontier would allow Frontier to (1) increase its passenger share from 18% to almost 30% of the potential MIA total, (2) further stimulate the market and allow a greater portion of Cuban Americans access to flights to Cuba that may very well be out of reach with the dramatically higher prices commonly charged by American and Delta when compared to Frontier, and (3) impose far greater downward pressure on the prices to be charged for transportation in the MIA-HAV market.<sup>17</sup>

Southwest and Spirit oppose Frontier's request to transfer one frequency from FLL to MIA, arguing that Frontier's arguments have been rebutted on the record and were considered in the Department's show-cause order.<sup>18</sup> Silver Airways argues that in no event should the Department seriously entertain competing requests to re-distribute the tentative allocation of Havana frequencies without ensuring that Silver Airways is provided with a modicum of access to the Havana scheduled air services market.<sup>19</sup>

**JetBlue** applauds the Department's tentative decision to award it authority to serve Havana from Fort Lauderdale, New York, and Orlando. JetBlue argues, however, that it should not lose out on a second Saturday Fort Lauderdale-Havana frequency to support United's proposed Saturday-only Houston-Havana service. JetBlue also objects to the Department's tentative decision not to select Boston for non-stop service to Havana.<sup>20</sup>

JetBlue specifically acknowledges that it is willing to accept a six-weekly (Sunday through Friday) Fort Lauderdale-Havana frequency allocation in addition to its daily frequency allocation, but asserts that the tentative decision is harmful to JetBlue and places it at a major competitive disadvantage.<sup>21</sup> JetBlue argues that Southwest and Spirit would both offer more flights and a more consistent schedule from Fort Lauderdale to Havana, and that American would offer 400% more service from South Florida to Havana on Saturdays.<sup>22</sup> JetBlue argues that the Department should re-allocate a Saturday-only frequency from Alaska, Delta or Frontier and ensure that JetBlue can compete on a level playing field.<sup>23</sup>

JetBlue also proposes that, by slightly altering the Department's tentative award, the Department could re-allocate a single Saturday-only frequency from Miami, Newark or Los Angeles to Boston to add an 11<sup>th</sup> deserving U.S. gateway city to Havana.<sup>24</sup> JetBlue argues that re-allocating a single Miami frequency would result in minimal impact on the important Florida-Havana market, and that American has the ability to upgauge service on Saturdays to account for a

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<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> Reply of Southwest, at 1-2; and Consolidated Reply of Spirit, at 2-4.

<sup>19</sup> Answer of Silver Airways, at 3.

<sup>20</sup> Objections of JetBlue, at 1-2.

<sup>21</sup> *Id.*, at 2-3.

<sup>22</sup> *Id.*, at 3.

<sup>23</sup> *Id.*, at 5.

<sup>24</sup> *Id.*, at 6.

reduction in frequencies.<sup>25</sup> JetBlue asserts that Boston is one of the top markets in the United States, with significant connections to Cuba that will drive demand under the existing twelve categories of travel.<sup>26</sup>

JetBlue also asserts that, should the Department not adopt its suggestion to award JetBlue a second Saturday-only frequency for Fort Lauderdale, then backup authority should be awarded to JetBlue. JetBlue requests that a Saturday-only backup authority condition be placed on all awards to carriers in other markets, whereby if any carrier ceases Saturday service to Havana, that Saturday frequency would automatically be awarded to JetBlue for Fort Lauderdale-Havana service.<sup>27</sup>

United takes issue with JetBlue's claims that the Department's tentative award of a single frequency to United at Houston is somehow punitive to JetBlue, puts JetBlue at a major competitive disadvantage, or is harmful to JetBlue and the traveling public.<sup>28</sup> Delta disagrees with JetBlue's claim that all other U.S. carriers will have an immediate advantage over JetBlue, asserting that only a single carrier was awarded more frequencies to Havana than was JetBlue.<sup>29</sup>

American argues that JetBlue's request for Saturday-only Boston-Havana service constitutes a new, and late-filed, request that should be summarily dismissed.<sup>30</sup> Spirit states that even without a Saturday flight from Boston, JetBlue travelers from the Boston area will have easy one-stop access to Havana.<sup>31</sup>

Silver Airways opposes JetBlue's request to reallocate frequencies and for the award of backup authority, unless the Department also awards Silver Airways scheduled authority for Havana service.<sup>32</sup> Alaska, Southwest, and the City of Houston also oppose JetBlue's request to reallocate frequencies from their respective gateways to support additional JetBlue services.

JetBlue filed a surreply maintaining its position that it is deserving of a second Saturday-only frequency from Fort Lauderdale, and that its Saturday-only Boston frequency request is justified.<sup>33</sup> JetBlue also maintains that backup authority is warranted for the second Saturday-only frequency at Fort Lauderdale. American filed a response to JetBlue's surreply, maintaining its position that the Department must reject JetBlue's Saturday-only Boston request as a late-filed new service proposal.<sup>34</sup>

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<sup>25</sup> *Id.*, at 7.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*, at 10.

<sup>28</sup> Reply of United, at 1.

<sup>29</sup> Answer of Delta, at 4.

<sup>30</sup> Response of American, at 1-2.

<sup>31</sup> Consolidated Reply of Spirit, at 8.

<sup>32</sup> Answer of Silver Airways, at 1-2.

<sup>33</sup> JetBlue accompanied its surreply with a motion for leave to file. The Department will grant the motion.

<sup>34</sup> American accompanied its filing with a motion for leave to file. The Department will grant the motion.

**Silver Airways** argues that the Department's failure to tentatively allocate even a single frequency to Silver Airways runs counter to the Department's stated objectives to maximize public benefits. Silver Airways asserts that the Department incorrectly concludes that an award of frequencies to Silver Airways would not be an efficient use of limited traffic rights in light of the size of the airline's aircraft. Silver Airways argues that current U.S.-Cuba travel restrictions are unlikely to be removed anytime soon, and in order to maximize benefits now, the frequency allocations should be focused on the areas with the largest authorized travel groups, particularly Palm Beach County and the Fort Myers area, which both have substantial Cuban-American populations and which Silver Airways, unlike the other Havana applicants still active in this proceeding, proposes to serve nonstop.<sup>35</sup> Silver Airways contends that a concentration of service at Miami and Fort Lauderdale will result in decreased scheduled service and consumer choice, and an increase in fares over the longer term, as fewer competitors will remain in the market.<sup>36</sup>

Silver Airways also asserts that a serious Cuba hotel capacity limitation will greatly constrain the potential growth in U.S. travel to Cuba over the near- and mid-term. Silver Airways argues that, considering the backdrop of U.S. travel restrictions and current Cuban infrastructure limitations, the level of scheduled service tentatively authorized by the Department is wholly out-of-step with anticipated traffic levels, and that it is inappropriate and ill-advised to exclude an applicant solely based on its aircraft size.<sup>37</sup> Silver Airways asserts that its aircraft are entirely suitable to meet anticipated demand, and Silver Airways could quickly up-gauge to larger aircraft, up to 60 seats, should market conditions warrant.<sup>38</sup>

Silver Airways argues that, while the Department states its intention to award frequencies to a variety of carriers, the Department utterly fails to consider the competitive benefits of awarding a single frequency to an independent regional carrier. Silver Airways also states that, without an award of even one Havana frequency, its service pattern for the rest of Cuba is endangered.<sup>39</sup>

Silver Airways urges the Department to award backup authority should the Department move forward with its proposed allocations, and to impose more robust conditions on the frequency awards by vigorously enforcing the 90-day startup condition, and barring inter-carrier transfers of Havana frequencies.<sup>40</sup> Silver Airways also asserts that the Department should hold carriers to their service proposals and prevent carriers from significantly down-gauging their proposed aircraft. Silver Airways states that any award of Havana frequencies should have a condition that the carriers operate service with aircraft having capacity of no less than 90% of the proposed capacity.<sup>41</sup>

In response to Silver Airways, Alaska argues that the driving distance from West Palm Beach Airport to Fort Lauderdale Airport is just 49.1 miles, the driving distance to Miami is only

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<sup>35</sup> Objections of Silver Airways, at 6.

<sup>36</sup> *Id.*, at 8-9.

<sup>37</sup> *Id.*, at 7-8.

<sup>38</sup> *Id.*, at 8.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*, at 14-15.

<sup>41</sup> *Id.*, at 20.

slightly further, and the Department's tentative allocation to Florida communities is generous.<sup>42</sup> Spirit asserts that the Department correctly found that Silver Airways' aircraft offers inadequate capacity to achieve the benefits of using larger aircraft and would not be an efficient use of the limited frequencies.<sup>43</sup> Delta asserts that the record does not support the down-gauging condition proposed by Silver Airways.<sup>44</sup>

**Southwest** asserts in its reply that the Department should make backup awards for Havana frequencies, and Southwest requests backup status for JetBlue's and Spirit's two Fort Lauderdale frequencies, and Frontier's Miami frequency (which Southwest would operate from Fort Lauderdale).<sup>45</sup>

**The Massachusetts Port Authority (Massport)** objects to the Department's tentative decision not to select JetBlue's Boston-Havana proposal.<sup>46</sup> Massport asserts that there is a demonstrated need for Havana service from Boston and New England, with connections to Cuba from the fields of life sciences, higher education, and healthcare,<sup>47</sup> and that these factors are independent significant drivers of demand under the current regulatory environment.<sup>48</sup> Massport also argues that Boston, as a gateway to New England, is an equal if not superior alternative to cities that were tentatively selected. Massport requests that the Department re-allocate a single Saturday-only frequency from Miami to fund JetBlue's proposed Boston-Havana service.<sup>49</sup>

**The City and County of Denver (Denver)**, operator of Denver International Airport (DEN), is disappointed by the Department's tentative decision to shut out Denver and much of the entire Western United States from convenient, low-fare service.<sup>50</sup> In particular, Denver objects to the tentative decision by the Department not to allocate back-up authority in this case. Denver asserts that one-year back-up authority should be allocated to Frontier for DEN-Havana service so that Frontier and Denver would have the first opportunity to offer replacement service.<sup>51</sup> Denver also urges the Department to immediately request consultations leading to negotiations with Cuba for added service to Havana.<sup>52</sup>

**The Metropolitan Washington Airports Authority (MWAA)** filed comments stating that it is very disappointed that the Department did not award United a single Saturday-only frequency for nonstop capital-to-capital service between the Washington Dulles International Airport (IAD) and Havana. MWAA states that it does not seek to delay finalization of the Department's show-cause order, but MWAA requests that the Department favorably consider United's nonstop IAD-

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<sup>42</sup> Consolidated Answer of Alaska, at 9.

<sup>43</sup> Consolidated Reply of Spirit, at 5.

<sup>44</sup> Answer of Delta, at 6-7.

<sup>45</sup> Reply of Southwest, at 6.

<sup>46</sup> Massport also filed a surreply in the docket, and a motion for leave to file. The Department will grant the motion.

<sup>47</sup> Objections of Massport, at 2-4.

<sup>48</sup> Surreply of Massport, at 2.

<sup>49</sup> Objections of Massport, at 9.

<sup>50</sup> Objection of Denver, at 2.

<sup>51</sup> *Id.*, at 3.

<sup>52</sup> *Id.*, at 4.



Havana service proposal for any U.S.-Havana frequencies that may become available in the future.<sup>53</sup>

### **Final Decision**

The Department has decided to make final its tentative allocation of the 20 available U.S.-Havana frequencies, as set forth in Order 2016-7-4 (See the chart on page 2, above).

In reaching its tentative decision, the Department tentatively found, in light of more than 50 years without scheduled service between the United States and Havana, that the Department could best maximize public benefits by addressing a variety of public interest needs. The Department tentatively concluded that its top priority in addressing service needs should be to allocate frequencies in a manner that will maximize opportunities for the substantial communities most likely to benefit. The record amply supports that the Cuban-American population centers in the United States are the areas most in need of scheduled service to Havana. It was on this basis that the Department tentatively allocated frequencies for service at airports serving Florida (particularly South Florida); the New York City/Newark, New Jersey metropolitan area; and the Los Angeles, California metropolitan area. Furthermore, the Department tentatively found that diversifying the allocation among a variety of carriers and airports serving those regions would be consistent with the Department's goal of promoting a competitive market structure and allowing the public to make its own choices in the marketplace.

Beyond focusing on the service needs of the major Cuban-American population centers, the Department tentatively found this proceeding also provides an opportunity to establish a framework for promoting competition in the overall U.S.-Havana market. With that in mind, the Department tentatively allocated frequencies for service from certain aviation hub cities, including daily service from American's Charlotte hub, daily service from Delta's Atlanta hub, and once weekly Saturday-only service from United's Houston hub.

The Department's tentative decision was also sensitive to the applicants' own sense of how best to develop the U.S.-Cuba market, as reflected in their rankings of their proposals. For those applicants the Department tentatively selected, its tentative allocation included each carrier's first ranked choice. In a number of instances additional preferences were also tentatively accommodated.

Having carefully reviewed the objections and pleadings filed in response to Order 2016-7-4, the Department finds that no party has presented any arguments that warrant a different outcome in this proceeding.

As noted in the tentative decision, the Department could not select every applicant or every city. However, the Department tentatively found, and continues to believe that, on balance, its selections represent the best approach to achieving maximum public benefits.

JetBlue asserts that the Department should reallocate a Saturday-only frequency from another carrier/city to support a second Fort Lauderdale-Havana flight on Saturdays operated by JetBlue.

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<sup>53</sup> Comments of MWAA, at 2-3.

The Department acknowledges JetBlue's desire to provide a second Fort Lauderdale-Havana flight on Saturdays; however, the Department has decided not to make the requested change.

The Department notes first that JetBlue has stated its willingness to accept a six-weekly (Sunday through Friday) allocation in addition to its daily Fort Lauderdale-Havana allocation. Given the limited number of Havana opportunities available, and the fact that the carrier demand for Havana frequencies exceeds those opportunities, any reordering of our proposed allocations would mean withdrawing tentatively allocated frequencies from another applicant. The Department has seen no persuasive argument that doing so would achieve a better public interest outcome than the one proposed in the Department's tentative decision. Despite not having two JetBlue Fort Lauderdale-Havana flights on Saturdays, the city-pair market will still benefit from five nonstop flights on Saturdays and six nonstop flights on Sundays through Fridays. JetBlue travelers will also benefit from competitive daily services from New York (JFK) and Orlando. Indeed, JetBlue received the second highest allocation of frequencies of any applicant in this proceeding. In these circumstances, modifying the tentative decision to take a Saturday-only frequency from another carrier to give JetBlue a second Saturday frequency at Fort Lauderdale would not achieve overall greater public benefits.

The Department also fully considered JetBlue's Boston-Havana proposal, and the arguments it presented regarding potential Boston-area travelers who might benefit. However, Boston's Cuban-American population is among the lowest of the cities proposed in this proceeding, raising questions as to whether its selection would represent the best use of frequencies in the current setting. Moreover, the Department's tentative decision not to select the Boston-Havana proposal was, in part, shaped by JetBlue's ranking of that proposal. Boston was JetBlue's last-ranked city among the six cities proposed by JetBlue, and JetBlue ranked its Boston-Havana proposal 10<sup>th</sup> among its 12 proposals for daily service.<sup>54</sup> The Department recognizes that Boston and New England are home to healthcare, technology, and educational institutions that would benefit from nonstop service to Havana. Allocating service to Boston now, however, would require foregoing the anticipated benefits at whichever of our tentative selections would lose service to accommodate the reallocation. Based on the totality of the record and on our stated decisional parameters, the Department finds that the cities and services tentatively selected in the show-cause order, and finally selected here, represent a better use of the limited Havana frequencies and best fulfill our stated goal of maximizing public benefits.<sup>55</sup>

As to Frontier's objection to the Department's allocation between the airports in Fort Lauderdale and Miami, the Department again finds no basis to change its tentative allocation. The tentative decision took note of the extensive debate on the record as to whether Miami or Fort Lauderdale was the better airport choice for the region's considerable Cuban-American population. The Department tentatively concluded that, where the market has been totally devoid of scheduled service and where no historical scheduled traffic data exists, the appropriate course is for the Department to authorize a variety of services and let the traveling public and marketplace decide.

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<sup>54</sup> See Order 2016-7-4, Appendix B.

<sup>55</sup> The Department has also considered JetBlue's revised proposal for Saturday-only Boston-Havana service. The Department finds no persuasive basis to deviate from its tentative decision, and thereby forgo the expected public benefits of other deserving U.S.-Havana proposals.

Frontier has offered no convincing argument as to why the Department should now follow a different approach.

Silver Airways has objected to its lack of Havana allocation. The Department tentatively found that allocating some of these frequencies for service with commuter-type aircraft would not be an efficient use of these limited rights. The Department's allocations will enable the selected carriers to serve significant local traffic bases, and in most cases will provide opportunities to carry connecting traffic from behind-gateway points, factors which favor selection of carriers offering larger aircraft capacities and operating significant route networks over broad catchment areas. In the circumstances presented, the Department finds, on balance, that these factors should carry more weight than those presented by Silver Airways in maximizing public benefits. Accordingly, the Department continues to believe that an allocation to Silver Airways for service using its small 34-seat aircraft would not make an efficient use of the frequencies.

The Department has also considered Silver Airways' assertions that Cuban hotel and infrastructure limitations will constrain near-term and mid-term growth in U.S. travel to Cuba. The Department does not view this factor as dispositive in this proceeding. The Department will not substitute its judgement for that of carrier managements who have formulated and submitted proposals designed to take advantage of the reopened scheduled service market to Havana and who can be expected to have aligned their plans to the anticipated reality of the marketplace. In those circumstances, the Department does not find that Silver Airways' assertions justify reallocating any frequencies for Silver Airways.

With respect to the objections of Eastern, the Department sees no new argument that would warrant a change to the tentative decision. In tentatively deciding not to select Eastern for any authority in this proceeding, the Department stated that Eastern had not completed the necessary licensing steps to conduct scheduled air transportation, and that Eastern's certificates limit it to providing charter flights only.<sup>56</sup> In its objections to the show-cause order, Eastern references the precedents it cited in its March 21, 2016 Reply,<sup>57</sup> and claims that, based on those precedents, the Department was required by *Ashbacker Radio Corp. v. Federal Communications Comm'n*, 326 U.S. 327, 333 (1945) to grant comparative consideration to its application.<sup>58</sup> However, the precedents cited by Eastern are inapposite.<sup>59</sup> Eastern is not similarly situated to the other applicants in this proceeding and therefore cannot rely on *Ashbacker*. Against that background, the Department has decided to make final its decision not to award Eastern any U.S.-Cuba scheduled authority at this time.

As a final matter, the Department has decided to finalize its tentative allocations without awarding backup authority. As noted above, and in the tentative decision, the U.S.-Cuba market has been devoid of scheduled air services for over 50 years and the U.S.-Cuba scheduled service market is at a developmental stage. While it is certainly possible that at least some of the

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<sup>56</sup> Order 2016-7-4, at 9.

<sup>57</sup> See March 21, 2016 Reply of Eastern, at 4-5, n. 6 & 7.

<sup>58</sup> Objection of Eastern, at 2.

<sup>59</sup> They involved cargo carriers, domestic service operators, and a commuter carrier already holding scheduled authority. None involved a large aircraft operator with a charter-only certificate seeking to perform scheduled combination foreign air transportation.

selected carriers might not fully realize their objectives, the Department is not in a position now to anticipate precisely what will occur and what would be the most appropriate regulatory outcome consistent with our continuing goal of maximizing public benefits. 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.

### **Terms, Conditions, and Limitations**

The Department has decided to impose a startup condition for each award of U.S.-Havana frequencies. In this regard, the Department will require the carriers to institute their proposed U.S.-Havana services within 90 days of the issue date of this order.

In addition, consistent with the Department's standard practice, the frequencies allocated here will be subject to the Department's standard 90-day dormancy condition, wherein any frequency not utilized for a period of 90 days (once inaugurated) would be deemed dormant and the allocation with respect to each such frequency would expire automatically and the frequency would revert to the Department for reallocation.<sup>60</sup>

Finally, the frequency allocations and exemption authority tentatively granted here will also be subject to the standard condition that the Department may amend, modify or revoke the authority at any time and without hearing, at our discretion.<sup>61</sup>

### **ACCORDINGLY,**

1. The Department grants exemption authority under 49 U.S.C. § 40109 to Alaska Airlines, Inc. to provide scheduled foreign air transportation of persons, property, and mail between Los Angeles, California, and Havana, Cuba;
2. The Department grants exemption authority under 49 U.S.C. § 40109 to American Airlines, Inc. to provide scheduled foreign air transportation of persons, property, and mail between (1) Charlotte, North Carolina, and Havana, Cuba; and (2) Miami, Florida, and Havana Cuba;
3. The Department grants exemption authority under 49 U.S.C. § 40109 to Delta Air Lines, Inc. to provide scheduled foreign air transportation of persons, property, and mail between (1) Atlanta, Georgia, and Havana, Cuba; (2) Miami, Florida, and Havana, Cuba; and (3) New York, New York, and Havana, Cuba;

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<sup>60</sup> Some parties have urged the Department to impose strengthened or modified conditions on the final frequency awards to ensure full utilization of allocated frequencies. The Department finds, in the circumstances of this case, that it is well positioned pursuant to the standard conditions it routinely imposes to address any concerns regarding carrier utilization of frequencies on a case-by-case basis; therefore, the Department finds no basis to deviate from its well-established standard conditions.

<sup>61</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 relieves parties from complying with all applicable regulations and requirements of other U.S. agencies and with all applicable laws of the United States.

4. The Department grants exemption authority under 49 U.S.C. § 40109 to Frontier Airlines, Inc. to provide scheduled foreign air transportation of persons and property<sup>62</sup> between Miami, Florida, and Havana, Cuba;
5. The Department grants exemption authority under 49 U.S.C. § 40109 to JetBlue Airways Corporation to provide scheduled foreign air transportation of persons, property, and mail between (1) Fort Lauderdale, Florida, and Havana, Cuba; (2) New York, New York, and Havana, Cuba; and (3) Orlando, Florida, and Havana, Cuba;
6. The Department grants exemption authority under 49 U.S.C. § 40109 to Southwest Airlines Co. to provide scheduled foreign air transportation of persons, property, and mail between (1) Fort Lauderdale, Florida, and Havana, Cuba; and (2) Tampa, Florida, and Havana, Cuba;
7. The Department grants exemption authority under 49 U.S.C. § 40109 to Spirit Airlines, Inc. to provide scheduled foreign air transportation of persons, property, and mail between Fort Lauderdale, Florida, and Havana, Cuba;
8. The Department grants exemption authority under 49 U.S.C. § 40109 to United Airlines, Inc. to provide scheduled foreign air transportation of persons, property, and mail between (1) Houston, Texas, and Havana, Cuba; and (2) Newark, New Jersey, and Havana, Cuba;
9. The Department allocates to Alaska Airlines, Inc. one daily frequency for its proposed Los Angeles-Havana service;
10. The Department allocates to American Airlines, Inc. (1) one daily frequency for its proposed Charlotte-Havana service; and (2) four daily frequencies for its proposed Miami-Havana service;
11. The Department allocates to Delta Air Lines, Inc. (1) one daily frequency for its proposed Atlanta-Havana service; (2) one daily frequency for its proposed Miami-Havana service; and (3) one daily frequency for its proposed service New York (JFK)-Havana service;
12. The Department allocates to Frontier Airlines, Inc. one daily frequency for its proposed Miami-Havana service;
13. The Department allocates to JetBlue Airways Corporation (1) one daily frequency for its proposed Fort Lauderdale-Havana service, and six weekly frequencies for Fort Lauderdale-Havana service on Sundays through Fridays; (2) one daily frequency for its proposed New York (JFK)-Havana service; and (4) one daily frequency for its proposed Orlando-Havana service;
14. The Department allocates to Southwest Airlines Co. (1) two daily frequencies for its proposed Fort Lauderdale-Havana service; and (2) one daily frequency for its proposed Tampa-Havana service;

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<sup>62</sup> Frontier requests exemption authority “to engage in the scheduled foreign air transportation of persons and property on the route operated and with the frequencies granted to it under the Order.” Frontier Application for Exemption, at 2.

15. The Department allocates to Spirit Airlines, Inc. two daily frequencies for its proposed Fort Lauderdale-Havana service;

16. The Department allocates to United Airlines, Inc. (1) one daily frequency for its proposed Newark-Havana service; and (2) one weekly frequency for its proposed Houston-Havana service on Saturdays;

17. The frequencies allocated by ordering paragraphs 9 through 16 above are effective immediately and will not expire, *provided that* the holder continues to hold the necessary underlying authority to serve the markets authorized; that the holder begins service with the allocated frequencies within 90 days of the issue date of this order; and *provided further* that any frequency will become dormant and will revert automatically to the Department if not used for a period of 90 days (once inaugurated);

18. The frequencies allocated by ordering paragraphs 9 through 16 above are subject to the Department's standard condition that the Department may amend, modify or revoke the allocation at any time and without hearing, at its discretion;

19. The exemption authority granted by ordering paragraphs 1 through 8 above is effective immediately and will remain in effect for two years, subject to the Department's standard exemption conditions attached as Appendix A, and subject also to the standard condition that the Department may amend, modify or revoke the authority at any time and without hearing, at its discretion;<sup>63</sup>

20. The Department grants all motions for leave to file otherwise unauthorized documents in this proceeding;

21. To the extent not granted, the Department denies the remaining applications in this proceeding;

22. The Department will not consider petitions for reconsideration of this order; and

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<sup>63</sup> The Department finds that its actions would not constitute a "major regulatory action" under the Energy Policy and Conservation Act of 1975, as defined by section 313.4(a)(1) of the Department's regulations.

23. The Department will serve this order on the parties to the proceeding; the U.S. Department of State (Office of Aviation Negotiations); the Federal Aviation Administration; and the Ambassador of Cuba in Washington, D.C.

By:

**JENNY T. ROSENBERG**  
Acting Assistant Secretary for  
Aviation and International Affairs

(SEAL)

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U.S. Carrier 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, the Transportation Security Administration, and with all applicable U.S. Government requirements concerning security, including, but not limited to, 49 CFR Part 1544. 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;
- (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.