

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

Application and Notice of)
)
CORVUS AIRLINES, INC.)
)
for a waiver of the 45-day advance)
filing requirements of §204.7 and)
Notice of intent to resume interstate)
scheduled air transportation)
_____)

DOCKET DOT-OST-2020-0134

Essential Air Services at)
)
ST. PAUL, ALASKA)
)
)
Under 49 U.S.C. 41731 *et seq.*)
_____)

DOCKET DOT-OST-2019-0038

**SURREPLY OF ALASKA CENTRAL EXPRESS, INC.
TO THE JOINT MOTION AND REPLY OF
FLOAT ALASKA, LLC AND CORVUS AIRLINES, INC.**

Communications with respect to this document may be served upon:

Michael A. Bergt
President
ALASKA CENTRAL EXPRESS, INC.
5901 Lockheed Ave.
Anchorage, Alaska 99502

Robert P. Silverberg
SILVERBERG GOLDMAN, PLLC
1101 30th Street, NW
Suite 500
Washington, DC 20007
Tel: 202-944-3300
E-Mail: rsilverberg@sgbdc.com

Dated: September 1, 2020

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

Application and Notice of)
)
CORVUS AIRLINES, INC.)
)
for a waiver of the 45-day advance)
filing requirements of §204.7 and)
Notice of intent to resume interstate)
scheduled air transportation)
)

DOCKET DOT-OST-2020-0134

Essential Air Services at)
)
ST. PAUL, ALASKA)
)
)
Under 49 U.S.C. 41731 *et seq.*)
)

DOCKET DOT-OST-2019-0038

**SURREPLY OF ALASKA CENTRAL EXPRESS, INC.
TO THE JOINT MOTION AND REPLY OF
FLOAT ALASKA, LLC AND CORVUS AIRLINES, INC.**

On August 25, 2020 FLOAT Alaska and Corvus Airlines, Inc. (“New Corvus”) filed a reply to the Opposition of Alaska Central Express, Inc. (“Alaska Central”) to the claim of New Corvus that it is the successor to the pre-bankrupt entity known as Corvus Airlines, Inc. (“Old Corvus”). The New Corvus reply (“New Corvus Reply”) chastises Alaska Central for restating its arguments why New Corvus cannot be considered a successor to Old Corvus. Also New Corvus argues that Alaska Central’s Opposition did not address the issues relevant to the Application of New Corvus in Docket DOT-OST-2020-0134 to resume operations and to do so on less than 45 days advance as required by section 204.7(b). In this Surreply Alaska Central

responds to the arguments of New Corvus to set the record straight and to be certain the Department has all of the necessary facts before it prior to its rendering a decision.¹

On page 2 of the New Corvus Reply, New Corvus accuses Alaska Central of merely “regurgitating” its arguments that New Corvus cannot be deemed a successor to Old Corvus. Yes, Alaska Central quoted and requoted in both its pleadings the same two important sections of the Bankruptcy Court Sale Order (Section V. K, page 4 and VII. P., page 7) noting that these sections of the Sale Order preclude New Corvus from holding itself out as a successor to Old Corvus. Not once but twice Alaska Central gave FLOAT Alaska/New Corvus the opportunity to respond to the substance of the position of Alaska Central and to dispute the plain meaning of the terms of the Sale Order. Twice FLOAT Alaska/New Corvus, by its silence, declined to do so and based on the non-responsiveness of New Corvus, DOT should come to the obvious conclusion that the applicant has no answer to the charge that it cannot be a successor to Old Corvus. Hence, the Department should not treat New Corvus as such and should require New Corvus to file for a new certificate under 49 U.S.C. § 41102 and in so doing establish its fitness to engage in air transportation as the Department is required to find in accordance with 49 U.S.C. § 41102(b)(1). Stated succinctly, New Corvus did not purchase Old Corvus as a going concern.

The irony of the situation is that the Bankruptcy Court included the provisions in the Sale Order cited by Alaska Central to protect FLOAT Alaska/New Corvus from possible claims of successor liability—meaning if New Corvus were to hold itself out as continuing the business of Old Corvus, as it is now attempting to do, it could become liable for the debts of Old Corvus

¹ Good cause exists for the Department to accept this Alaska Central Surreply. To the extent necessary, Alaska Central hereby moves for leave to file this Surreply.

under the well understood principle of successor liability. And these debts are substantial. The Debtor's Disclosure Statement for the Chapter 11 Plan of Liquidation estimates unsecured claims against the Debtor of from \$125 to \$149 million with a 0% percent chance of recovery from the Debtors.² By holding itself out as a successor to Old Corvus, New Corvus is taking a risk that one or more of these unsatisfied creditors or even secured creditors that likewise failed to recover anything as a result of the liquidation of the property of the Debtor's Estate could seek to bring an action against FLOAT Alaska under the theory of successor liability as recognized in the State of Alaska.³ Such a claim would be easy for the creditors to frame by simply pointing to the many instances where New Corvus is holding itself out and operating as the successor to Old Corvus, or at least attempting to do so. New Corvus should not benefit from the issuance of the Bankruptcy Court Sale Order, and the successor liability protections the Court included therein, and then turn around and claim to the Department that it is the successor to Old Corvus. And the Department should not aid New Corvus in doing so by treating New Corvus as Old Corvus. In this regard note that Old Corvus is not applying for the authority under 49 U.S.C. § 41105 to transfer the certificates held by Old Corvus to New Corvus, but rather to permit what was Old Corvus to resume operations under Old Corvus' existing DOT-issued certificates. There can be no clearer indication that New Corvus is planning to hold itself out as the same legal entity that constituted Old Corvus (or a continuation thereof) when the Sale Order made a finding that New Corvus would not do so if the sale was approved.

² See Disclosure Statement, Exhibit B, Liquidation Analysis (found at pdf page 128 <https://cases.stretto.com/public/X065/10215/PLEADINGS/1021506092080000000065.pdf>)

³ See *Savage Arms, Inc. v. Western Auto Supply Co.*, 18 P.3d 59 (2001).

As to the comment of New Corvus that in its August 24, 2020 Opposition Alaska Central did not challenge the substance of the Application/Notice in Docket DOT-OST-2020-0134 (New Corvus Reply, p. 2), Alaska Central chose to base its Opposition to New Corvus on its deviation from the terms of the Sale Order. However, the inadequacy of the New Corvus Application/Notice is now very much in issue as raised by J&M Alaska Air Tours, Inc. d/b/a Alaska Air Transit (“AAT”) that filed in opposition to the New Corvus Waiver of the 45-Day Notice to Resume Operations, and moved that the waiver request either be dismissed or stayed until New Corvus files with the Department all of the information required to be submitted in accordance with the requirements of 14 C.F.R. § 204.3 (“AAT Reply”). AAT’s filing provided detailed comments explaining how the Application/Notice failed to comply with the evidentiary requirements of Section 204.7(b). The twenty enumerated evidentiary deficiencies are set out on pages 4-17 of AAT’s Reply dated August 25, 2020. The Department will obviously have to address these deficiencies as it considers the New Corvus request to resume operations.

Alaska Central recognizes that AAT has advised the Department by letter dated August 26, 2020 that in light of the decision of New Corvus not to seek to resume service to McGrath, with or without subsidy, announced in a letter from counsel for New Corvus counsel filed in McGrath EAS *Proceeding* (Docket DOT-OST-2017-0108) also dated August 26, 2020, AAT withdrew its Reply described above. The withdrawal of the AAT Reply does not diminish the arguments of AAT that carefully detailed all of the evidentiary deficiencies in the New Corvus Application/Notice. Specifically, AAT uncovered no less than 20 specific instances where New Corvus failed to file all of the information required by section 204.3 for carriers seeking to resume service after a period of dormancy. AAT Reply, pages 4-14. The withdrawal of the AAT Reply does not diminish in the least the failure of New Corvus to meet all of the

evidentiary requirements of section 204.3 that the Department must still address.⁴ The Fitness Division has a solid and well-earned reputation for requiring carriers and new entrants alike to comply with the provisions of section 204.3 and whether or not AAT withdrew its objections to the New Corvus Application, the Department must discharge its responsibility to see to it that New Corvus supplies the information required by rule before a carrier can initiate or resume operations.⁵ To use the old expression, “you can’t unring a bell”. Only when all of the required evidence of fitness is submitted for review and analysis by the Department can it be said that the statutorily required carrier fitness test will have been satisfied. 49 U.S.C. § 41102(b)(1). AAT’s recitation of the missing information should guide the Department into its inquiry of New Corvus’ fitness.

Finally, the New Corvus Reply makes reference to the written position of St. Paul Island filed in the ongoing St. Paul EAS Proceeding. (Docket DOT-OST-2019-0038). Alaska Central filed its proposal to serve St. Paul. No other authorized carrier did so. New Corvus somewhat presumptuously assumes it will resume serving St. Paul under the prior award to Old Corvus.⁶ While St. Paul’s comments question aspects of the Alaska Central service proposal, New Corvus’ Reply distorts St. Paul’s comments by selectively quoting on pages 4 and 5 of its Reply from the St. Paul comments. Alaska Central will provide responsive comments to those

⁴ Although New Corvus supplemented its Application to resume service on August 27, 2020, the supplement does not begin to address all of the 20 deficiencies detailed by AAT that remain to be satisfied.

⁵ Although New Corvus casts its request as seeking approval to resume operations, New Corvus cannot be viewed as a successor of Old Corvus for the reasons cited by Alaska Central and hence the Department should appropriately view the matter as New Corvus applying for initial air carrier authority.

⁶ The Department at page 2 of Order 2020-6-16 states that it could terminate the St. Paul carrier selection case if “RAVN resumes EAS for St. Paul... or if an entity that acquires RAVN assumes the EAS contract.” However, as noted, Old Corvus (RAVN) was not acquired by New Corvus as a going concern and hence, DOT’s conditions precedent to termination of the St. Paul *Proceeding* cannot be satisfied.

submitted by the Community in a separate filing. Attempting to inject the issue of which carrier is in the best position to serve St. Paul with passenger service is premature at this junction since New Corvus does not even have the required authority to provide the service. Unless and until the Department grants New Corvus the authority to provide air transportation, the issue of which carrier is best equipped to serve St. Paul is untimely.

Nonetheless, as New Corvus has raised the issue, the Department should take note that the Community is uncertain that New Corvus will in fact be awarded the authority necessary to resume service and then, if so, will be in a position to provide “an acceptable safe and reliable” level of service. Community Comments, page 3. The position taken by the Community is one that takes into account the possibility that New Corvus will not be in a position to serve St. Paul within a reasonable period of time. This statement implicitly recognizes the fact that New Corvus needs authority from DOT and FAA and that New Corvus cannot dictate the results of the actions of the agencies. Finally, New Corvus failed to note that the Community expressed its appreciation to Alaska Central in the following terms:

Over the years ACE has provided important and necessary aviation services for SPI. This is particularly the case for movement of mail and air freight. These services have continued during the current challenges posed by Ravn’s bankruptcy and the COVID pandemic. The community greatly appreciates ACE’s continued commitment to provide services at SPI.

St. Paul Island Community Comments, page 2.

The Community goes on to support an award to Alaska Central absent other possible expressions of interest and to urge that Alaska Central increase its flight frequency if supported by traffic levels. Alaska Central specifically stated in its EAS proposal dated August 3, 2020 that as traffic returns from post-Covid levels, Alaska Central was committed to increasing its frequency of service to the Island. Alaska Central Proposal, page 2. The picture of the St. Paul Community

views New Corvus attempts to paint is misleading to the extent it intentionally avoids all mention of the Community's full views on the proposal of Alaska Central to serve St. Paul and quotes only from the comments that offer some but not unequivocal support for New Corvus.

The Department is urged by Alaska Central to carefully consider the terms of the Sale Order and to reject the claim of New Corvus that it is the legal successor to Old Corvus. The Department must also address the numerous shortcomings of the section 204.3 submission by New Corvus. These considerations are completely independent of the carrier selection process in the St. Paul EAS *Proceeding*.

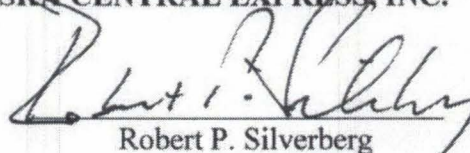
Respectfully submitted,

SILVERBERG GOLDMAN, PLLC

Attorneys for

ALASKA CENTRAL EXPRESS, INC.

By:



Robert P. Silverberg

Dated: September 1, 2020

Service List

Venkatesh.Paluvai@dot.gov

laura.remo@dot.gov

Damon.Walker@dot.gov

Kevin.Schlemmer@dot.gov

Venkatesh.Paluvai@dot.gov

Barbara.Snoden@dot.gov

pazavadil@stpaulak.com

mjmerculieff@aleut.com

rob@floatshuttle.com

plestenkof@cbsfa.com

jacob@stpaulak.com

chrism@tdxcorp.com

mateo@mpstrategies.net

robert.cohn@hoganlovells.com

patrick.rizzi@hoganlovells.com