



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

Order 97-11-35

Issued by the Department of Transportation
on the 20th day of November, 1997

SERVED: November 20, 1997

**1997 U.S.-ARGENTINA ALL-CARGO
FREQUENCY PROCEEDING**

Docket OST-97-3139

Joint Application of

**FEDERAL EXPRESS CORPORATION,
ARROW AIR, INC., AND FLORIDA WEST
INTERNATIONAL AIRWAYS, INC.**

Docket OST-97-2548

**for approval of a transfer of frequency allocations
pursuant to 49 U.S.C. § 41105 (U.S.-Argentina All-
Cargo Frequencies)**

Applications of

**ARROW AIR, INC.
FEDERAL EXPRESS CORPORATION
FINE AIRLINES, INC.
POLAR AIR CARGO, INC.
SOUTHERN AIR TRANSPORT, INC.**

**Docket OST-97-2848
OST-97-2594
OST-97-2852
OST-97-2578
OST-97-2855**

**for allocation of frequencies and/or exemption
authority (U.S.-Argentina All-Cargo Frequencies)**

<p>Application of</p> <p>FLORIDA WEST INTERNATIONAL AIRWAYS, INC.</p> <p>for renewal of exemption authority and frequency allocation</p>	<p>Docket OST-97-2648¹</p>
<p>Motion and Request of</p> <p>CHALLENGE AIR CARGO, INC.</p> <p>for clarification of Department's August 14, 1997 Notice regarding U.S.-Argentina All-Cargo Services</p>	<p>Undocketed</p>
<p>Application of</p> <p>CHALLENGE AIR CARGO, INC.</p> <p>for renewal of an exemption pursuant to 49 U.S.C. §40109</p>	<p>Docket OST-96-1042²</p>
<p>Joint Petition for Review of Staff Action of</p> <p>FEDERAL EXPRESS CORPORATION and ARROW AIR, INC.</p> <p>regarding August 14, 1997 Notice on U.S.-Argentina All-Cargo Services</p>	<p>Undocketed</p>

ORDER INSTITUTING PROCEEDING

Summary

By this order, we institute the *1997 U.S.-Argentina All-Cargo Frequency Proceeding* to determine whether U.S.-Argentina all-cargo frequencies currently held by Florida West, Arrow Air, and Challenge should be reallocated, including the issue of whether frequencies should be transferred from Florida West and Arrow Air to Federal Express. We will consolidate all of the captioned applications into this new proceeding.

¹ Only that portion of Docket OST-97-2648 which deals with U.S.-Argentina authority will be considered here. The balance of the application will be considered in the context of Florida West's fitness renewal proceeding.

² This order will consider the previously deferred portion of Docket OST-96-1042. (See Order 97-3-6).

Background

Under the U.S.-Argentina aviation agreement, U.S. carriers may operate a total of 12 weekly narrow-body frequencies for all-cargo services.³ By Orders 95-1-9 and 95-3-30, the Department renewed the allocations of Federal Express (5 weekly frequencies), Arrow Air, Inc. (2 weekly frequencies), and Florida West (1 weekly frequency), and allocated 2 weekly narrow-body frequencies each to Polar Air Cargo, Inc. and Challenge Air Cargo, Inc.⁴ The frequencies are subject to our standard 90-day dormancy provision such that, if the frequencies are not used for a period of 90 days, they automatically revert back to the Department.

On May 21, 1997, Federal Express, Arrow and Florida West filed an application seeking transfer of the frequencies held by Arrow and Florida West to Federal Express. Federal Express holds the necessary underlying authority and seeks only to expand its services in the market.

On June 2, 1997, Polar Air Cargo filed an application for reallocation of the two frequencies originally awarded to Challenge Air Cargo, arguing that Challenge is not using its frequencies.

On June 9, 1997, Federal Express filed a competing application for Challenge's frequencies on a contingent basis should the Department not approve its frequency transfer application.

On June 24, 1997, Florida West timely filed a request for renewal of its U.S.-Argentina exemption authority and, as noted in footnote 4 above, a timely request for renewal of its frequency allocation for U.S.-Argentina services.

On August 14, 1997, the Director, Office of International Aviation, acting under authority specifically delegated to him by our regulations,⁵ issued a Notice which stated that there was no evidence of scheduled Argentina operations by either Challenge or Arrow. The Notice cited the various pending applications and said that we would afford all U.S. carriers interested in serving Argentina the opportunity to file applications by August 25, with answers due by September 2.⁶

³ For the purposes of frequencies, wide-body aircraft may be substituted for narrow-body aircraft at the following rates of conversion: one wide-body aircraft (*i.e.*, L-1011, DC-10, A-300, B-747SP, B-767 or similar aircraft) shall be equivalent to 1.5 narrow-body aircraft (*i.e.*, DC-8, B-707, B-727, B-737, B-757, MD-80 or similar aircraft), except that one B-747-100 or similar aircraft will be equivalent to two narrow-body aircraft and one B-747 Combi (with maindeck cargo) shall be equivalent to 1.5 narrow-body passenger aircraft and one narrow-body all-cargo aircraft.

⁴ The subject frequencies have subsequently been renewed: Federal Express, Polar, and Arrow through June 12, 1998, see Order 96-7-43; Challenge (one frequency) through February 19, 1999, and Florida West through August 6, 1997, see Order 97-3-6. On June 24, 1997, Florida West timely filed a request for renewal of its frequency.

⁵ See 14 CFR 385.13(p).

⁶ Federal Express and Arrow jointly petitioned for review of the Notice. Challenge also objected to the Notice. Contrary to the assertions of the petitioning and objecting parties, the Director made no final determinations in this Notice on the merits of pending applications or on the procedures to be applied in addressing those applications but acted to ensure that all potential interested parties were accorded notice of all proceedings and properly sought information. In the circumstances presented this was action within his delegation of authority. We will affirm his action by this order.

In response to our notice, Southern Air Transport (SAT) and Fine Air Services, Inc. (Fine) filed applications seeking frequency allocations to serve Argentina. Arrow Air also filed a contingent application for allocation of two weekly frequencies in the event the Department does not approve its request to transfer its currently allocated frequencies to Federal Express. Challenge Air Cargo, Inc. (Challenge) has pending an application for renewal of one of its frequencies that expires December 1, 1997.

Responsive Pleadings⁷

Federal Express, Arrow, and Florida West argue that their transfer application will produce significant public benefits by increasing services in the U.S.-Argentina market, and that, consistent with Department precedent in transfer cases, the Department should approve the transfer and not entertain competing applications.

Fine and Polar argue that a transfer of these additional frequencies to Federal Express would result in two thirds of the available frequencies residing in the hands of one carrier, thereby producing, in light of Challenge's dormancy, a near monopoly market. Unlike most transfer situations, the carriers argue that the Federal Express/Arrow/Florida West application will result in a reduction of competitors, rather than the replacement of one competitor with another, and, thus, would adversely affect competition in the market. Polar contends that should the transfer be approved, it would be forced out of the market since its current allocation enables it to operate only one weekly wide-body flight, and it could no longer compete effectively with Federal Express' eight weekly frequencies. Polar states, however, that if it is reallocated the frequencies currently held by Challenge, it would withdraw its objection to the frequency transfer.

Fine and Polar have also questioned whether the Department should authorize transfer of frequencies (as opposed to underlying route authority) between carriers. They note that while the statute provides for the transfer of certificate authority, there have been no DOT cases involving the transfer of frequencies only. Federal Express, Arrow, and Florida West maintain that the frequencies constitute operating rights and, thus, can be transferred. They request that the Department issue an order that places at issue only reallocation of Challenge's frequencies and grants tentative or final approval of the transfer of Florida West's and Arrow's frequencies to Federal Express.

Challenge objects to any consideration of whether its frequencies are dormant and requests that we issue an order to exclude from consideration reallocation of its frequencies and to place at issue only the Federal Express/Arrow/Florida West route transfer.

With respect to dormancy, both Challenge and Arrow argue that they have used their frequencies within the 90-day dormancy period, which is the only established requirement, and that the Department cannot now impose additional standards to establish whether the frequencies are dormant. Challenge states that since May 1997 it has operated a pattern of service of one wide-

⁷ We summarize the pleadings fully in the attached Appendix. A number of responsive pleadings were accompanied by motions for leave to file otherwise unauthorized documents. We will grant the motions.

body flight per month. Arrow acknowledges that it not published schedules holding out U.S.-Argentina scheduled cargo service; that it has made only limited use of its frequencies but expects to operate additional cargo flights in the future. Fine, Polar, and Southern Air Transport argue that such limited operation of the allocated weekly frequencies is not an effective use of the limited route rights available and that the public interest calls for reallocation of the frequencies.

Decision

We have decided to institute the *1997 U.S.-Argentina All-Cargo Frequency Proceeding* to examine the current U.S. carrier service in the U.S.-Argentina market and to consider whether reallocation of the frequencies held by Arrow, Florida West, and Challenge, including the proposed transfer of frequencies from Florida West and Arrow to Federal Express, is in the public interest.

While the record before us reflects a variety of disagreements, the principal issue before us is use and allocation of frequencies, specifically, a portion of the U.S. carrier frequencies available for service to Argentina. The prime matter for us to resolve is which carriers should be permitted to hold those frequencies. In other words, in the current circumstances and given the various positions that have been expressed, what allocation of those U.S. - Argentina frequencies would best serve the public interest.

The case before us is a frequency allocation case. While some of the parties have invoked route transfer cases as precedential guidance, the transfer language of the Act relates to the transfer of certificate authority.⁸ Frequency allocations are not certificate awards. We have traditionally deemed them to be in the nature of exemption authority. As with exemptions, we typically grant frequency authority for a limited period of time--in limited entry markets normally for no more than one year. As with exemptions, we award frequency allocations on the express basis that we may amend, modify or revoke them in our discretion and without hearing.⁹ Furthermore, we make frequency allocations subject to a 90-day dormancy provision, whereby frequencies automatically revert to the Department if they are not being used by the authorized carrier.¹⁰ Certificate holders, on the other hand, have specific rights under the provisions of section 41110 of the Act concerning their certificate authority, even in cases where their authority has been dormant.

We have treated frequency awards in this fashion because, in the limited-service markets where we must make such awards, we have wanted to preserve maximum flexibility to respond to changing conditions, whether in terms of the operations of the carriers already serving, the interests of the carriers that might want to serve, the overall state of the applicable bilateral relationship, or any other public interest factors.

⁸ See 49 U.S.C. § 41105.

⁹ See, e.g., Orders 95-5-30, 97-3-35, and 97-9-29.

¹⁰ See, e.g., Orders 96-6-12 (Brazil), 96-10-2 (Peru), and 97-8-20 (Ecuador).

The various submissions we have received on the issue of Argentina service indicate a substantial evolution in the position and operations of a number of U.S. carriers with frequency allocations for Argentina from the time that we issued their respective authorizations. In light of this situation, we find that a comprehensive approach is required to ensure that we can adequately consider the public interest and ensure a result which maximizes future public benefits.¹¹ The limited U.S.-Argentina frequencies constitute valuable operating rights that were granted in exchange for rights to Argentine carriers, and the public interest requires full and effective use of these rights. The proceeding we are instituting here will ensure that the U.S. makes full use of the route rights available under our bilateral agreement and, consequently, will ensure more effective competition in the market.

We specifically will examine the frequency allocations currently held by Florida West (one), Arrow (two), and Challenge (two). We find that sufficient questions have been raised about actual past use, and optimum future use, of these frequencies to warrant a renewed public interest inquiry on our part as to how they might best be allocated.¹² If, upon completion of that inquiry, we were to determine that the allocations now held by Florida West and Arrow could continue with those carriers, then we would also consider whether it would be consistent with the public interest for those carriers thereupon to transfer those frequencies to Federal Express. We emphasize, however, that these will be matters for resolution in this proceeding. Similarly, if we were to decide that some or all of the five frequencies being placed at issue should not be retained by the current holder(s), then we will need to decide how to reallocate them among the various carriers that have submitted formal requests seeking additional frequencies.

In examining all of these issues, our principal objective will be to maximize the public benefits that can be expected to result from awarding U.S.-Argentine frequencies. We will place primary emphasis on which applicant/gateway will be most likely to offer and maintain the best all-cargo service for the shipping public. We will also consider the effects of the applicants' service proposals, including their proposed gateways, on the overall market structure and the level of competition in the U.S.-Argentine all-cargo market and any other market that the applicants demonstrate is relevant. In addition, we will consider other factors historically used by the Department for frequency allocation decisions where they are relevant.

As we have already solicited applications for U.S.-Argentina all-cargo services by our August 14 Notice, we will not provide a further opportunity for additional carriers to file applications in response to this order.

¹¹ We will accordingly deny the joint petition of Federal Express and Arrow that the Federal Express/Arrow/Florida West frequency transfer not be made subject to a comparative selection proceeding.

¹² A number of parties have devoted considerable time in the pleadings to the issue of whether we may proceed against certain of the frequency allocations at issue under our standard dormancy condition. We need not make that determination at this time, since we are instituting this proceeding under our general powers to review the public interest bases of the current awards. Of course, parties will be free to raise arguments relating to dormancy for our consideration in the context of this proceeding. Against this background, we will deny Challenge's request to exclude from consideration the reallocation of frequencies allocated to it.

As stated earlier, it has been our normal practice to grant frequency allocations in limited-entry markets for a period of one year, subject to a 90-day dormancy provision. We will follow that practice in this case.

Finally, we will consolidate all of the captioned applications into this proceeding. We note that Federal Express and Arrow have filed contingent applications in addition to the joint frequency transfer application. For such applications to be considered as well as the frequency transfer application, the applicants will have to prosecute these applications fully under the evidentiary procedures set forth in this order. Should they decide not to prosecute all applications, they should notify the Department to that effect on the date established for supplemental applications. Moreover, given our desire to complete this case as quickly as possible, we do not intend to delay the procedural dates in this case for any applicant.

Procedures and Timetable for Decision

It is our policy to tailor our procedures to the scope and complexity of the issues before us. We believe that written, non-oral, show-cause procedures under Rule 1750 of our regulations (14 CFR 302.1750) are appropriate and that by using these procedures we can establish a complete evidentiary record and make a selection with the least possible delay and without unnecessary costs to the applicants. We find no material issues of fact that would warrant an oral evidentiary hearing in this case. We intend to process this case on an expedited schedule to facilitate timely inauguration of service by the selected carriers. This case, which is subject to Rule 22a(d) of our procedural regulations [14 CFR 302.22a(d)], will be assigned to the Department's Senior Career Official, who will be the DOT decisionmaker in this proceeding.

In order to develop a comparative basis for selecting among the applicants in this proceeding, we will require submission of certain evidentiary information. We expect all applicants to comply fully with the evidence request and evidentiary procedures established in this order. An applicant's failure to do so could bear negatively on the consideration accorded to that applicant's evidentiary submissions. Furthermore, depending on the circumstances, it could lead to nonadmission of those submission or even to the applicant's disqualification from this proceeding. In addition to the material being requested from the applicants, the Department will make certain information available to the parties to facilitate preparation of their proposals.

A. Applicant Evidence¹³

Each applicant should submit the following information for the twelve months ending December 31, 1996. Submissions should be specific factual information so that further calculation is unnecessary. The sources and methodology used for all traffic estimates should be clearly explained.¹⁴ The applicants should also submit the required information to the extent that it is not already included in their applications on file.

1. Proposed schedules showing startup dates, **complete** routings from origin to destination of all flights, days scheduled, equipment types, and variation of frequencies/routings by traffic season, if applicable.
2. Based on the proposed schedules, a cargo traffic forecast (revenue tons), by direction, for the proposed U.S.-Argentine single-carrier services indicating the data source of all traffic projections.¹⁵ This should include separate traffic estimates for:¹⁶ (a) single-plane U.S.-Argentina, single-plane U.S.-third country, and single-plane third-country-Argentina traffic to be carried; (b) behind-gateway traffic (excluding single-plane traffic (*i.e.*, U.S.-Argentina; U.S.-third country), by direction, that the applicant expects to flow over the proposed U.S. gateway(s) or any single-plane behind gateway points to be served, and the source of such estimates; and (c) any third country-Argentina traffic which would be carried on the proposed service (*e.g.* Asia-Argentina); and (d) any third country-third country traffic that would be carried on the proposed service (*e.g.* Asia-South Africa via Argentina).¹⁷ Forecasts should **also** specify the capacity available on the proposed services for U.S.-Argentine, U.S.-third country, third country-Argentina, and third country - third

¹³ As all applications are being consolidated into the proceeding instituted here, all submissions **must be filed in the proceeding docket established by this order.**

¹⁴ All data and responsive information **must** be given in U.S. dollars and pounds/tons. An applicant may choose, in addition, to present evidence using other units of measure; however, it **must** provide the data in the standard measure for comparative purposes.

¹⁵ Applicants should specify the payload capacity used based on the stage lengths and full routings involved in determining their estimates.

¹⁶ The base year for traffic forecasting purposes should be the twelve months ended December 31, 1996. The forecast year is the twelve months ending December 31, 1998.

¹⁷ For example, should an applicant propose the following hypothetical single-plane service pattern: Chicago-Miami-Belem-Buenos Aires, we would expect traffic (tons carried) on this service to be reported separately as follows (southbound direction--reverse the markets for northbound traffic):

- Chicago-Miami
- Chicago-Belem
- Chicago-Buenos Aires
- Miami-Belem
- Miami-Buenos Aires
- Belem-Buenos Aires
- Total all other U.S. cities - Belem
- Total all other U.S. cities- Buenos Aires
- Total third country-Belem
- Total third country-Buenos Aires
- Total third country-total other third country

country traffic, and the percentage of express/small package and general air freight expected to be carried. If mail is expected to be carried, this should also be shown separately.

3. A statement as to whether the aircraft to be used in the proposed schedules are (a) on hand or (b) on order. If on hand, indicate where, and to the extent to which, those aircraft are currently being used. If on order by purchase or lease, indicate when they will be delivered and how the aircraft will be financed. Indicate whether the aircraft to be used comply with FAR-36. If not, indicate specific plans for achieving compliance.

4. For each U.S.-South American market that the applicant has authority (either certificate or exemption) provide scheduled all-cargo service, provide the number of scheduled flights operated, by direction, by month, for the period, January 1, 1996, through December 1, 1996.

5. A statement as to whether the applicant, if allocated frequencies, would accept a condition that the authority requiring service by a date specified by the Department, and if so, what start-up period should be imposed.

6. A statement as to whether the applicant, if not allocated all of the frequencies it desires, would accept and operate an allocation of fewer frequencies, and if so how many fewer.

7. A statement as to whether the applicant's services will be operated in conjunction with any cooperative arrangement (*e.g.* wet lease, code-share) with any other U.S. carrier or foreign air carrier. If such services are to be operated, a detailed explanation regarding such operations must be provided, as well as a copy of the cooperative agreement.

B. DOT Evidence

Pursuant to sections 241.19-6 and 399.100 of the Department's regulations, it is determined that the Department's T-100 data for cargo operations between the United States and Argentina for the period January 1, 1994, through December 31, 1996, are material and relevant to a final determination of the issues in this case. We are releasing those data to the U.S. carrier applicants in this proceeding. Those parties to the proceeding will be free to use those data to the extent they deem necessary in this proceeding.

The Economic & Financial Analysis Division of the Office of Aviation Analysis will make available to the parties the following data, to the extent possible, in the form of information responses:

1. Schedule T-100 and T-100(f) nonstop segment data (scheduled and nonscheduled), including, *inter alia*, belly-cargo traffic, by carrier (U.S. and foreign) by month by direction, beginning January 1, 1994, through December 31, 1996, between the United States and Argentina; and
2. Schedule T-100 and T-100(f) on-flight market data (scheduled and nonscheduled), including, *inter alia*, belly-cargo traffic, by carrier (U.S. and foreign) by month by direction, beginning January 1, 1994, through December 31, 1996, between the United States and Argentina.

C. Incumbent Responses

As indicated in the August 14, 1997 Notice, some incumbent carriers may not have filed complete data with the Department regarding U.S.-Argentina services. To ensure that accurate information is available to all parties in this case, we require incumbent carriers to submit the following information (failure to do so may disqualify an applicant in this proceeding):

Frequencies for U.S.-Argentina service used by week by aircraft type for the period June 1995 through September 30, 1997 (if a carrier operated via wet lease, indicate wet lessor, aircraft type and date of such operations and reason for not operating service with own aircraft)

For the twelve-months ended June 30, 1997, for U.S.-Argentina flights by direction, provide the following information:

Revenue Tons Transported

Southbound:

for US-US; US-Argentina; US-Non Argentina; Non Argentina - Argentina;
Non-Argentina-Non Argentina; Total traffic Southbound on U.S.-Argentina flights

Northbound:

for Argentina-US; Non-Argentina - US; Argentina-Non Argentina;
Non Argentina-Non Argentina; US-US; Total traffic Northbound on Argentina-U.S. flights

Procedural Schedule

In order to facilitate a prompt decision in the case, we intend to conduct the proceeding according to the following schedule:

Date for Incumbent Responses: December 2, 1997

DOT IRs:¹⁸ December 2, 1997

Supplemented applications: December 23, 1997

Answers to supplemented applications: January 21, 1998

Replies to Answers: February 4, 1998

All dates indicated are delivery dates. An original and four copies of all submissions are to be received by the Department's Docket Section no later than the dates indicated.¹⁹

¹⁸ Due to the volume of the Department's Information Responses, we will be unable to print and distribute copies to each party. One copy of these materials will be made available for the parties' use in Room 4201, 400 Seventh Street SW, Washington DC. In addition, the Department will issue on request copies of its information responses on computer diskettes. Parties who wish to receive such a diskette should contact the Economic & Financial Analysis Division at 202-366-2344. Use of the data in the Department's Information Responses (either hard copy or computer diskette) is restricted to representatives of applicant carriers and interested U.S. parties (*i.e.*, those that have filed applications or comments) to this proceeding.

ACCORDINGLY,

1. We affirm the August 14 action of the Director, Office of International Aviation in soliciting applications for U.S.-Argentine all-cargo authority;
2. We deny Challenge Air Cargo's request to exclude from consideration in this proceeding the reallocation of frequencies allocated to it;
3. We deny the Joint Petition of Federal Express and Arrow Air for a notice to confirm that only the two Argentina frequencies allocated to Challenge are available for reallocation, and for immediate issuance of a tentative or final order approving the transfer of three Argentina cargo frequencies to Federal Express;
4. We institute the ***1997 U.S.-Argentina All-Cargo Service Proceeding, Docket OST-97-3139***, to be decided by non-oral, show-cause procedures under Rule 1750 of our regulations (14 CFR 302.1750);
5. The proceeding instituted in ordering paragraph 4 shall include consideration of the following issues:
 - a. whether U.S.-Argentine frequencies currently allocated to Arrow Air, Florida West, and Challenge Air Cargo are being used in a manner that best serves the shipping public;²⁰ and
 - b. if not, how the frequencies should be reallocated, including whether three frequencies (two held by Arrow and one held by Florida West) should be transferred to Federal Express;
7. We consolidate into the ***1997 U.S.-Argentina All-Cargo Frequency Proceeding***, the following applications: Federal Express Corporation, Arrow Air, Inc., and Florida West

¹⁹ The original filing should be on 8½" x 11" white paper using dark ink and be unbound without tabs, which will expedite use of our docket imaging system.

Carriers should also provide the Department with a computer diskette of all information pleadings prepared using electronic spreadsheet or word processing programs. Such diskettes should be filed with the Department's Economic & Financial Analysis Division of the Office of Aviation Analysis, X-55, Room 6401, 400 Seventh Street, SW, Washington DC 20590. Diskettes should be DOS formatted. Submissions prepared in Microsoft Excel®(version 5.x or earlier), Lotus 1-2-3®(version 3.x or earlier), Microsoft Word® (version 6.x or earlier), or WordPerfect® (version 5.2 or earlier) should be filed in their native formats. Parties using other software may either (1) file IRs, responses in the foregoing formats, or (2) contact Mr. Michael A. Lane at 202-366-2352 or Mr. Stephen H. Davis at 202-366-1049 for format compatibility information or to seek a waiver, which will be considered on an *ad hoc* basis. Submissions in electronic form will assist the Department in quickly analyzing the record and preparing its decision. The paper copy of all submissions, however, will be the official record.

²⁰ This will include the issue of whether the frequency allocations held by Florida West and Challenge Air Cargo should be renewed.

International Airways, Inc. (joint application in Docket OST-97-2548); Arrow Air, Inc. (Docket OST-97-2848); Federal Express Corporation (Docket OST-97-2594); Florida West International Airways, Inc. (Argentine portion only of Docket OST-97-2648); Polar Air Cargo, Inc. (Docket OST-97-2578); Southern Air Transport, Inc. (Docket OST-97-2855); Challenge Air Cargo, Inc. (Docket OST-96-1042) and issues raised in Challenge Air Cargo, Inc.'s undocketed request for clarification;²¹

8. Petitions for reconsideration of this order shall be due no later than four calendar days from the date of service of this order; answers to petitions for reconsideration shall be due no later than two calendar days thereafter;

9. We will grant all motions for leave to file otherwise unauthorized documents in the captioned docketed and undocketed matters; and

10. We will serve this order on Arrow Air, Inc.; Challenge Air Cargo, Inc.; Federal Express Corporation; Fine Airlines, Inc.; Florida West International Airways, Inc.; Polar Air Cargo, Inc.; Southern Air Transport, Inc.; the Ambassador of Argentina in Washington DC; and the Department of State (Office of Aviation Negotiations).

By:

CHARLES A. HUNNICUTT
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/general/orders/aviation.html>*

²¹ Since Challenge's Request for Clarification was undocketed, the U.S. Air Carrier Licensing Division staff advised the Department's Dockets staff not to docket the item, but rather to post it on the Docket Section bulletin board. We are consolidating the issues regarding dormancy in the Request into the proceeding being instituted here. The document will be placed into the newly established docket, as will the undocketed answer to Challenge's request and the undocketed consolidated reply of Challenge.

Appendix

I. Federal Express/Arrow/Florida West Route Transfer (Docket OST-97-2548)

Federal Express Corporation, Arrow Air, Inc., and Florida West International Airways, Inc., jointly seek approval of a transfer of U.S.-Argentina all-cargo frequency allocations pursuant to 49 U.S.C. § 41105(a). They state that Federal Express has entered into two separate Route Purchase and Transfer Agreements, one dated May 14, 1997, between Federal Express and Arrow, and the second dated May 16, 1997, between Federal Express and Florida West. Under these Agreements, Federal Express would purchase Arrow's two frequencies for \$1.5 million and Florida West's one frequency for \$.5 million. The joint application makes clear that Federal Express is not purchasing the underlying exemption authority granted to Arrow and Florida West for U.S.-Argentina services, but rather only the frequencies for such services, subject to the expiration date and other conditions applicable to those allocations. The application states that Florida West is currently using its one frequency, but Arrow is not currently using its two U.S.-Argentina frequencies, noting that Arrow most recently used its two U.S.-Argentina frequencies in March 1997. The joint application further indicates that with government approval of the transfer of frequencies, Federal Express would increase the scope of its existing five-day-a-week B-727 all-cargo operations to a five-day-a-week DC-10-30 aircraft operation; that Federal Express needs to expand the capacity of its service to and from Argentina as existing traffic demand exceeds the limits of the payload capacity of its B-727 on peak days in the southbound direction; and that under the current allocation formula contained in the Argentina bilateral, a five weekly wide-body aircraft (DC-10-30) requires allocation of 7.5 weekly frequencies. The joint applicants maintain that transfer to Federal Express of the Argentina frequencies allocated to Arrow and Florida West is wholly consistent with the public interest as "the ability of Federal Express to expand the scope of its service in the U.S.-Argentina market ...will bring about a substantial enhancement of air express and air freight services in that market over the more limited variety, quality and geographic scope of general air freight services which Arrow and Florida West currently provide."¹ Moreover, the joint applicants maintain that the transfer to Federal Express will serve to strengthen the U.S.-flag competitive presence in the U.S.-Argentina market by enhancing Federal Express' ability to compete aggressively for cargo traffic in the fast-growing and highly-competitive U.S.-Argentina market and that the transfer will have a relatively small impact on the degree of concentration in the U.S.-Argentina market. Finally, the joint applicants request the Department to consider the case through use of expedited show-cause procedures.

In response to the joint application for transfer, Fine submitted a preliminary answer and Polar, an answer, to which Federal Express, Arrow and Florida West filed a Joint Reply. Polar then submitted an additional Response; Fine, an answer with Motion to Compel and Contingent Motion for Leave to File which were followed by a consolidated Joint Surreply of Federal

¹ Joint Application at 12.

Express, Arrow and Florida West and a Consolidated Joint Further Reply of Federal Express, Arrow and Florida West.²

In its preliminary answer, Fine notes its intent to file a full answer in opposition twenty-eight days after a complete Joint Application is submitted. Fine maintains that it has been the Department's practice to afford interested parties at least a 28-day period in which to respond to applications for transfer and that at least that much time is required to fully examine key issues, including: whether transferring three frequencies to the dominant incumbent carrier in the highly restricted U.S.-Argentina market comports with the Department's statutory obligation to promote competition; whether it is consistent with federal law and Departmental policy to permit the three frequencies--clearly assets of the United States--to be sold by Arrow and Florida West for their personal gain; and whether Arrow and Florida West, at the time they applied for the frequencies they now propose to sell, materially misrepresented their intentions with respect to the three frequencies, which should therefore be reclaimed by the Department and redistributed to interested carrier applicants. Fine maintains that the Joint Application is incomplete and contains numerous assertions of facts, regarding market concentration, load factors and Federal Express' intended activities after the transfer which have not been verified or attested to by persons having knowledge of them. Fine states that absent a procedural order to the contrary, Fine will submit its answer once a complete application is filed.

In its answer, Polar requests that the Department deny the Joint Application and institute a proceeding to reassign the unused and/or unwanted frequency allocations of Arrow and Florida West to a carrier or carriers that the Department determines will put them to use most beneficial to the public, or, in the alternative, defer acting on the Joint Application until such time as Polar is authorized to operate a second weekly B-747F in the U.S.-Argentina market. Polar argues that, given the severe numerical limits on scheduled U.S. all-cargo flights to Argentina and the distribution of four weekly narrow-body frequencies not held by or under contract to Federal Express, a finding could not be made that approval of the transfer would be consistent with the public interest. It maintains that the consequence of the proposed transfer would be the elimination of scheduled U.S.-flag freighter competition between the U.S. and Argentina and that Federal Express could gain an absolute monopoly on scheduled freighter lift in this market. Polar also states that it knows of no instance in which the Department has sanctioned stand alone sales of allocations and maintains that by placing 90-day "use-or-lose" conditions on these frequencies, the Department contemplated its own expedited reallocation of dormant authorizations. It further argues that if Federal Express were in the position of offering shippers comparable wide-body lift on a five-day-a week basis and Polar were to remain restricted to a one-day-per-week operations, Polar could well be forced to abandon the route.

Polar notes that Federal Express does not intend to add any flights with the additional frequencies but rather would convert its existing narrow-body operations to wide-body. Polar maintains that if its own request in Docket OST-97-2578 were granted, the issues raised by Polar here would be moot.

² Several of the responses to the Joint Application were accompanied by Motions for leave to file otherwise unauthorized documents in order to present further facts and/or to clarify previously presented facts. In the interest of presenting all views, we will grant all of the motions for leave to file otherwise unauthorized documents.

The Joint Applicants maintain that they have provided extensive factual evidence of the public benefits which will result from transfer of the three Argentina cargo frequencies held by Arrow and Florida West. They argue that neither Fine nor Polar has cited a single case in which the transfer of a frequency allocation or other route authority has been denied by the Department in comparable factual circumstances. The Joint Applicants maintain that the air economic license confers a property right and that the authority can be transferred by the carrier and cannot be modified, amended, suspended or revoked without due process of law. They also argue that Federal Express cannot gain a monopoly in the market as there are four other frequencies held by other carriers than Federal Express. The Joint Applicants urge the Department to dispense with the customary show-cause order procedure, which they maintain is “manifestly unnecessary to develop a complete record in the case,” and proceed immediately to issue a final order approving the transfer of three Argentina cargo frequencies to Federal Express.

Fine maintains in its answer that the Joint Application is “antithetical” to U.S. international policy in three ways: the transfer of frequencies would give Federal Express control of eight of the twelve available U.S. frequencies in the market and result in an overwhelmingly concentrated market dominated by Federal Express; approval would permit Federal Express “to ride roughshod” over the Department’s policy against allowing any incumbent carrier to further dominate the U.S.-Argentina market; and contrary to the Joint Applicants, it appears that Arrow has not held out scheduled service to Argentina and approval of the application would undermine the credibility of the Department’s policy in the U.S.-Argentina and other capacity-controlled markets of requiring carriers either to use assigned frequencies or to return them to the Department. Fine urges the Department to (1) compel Joint Applicants, if they seek to further pursue the Joint Application, to produce expanded HHI and load factor data; (2) in the absence of new evidence, reject the Joint Application; and (3) reclaim and redistribute to interested carriers any and all U.S.-Argentina frequencies that are not being fully used.

In their surreply, Joint Applicants argue that the authority-transfer matters at issue have no relationship to the Polar-Challenge frequency reallocation application in Docket OST-97-2578 as a matter of fact, law or policy. They maintain that contrary to Polar’s efforts to link these two separate proceedings, there is precedent that authority-transfer issues should be considered and decided independently of competing applications by third-party carriers for the same authority. They state that the transfer application does not take away either Arrow or Florida West’s ability to serve the U.S.-Argentina market as both carriers retain their basic economic authority to serve the market and both are free to operate cargo charter services in the market and remain free to apply for new frequency allocations. They state that the motivation behind the decision of Federal Express to purchase three Argentina frequencies from Arrow and Florida West is not to gain a competitive advantage in the market, but rather to alleviate an increasingly severe problem of insufficient capacity and operational inefficiency affecting the Argentina operations of Federal Express resulting from limitation to five weekly B-727 narrow body operations.

The Further Reply of the Joint Applicants is limited to Fine’s second answer and motion to compel. They assert that Federal Express has not been able to substitute the A-310 in its Argentina operations as there has been some misunderstanding between officials of the U.S. and Argentina on the A-310 issue and the Argentina government has expressed an unwillingness to

grant such authority. The Joint Applicants submit more detailed load factor data regarding Sao Paulo-Buenos Aires operations, but urge the Department to deny Fine's demand that Federal Express submit load factors by direction, year-round, for the past five years. They maintain that load factor data for any period prior to the most recent year would be stale and would have no conceivable relevance or probative value to any issue in this proceeding. They further urge the Department to deny Fine's Motion to Compel insofar as it seeks to require more meaningful HHI data; the applicants state that they have met the burden of presenting evidence to support grant of the relief requested. In response to the Arrow dormancy issue, the Joint Applicants acknowledge that Arrow has not published schedules holding out U.S.-Argentina scheduled cargo service and that it has made only limited use of its operating frequencies in recent months; however, they state that Arrow has recently operated a scheduled wide-body freighter aircraft round-trip flight between Miami and Buenos Aires on June 21, 1997, and expects to operate additional cargo flights between the U.S. and Argentina in the future. The Joint Applicants further request the Department to issue a final order approving the proposed transfer.

II. Polar Application for Reallocation of Challenge Frequencies (Docket OST-97-2578)

Polar Air Cargo, Inc., seeks allocation of two weekly U.S.-Argentina narrow body all-cargo frequencies "originally awarded to Challenge Air Cargo, Inc... which to the best of Polar Air's knowledge and belief have been unused by Challenge for more than 90 days."³ Polar states that it would combine these frequencies with its existing two in order to operate a total of two round trip B747F flights per week and that operation of each round trip requires two narrow-body frequencies. Polar states that if Challenge has not used its frequencies since February 25, 1997, they are available for reallocation and that Polar has a pressing need to increase the frequency of its Argentina service. It notes that it has already incurred \$3 million in losses in developing a foothold in Argentina and that a second weekly frequency would help to offset the unprofitable single weekly service by permitting a larger revenue base. Polar states that its application is in the public interest as additional frequencies will enable it to compete more effectively with Federal Express which has announced its intention to acquire frequencies to convert its narrow-body flights to wide-body flights. It maintains that without additional frequencies, Polar is at a significant competitive disadvantage and may not be able to maintain a presence in the U.S.-Argentina market and that a Polar termination could leave Federal Express with an effective monopoly in the market.

Federal Express, Challenge, and Fine submitted answers to Polar's application.

Federal Express states that it is not necessarily opposed to Polar's request for reallocation to Polar of two frequencies allocated to Challenge, provided that the Joint Application of Federal Express, Arrow and Florida West for approval of the transfer of three Argentina cargo frequencies from Arrow and Florida West to Federal Express is approved by the Department. On the other hand, Federal Express states that if any part of the Joint Application is not approved, it opposes grant of Polar's application and urges that its contingent application for reallocation to Federal Express be granted and Polar's request be denied.

³ Application at 1.

Challenge opposes Polar's request and argues that Polar's assertion that Challenge may not have used one or both of its frequencies is not correct. It states that its most recent flight was operated May 17-19 with wide-body equipment over a Miami-Bogota-Sao Paulo-Buenos Aires-Sao Paulo-Bogota-Miami routing and that it fully intends to retain and operate its Argentine authority and Polar's application should be denied.

Fine argues that in the 1995 U.S.-Argentina proceeding where Polar received its allocation, the Department determined that the overall U.S. goals for Argentina would best be served by adding new competitors rather than authorizing incumbent carriers to increase their services. Fine maintains that premise should be followed here and that the Department's first priority in reallocating frequencies available must be to increase the number of competitors in the market.

Polar submitted a reply and Challenge submitted opposition to that pleading.⁴ Polar maintains that Challenge's May 17-19 flight appears to be a "charter" not a "scheduled" flight and that that one flight appears to be the only flight operated to Argentina this year and maintains that the flight is certainly the only flight since February 25, 1997, when the "use or lose" provision became effective. Polar argues that Challenge's plan to use its frequency calls for one flight per month operating every third Sunday. Polar questions "whether, more than a year and a half after its initial award and nearly seven months after its second award, one flight per month would be considered 'immediate and well-timed service' and whether this would constitute appropriate 'scheduled use' by Challenge sufficient to retain the allocation."⁵ Polar argues that operation of a single, apparently non-scheduled flight in the past 90 days is insufficient to fulfill its obligation to use the scheduled frequencies and that these frequencies should be available for reallocation to a carrier which will properly use them. In the alternative, Polar request the Department to investigate Challenge's use of the scheduled frequencies and initiate a proceeding to revoke Challenge's allocation.

Challenge argues that its May 17-19 flight was not a random, nonscheduled charter flight; that it was operated as part of a pattern of regularly scheduled service, pursuant to scheduled authority granted by the Argentine government and in accordance with a schedule filed with Argentine authorities; and that under that schedule, Challenge operates one wide-body flight (*i.e.*, two narrow-body equivalents) every fourth week (*i.e.*, on the third Sunday of every month). It states it operated another such flight June 21-22 and the next flight will occur July 20-21. Challenge maintains that there can be little question that it has satisfied and is continuing to satisfy the requirements of the Department's Notice of Action Taken, February 25, 1997.

⁴ Polar's reply and Challenge's opposition to said reply were both accompanied by separate Motions for Leave to File. Challenge submits that good cause exists for permitting it to file the opposing statement. In order to present all views, we will grant the motions.

⁵ Motion and Reply of Polar, dated June 18, 1997, at 2-3.

III. Federal Express' Contingent Application (Docket OST-97-2594)

Federal Express Corporation also requests, in a "contingent application," reallocation of two weekly U.S.-Argentina all-cargo frequencies, currently allocated to Challenge Air Cargo, Inc. It maintains that Challenge is not using its Argentina cargo frequency allocation and has not used it for a continuous period of more than 90 days and that the "use-it-or-lose-it" forfeiture condition applicable to frequency allocation use requires the reallocation of those dormant frequencies to another U.S. carrier which will use them.⁶ Federal Express further states that it is in urgent need of additional frequencies in order to use the DC-10-30 aircraft in place of its current B-727-200 aircraft and that it has filed this application as a contingency in case the Department denies in whole or in part its joint application with Arrow and Florida West in Docket OST-97-2548. Should the Department grant the application in OST-97-2548, Federal Express states that it will withdraw this application.

Fine filed an answer in opposition to Federal Express' contingent application, maintaining that the transfer of any additional frequencies to Federal Express would result in even greater concentration in this already highly concentrated market for all-cargo services and would be contrary to the public interest.

IV. Applications in Response to August 14 Notice⁷

A. Fine Airlines, Inc. (Docket OST-97-2852) requests allocation of four weekly U.S.-Argentina scheduled all-cargo frequencies and all exemption, route integration, and other economic authority necessary to conduct its U.S.-Argentina services proposed. Fine states that it plans to use the four frequencies over three routings: (1) Wednesday flights with L-1011 aircraft over a Miami-Port of Spain-Buenos Aires-Quito-Guayaquil-Miami routing; (2) Sunday flights with L-1011 aircraft over a Miami-Port of Spain-Buenos Aires-Santiago-Caracas-Miami routing; and (3) Thursday flights with DC-8 aircraft over a Miami-Port of Spain-Buenos Aires-Quito-Guayaquil-Miami routing.⁸ Fine states the when using L1011 or DC-10 aircraft, Routes 1 and 2 would require a total of three frequencies, with one remaining frequency for the DC-8 service over Route 3; and if it uses B-747 aircraft on Routes 1 and 2, requiring a total of four frequencies, it would suspend operations on Route 3. Since Fine neither possesses U.S.-Argentina nor U.S.-

⁶ Federal Express also states that on the basis of information available to it, including the Official Airline Guide for the months of January through May 1997 and periodic telephone inquiries, it appears that Challenge is not currently using its frequency allocation and has not used that allocation for a continuous period of longer than 90 days.

⁷ In response to the Department's Notice, Federal Express, Arrow and Florida West (Joint Applicants) filed a joint consolidated answer to the applications of Fine and Southern Air; Southern filed a consolidated answer; and Fine filed an answer which incorporated comments from applications filed August 25 and from earlier filed applications. To the extent that Fine's answer submitted comments to applications filed prior to the Department's Notice, together with applications filed in direct response to the Notice, Fine seeks leave to submit an unauthorized document. We will grant the motion.

⁸ On days with L-1011 aircraft may use interim wet leased DC-10 or B-747; Port of Spain, Guayaquil, and Caracas are fuel technical stops.

Chile scheduled all-cargo authority, it requests the requisite exemption authority to operate in both markets.

The Joint Applicants submitted an answer in response to Fine's application, stating that they take no position regarding Fine's application insofar as it seeks only the reallocation of two arguably-dormant Argentina frequencies allocated to Challenge Air Cargo. They, however, strongly object insofar as the application seeks more than two frequencies, which must be construed as seeking reallocation of two frequencies allocated to Arrow and state that those frequencies have been sold by Arrow to Federal Express, subject to Department approval.

B. Southern Air Transport (Docket OST-97-2855) seeks exemption authority to provide scheduled all-cargo service between Miami, Florida, on the one hand, and Buenos Aires, Argentina, on the other hand, and to integrate services to Buenos Aires with services that Southern is authorized to provide pursuant to its other exemption and certificate authorities, consistent with applicable international agreements. Southern also requests four weekly narrow-body frequencies to conduct these services. Southern plans to operate twice weekly service over a Miami-Buenos Aires-Bogota-Miami routing, using B-747-200 aircraft from its current fleet. It states that such a routing would provide a southbound flow of general commodity cargo to Argentina and that shippers would benefit by having an increased flow of exports to Argentina without having to pay for full round-trip aircraft operations. Southern states that it would begin services to Argentina as soon as commercially feasible, but within 90 days of receiving authority.

In response to Southern's application, the Joint Applicants (Federal Express, Arrow and Florida West) and Fine filed answers. The Joint Applicants take no position with regard to the application insofar as it seeks only the reallocation of two arguably dormant Argentina frequencies currently allocated to Challenge. However, they strongly object to the consideration or grant of the application to the extent that it seeks allocation of any of the Argentina cargo frequencies at issue in Docket OST-97-2548. Fine states that it believes its application for US-Argentina service is superior to Southern's because Fine has an array of aircraft types to respond to the changing market conditions whereas SAT's application indicates no flexibility; it proposes to operate three services per week whereas SAT proposes two; and Fine maintains it is the leading all-cargo carrier operating out of Miami International Airport.

C. Arrow Air, Inc. (Docket OST-97-2848) in a "contingent" application, seeks allocation of two weekly U.S.-Argentina frequencies. It states that, contrary to implications in the Department's Notice, its frequencies are not dormant and have not automatically reverted to the Department, and that in order to protect its rights, it is filing this contingent application in the event the Department may subsequently rule that the frequencies have indeed become dormant and reverted to the Department or does not approve the transfer of Arrow's two previously allocated frequencies to Federal Express. Arrow states that in the event the Department (1) determines that Arrow's frequency allocation is not dormant, and/or (2) permits the transfer of Arrow's two frequencies to Federal Express, this application will be withdrawn.

In response to Arrow's contingent application, Southern, Fine and the Joint Applicants (Federal Express, Arrow and Florida West) filed answers.

Southern argues that in the event the Department determines that Arrow has not complied with the “use-or-lose” condition and its two frequencies are available for reallocation, Arrow should then not be awarded any new frequencies due to its failure to use the frequencies awarded to it in the first place and there is no valid reason why a carrier should be permitted to profit financially from the sale of frequencies allocations it historically has not used and has no intention of actually using itself. Moreover, it argues that the minimal number of single flights operated by Arrow constitutes misuse and as such, it will not keep the dormancy clause from being triggered.

Fine argues that Arrow’s promise to begin regular scheduled service within 30 days if allocated frequencies , when it had every opportunity to begin such service in the past seventeen months had it so chosen, strains credulity and that waste of precious frequencies to operate in a limited entry market for 1½ years, when other carriers eagerly seek to operate in that market, should, as a matter of Department policy, bar it from any new allocation.

The Joint Applicants argue that, contrary to the Department’s Notice, the two frequencies held by Arrow are not dormant and have not reverted to the Department for reallocation and further state that the “two Argentina cargo frequencies currently allocated to Arrow...have been sold by Arrow to Federal Express, subject to Department approval as applied for in Docket OST-97-2548.”⁹

D. Petition for Review of Staff Action

On August 21, 1997, Federal Express Corporation and Arrow Air, Inc. filed a joint petition of review of staff action regarding the Director’s August 14, 1997 Notice. They specifically request that the Department: (1) issue an immediate Notice modifying or clarifying the August 14, 1997 Argentina Notice to confirm that only the two Argentina cargo frequencies allocated to Challenge and applied for by Polar Air are currently available for possible reallocation by application by interested carriers and (2) issue an immediate tentative or final order approving the transfer of three Argentina cargo frequencies to Federal Express in Docket OST-97-2548, based on evaluation of the arguments of fact, law, and policy contained in the Joint Application and subsequent pleadings filed in that Docket.

The Petitioners urge the Department to modify or clarify the Argentina Notice so as to confirm that the application procedures contemplated by the Notice do not affect or involve any of the three Argentina all-cargo frequencies at issue in the pending Joint Frequency Transfer Application in Docket OST-97-2548. They contend that doing so is squarely contrary to long-established Department policy and precedent of “refusing” to entertain competing applications in the context of route-authority transfer applications and of affording expeditious processing to route authority transfer applications. They argue that the Director of International Aviation does not hold delegated authority to solicit competing applications for the authority at issue in a route transfer proceeding and thus, the Notice in that regard must be vacated. Moreover, they argue that the Argentina Notice is not a procedural or substantive Order and cannot make any findings of fact or conclusions of law with respect to the issue of whether the Argentina frequencies allocated to

⁹ Joint Consolidated Answer of Federal Express, Arrow, and Florida West, August 26, 1997, at 2.

Arrow and Challenge have become dormant under the terms of the 90-day dormancy condition applicable to those allocations. They argue that Arrow has complied with the dormancy condition as it is now written and the level of service, although very limited, is consistent with the literal terms of the 90-day dormancy condition. They maintain that while the Department is free to change the language of its 90-day dormancy condition, it cannot do so retroactively. They also argue that a further “asserted predicate” for the Notice, i.e. affording interested carriers another opportunity for filing Argentina applications and the possibility that not all interested carriers may have been served is “simply incorrect.”

Fine submitted an answer to the Joint Petition for Review of Staff Action, arguing that the Petition should be denied since Arrow’s two frequencies have reverted to the Department and Arrow has no right to a hearing before such an automatic reversion becomes effective and that all other issues raised by the Petition are moot.

Federal Express and Arrow filed a joint reply, arguing that Fine has misconstrued and misstated the principal thrust of the Joint Applicants’ Petition for Review of Staff Action and reiterating their stated positions in their August 21 Joint Petition.¹⁰ They argue further, however, that Fine has applied a more explicit minimum service requirement to the present language of the DOT standard 90-day dormancy condition. They note that the Department’s standard dormancy condition does not currently require that a carrier operate service at any specified minimum frequency or that it must publish its service in the OAG’s Air Cargo Guide. They state that the Department is free to change the language of its 90-day dormancy condition to specify the level of use required to avoid a finding of dormancy, but that it cannot do so retroactively. They again state that “Arrow continues to hold the two Argentina frequencies which were allocated to it by the Department and which it has validly sold to Federal Express subject to Department approval in Docket OST-97-2548”¹¹ and the Joint Applicants urge the Department to review and vacate the staff action embodied in the “Argentina Notice” insofar as that Notice solicits competing applications for the Argentina frequencies at issue in Docket OST-97-2548 and further urges the Department to issue a final order approving the frequency transfer application in Docket OST-97-2548 without delay.

E. Challenge’s Request for Clarification of Department Notice, Undocketed

On August 25, 1997, Challenge Air Cargo, Inc. submitted an undocketed request for clarification of the Department’s Notice. Challenge maintains that the Department’s August 14 Notice was predicated upon the tentative determination by the Department that the frequencies allocated to Challenge and Arrow have been dormant and are available for reallocation. Challenge argues that it did operate three flights, one each on May 17, June 21, and July 19, through a wet-lease arrangement with United Parcel Service and that the flights were operated as scheduled flights, using Challenge flight numbers, Challenge’s scheduled authority and pursuant to schedules filed

¹⁰ The Joint Reply was accompanied by a Motion for leave to file for good cause. The Joint Applicants submit that receipt and consideration of the Joint Reply will allow them to respond to issues raised by Fine’s answer and will clarify issues in the proceeding and will assist the Department in reaching a sound decision in this case. We will accept the filing.

¹¹ Joint Reply, September 10, 1997, at 5.

with the Brazilian government; and therefore, it contends, that there can be no question that Challenge duly exercised its Argentine authority within 90 days following issuance of the Department's February 25 Notice of Action Taken and has duly exercised that authority during every subsequent 90 day period thereafter, thus satisfying the requirements of the February 25, Notice of Action Taken. Challenge urges the Department to clarify its August 14 Notice and to remove from the scope of this proceeding any question as to the reallocation of frequencies allocated to Challenge.

Fine filed an answer, arguing that by no reasonable definition does operating a total of three flights in six months constitute "regularly scheduled" service as Challenge contends and that by highlighting just how few flights they have really operated, Challenge and Arrow have effectively flaunted their nonuse of scarce public resources. Fine states that the Department should promptly reallocate the two frequencies that Challenge once held and that have now, pursuant to the explicit terms of Challenge's allocation, reverted to the Department.

Southern Air Transport included comments on Challenge's request in its consolidated reply to other applications. Regarding Challenge, SAT details the history of Challenge's awards and argues that not only has Challenge not used the valuable frequencies awarded to it but when it does operate the odd flight to Argentina, it uses an equipment type which it must lease from UPS and that the wet-leasing of another carrier's aircraft for all operations to Argentina violates the Department's policy in frequency-limited markets that carriers awarded scarce and valuable rights exercise those rights using their own equipment.

On reply, Challenge submits that these carriers have raised issues to which Challenge has not had an opportunity to respond. Challenge argues that neither Fine nor SAT denies that Challenge used its Argentine frequencies within the 90-day period specified in Order 97-3-6 and is continuing to do so today and that their arguments "are little more than a bald invitation to the Department to redraw the language of the dormancy condition contained in Order 97-3-6."¹² Challenge further argues that:

That Order states simply that the Argentine frequencies must be "used" within any given 90-day period (*i.e.*, they "will expire automatically" and "revert back to the Department if they are not used for a period of 90 days"). It does not specify a minimum number of weeks within any given 90-day period that the frequencies must be operated, only that the frequencies must be "used." Given this fact, the only plausible conclusion to be drawn from the literal wording of Order 97-3-6 is that the allocated frequencies must be operated during at least once (*i.e.*, once during any given week) during the relevant 90-day period, a requirement which Challenge clearly - and indisputably - has satisfied. Any other interpretation would contravene the plain language of Order 97-3-6 and read into the Department's standard dormancy condition a requirement that does not today exist.¹³

Thus, Challenge requests the Department to remove from the scope of this proceeding any question as to the reallocation of the frequencies allocated to Challenge.

V. Florida West International Airways' Renewal Application, Docket OST-97-2648

¹² Challenge Consolidated Reply, dated September 11, 1997, at 3.

¹³ *Id.*, at 4-5.

Florida West requests renewal of its exemption authority and frequency allocation.¹⁴ Regarding Argentina services, it seeks renewal for a two-year period of its one weekly U.S.-Argentina all-cargo frequency allocation and exemption authority granted to it by the Department in Docket OST-96-1028 to engage in scheduled foreign air transportation of property and mail between Miami, Florida, and Buenos Aires, Argentina. Florida West states that it remains fully qualified to perform these cargo services; that its renewal application raises no environmental or energy issues; that all of its operations are conducted in accordance with applicable noise abatement requirements; and that renewal will not result in a near-term increase in fuel consumption of ten million gallons or more.

While numerous pleadings were submitted in response to the application, only those relating to U.S.-Argentina frequency issue are summarized here. Polar argues that Florida West has no intention of using its scheduled Argentina frequencies on its own behalf, but rather seeks to maintain the authorization in order to sell it to Federal Express and that the Department's process for allocating frequencies contemplates that if not used by carrier to which they are assigned, such frequencies are to be returned to the Department for reallocation to another operator. Polar requests that the Department deny Florida West's request for renewal of its weekly U.S.-Argentina all-cargo frequency and that the frequency authorization revert to the Department for appropriate reallocation.¹⁵

Fine reiterates its position that transfer of any frequency to Federal Express would be contrary to the public interest and argues that if the Department were to grant the application in Docket OST-97-2548, Florida West's exemption authority to conduct scheduled authority to Argentina should be stripped as Florida West would no longer possess the frequencies required to conduct service. Fine maintains that it is contrary to Department policy to permit a carrier to retain scheduled authority which a relevant bilateral agreement does not permit it to exercise.

In response, Florida West argues that it is and has been using its U.S.-Argentina frequency and urges the Department to renew all of its exemption authority including U.S.-Argentina once weekly all-cargo allocation. It states that in the unlikely event the proposed transfer to Federal Express were disapproved, Florida West would continue to operate its U.S.-Argentina service.

VI. Challenge Air Cargo, Inc. Application for Renewal of Frequency, Docket OST-96-1042

¹⁴ As noted above, only the portion of Docket OST-97-2648 which deals with relevant U.S.-Argentina authority is the subject of this order. The remaining authorities for which Florida West seeks renewal will be handled separately in another order. Florida West invokes the provisions of the Administrative Procedures Act and Part 377 of the Department's Procedural Regulations to continue its existing authority in effect pending a final decision on the renewal request.

¹⁵ While Polar served its answer on all Parties listed on the service list by the answer date required by the Department's regulations (July 9), it did not submit the answer to the Department's Docket Section, which called the matter to Polar's attention when the Docket Section received a reply to a document not in its possession (Florida West submitted a reply on July 16). On July 17 Polar submitted its answer to the Docket Section with a Motion for Leave to File Late. Polar states in its Motion that failure to submit the document to the Docket Section was an oversight and that all parties were served at the appropriate time. Fine's July 21 Answer was also accompanied with a Motion for Leave to File. We will grant the motions.

By Order 95-3-30, Challenge was allocated two weekly narrow-body all-cargo frequencies in the U.S.-Argentina market: one effective October 1, 1995 through October 1, 1996, and the other effective December 1, 1996 through December 1, 1997. By application filed January 30, 1996, Challenge sought renewal of both frequencies. No answers were received to the application. By Notice of Action Taken dated February 25, 1997 (confirmed by Order 97-3-6) the first frequency was renewed through February 19, 1999. Action on the second frequency, which is not scheduled to expire until December 1, 1997, was deferred until a later date.