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

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U.S.-France Frequency Allocation Proceeding	**Docket OST-2000-7628** – 1
Application of **Tower Air, Inc.** for waiver of dormancy period (U.S.-France Combination Service Frequency Allocation)	**Docket OST-98-3872** – 29
Applications of **American Airlines, Inc.** **Delta Air Lines, Inc.** **United Air Lines, Inc.** for frequency allocation and/or related authorities (U.S.-Paris)	**Dockets OST-2000-7607** – 2 **OST-2000-7433** – 6 **OST-2000-7384** – 7
Application of **United Air Lines, Inc.** for exemption authority pursuant to 49 U.S.C. section 40109 (New York-Paris)	**Docket OST-95-535** – 13 **(formerly Docket 47513)**

ORDER DISMISSING DORMANCY WAIVER AND INSTITUTING PROCEEDING

Summary

By this order, we institute a proceeding for allocation of 15 weekly frequencies for combination services in the U.S.-France market (eight frequencies are available immediately, and seven frequencies are available April 2001). We also dismiss the request of Tower Air, Inc. (Tower), for a waiver of the dormancy condition with respect to its eight weekly frequencies for U.S.-France combination services.

Background

The 1998 Air Transportation Agreement (Agreement) between the United States and France provides for substantial growth in transatlantic scheduled air services from April 1998 through March 2003 over the base level of operations when the agreement was reached.[1] During this period, U.S. airlines designated for combination services collectively may operate up to 63 additional weekly frequencies in the U.S.-France market.[2] Pursuant to the Agreement, seven additional weekly frequencies become available to U.S. carriers in April 2001.[3]

By Order 98-6-29, the Department formalized allocation of the 148 base-level frequencies already held by U.S. carriers for U.S.-France combination service, including the allocation to Tower of eight weekly frequencies for New York-Paris combination services. All frequencies were subject to the Department's standard dormancy condition whereby the frequency allocations would expire automatically and the frequencies would revert to the Department for reallocation if they were not used for a period of 90 days.[4]

The Agreement also provides that until April 2003, only five U.S. carriers may be designated to serve the New York-Paris market. Tower is one of the five carriers designated for this service.[5] The Agreement provides that the U.S. may replace any carrier that ceases service in the market.

On February 29, 2000, Tower filed for Chapter 11 bankruptcy protection, while continuing to provide certain air transportation services. However, on May 1, 2000,

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[1] Effective April 2003 there are no capacity limits on U.S. and French airline operations.

[2] Of these 63 frequencies, a total of 42 became available in 1998, 1999, and 2000. Those frequencies were allocated by Orders 98-5-8, 98-11-19, and 99-9-10.

[3] References to April of a given year mean that opportunities will be available from the first day of the International Air Transport Association (IATA) summer traffic season, which is normally the last week of March.

[4] The 148 base-level frequencies and additional frequencies allocated to date pursuant to the phase-in provisions of the 1998 Agreement are as follows: American-49; Continental-21; Delta-35; Northwest-7; Tower-8; TWA-14; United-35; and US Airways-21.

[5] Delta Air Lines, Continental Airlines, American Airlines, and Trans World Airlines are the other four carriers designated for the New York-Paris market.

Tower ceased all scheduled air transportation services. Tower cannot resume such operations until the Department has completed a review of the carrier's fitness and has authorized it to conduct scheduled operations.[6]

Applications/Responsive Pleadings

A. Reallocation of Tower's Unused Frequencies

United Air Lines, Inc. (United), and Delta Air Lines, Inc. (Delta), and American Airlines, Inc. (American) have filed applications requesting reallocation of Tower's frequencies.

Specifically, United filed an application, in Docket OST-2000-7384, requesting reallocation of seven of Tower's unused frequencies to provide new service in the New York-Paris market,[7] and reallocation of Tower's designation as one of the five U.S. carriers entitled to serve the market. Delta filed an application, in Docket OST-2000-7433, requesting allocation of seven of Tower's unused frequencies to provide a second daily year-round nonstop flight in the New York-Paris market. Both carriers propose to begin service on October 29, 2000.[8] American filed an application in Docket OST-2000-7607 for allocation of 14 weekly frequencies. American seeks allocation of seven of Tower's frequencies as well as allocation of the seven additional frequencies that become available on April 1, 2001. American proposes to use the frequencies to commence service in the San Jose-Paris market and to operate a second daily flight in the Chicago-Paris market. American would begin both of these services on April 1, 2001.[9]

American Airlines, Inc. (American), United, and Charles A. Stanziale, Jr., the Chapter 11 Trustee for Tower ("Tower" or "Trustee"), filed answers to Delta's application.[10] American, Delta, and Tower filed answers to United's applications. Delta also filed a motion to consolidate the applications of United and Delta for U.S.-France frequencies. United filed consolidated replies to the answers. United and Delta each contends that its proposal is superior and should be selected. With the exception of Tower, each of the respondents requests that the Department promptly institute a proceeding to reallocate Tower's unused frequencies and to allocate the seven frequencies available in April 2001.

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[6] Letter to Terrence Dennison, Chief Operating Officer for Tower Air from Patricia L. Thomas, Chief, Air Carrier Fitness Division dated May 24, 2000.

[7] United also filed a motion for immediate action on its application requesting New York-Paris exemption authority in Docket OST-95-535. American filed an answer to the motion for immediate action.

[8] United originally proposed to begin service on April 1, 2001.

[9] Answers to American's application are due July 17, 2000.

[10] The Trustee accompanied its answer with a motion for leave to file late. We will grant the motion.

B. Waiver of Dormancy Period

On May 26, 2000, the Trustee filed an application, in Docket OST-98-3872, requesting a waiver from the 90-day dormancy period for the eight weekly frequencies allocated to Tower to provide New York-Paris service. The Trustee states that, since his appointment as Trustee on May 5, 2000, he has been reviewing Tower's historic operations for the purpose of developing a business plan for the carrier, and that he is currently evaluating the New York-Paris market. In this regard, to provide sufficient time to evaluate the service, the Trustee requests that the Department waive the dormancy condition to the extent necessary to extend the date on which the frequencies would be deemed dormant and would revert automatically to the Department to July 15, 2000. United filed an answer to the application, stating that Tower's last flight to Paris was February 18, 2000, and, thus, that the frequencies are already dormant and have reverted to the Department. United further argues that if Tower wants to seek reallocation of its frequencies, its application should compete with those of other carriers that are interested in using the frequencies.

C. Subsequent Information Request

By letter dated June 21, 2000, the Department requested Tower, through its Trustee, to answer certain questions regarding its application for a waiver of dormancy in this matter, including clarification of the date on which it ceased its services to France.[11] On June 26, 2000, Tower supplemented its application as requested by the Department. Tower clarified that it had ceased operations in the New York-Paris market on February 18, 2000, but that the Department should, in light of Tower's historic seasonal service pattern, calculate dormancy in such a manner as to reflect such historic use. Tower maintains that such a calculation of dormancy is fully consistent with the manner in which the Department historically permitted Tower to use its frequencies, as well as the public interest considerations that led the Department to permit Tower to operate its frequencies in this manner over the past several years. Tower states, further, that the requested waiver date of July 15, 2000, was chosen to provide the Trustee sufficient time to evaluate Tower's New York-Paris service for the purpose of developing a plan of reorganization for the carrier, and a date certain "that will permit the frequencies to be reallocated if they should revert to the Department at the end of this period."

United filed an answer to Tower's supplement, stating that it is now apparent that Tower's eight U.S.-France frequencies became dormant on May 18, 2000, 90 days following Tower's last operation of flights between the United States and France; that the frequencies have already reverted to the Department; and that Tower's request for a waiver should be dismissed or denied; and that the Department should proceed with an expeditious reallocation of Tower's reverted frequencies and associated New York-Paris authorities. United argues that Tower's claims that the Department's awareness of the

[11] The Department asked Tower, among other things, to provide information regarding its cessation of services in the New York-Paris market, and asked why Tower chose the date July 15, 2000, as the modified dormancy date in this case.

"seasonal" nature of Tower's service entitled Tower to commence, suspend, and terminate service at its discretion are without merit; that the Department has not afforded Tower or any other U.S. carrier such discretion in the U.S.-France or any other limited-entry market; and that to accept Tower's interpretation of the Department's dormancy policy for seasonal service would render the dormancy conditions meaningless.[12]

In its reply, Tower argues that it did provide the Department with specific information concerning its historic and planned New York-Paris operations and the Department, over the objections of United, reaffirmed its award of eight frequencies to Tower, knowing that Tower would not operate all eight weekly frequencies in the New York-Paris market at all times during the year.[13] (Order 98-10-21.) Tower maintains that it actually operated more, not less, New York-Paris monthly flights than it projected in its July 21, 1998, letter to the Department.[14] Tower urges the Department to grant the waiver of the 90-day dormancy condition in the manner requested in its application.

United filed a response to Tower's reply arguing that the waiver cannot be granted as requested because the frequencies already reverted to the Department and that Tower has presented no evidence to warrant any other conclusion.[15] Tower filed a surreply reiterating its request that the Department grant its waiver application.[16]

Decision

After careful review of the circumstances described above, we have decided (1) to dismiss the application of Tower for a waiver of the dormancy period with respect to its New York-Paris frequencies; and (2) to institute a proceeding to invite applications for exemption authority and/or frequency allocation(s) to (a) use the seven new frequencies that will be available in April 2001, and (b) use the eight frequencies previously allocated to Tower that we have determined are available for reallocation and immediate use.

A. Tower's Dormancy Request

The U.S.-France frequencies available to U.S. carriers under the transitional service regime constitute valuable operating rights and important access for the traveling public in the U.S.-France market. It is the Department's policy to ensure that such valuable operating rights be readily available for other carriers if they are not being used. Indeed,

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[12] United notes that, by Order 98-6-29, the Department requested carriers proposing seasonal operations in the U.S.-France market to so indicate in supplemental filings and that, in its response, Tower did not define its period of seasonality. (See Tower letter dated July 21, 1998).

[13] Tower accompanied its reply with a motion for leave to file an otherwise unauthorized document. We will grant the motion.

[14] Reply at 3.

[15] United accompanied its response with a motion for leave to file an otherwise unauthorized document. We will grant the motion.

[16] Tower accompanied its response with a motion for leave to file an otherwise unauthorized document. We will grant the motion.

it was for this reason that, in allocating the base-level frequencies to incumbent carriers, we specifically subjected those frequencies to a 90-day dormancy condition. [17]

Tower has confirmed on the record of this case that it ceased operating its U.S.-France services on February 18, 2000, and at no time since resumed that service. Under the 90-day dormancy condition applicable to its frequency allocation, these frequencies became dormant and automatically reverted to the Department on May 18, 2000. As Tower's request for waiver was filed after the 90th day of dormancy, Tower's request for a waiver cannot be considered retroactively. [18] We are unpersuaded by Tower's arguments that, because it operated service on an irregular basis, the dormancy period should apply with respect to each frequency based on the historic pattern of its service. The dormancy conditions are imposed to ensure that valuable route rights become available promptly if the carrier authorized ceases to use them for a period of 90 days. Although, the Department was prepared to accept Tower's irregular pattern of service in the U.S.-France market while the carrier actively served the market, that flexibility in no way relieved Tower of the applicable dormancy conditions once the carrier ceased all of its airline services in the market.[19] To apply the dormancy condition otherwise would be contrary to the purpose and intent of the condition. We, therefore, will dismiss, as moot, Tower's request for a dormancy waiver in this matter. As discussed below, we are instituting in this order a proceeding to allocate the seven April 2001 frequencies as well as the eight frequencies previously allocated to Tower. Tower, or its successor, will be free to compete for reallocation of the frequencies in the instituted proceeding, should it be in a position to do so.

B. Allocation Proceeding

Under the transitional service provisions of the Agreement, seven additional frequencies are available for U.S. carrier services effective April 1, 2001. In addition, as discussed above, the eight weekly frequencies previously allocated to Tower for New York-Paris services have automatically reverted to the Department, and are available for reallocation, as is Tower's designation to serve Paris from New York.

To facilitate and maximize use of these valuable rights, it is our intent to allocate all of these frequencies quickly. We have, therefore, decided to consider allocation of all 15 frequencies in one expedited proceeding. This will enable the Department to consider all of the near-term needs of the U.S.-France market together, rather than in separate back-to-back proceedings, and will reduce the burden on both the Department and the carriers, while still ensuring a prompt decision with respect to allocation of all of the available frequencies. Therefore, we institute the *U.S.-France Frequency Allocation Proceeding* to

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[17] Orders 98-5-29 and 98-6-29.

[18] See, e.g., Order 99-12-27, at 6, in the *1999 Brazil Case*.

[19] We note from evidence provided by Tower itself that notwithstanding Tower's irregular historic service pattern, at no time prior to February 18, 2000, had Tower ceased all of its New York-Paris services. Indeed, in 1999, Tower operated service in each of the months of the period corresponding to the 90 days following February 18 (See Table 1 of Tower's June 26, 2000, Supplement to its Application).

determine how and in which market(s) the 15 U.S.-France frequencies should be allocated. We will also place at issue whether it is in the public interest to authorize an airline to use the available opportunity as the fifth carrier entitled to serve the New York-Paris market.[20]

Whether authorizing carriers for this service is consistent with the public interest will not be at issue. The traffic rights involved constitute a valuable resource obtained in exchange for granting France route opportunities for its airlines to serve the United States. The use of these frequencies will provide important service options to travelers and shippers and will enhance competition in the U.S.-France market. In these circumstances, we find that the public interest clearly calls for use of the rights.

In determining which service proposals will be authorized, our principal objective will be to maximize the public benefits that will result from award of the authority in this case. In this regard, we will consider which applicant will be most likely to offer and maintain the best service for the traveling and shipping public. We will also consider the effects of the applicants' service proposals on the overall market structure and level of competition in the U.S.-France market, and any other market shown to be relevant, in order to promote an air transportation environment that will sustain the greatest public benefits. In addition, we will consider other factors historically used for carrier selection where they are relevant.

Procedures and Evidence

We invite all U.S. carriers interested in using these opportunities to file applications as set forth below.

Carriers with proposals to use the frequencies available immediately (8 frequencies), and/or those available in April 2001 (7 frequencies), should file applications no later than seven calendar days from the date of service of this order. Carriers that already hold the necessary underlying authority need only file an application for allocation of the available frequencies. Carriers that require additional underlying authority as well should file applications that include a request for both exemption authority and a frequency allocation. Answers to applications will be due five calendar days from the application date, and replies will be due three calendar days thereafter. Except for the filing dates, exemption applications should conform to Subpart C of Part 302 of the Department's regulations.[21] All applications should be filed with the Department of Transportation, Dockets, Room PL-401, 400 Seventh Street, SW, Washington, DC 20590, in Docket OST-2000-7628.[22]

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[20] As Tower's frequencies are part of the 148 base level frequencies allocated, Tower's frequencies are movable to other U.S. gateways (see Order 98-5-29 at 2, n.3).

[21] 14 CFR Part 302, revised 65 FR 6474 (February 9, 2000), and 65 FR 7418 (February 14, 2000).

[22] The original submission is to be unbound and without tabs on 8 ½" x 11" white paper, using dark ink (not green) to facilitate use of the Department's docket imaging system. In the alternative, filers are encouraged to use the electronic submission capability available through the Dockets/DMS Internet site (http://dms.dot.gov) by following the instructions on the web site.

All applications (frequency allocation only and exemption/frequency allocation) should include, at a minimum, the following information: (a) the number of weekly frequencies and the full routing of the flights to be operated, including the duration of service in each market, if not to be provided on a year-round basis; (b) the proposed startup date for each service; (c) type of aircraft to be used for each service, including passenger capacity of the aircraft and whether such aircraft are currently available in the carrier's fleet; and (d) evidence of the carrier's underlying economic authority, including route integration authority, if applicable. Applicants for reallocation of Tower's frequencies and proposing a start-up date before April 1, 2001, should also indicate what steps they have taken or plan to take to secure the necessary slots for their proposed service. Applicants are also free to submit any additional information that they believe will help us in making our decision.

As we have stated above, United and Delta have already filed applications for allocation of some of the available frequencies (Dockets OST-2000-7384 and 95-535-United and Docket OST-2000-7433-Delta). In addition, American Airlines has filed an application for allocation of 14 weekly frequencies to operate services in the San Jose-Paris market and the Chicago-Paris market. We will consolidate all of these applications into the *U.S.-France Frequency Allocation Proceeding*. United, Delta, and American should supplement their applications with the information requested here to the extent necessary under the procedural schedule set forth in this order.

We intend to allocate the available frequencies and grant, as applicable, the necessary underlying economic authority, based on the applications and responsive pleadings filed in response to this order. We intend to make our decision using written, show-cause procedures in accordance with Part 302 of our regulations (14 CFR Part 302).

Because of the expedited nature of this proceeding, we will authorize service of documents by facsimile and by email. Parties, however, should specify the type of service preferred and should provide their fax number and/or email address.

ACCORDINGLY,

1. We dismiss the application of Charles A. Stanziale, Jr. ("Tower" or "Trustee"), filed in Docket OST-98-3872, for waiver of the dormancy period with respect to the eight weekly frequencies allocated to Tower Air, Inc., by Order 98-6-29;

2. We institute the *U.S.-France Frequency Allocation Proceeding*, Docket OST-2000-7628, to be decided by non-oral, show-cause procedures under Subpart C of Part 302 of our regulations;

3. The proceeding instituted in ordering paragraph two will consider the following issues:

   a. Which carrier(s) should be selected to use the seven weekly frequencies available April 2001;

b. Which carrier(s) should be selected to use the eight weekly frequencies available immediately;
c. Whether it is in the public interest to select a fifth carrier as one of the five U.S. carriers that may be designated to serve Paris from New York under the U.S.-France aviation agreement;
d. What other authorities, including exemption authority and route integration authority, should be granted in conjunction with the France services authorized in this proceeding; and
e. What terms, conditions, and limitations should be imposed on any existing authority, and any new authority or frequency allocation awarded in this proceeding.

4. We consolidate into the *U.S.-France Frequency Allocation Proceeding*, the applications of United Air Lines, Inc., in Dockets OST-2000-7384 and OST-95-535, the application of Delta Air Lines, Inc., in Docket OST-2000-7433, and the application of American Airlines, Inc., in Docket OST-2000-7607;

5. We grant the motion of Charles A. Stanziale, Jr., for leave to file late in Docket OST-2000-7433;

6. We grant all motions for leave to file otherwise unauthorized documents in Docket OST-98-3872; and

7. We will serve this order by facsimile on all U.S. certificated combination air carriers operating large aircraft, the U.S. Department of State (Office of Aviation Negotiations), the Federal Aviation Administration (AFS-200), and the Ambassador of France in Washington, D.C.

By:

A. BRADLEY MIMS
Acting Assistant Secretary for Aviation
and International Affairs

(SEAL)

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