



Order 2020-5-7

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

Issued by the Department of Transportation
on the 28th day of May, 2020

Served: May 28, 2020

U.S.-HAVANA PUBLIC CHARTER AUTHORIZATIONS

DOCKET DOT-OST-2020-0011

FINAL ORDER

Summary

By this Order, the U.S. Department of Transportation (the Department) finalizes, with certain modifications, our tentative decision to institute new procedures to distribute the available round-trip public charter flights between the United States and José Martí International Airport (HAV) in Havana, Cuba. The Department also grants an initial allocation of charters to Swift Air, LLC (Swift) and Caribbean Sun Airlines, Inc. d/b/a World Atlantic Airlines (World Atlantic) for U.S.-Havana public charter flights between June 1, 2020 and May 31, 2021. The remaining charters will be maintained in a charter pool for distribution on a first-come, first-served basis as discussed in this Order.¹

Background

By letter dated January 7, 2020, Secretary of State Michael R. Pompeo wrote to Secretary of Transportation Elaine L. Chao, stating that:

To strengthen the impact of the Administration's policy of applying economic pressure on the Cuban regime to respect human rights and fundamental freedoms for all in Cuba and to cease its unconscionable support for the illegitimate and totalitarian regime of former President Maduro in Venezuela, and in the foreign-policy interests of the United States, I respectfully request that the Department of Transportation suspend until further notice all public charter flights between the United States and all airports in Cuba except

¹ In March 2020, during the pendency of this proceeding, carriers and public charter operators cancelled numerous public charter flights to Havana citing a Cuban Government order restricting entry into Cuba and prohibiting Cuban nationals from traveling to the United States in response to the coronavirus (Covid-19) outbreak. The Department has been informally advised by parties that the Cuban Government has indicated plans for the resumption of flights to Cuba, possibly by July 1, 2020. Our action in this order should enable interested parties to deal with any such resumption when it occurs.

José Martí International Airport (HAV) in Havana. I further request that the Department of Transportation, in the foreign-policy interest of the United States, cap charter flights to José Martí International Airport at an appropriate level consistent with the policy objectives identified above.

The letter further stated that:

The suspension of public charter flights to all points outside of Havana will prevent public charter operators from expanding their services to compensate for the Administration's October 25, 2019, action suspending commercial flights to those airports. Maintaining and capping public charter flights to José Martí International Airport preserves the main gateway for travel from the United States to Cuba for family visitation or other lawful purposes, while preventing public charter operators from increasing service to Havana in response to the suspension of flights to all other airports in Cuba.²

By Notice dated January 10, 2020, the Department (1) suspended the authority granted to all public charter operators that authorizes public charter flights between any point in the United States and any point in Cuba, except José Martí International Airport (HAV) in Havana;³ and (2) established a limit on the number of authorized public charter flights between the United States and Havana.

With respect to Havana, the Department found that an appropriate level for the public charter cap would be one corresponding to current levels of service, based on public charter prospectuses accepted for calendar year 2019. For that year, the Department accepted public charter prospectuses for Havana proposals totaling approximately 3,600 round-trip flights. Accordingly, in the Notice, the Department established a limit on the number of authorized public charter flights at Havana to that level for the initial charter year. The Department also stated its intention to subsequently propose a regulatory framework and allocation procedures by which carriers may apply to conduct public charter flights between the United States and Havana.

Show Cause Order

By Order 2020-1-16, issued January 29, 2020, the Department tentatively implemented the cap on the number of public charter flights between the United States and Havana, Cuba. The order specifically proposed a combination of advance allotments of charter flights for incumbent carriers and a first-come, first-served charter pool for the remainder of the available charters. Under this arrangement, for the initial charter year the Department would limit the number of public charters between the United States and Havana to 3,600 round-trip flights, beginning the first day of the month following issuance of a final order. The proposal also included conditions that would require carriers to "use or lose" their allocated frequencies, would limit advance allocations from the charter pool to six months, and would require monthly reporting of actual operations. The proposal also set forth application procedures for the charter pool.

² The full text of the letter is attached to this Order as Appendix A.

³ The suspension of public charter flights to points other than Havana became effective March 10, 2020 – 60 days after the date of the Notice.

The Department also proposed to grant an initial allocation of charters to Swift and World Atlantic for their currently authorized U.S.-Havana public charter flights. The Department required that the carriers advise the Department within seven (7) calendar days of the issue date of the order of the number of those flights that they intend to actually operate, as well as those flights that they do not intend to operate, which would be returned to the charter pool.

The order allowed two weeks for comments from interested parties, and one week for parties to file answers to any comments.

Responsive Pleadings

Two direct charter carriers, Swift and World Atlantic, filed responsive pleadings, as did four public charter operators – Cuba Charter Services, LLC d/b/a Aerocuba (Aerocuba); Cuba Travel Services, Inc. (CTS); ViajeHoy Charters, LLC d/b/a Havana Air (Havana Air); and Superior Air LLC (Superior). The two direct carriers filed motions for confidential treatment of their charter contracts, and a number of parties requested leave to file otherwise unauthorized documents. Good cause having been shown, and in the interest of a complete record, we will grant all motions.

Direct Carriers

Swift and World Atlantic filed notifications on February 5, 2020, confirming the tentatively allocated flights that they intend to operate. Swift states that it intends to operate 2,240 charter flights to Havana on behalf of four of its current public charter operator customers, Aerocuba, Cubazul, Havana Air, and Xael Charters. Swift also requests authority to operate 1,386 additional charters between March 1, 2020 and January 31, 2021. World Atlantic stated that it intends to operate a total of 355 charter flights to Havana for one charter operator, Superior. On March 13, 2020, however, World Atlantic submitted a letter to the Docket stating that it no longer intends to operate those flights for Superior.

Swift asserts that award of all of its requested flights during the initial charter year is necessary to avoid providing advantages to two of the four primary public charter operators based on their annual cycle of filing charter prospectuses. Swift notes that its tentative allocation includes flights for the public charter operators Aerocuba and Cubazul through March 2020, Xael through December 2020, and Havana Air through January 2021. Swift asserts that proceeding in a manner inconsistent with Swift's proposal would advantage Havana Air and to a large extent Xael relative to Aerocuba and Cubazul simply because of timing of the issuance of the Department's January 10 Notice and the Show Cause Order relative to the latter's annual cycle of filing charter prospectuses.⁴ Swift therefore asks that the operations proposed by its customers be allowed to continue until the January 31, 2021, expiration date of the current Havana Air prospectus recognized in the Show Cause Order.⁵

⁴ Response and Objection of Swift, at 5.

⁵ *Id.*, at 4.

Swift also objects to the Department's tentative allocation to World Atlantic because Swift claims that World Atlantic is not an incumbent carrier. Swift asserts that World Atlantic operated no flights for Superior in calendar year 2019, and that hundreds (if not thousands) of passengers were stranded at the airport in Miami, when charters planned to begin on December 16, 2019, did not operate.⁶

Swift also asserts that the Department should reconsider its procedures for allocating authorities from the charter pool, and that the Department should make clear that eligibility is restricted to U.S. carriers and not to foreign carriers operating on a seventh-freedom basis.⁷

Swift states that it is concerned that the proposed first-come, first-served application process -- where carriers could apply no earlier than six months in advance, and where more than 20 monthly operations would require a poll of interested parties -- will result in unpredictable and haphazard schedules. Swift states that the Department selected the first-come, first-served procedure based on an undersubscribed market. Swift asserts, however, that with flights to all Cuban provinces except for Havana being suspended for both charter and scheduled passenger service, demand for flights to Havana will likely increase substantially, and it is highly likely that demand will exceed available supply.

World Atlantic states that given the volume of changes in the charter market, too great a reliance on a charter pool system would be unnecessarily complicated. World Atlantic suggests that the demand for limited, U.S.-Havana public charters can be most fairly met by reducing the initial size of the proposed charter pool, allowing a slight increase in initial allocations, and providing a limited opportunity for allocations tied to a new charter operator to be "transferable" (by the direct air carrier) to another operator or to direct sale charters to the extent the new operator's flights will not operate.⁸

World Atlantic agrees with the Department's plan for an initial allocation of charter authorizations to Swift and World Atlantic, which have experience in the market and had already filed 2020 public charter prospectuses. World Atlantic states that this will help maintain the market's stability, provided the initial allocation includes only flights on prospectuses approved as of the date of Order 2020-1-16 (and described in that order) that are supported by carrier notices showing firm plans for operation.

World Atlantic asserts that Swift's request to operate future charters is premature and improper.⁹ World Atlantic states that it also has plans to add 2020 flights for other charterers or in its own name, as a direct sale charter, during the upcoming charter year.¹⁰

World Atlantic states that it supports initial allocations in future years generally using the approach described in the Show Cause Order.¹¹ World Atlantic states that it and Swift have

⁶ *Id.*, at 6-7.

⁷ *Id.*, at 10.

⁸ Comments of World Atlantic, at 2.

⁹ *Id.*, at 1.

¹⁰ *Id.*, at 1; and March 13, 2020 Revision to World Atlantic's Notice of February 5, 2020.

¹¹ *Id.*, at 3

expressed interest in additional charter flights in 2020, and if left to a pool, World Atlantic asserts that these requests could not fairly be met through a first-come, first-served system. World Atlantic asserts that the Department should simply consider now any additional requests of incumbent direct air carriers for allocations, leaving only a small pool of around 10% of the annual cap for adjustments later in the charter year.¹²

Public Charter Operators

Aerocuba objects to the Department's show cause order, arguing that the proposed allocation procedures are anticompetitive, incompatible with the U.S.-Cuba market, and lack clarity.

Aerocuba asserts that the Department should award charter allocations to public charter operators instead of charter carriers, because carriers play little role in public charter operations beyond flying the aircraft. Aerocuba states that the functions of selecting routes, setting the schedule, obtaining landing rights in Cuba, and holding out and selling seats, are performed by the public charter operator. Aerocuba states that Part 380 permits public charter operators to choose the best charter carrier for its proposed operations, and by initially providing incumbent status to two carriers, the Department eliminates competition and strengthens the already dominant position of these two carriers in the U.S.-Cuba charter market.¹³

Aerocuba also asserts that the proposed procedures would further restrict the number of potential carriers available to public charter operators by prohibiting scheduled carriers from participating. Additionally, Aerocuba asserts that the return of the "undue reliance" doctrine comparing the number of seventh-freedom operations a foreign carrier proposes to operate to the number of third- and fourth-freedom operations it has conducted, has effectively eliminated foreign air carrier participation in charter markets. Aerocuba argues that all of these factors taken together serve to strengthen the already dominant position of the U.S. charter carriers, Swift and World Atlantic, in the U.S.-Havana market.¹⁴

Aerocuba also asserts that the Department should not cap service to Havana based on a historic level that is no longer applicable due to changed market conditions that result from funneling demand to a single Cuban point. Aerocuba asserts, instead, that the Department should initially make the full 3,600 allocations to interested public charter operators and maintain an additional 1,200 allocations in a charter pool on a first-come, first-served basis. Aerocuba also asserts that the Department should clarify when it will accept filings from public charter operators, and it urges the Department to institute a level playing field among all incumbent public charter operators.¹⁵

CTS objects to Order 2020-1-16, and urges the Department to (a) reconsider and simplify its procedures for allocating charter authorizations, and (b) reject Swift's attempt to avoid the application requirement and take advantage of a first-come, first-serve allocation from the charter pool. CTS states that it plans to seek Part 380 authorization after its direct air carrier

¹² *Id.*, at 5.

¹³ Objection of Aerocuba, at 2.

¹⁴ *Id.*, at 2-3.

¹⁵ *Id.*, at 9.

receives charter authorization, so that it can offer charter flights to meet an anticipated increase in demand.

CTS states that it objects to an allocation process that does not take into consideration the change in the U.S.-Cuba market and that, with the suspension of air transportation services to non-Havana airports, CTS anticipates that demand for transportation to Havana will increase. CTS states that the Department's proposal to cap the first and second charter years does not account for these market changes, and it objects to a scheme where the Department considers past Part 380 authorizations to establish the first-year cap.¹⁶

CTS states that the U.S.-Cuba market is not one in which charter operators arrange flights on an ad hoc basis, and asserts that there is no reason to create uncertainty in the market by allocating Havana charters from the pool on a bi-annual basis. CTS suggests that the Department consider allocating charters on a yearly basis, which would benefit all charter operators and their direct carriers, both of which need to plan a regular charter schedule well in advance.¹⁷ CTS also suggests that the Department consider March 1, 2020, through December 31, 2020, as the first charter year, and with incumbent carriers seeking more than 3,600 charters, the Department can apply the cap to the first year (which would comprise only 10 months).¹⁸

CTS also objects to the first-come, first-serve allocation of charter flights from the charter pool, asserting that this mechanism would benefit one carrier – Swift – over any other interested carrier because Swift already has contracts with four charter operators. If any of Swift's charter operators decides to cancel a flight or series of flights, Swift would have advance notice and would be able to submit an application for reallocation without giving other carriers an opportunity to apply.¹⁹ CTS suggests that the Department invite carriers to submit applications for allocation from the charter pool at the same time as it invites incumbent carriers to apply for advance allotments, and reserve 10% of flights in the pool and eliminate the 20 flight per month cap on applications.²⁰

Havana Air asserts that allocations should be made to the true incumbent public charter operators, which in the case of Cuba make all of the sales, marketing, booking, and other commercial and legal arrangements in the U.S. in the sale of any ticket to passengers, and Havana Air asserts that the direct carrier has no participation (or liability) in any of those functions.²¹ Havana Air argues that the Japan and China proceedings cited by the Department involved quite different commercial and regulatory circumstances, notably, the absence of U.S. public charter operators, and that making the direct air carrier the party-in-interest in this case,

¹⁶ *Id.*, at 3-4.

¹⁷ *Id.*, at 5.

¹⁸ *Id.*, at 5-6.

¹⁹ *Id.*, at 7.

²⁰ *Id.*, at 8-9. CTS also requests that the Department clarify whether the 20-flight limit applies to each carrier, regardless of the number of charter programs it may have, or to each of the carrier's charter programs.

²¹ Response and Objections of Havana Air, at 3-4.

effectively upends the Department's whole Part 380 regulatory scheme established decades ago.²²

Havana Air also asserts that any authorizations must be consistent with prior year authorizations, and urges that in the Department's simplified flight allocation procedure, the 2019 filing level must be interpreted to mean flights actually filed and operated by a true public charter operator. Havana Air asserts that this would preclude from any allocation (i) opportunistic new entrants with zero history of operations; (ii) any incumbent whose Havana flight program failed and which did not in fact operate any of its approved flights; and (iii) any direct air carrier/PC Operator incumbents seeking authorizations over-and-above their historical and prior-year levels of flights.²³

Havana Air states that the Department did not state when the initial charter year would end, and that Havana Air would support an 11-month initial charter year definition. However, to the extent the Department intends the initial charter year to be a full 12-month period, Havana Air notes that this would result in no public charter operator having any flights filed for February 2021, and no more authorizations available for allocation for that month.²⁴

Havana Air argues that the very recent World Atlantic/Superior application for a large number of operations is totally opportunistic and problematic and should be rejected. Havana Air argues that by any measure World Atlantic/Superior cannot be regarded as a prior/current year incumbent, as it is a new operator with no history of any operations in the Cuba market. Havana Air further argues that Superior's Cuba program collapsed before it even started, no flights were operated, and many passengers were left stranded at Miami airport in exceedingly difficult circumstances.²⁵

Havana Air asserts that, until recently, Cubazul's filed and historically-operated levels of Havana flights have been slightly more than a daily round-trip basis. Havana Air states that Cubazul apparently now wishes to double-up its Havana schedule to an almost twice-daily Havana service. Havana Air further asserts that, similar to Cubazul, Aerocuba's historically operated levels of Havana flights have been on a basic daily round-trip basis, and that Aerocuba now wishes to double-up its Miami-Havana schedule.²⁶ Havana Air states that simple equity demands that, to alleviate the opportunistic over-demand situation caused by Cubazul/Aerocuba (as well as World Atlantic/Superior), Cubazul and Aerocuba should each be limited to the operation of flights at the same levels previously-filed and historically-operated by each prior to the imposition of the flight cap.²⁷

Superior states that it had traffic rights for Cuba before its December flights, and it asserts its December 2019 flights did not start due to an intermediary that failed to deliver funds to Cuba.²⁸

²² *Id.*, at 2.

²³ *Id.*, at 4-5.

²⁴ *Id.*, at 6.

²⁵ *Id.*, at 6-9.

²⁶ *Id.*, at 9-10.

²⁷ *Id.*, at 10.

²⁸ Response and Comments of Superior, at 1.

Superior states that it has landing rights in Cuba, has a contract with World Atlantic, and is committed to provide travel services as the presently approved schedule permits.²⁹

Recent Developments

In March 2020, carriers and public charter operators cancelled numerous public charter flights to Havana citing a Cuban Government order restricting entry into Cuba and prohibiting Cuban nationals from traveling to the United States in response to the coronavirus (Covid-19) outbreak.

In this regard, on March 24, 2020, Swift submitted a letter to the Docket stating the United States-Havana route has seen material reductions in demand, and further stating that the Instituto de Aeronautica Civil de Cuba has issued an order prohibiting Cuban nationals from traveling to the United States even if they have legal U.S. residence. As a result, Swift states that it and its charter operator customers would suspend all U.S.-Cuba flights as of March 27. Swift states that it and all of its customers intend to resume all approved flights as soon as conditions allow.³⁰

Decision

The Department has decided to make final its decision to implement simplified public charter allocation procedures, and to grant an initial allocation to Swift and World Atlantic to provide for the continuation of existing public charter services at current levels consistent with the Department of State's foreign policy requests. Based on the pleadings filed in this case, the Department has decided, however, that certain modifications to the tentative decision and the initial allocation structure as discussed below are in the public interest.

When we issued Order 2020-1-16, we did so in response to the Department of State's January 7 letter that cited the Administration's policy of applying economic pressure on the Cuban regime, as well as the foreign-policy interests of the United States, as a basis for requesting action. Proceeding from that predicate, the Department of State asked the Department of Transportation to suspend all public charter flights to points in Cuba other than Havana, and "to cap charter flights to José Martí International Airport (HAV) at an appropriate level"³¹ consistent with the Department of State's identified policy objectives. We had already announced in a January 10 Notice that that appropriate level was one that corresponded to "current levels of service, based on public charter prospectuses accepted for calendar year 2019,"³² and that this level was 3,600 round-trip flights.

Several parties have filed comments in response to the show cause order suggesting that the Department should exceed the cap by allocating more than 3,600 flights for the initial year, or that we implement a shortened charter year in which we would allocate all 3,600 charter flights during a 10 or 11-month period, thereby exceeding the cap during the first 12-month year under

²⁹ We note that on March 13, 2020, subsequent to Superior's filing, World Atlantic submitted a letter stating that it no longer intends to operate for Superior the flights shown in prospectus PC-19-147.

³⁰ Swift subsequently filed a letter stating that Swift and certain of its customers have decided to operate five "rescue flights" between March 28 and March 31, to repatriate passengers.

³¹ The full text of the letter is attached to this Order as Appendix A.

³² Notice of January 10, 2020, in Docket DOT-OST-1998-20.

the new charter regime. Furthermore, some parties assert that the Department's approach to establishing the cap was flawed because the Department failed to consider market growth or the effect of diverted traffic from other cities in Cuba where scheduled and public charter services have been suspended.

However, the Department of State was explicit in stating that it wanted to "prevent[] public charter operators from increasing service to Havana in response to the suspension of flights to all other airports in Cuba."³³ Clearly, the Department of State was requesting a strict, firm cap, one that would not be subject to assertions of altered traffic flows, growth, or other market variations. Since our imposition of the cap flows entirely from the Department of State request, we view that request as dispositive on this point, and we therefore decline to reconsider raising the level of the established cap or altering the duration of the charter year such as would effectively amount to the same thing.

That said, the responsive pleadings make clear that certain aspects of the proposal warrant modification to achieve, within the parameters of the newly restrictive operating regime we have been asked to implement, a greater level of fairness and a greater degree of administrative efficiency both for the stakeholders and for ourselves. The Department is accordingly finalizing its tentative decision with modifications that seek to provide a reasonable regulatory framework through which carriers and public charter operators will be able to access the Havana public charter market in a manner that is consistent with the State Department's expressed objectives.

We believe that this approach, as modified, will meet our public interest objectives with as little procedural burden on applicants as possible. As we have done in other restricted charter regimes, should circumstances warrant, we specifically reserve the right to modify our approach and to adopt appropriate procedures as necessary.

Eligibility for Charter Allocations

As an initial matter, the Department has decided to finalize its tentative decision to allocate charters to carriers and not to public charter operators. We have taken note of the charter operators' assertions that the functions of selecting routes, setting schedules, obtaining landing rights in Cuba, and advertising and selling seats, are all performed by the public charter operator and not the carrier. However, we do not find anything in the pleadings to suggest that allocating charter opportunities to carriers would preclude the charter operators from continuing to perform the various public charter functions over which they have expressed concern. Allocating charter opportunities to direct carriers follows years of Department precedent in other limited charter regimes,³⁴ and has generally proven administratively efficient. We have accordingly decided to finalize this aspect of the proposal.

³³ January 7, 2020 Department of State letter, attached as Appendix A to this Order.

³⁴ While it is true, as the charter operators assert, that the Japan and China precedents did not involve U.S. public charter operators, the U.S. direct carriers in those cases still needed to coordinate with a range of charter operators who were arranging the services and holding them out to the public. *See, e.g.*, Order 89-9-44.

We are also finalizing our proposed approach as to which carriers are eligible for allocations under the charter allocation regime. The Department proposed that a carrier holding a U.S.-Havana scheduled frequency allocation would not be considered an incumbent for the purposes of obtaining an advance allotment in future charter years.³⁵ Aerocuba argues that this would reduce competition and strengthens the already dominant position of Swift and World Atlantic.³⁶ We note, however, that the Department's proposal would not preclude scheduled carriers from seeking allocations from the charter pool, but is instead intended to maximize opportunities for other carriers to enter the market on a charter basis. We also note that the proposal follows past practice in other limited charter regimes, and that none of the U.S. carriers holding scheduled service frequencies objected to the Department's proposal. We will accordingly make that decision final.

We have also decided against adopting Swift's suggestion that we bar foreign carriers from applying for Havana charter flights. We have concluded that the process we are implementing by this Order will be well suited for the Department to consider such proposals as they may arise and in the context of the circumstances presented at that time. Any foreign carrier application for a charter flight allocation would be filed in the public docket and would be subject to comment from interested parties. Furthermore, foreign carriers would also need to apply for a statement of authorization under Part 212 to conduct a seventh-freedom charter flight, thereby affording interested parties an additional opportunity to comment on the proposal, and affording the Department an opportunity to weigh all of the relevant public interest parameters in reaching a decision. We will therefore, not preclude foreign air carriers from applying for Havana public charter allocations, and will instead handle any such requests on a case-by-case basis.

Initial Allocation for 2020 / 2021 Charter Year

In the show cause order, the Department proposed to grant an initial allocation to the carriers that have already been authorized to provide Havana public charter flights by virtue of the public charter prospectuses that have already been filed with, and accepted by, the Department. We stated that our recent experience persuaded us that a carrier selection-type allocation proceeding would not be necessary and that we believed a simplified approach of utilizing an advance allotment regime combined with a first-come, first-served approach for the remaining flights would be well suited for the U.S.-Havana public charter market.

On that basis, the Department tentatively allocated flights to Swift and World Atlantic for their currently authorized 2020 and January 2021 Havana public charter flights, subject to the condition that the carriers confirm the number of those flights that they intend to actually operate, as well as those flights that they do not intend to operate, which would be returned to the charter pool. Swift advised that it would operate all 2,240 flights proposed in public charter prospectuses with four charter operators – Aerocuba, Cubazul, Havana Air, and Xael Charters. World Atlantic initially advised that it would operate all 355 flights proposed in its public charter

³⁵ Under the terms of the Memorandum of Understanding (MOU) between the United States and Cuba, signed February 16, 2016, U.S. carriers may operate up to twenty (20) daily combination or all-cargo scheduled round-trip frequencies between the United States and Havana, Cuba. *See* Docket DOT-OST-2016-0021.

³⁶ Objection of Aerocuba, at 2.

prospectus with one charter operator – Superior; however, World Atlantic subsequently advised that it no longer intends to operate those flights for Superior.³⁷

While this allocation would remain below the cap of 3,600 charters, the responsive pleadings indicate that finalizing our tentative allocation could result in an unfair situation for some of the established charter operators in the market. Through no fault of their own and based solely on their previous prospectus-filing cycles, the four currently-authorized public charter operators have unequal durations of their existing authorities to arrange U.S.-Havana public charter flights. One charter operator, Havana Air, is approved through January 2021, Xael Charters is approved through December 2020, and Aerocuba and Cubazul were approved through March 2020. Finalizing the tentative allocation would allocate charters for the Havana Air program through January 2021, while the other public charter operators could only extend their services by having a direct carrier obtain allocations from the charter pool under the new more-restrictive application procedures.

Swift submitted a request for an allocation of an additional 1,386 charters, which it asserts would provide parity in allocation of opportunities among its four charter operator customers; however, that request alone exceeds the annual cap when added to its tentative allocation of 2,240 charters. World Atlantic also expressed its own intent to request additional charters for the remainder of 2020, which would exceed the cap to an even greater degree. In light of what we said above about the basis for, and strict nature of, the cap, granting these requests that clearly exceed calendar year 2019 proposed levels of service, and that would exceed the annual cap of 3,600 charters for the initial charter year, is simply not an option.

Against that background, the Department has decided to modify its initial allocation to carriers for the initial charter year. We find that the public interest would be best served by making an initial allocation for the 2020/2021 charter year that better reflects what we said we would do when we announced the cap on January 10. That is, we will allocate based on 2019 proposals for existing carriers and public charter operators, and we will base our first-year allocations on current levels of service as determined by the prospectuses accepted for 2019.

On that basis, 3,000 charter flights would be allocated to Swift, and 256 charter flights would be allocated to World Atlantic for the specific direct carrier/public charter operator combinations and number of flights proposed for calendar year 2019 (see chart below).³⁸ The Department will also rescind its acceptance of public charter prospectuses to the extent that the proposed U.S.-

³⁷ See March 13, 2020, Revision to World Atlantic Notice of February 5, 2020.

³⁸ The Department has decided to limit this initial allocation to charter operators that (1) proposed U.S.-Havana public charter flights in a public charter prospectus for calendar year 2019; and (2) have existing public charter prospectuses on file with the Department during the pendency of this proceeding, or expressly notified the Department of their intent to offer public charter flights to Havana in the initial charter year. In light of World Atlantic's revised notification that it will not operate for Superior, we are not including in this initial allocation the 18 charters proposed by Superior for December 2019. We point out in addition that a carrier is not permitted to transfer an allocated public charter flight from one public charter operator to a different public charter operator. Such a transfer could be facilitated by returning an allocated charter to the pool and applying for a new allocation under the application procedures discussed in this Order.

Havana flights exceed the number of flights proposed in 2019 for that specific carrier/charter operator combination.³⁹

We will require Swift and World Atlantic to confirm to the Department within 21 calendar days after the issue date of this Order the flights that they intend to operate for the previously-accepted charter programs listed below, as well as any flights that they do not intend to operate, which would be returned to the charter pool.⁴⁰ We recognize that market conditions might not yet have returned to normal in 21 days; however, we believe that it is in the public interest to promptly implement the new procedures discussed in this Order so that all affected carriers and charter operators are able to begin developing their long-term plans. Of course, Swift or World Atlantic are free to submit their notification earlier than 21 days, to the extent that they are positioned to resume certain services.

This notification should identify the public charter operator; the date of each flight; the city-pair markets; the type of aircraft to be used; and a statement affirming that the carrier has firm plans to use the charter(s). A copy of the charter contract will also be required, for which applicants may request confidentiality under Rule 12 of our procedural regulations (14 CFR § 302.12). We will allow two weeks after these notifications for respective public charter operators to file the necessary public charter prospectus documents as required under 14 CFR Part 380.

The remaining 344 charters, plus any that are returned by the carriers, would be placed in the charter pool and would be available for allocation as discussed below.⁴¹

Carrier	Charter Operator	2019 Proposed Charters
Swift	Aerocuba	485
	Cubazul	312
	Havana Air	793
	Xael	1,407
	Cuba Travel Service	3
Swift Total		3,000
World Atlantic	Havana Air	256
World Atlantic Total		256
Grand Total		3,256
3,600 – 3,256 =		344 remaining for charter pool

Advance Allotment Regime

For the most part, parties to this proceeding support the concept of advance allotments and the procedural regime proposed in the show cause order. Several parties assert that the allocation

³⁹ We will also rescind our acceptance of the Superior Air prospectus.

⁴⁰ This notification should be filed in Docket DOT-OST-2020-0011 and sent by email to Brett.Kruger@dot.gov.

⁴¹ We reserve the right to modify this allocation should experience demonstrate that the approach needs further modification consistent with the public interest. However, we make clear that under no circumstances will we allocate more charters than are permitted under the cap.

regime could benefit from more advanced allocations, and fewer charters reserved for the first-come, first-served pool. The parties state that the U.S.-Havana public charter market consists of a relatively small group of incumbent carriers and charter operators serving a traveling public that requires more advanced planning than is found in other charter markets. World Atlantic and Cuba Travel Services specifically suggest that the Department reserve only 10% for the charter pool, and allocate a greater share of the available charters at the outset of the year.

We find merit to the assertions that this market warrants a greater emphasis on advanced planning, and less reliance on the charter pool for ad hoc services. At the same time, we find that the public interest warrants the retention of some charters in the first-come, first-served pool to provide an opportunity for other interested parties to participate in the U.S.-Havana public charter market. We will accordingly finalize our advance allotment proposal, but will, as some of the commenting parties requested and none opposed, raise the number of advance allotments and reduce the size of the charter pool. Specifically, we will grant advance allotments up to 90% of the cap, and reserve 10% for the first-come, first-served charter pool.⁴²

In this regard, beginning in the 2021/2022 charter year, U.S.-Havana public charters will be allocated based on the average number of charters operated during the past two years. The two-year average will be based on the years ended November 30, six months after the beginning of the charter year. Under this arrangement, carriers would automatically qualify for incumbent status and, thus, advance allotments, if they operate an average number of round-trip charters equaling at least five percent of the cap in the two preceding consecutive base years. Similarly, incumbent carriers would lose their advance allotments if they do not maintain an average service level of five percent of the Havana public charter cap during the latest two consecutive base years. (They would, of course, be eligible for ad hoc distributions from the pool on a first-come, first-served basis.)

In December, or approximately six months before the beginning of the next charter year, we will issue a notice inviting applications for advance allotments and requiring the carriers to advise us within 14 days as to the number of U.S.-Havana public charter flights operated during the previous two years, and advising us of the number of public charter flights they plan to use in the coming charter year. Provided that the total advance allotment does not exceed 90 percent of the total available public charter flights for the charter year, the Department would then issue its advance allotment based on the average number of public charters operated during the past two years.⁴³

As discussed above, the Department will limit incumbent status to carriers that do not have access to the Havana market through scheduled service. Thus, while we will not restrict scheduled carriers from seeking charter allocations from the charter pool, a carrier holding a

⁴² We recognize that the initial allocation to Swift and World Atlantic for the 2020/2021 charter year exceeds 90% of the cap by 16 charters. Given our desire to reach a fair and non-discriminatory outcome, and noting that 344 charters will remain available in the pool, we find that the public interest justifies this minor deviation for the initial charter year.

⁴³ If the incumbents' operations justify allotment of more than 90 percent of the total available public charter flights, we will reduce all their allotments pro rata.

U.S.-Havana scheduled frequency allocation will not be considered an incumbent for the purposes of obtaining an advance allotment in future charter years.

Charter Pool and Proposed Application Procedures

The Department proposed that charters not distributed to incumbents in advance would be placed in a charter pool for distribution on a first-come, first-served basis. As noted above, parties generally agree that the U.S.-Havana market requires more advanced planning than other charter markets. Some parties specifically requested in this regard that instead of permitting pool applications no more than six months in advance, we permit them for the full year. In addition, several parties have expressed concerns that the first-come, first-served approach is not suited for this market, where demand is likely to exceed the cap. Parties also assert that a carrier could take advantage of a lack of transparency in the process by having advanced notice of cancellations and simultaneously filing a notice of cancellation along with an application for a new allocation. In such case, competing carriers would not have the advanced warning that charter opportunities would become available, and they would not be in a position to timely file a competing application for the opportunity.

As noted above, we find merit in the assertions that this market warrants a greater emphasis on advanced planning, and the Department therefore has decided to permit carriers to seek allocations from the charter pool for the entire charter year. We will accept applications for flights from the pool beginning immediately after the Department announces each year's advance allotments, and those applications can be for any of the 12 months for the applicable charter year.⁴⁴ We have further decided to increase to 30 the number of charters that carriers may seek for a given month without conducting a poll of interested parties.

While these changes to the pool procedures will facilitate advanced planning for carriers and charter operators, they could result in an early depletion of the charter pool. Nevertheless, we find that the benefits of trying to meet the parties' needs for advanced planning, along with enhanced administrative efficiency, outweigh the potential concerns about possibly limited remaining pool allocation opportunities later in the year. We remain concerned, however, that carriers could seek to warehouse valuable charter allocations without plans to use them and thereby preclude the opportunity for other parties to participate in the market. In this regard, we believe that the public interest warrants extension of the "use-or-lose" condition proposed in the show cause order to any charter allocation from the charter pool.

The Department also shares the concerns raised by parties about a potential lack of transparency in the charter pool process, particularly as they relate to cancelled charters that are returned to the charter pool. To address these concerns, we will require that all cancellation notices and applications be served on interested parties, and that applications for reallocation of any charters that are returned to the pool may be filed beginning one business day after the cancellation notice is submitted. Furthermore, all applications will carry a seven calendar-day answer period.

⁴⁴ We will accept applications for flights from the pool for the initial 2020/2021 charter year beginning seven calendar days after the issue date of this Order.

Carriers seeking to conduct a public charter on shorter notice may expedite the answer period by polling interested parties.⁴⁵

Against that background, the charters not distributed to incumbents in advance, as well as any charters that might be returned as the charter year proceeds, will be placed in a charter pool for distribution on a first-come, first-served basis under the following procedures:

1. Applications must identify the public charter operator; the date of each flight; the city-pair markets; the type of aircraft to be used; and a statement affirming that the carrier has firm plans to use the charter(s). A copy of the charter contract will also be required. Applicants may request confidentiality under Rule 12 of our procedural regulations (14 CFR § 302.12);
2. Applications must be served on interested parties, filed in Docket DOT-OST-2020-0011, and will be subject to a seven calendar-day answer period;⁴⁶
3. Applications for charters not allotted in advance of the charter year may be filed no earlier than the date on which the Department announces each year's advance allotments;
4. Applications for charters that are returned or forfeited into the pool may be filed no earlier than one business day after the notification of that charter flight's return is submitted;
5. Carriers may apply to operate up to thirty (30) public charter flights each month from the pool;
6. Applications to operate more than thirty (30) public charter flights in a given month may be considered after the applicant completes polling of interested parties; and
7. Mutually exclusive requests that would result in exceeding the cap will be reduced on a pro rata basis to remain within the annual cap on Havana public charters, and the remaining portion of each carrier's request will be dismissed.

If the charter allocation is approved, we will provide the carrier with a Notice acknowledging its authority to perform the proposed charter.⁴⁷ The respective public charter operators will then be

⁴⁵ The Department would expect that all documents filed in this docket would be served on the parties to this proceeding, as well as any other parties that might subsequently participate in the U.S.-Havana public charter market. The Department may, of course, require additional service of any document as it deems necessary.

⁴⁶ Applications should also be sent by email to Brett.Kruger@dot.gov or by fax to (202) 366-3694.

⁴⁷ An allocation of a charter flight will not relieve any party from other regulatory responsibilities to obtain licenses or authority from the Department. Parties are further reminded that a number of significant limitations and requirements remain in place concerning air transportation between Cuba and the United States. Nothing in the Department's award of authority will relieve any party from complying with all applicable regulations and requirements of other U.S. agencies and with all applicable laws of the United States.

free to submit the necessary public charter prospectus for review under the Department's normal procedures.

Required Reports and Use-or-Lose Condition

Carriers receiving a public charter allocation for the initial charter year in this Order, an advance allotment for subsequent years in future orders, or an allocation from the charter pool, shall, in writing, return any flight(s) that they will not use to the U.S. Air Carrier Licensing/Special Authorities Division.⁴⁸ Each carrier granted a charter allocation/allotment must also report, in writing, to the U.S. Air Carrier Licensing/Special Authorities Division, on its operations for the preceding month by the tenth day of each month.⁴⁹

In addition to these reporting requirements, the Department also believes that we should take steps to prevent carriers from warehousing public charter allocations/allotments without plans to use them. In this regard, the Department finalizes and adopts its proposed "use-or-lose" condition on U.S.-Havana public charter flight allocations, similar to conditions utilized in past charter allocation regimes. Under this condition, all public charter allocations/allotments (or portions thereof) would be subject to forfeiture if the carriers have no plans to use the allocated charters and such flights would be returned to the charter pool.

In addition, the charters allocated in the 2020/2021 charter year initial allocation, subsequent years' advance allotment, and any charters allocated from the charter pool before the beginning of the applicable charter year would be subject to forfeiture if less than 40 percent are used or committed for use by contract during the first six months of the charter year. As of the end of the sixth charter month, the remaining charter allotments exceeding the number equal to the number of those already operated or committed in the preceding six months would be forfeited and placed in the charter pool.

In light of our decision to allow carriers to seek more charters from the charter pool and to submit applications earlier in the year than was proposed in the show cause order, we find that the public interest calls for a corresponding expansion of the use-or-lose condition to ensure that charters allocated from the charter pool are used as planned, or that they are returned to the charter pool and made available for allocation to other interested parties. Under the revised charter pool procedures, carriers could seek allocations at any time throughout the course of the charter year, making a formulaic approach to the use-or-lose condition impractical. We remind carriers that it is not the Department's policy to allow valuable limited opportunities to go unused, and we hereby put parties on notice that we reserve the right to take any action necessary in the public interest to ensure the integrity of the charter pool.

⁴⁸ This notification must be received within two business days of the carrier's determination that an allocated flight or flights will not operate, and the notification shall also be served on interested parties and filed in Docket DOT-OST-2020-0011.

⁴⁹ The monthly reports must also be filed in Docket DOT-OST-2020-0011 and would contain the same information as required above for applications for flights from the charter pool.

Conclusion

We believe that the approach set forth in this Order will address the Department of State's request that we cap public charter flights to Havana, while providing the Department with a reasonable and workable regulatory framework to administer the cap in the public interest, taking into account the needs of the interested parties as expressed through their comments on the record of this proceeding. Should experience demonstrate that the approach needs further modification, we would be prepared to consider whether these procedures continue to be in the public interest.

ACCORDINGLY,

1. The Department establishes the regulatory framework and allocation procedures for U.S.-Havana public charter flights, as discussed in the text of this Order;
2. The Department grants Swift Air, LLC, an initial allocation of 3,000 round-trip public charter flights for the 2020/2021 charter year, as discussed in the text of this Order for the public charter operators as follows: Aerocuba: 485, Cubazul: 312, Cuba Travel Service: 3, Havana Air: 793, and Xael: 1,407;
3. The Department grants Caribbean Sun Airlines, Inc. d/b/a World Atlantic Airlines, an initial allocation of 256 round-trip public charter flights for the 2020/2021 charter year, as discussed in the text of this Order for the public charter operator Havana Air;
4. The initial allocations granted in ordering paragraphs 2 and 3 above are subject to the condition that the carrier shall advise the Department within twenty-one (21) calendar days after the issue date of this Order of the flights that it intends to actually operate, as well as those flights that it does not intend to operate, which would be returned to the charter pool. This notification shall identify the public charter operator; the date of each flight; the city-pair markets; the type of aircraft to be used; a statement affirming that the carrier has firm plans to use the charter(s); and a copy of the charter contract;
5. The initial allocations granted in ordering paragraphs 2 and 3 above are further subject to the condition that the applicable public charter operator shall file the necessary prospectus or amended prospectus with the Department within fourteen (14) calendar days after the carrier notification discussed in ordering paragraph 4;
6. The Department rescinds its previous acceptance of public charter prospectuses to the extent that the proposed U.S.-Havana public charter flights reflected in the accepted prospectuses exceed the number of flights proposed in 2019 for that specific carrier/charter operator combination as allocated in ordering paragraph 2 above;
7. The Department rescinds its previous acceptance of the public charter prospectus filed by Superior Air LLC, and assigned PC# 19-147;

8. The initial allocations in ordering paragraphs 2 and 3 above, any advance allotment granted in future charter years, and any allocation from the charter pool granted before the beginning of the charter year as discussed in the text of this Order will be subject to the following condition:

- a. Where fewer than 40 percent of a carrier's allocated charters have been used or been committed for use by firm contracts during the first six months of the charter year, the remaining charter allotments exceeding the number equal to the number of those already operated or committed in the preceding six months would be forfeited and placed in the charter pool;

9. The Department establishes a U.S.-Havana public charter pool subject to the following application and allocation procedures:

- a. Applications must identify the public charter operator; the date of each one-way flight; the city-pair markets; the type of aircraft to be used; and a statement affirming that the carrier has firm plans to use the charters. A copy of the charter contract is also required;
- b. Applications must be served on interested parties, filed in Docket DOT-OST-2020-0011, and will be subject to a seven calendar-day answer period;⁵⁰
- c. Applications for charters not allotted in advance of the charter year may be filed no earlier than the date on which the Department announces each year's advance allotments;
- d. Applications for charters that are returned or forfeited into the pool may be filed no earlier than one business day after the notification of that charter flight's return is submitted;
- e. Carriers may apply to operate up to thirty (30) public charter flights each month from the pool;
- f. Applications to operate more than thirty (30) public charter flights in a given month may be considered after the applicant completes polling of interested parties; and
- g. Mutually exclusive requests that would result in exceeding the cap will be reduced on a pro rata basis to remain within the annual cap on Havana public charters, and the remaining portion of each carrier's request will be dismissed.

10. Carriers receiving a public charter allocation, whether allocated above, through an advance allotment, or allocated from the charter pool, shall, in writing, return any flight(s) that they will not use to the U.S. Air Carrier Licensing/Special Authorities Division, and shall serve this notification on interested parties and file it in Docket DOT-OST-2020-0011, within two business days of the carrier's determination that an allocated flight or flights will not operate;

⁵⁰ Applications should also be sent by email to Brett.Kruger@dot.gov or by fax to (202) 366-3694.

11. Each carrier granted a charter allocation, whether allocated above, through an advance allotment, or allocated from the charter pool, must report, in Docket DOT-OST-2020-0011, on its operations for the preceding month by the tenth day of each month;

12. Any charter flight allocated under the terms of this order is subject to the Department's standard condition that the Department may amend, modify, or revoke the allocation at any time and without hearing, at its discretion;

13. The Department delegates to the Director of the Office of International Aviation the authority to administer distribution of flights from the charter pool proposed by this Order and, where deemed in the public interest, to waive the procedural restrictions on the charter pool;

14. The Department grants all motions for confidential treatment and motions for leave to file otherwise unauthorized documents; and

15. The Department will serve this Order on all certificated carriers operating large aircraft; all foreign air carriers holding permits; all public charter operators with recent U.S.-Cuba operations; the Ambassador of Cuba in Washington, DC; the Federal Aviation Administration; and the U.S. Department of State.

By:

David E. Short
Deputy Assistant Secretary
Aviation and International Affairs

(SEAL)

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<http://www.regulations.gov>

THE SECRETARY OF STATE
WASHINGTON

January 7, 2020

The Honorable
Elaine L. Chao
Secretary of Transportation
1200 New Jersey Ave., SE
Washington, DC 20590

Dear Madam Secretary:

The Department of Transportation's October 25, 2019, action to suspend scheduled air service to nine Cuban airports took effect on December 10, 2019, the same day the world celebrated Human Rights Day. Since then, the Cuban regime has increased its repression of the Cuban people, detaining dozens of human-rights activists and entrenching policies that restrict freedom of religion, expression, and peaceful assembly.

To strengthen the impact of the Administration's policy of applying economic pressure on the Cuban regime to respect human rights and fundamental freedoms for all in Cuba and to cease its unconscionable support for the illegitimate and totalitarian regime of former President Maduro in Venezuela, and in the foreign-policy interests of the United States, I respectfully request that the Department of Transportation suspend until further notice all public charter flights between the United States and all airports in Cuba except José Martí International Airport (HAV) in Havana. I further request that the Department of Transportation, in the foreign-policy interest of the United States, cap charter flights to José Martí International Airport at an appropriate level consistent with the policy objectives identified above.

Suspending public charter flights to these nine airports and limiting such flights to Havana would send a clear message to the Cuban government that the United States is continuing to increase economic pressure on the regime in response to its ongoing repression of the Cuban people and support for Maduro. The suspension of public charter flights to all points outside of Havana will prevent public charter operators from expanding their services to compensate for the Administration's October 25, 2019, action suspending commercial flights to those airports. Maintaining and capping public charter flights to José Martí International Airport preserves the main gateway for travel from the United States to Cuba for family visitation or other lawful purposes, while preventing public charter operators from increasing service to Havana in response to the suspension of flights to all other airports in Cuba.

The Department of Transportation's implementation of this public charter suspension measure with a 60-day advance notice would allow for the orderly wind-down of flight operations. The Department of State considers that this action would not conflict with the U.S. government's obligations under applicable international agreements.

Sincerely,



Michael R. Pompeo