



Order 2020-2-12

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

Issued by the Department of Transportation  
on the 19<sup>th</sup> day of February, 2020

Served: February 19, 2020

In the matter of

**Expanded Cargo and Passenger Flexibility at Puerto  
Rican International Airports**

Docket DOT-OST-2019-0085

**ORDER TO SHOW CAUSE**

**Summary**

By this Order, the U.S. Department of Transportation tentatively finds that it is in the public interest to grant, as specified below, the request of the Commonwealth of Puerto Rico (Puerto Rico) to permit foreign air carriers to conduct certain expanded cargo and passenger transfer services at international airports in Puerto Rico.

**Application**

On June 7, 2019, Puerto Rico requested on behalf of its international airports that the Department grant exemption authority to all foreign air carriers authorized to serve the United States to enable expanded cargo and passenger transfer activities at these airports. Specifically, Puerto Rico asks that all foreign carriers with currently effective authority to serve the United States be expressly permitted by exemption to engage in the following cargo and passenger transfer activities at Puerto Rico international airports:

- (1) transfer cargo and passengers from one of the carrier's own aircraft to another, provided both aircraft are operating to or from a point in the carrier's homeland;
- (2) make changes of gauge at Puerto Rico airports for cargo and passenger operations in the type or number of aircraft used to transport such traffic, provided that in the outbound direction the transportation beyond Puerto Rico is a continuation of the transportation from the carrier's homeland to Puerto Rico, and in the inbound direction, the transportation is a continuation of the transportation from behind Puerto Rico;
- (3) commingle traffic destined to, or originating in the United States (i.e., traffic moving

in foreign air transportation with traffic not in foreign air transportation);

(4) discharge traffic at Puerto Rico airports for transfer to a U.S. carrier for onward carriage to a final destination in the U.S. or in a third country, and to uplift from Puerto Rico airports traffic transferred from a U.S. carrier that was transported by that carrier to Puerto Rico from a point of origin elsewhere in the United States or in a third country;

(5) discharge traffic at Puerto Rico's airports for transfer to another foreign carrier for onward carriage to a final destination in a third country, and to uplift from Puerto Rico airports traffic transferred from another foreign carrier that was transported by that carrier to Puerto Rico from a point of origin in a third country;

(6) store cargo in bonded warehouses in connection with any of the foregoing types of cargo transfer, consistent with all applicable regulations and requirements of the U.S. Customs and Border Protection (USCBP); and

(7) grant all foreign air carriers that currently hold, or that may subsequently receive effective Department authority, to serve any point or points in Puerto Rico, and to co-terminalize points in Puerto Rico with other U.S. points for which they hold Department authority.

In support of its application, Puerto Rico asserts the following reasons for why the requested flexibility will advance the public interest:

- Promote expanded passenger and cargo air service to and from Puerto Rico by taking advantage of the Island's geographic location on the Great Circle route between Europe and Latin America.
- Increase use of three substantially under-utilized international airports that include the longest runway in the Caribbean and a major maintenance, repair and overhaul facility.
- Enable Puerto Rico to promote economic development by highlighting to foreign carriers, industry, and tourism organizations the benefits of Puerto Rico for online and interline connections as well as for origin and destination point traffic.
- Facilitate rebuilding the Puerto Rican economy following Hurricane Maria, which caused catastrophic infrastructure damage estimated at between \$15.5 and \$19.5 billion, with the total economic loss to the Commonwealth in the range of \$54 to \$68 billion.
- Provide expanded air service specifically needed to aid Puerto Rico's recovering pharmaceutical and medical industry, which represents over 25% of the Island's economy, as well as the Island's growing technical services industry.
- Benefit U.S. carriers by expanding interline opportunities with foreign carriers providing increased service to Puerto Rico.
- Support a shift in the growth in passenger and cargo traffic seen now at foreign airports in the region to include the Dominican Republic, Colombia, and Panama to U.S. airports in Puerto Rico.
- Advance expansion of foreign tourist traffic from Europe to Puerto Rico's 300 beaches and numerous attractions away from foreign destinations to include Cuba.

- Bolster U.S. presence and influence in the Caribbean and Latin America and counteract the intrusion of nations, such as China, with interests adverse to the United States in the region.<sup>1</sup>

## **Responsive Pleadings<sup>2</sup>**

Opposition to the application was filed by the Air Line Pilots Association, International (ALPA); Mr. Luis Irizarry, an aviation consultant based in Puerto Rico; Delta Air Lines, Inc. (Delta); the Association of Flight Attendants-CWA, AFL-CIO (AFA); and the Transportation Trades Department, AFL-CIO (TTD). Puerto Rico filed a reply and various parties filed additional responsive pleadings. In addition, Mr. Jeronimo “Jerry” Lectora, a representative of a group of export executives and trade associations concerned with the Caribbean, filed comments in support of Puerto Rico’s application.

In general, ALPA, Delta, AFA, and TDD make two broad claims. First, they argue that grant of Puerto Rico’s request is unnecessary since substantially all of the flexibility proposed is already provided and available to carriers from open-skies countries, and the United States has now entered into over 125 open-skies agreements, including with every commercially significant country in Latin America.<sup>3</sup> Second, they contend that the application is an attempt, or at least a first step, by Puerto Rico to gain relief from the prohibition against cabotage. Some of these parties also question whether Puerto Rico is sufficiently isolated geographically to justify the type of flexibility that the Department has previously granted to areas such as Alaska, Hawaii, and Guam. Mr. Irizarry, for his part, claims that because Puerto Rico’s international airports are already being administered by a private entity or are being privatized, and because the privatization has hurt Puerto Rico’s economy, the people of Puerto Rico have no guarantee that Puerto Rico would benefit from a grant of the requested authority.

In response, Puerto Rico states that, notwithstanding the existence of open-skies agreements, it, and many interests inside Puerto Rico, still see its proposal as advancing the public interest. It points out that not every country has an open-skies agreement with the United States, and it contends that even as to those that do, not every carrier may recognize the flexibility available under those agreements. Regarding cabotage, Puerto Rico states repeatedly that it seeks only expanded passenger and cargo transfer flexibility at its airports – not cabotage. Regarding whether it is sufficiently isolated geographically to warrant this type of relief, Puerto Rico notes that Alaska secured and continues to secure flexibility relief based on its geography, and San Juan is only 30-minutes flight time closer to Miami than Anchorage is to Seattle. Finally, Puerto Rico maintains that it seeks an exemption to enhance its international airports, that the private management of any of these airports is irrelevant, and that Mr. Irizarry is mistaken in contending that the people of Puerto Rico will not benefit from the additional air service at those airports that could be generated by the requested exemption. Mr. Lectora challenges the concerns raised by the opposing parties and expands upon a number of the public interest arguments cited by Puerto Rico in favor of the application.

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<sup>1</sup> Application of Puerto Rico, at 2-3.

<sup>2</sup> In the interest of attaining a complete record in this proceeding, we grant all motions to file and accept all other late filed pleadings.

<sup>3</sup> See, e.g., ALPA Answer at 1-2.

## Tentative Findings and Conclusions

We have tentatively decided to grant Puerto Rico's request as specified below. Specifically, we tentatively find that it is consistent with the public interest to grant exemption authority, except as specified below, to foreign air carriers that currently hold, or that may subsequently receive, effective Department authority to engage in scheduled foreign air transportation: (1) to conduct expanded cargo and passenger transfer operations at Puerto Rico international airports (as more fully described below) and (2) to serve Puerto Rico and to coterminimize Puerto Rico with other U.S. points for which they hold our authority. We are also proposing to invite eligible foreign carriers to apply for authority to serve new U.S. points on an extrabilateral basis, so long as these flights also serve Puerto Rico, and subject to the standard that there must be a procompetitive agreement with the applicant's homeland country and that interested parties will be allowed to raise overriding public interest reasons for denying the requested authority.<sup>4</sup>

We find that these proposed actions are consistent with the public interest, as they will provide important benefits to Puerto Rico, its economy, and the traveling and shipping public. We propose to make this authority effective for two years from the date this action becomes final, and we reserve the right to amend, modify, or revoke this exemption authority at any time and to do so without hearing, should circumstances warrant.

In reaching our tentative decision, we find that Puerto Rico has demonstrated that its geographic location and economic situation warrant grant of the same type of relief that we earlier granted for Alaska, Hawaii, Guam, and the Commonwealth of the Northern Mariana Islands (CNMI).<sup>5</sup> As was the case in the earlier proceedings, we recognize that air service is vitally important to Puerto Rico, and that it is heavily dependent on air transportation as a vital element of its economy. In its application, Puerto Rico provided specific evidence of the negative impact that its economy has suffered in the aftermath of Hurricane Maria and for other reasons. None of the opposing parties persuasively challenge those factors on the record, and we find this factor to be compelling in Puerto Rico's favor as any degree of expanded air services there should be critical to Puerto Rico's effort to develop economic growth and to rebuild infrastructure.

We tentatively see no need to resolve the contentions on the record over the significance of open skies agreements. Puerto Rico has clearly expressed its view that the authority it requests will advance its interests notwithstanding the presence of those agreements, and we tentatively are not inclined to substitute our judgment for theirs. Given the strong economic public interest arguments that Puerto Rico has put forth, we would tentatively view even limited enhancements to the Island's economic situation as consistent with the public interest.

With respect to the passenger transfer authority we have tentatively decided to grant, the opposing parties have not demonstrated how awarding this authority, as conditioned, would

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<sup>4</sup> We believe that this condition will bring about the desired benefits for Puerto Rico without compromising our ability to protect the full range of important U.S. aviation interests or hampering U.S. negotiating ability. *See* Order 99-12-10 at 4-5.

<sup>5</sup> *See* Order 96-11-2, served November 7, 1996, and various actions taken in Dockets DOT-OST-2010-0200, DOT-OST-1996-1600, and DOT-OST-1999-5035, including most recently Notice of Action Taken September 20, 2018 (Alaska); Order 99-12-10, served December 14, 1999 (Hawaii); Order 2006-12-21, served December 22, 2006 (Guam); and Order 2007-4-7, served April 11, 2007 (CNMI).

undermine U.S. aviation regulatory policy or otherwise negatively impact the public interest. In this regard, we note that, in tentatively granting the cargo and passenger transfer authority at issue here, we have expressly reiterated that the prohibition of cabotage remains applicable. The burden is on foreign air carriers to ensure compliance with the cabotage prohibition, just as is the case with foreign carriers conducting cargo transfer operations pursuant to existing authority granted by transfer exemptions, as well as with those conducting cargo and passenger transfer operations in accordance with individual authorities granted by the Department under applicable open-skies and/or other agreements that explicitly provide for such rights.

Finally, we tentatively do not find evidence on the record to support the claim that grant of this authority would be harmful to the airports, economy, or people of Puerto Rico.

In the circumstances presented, we tentatively conclude that Puerto Rico has successfully demonstrated that a public interest basis exists for the type of relief we propose to confer, and we view that public interest basis as persuasive.

As we did in the previous transfer cases, we tentatively find that there is a need to exclude certain carriers from eligibility for the extrabilateral relief at issue here. Specifically, we believe it is in our aviation interests to propose to bar carriers from Venezuela.<sup>6</sup>

In view of the foregoing and all facts of record, we tentatively find and conclude that:

1. It is in the public interest to grant to all foreign air carriers (except as noted in paragraph 6) that currently hold, or that may subsequently receive, effective Department authority to engage in the foreign air transportation of cargo (whether under authorizations permitting combination or all-cargo services), an exemption from 49 U.S.C. § 41301 to engage in the following cargo transfer activities at Puerto Rico international airports, and to all foreign air carriers (except as noted in paragraph 6) that currently hold, or that may subsequently receive, effective Department authority to engage in the foreign air transportation of passengers, an exemption from 49 U.S.C. § 41301 to engage in the following passenger transfer activities at Puerto Rico international airports: (1) to transfer cargo and passengers from any of their aircraft to any of their other aircraft, provided that both aircraft are operating to/from a point in the carrier's homeland; (2) to make changes, at Puerto Rico international airports, in the type or number of aircraft used to transport cargo and passengers, provided that in the outbound direction the transportation beyond Puerto Rico is a continuation of the transportation from the carrier's homeland to Puerto Rico, and in the inbound direction, the transportation to the carrier's homeland is a continuation of the transportation from behind Puerto Rico; (3) to commingle cargo and passenger traffic moving in foreign air transportation with cargo and passenger traffic not moving in foreign air transportation;<sup>7</sup> (4) to discharge cargo and passenger traffic at Puerto Rico international airports for transfer to a U.S. carrier for onward carriage to a final destination in the United States or in a third country, and to uplift from Puerto Rico cargo and passenger traffic transferred from a U.S. carrier that was transported by that carrier to Puerto Rico from a point of origin elsewhere in the

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<sup>6</sup> We note that the Department has suspended foreign air transportation by all U.S. and foreign air carriers between Venezuela and the United States. *See* Order 2019-5-5 in Docket DOT-OST-2019-0072. In the event this suspension is modified, our exclusion of Venezuelan carriers from the authority at issue here will remain in place until further order of the Department.

<sup>7</sup> We emphasize that this is not to include cabotage.

United States or in a third country; and (5) to discharge passengers and cargo at Puerto Rico international airports for transfer to another foreign carrier for onward carriage to a final destination in a third country, and to uplift from Puerto Rico international airports passengers and cargo transferred from another foreign carrier that was transported by that carrier to Puerto Rico from a point of origin in a third country;<sup>8</sup>

2. Our action in Paragraph 1 above would not permit (1) the carriage of traffic by a foreign air carrier, in its own name and under its code, from any point in the carrier's homeland to a point in the United States not otherwise authorized by the Department from that homeland point; (2) the carriage of traffic by a foreign air carrier, in its own name and under its code, from any third country point to a point in the United States except as otherwise authorized by the Department; (3) code-share operations to U.S. points unless both carriers otherwise hold Department authority between the points involved and the requisite Statement of Authorization; and (4) cabotage operations;<sup>9</sup>

3. It is in the public interest to grant all foreign air carriers that currently hold, or that may subsequently receive, effective Department authority to engage in scheduled foreign air transportation, except as noted in paragraph 6 below, an exemption from 49 U.S.C. § 41301 to allow them to serve Puerto Rico and to coterminize Puerto Rico with other U.S. points for which they hold Department authority;

4. The authority described above would be effective on the date of issuance of a final order in this proceeding, and would remain in effect for two years;

5. It is in the public interest to invite eligible foreign air carriers, except as noted in paragraph 6 below, to apply for exemption authority to serve additional U.S. points on an extrabilateral basis, where those additional points would be served only on flights also serving Puerto Rico, subject to the standard that there must be a procompetitive agreement with the applicant's homeland country and that interested parties will be allowed to raise overriding public interest reasons for denying the requested authority; and

6. Grant of this authority should not apply to foreign air carriers of Venezuela, and those carriers shall be deemed not to meet the eligibility standards set forth in this order.

## **ACCORDINGLY,**

1. We direct all interested persons to show cause why the tentative decision set forth above should not be made final;

2. We grant all motions for leave to file and otherwise accept all pleadings filed;

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<sup>8</sup> We will dismiss without prejudice Puerto Rico's request concerning in-bond cargo storage, as it is properly within the jurisdiction of USCBP within the Department of Homeland Security.

<sup>9</sup> Cabotage operations would include the carriage by a foreign air carrier of passengers or cargo between Puerto Rico and other U.S. points for transfer to either a U.S. air carrier, or another foreign air carrier for carriage between Puerto Rico and a foreign point, in either direction. *Qantas Empire Air, Foreign Transfer Traffic*, 29 C.A.B. 33 (1959).

3. Any interested person objecting to the issuance of an order making final our tentative findings and conclusions shall, no later than fourteen (14) days after the date of service of this order, file with the Department and serve on the parties who have filed pleadings in Docket DOT-OST-2019-0085, a statement of objections specifying the part or parts of the tentative findings and conclusions objected to. If objections are filed, answers to objections are due no later than seven (7) calendar days thereafter;<sup>10</sup>
4. If timely and properly supported objections are filed, we will give further consideration to the matters and issues raised by the objections before we take further action;
5. In the event no objections are filed, we will deem all further procedural steps to be waived, and we will enter an order making final our tentative findings and conclusions set forth in this Order; and
6. We will serve a copy of this Order on all U.S. certificated and foreign air carriers, all other parties to this proceeding, and the Department of State.

By:

**JOEL SZABAT**  
Assistant Secretary  
Aviation and International Affairs

(SEAL)

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<http://www.regulations.gov>

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<sup>10</sup> Since the Department has provided for the filing of objections to this Order, we will not entertain petitions for reconsideration.