

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

Issued by the Department of Transportation  
on the 24th day of December, 1996

SERVED: December 31, 1996

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1996/1997 BRAZIL ALL-CARGO CHARTER : DOCKET OST-96-1242  
PROCEEDING (PHASE II) :  
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**FINAL ORDER ALLOCATING ADDITIONAL CHARTERS**

**Summary**

By this order we allocate the 300 additional charters available for U.S.-Brazil all-cargo charter operations as follows: Southern Air Transport (SAT)-75 charters, Florida West International Airways-25, Tower Air-25 charters, and the charter pool-175 charters. We also modify the charter pool rules to permit new entrant carriers to apply for up to eight flights each month.

**Background**

By Order 96-12-5, we tentatively allocated the 300 additional charter flights available for all-cargo services in the U.S.-Brazil market as follows: SAT-75 charters, Tower Air-25 charters, and the charter pool-200 charters.<sup>1</sup> The additional 300 charters became available as a result of a Memorandum of Consultations signed by representatives of the United States and Brazil in October 1996. Nine carriers had applied for allocation of the 300 flights. In addition to these allocations, we also proposed changes to the charter pool rules to permit greater access to the pool by new entrants and by incumbent carriers that had used a significant portion of their allocations. Objections to the Department's tentative decision were due December 16 and answers to objections were due December 19.

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<sup>1</sup> Under the aviation agreement with Brazil, U.S. carriers are entitled to operate a total of 450 round-trip all-cargo charters each calendar year (July 1 through June 30). The Department allocated those flights by Order 96-7-15. The additional flights represent an increase to 750 charters per charter year.

## **Objections and Responsive Pleadings**

Florida West International Airlines, Inc. and United Air Lines, Inc., filed objections to our tentative decision. SAT and Tower filed answers to those objections.

Florida West objects to our decision not to allocate it any of the 300 additional charters. Florida West contends that like SAT and Tower, it has operated a substantial portion of its existing allocation and thus should have been allocated a portion of the 300 flights. Specifically, Florida West states that through December 16 it has operated 43 of its existing allocation of 53 charters and will use the majority of the remaining charters by the end of 1996. It further states that, based on actual use through November, of the carriers allocated flights in the initial allocation (Order 96-7-15) only two carriers have operated more flights than Florida West (Millon and SAT) and only one of these (SAT) is still operating. Florida West argues that based on the more recent data, it is entitled to an additional allocation of at least 25 flights.

United objects to the Department's tentative decision to the extent that it restricts the access of incumbent combination service carriers serving Brazil to the charter pool for all-cargo charters. United argues that scheduled combination carriers serving the Brazil market are not permitted to use their frequencies to provide all-cargo services and, thus, should be considered new entrants to the market and permitted to apply for up to eight weekly flights from the charter pool at the same level as proposed for new entrants in the Department's show-cause order. United states that it is taking delivery of all-cargo configured aircraft next year and may seek to operate the aircraft on an ad hoc basis in the Brazil market. It further states that Tower Air, a carrier authorized to conduct scheduled combination services, holds an advance allocation of cargo charters and, under the Department's show-cause order, will be permitted to obtain up to eight monthly flights from the charter pool provided it first uses the majority of its existing charter allocation. United contends that other scheduled combination carriers should be permitted to do so as well on an equal basis. For these reasons, United seeks modification of the charter pool rules in order to facilitate all-cargo services by incumbent combination carriers.

SAT supports the Department's tentative decision and argues that the needs of Florida West and United can be met through the charter pool.

Tower does not oppose Florida West's request provided that it does not affect the allocation made to Tower in the show-cause order. Tower also does not object to United's request regarding combination carrier access to the charter pool.

## **Decision**

We have decided to make final our tentative allocations of 75 additional flights to SAT and 25 to Tower Air, although as discussed below, we will adjust SAT's allocation based on additional flights it has obtained from the charter pool. We will also modify

our tentative decision in order to allocate 25 of the 300 charters to Florida West International Airlines, thereby reducing to 175 the number of additional charters put in the charter pool for distribution on a first-come, first-served basis. In addition, we will finalize our proposal to amend the existing charter pool rules to permit new entrant carriers to apply for up to eight flights per month (an increase from four per month under the existing rules). We have decided not to amend our charter pool rules with respect to scheduled combination carriers at this time, as United requests.

In making our tentative decision, we stated that the additional charters offered us the opportunity to provide a greater opportunity for new entrant carriers to serve the market as well as to enable existing carriers to continue and/or expand their operations. With these considerations in mind we tentatively found that it was in the public interest to put the majority of the available flights in the charter pool to facilitate new entrant services and to modify the charter pool rules to permit new entrant carriers to obtain up to eight flights each calendar month for their services. We also tentatively found that the remaining flights should be used to facilitate continuation of services by carriers that currently serve the market and already had used a substantial portion of their existing allocations. In that regard, we noted that SAT and Tower Air, two of the six carriers that held charter allocations, had used a substantial portion of their allotted flights and had demonstrated a continued need for their services. We proposed to allocate 75 flights to SAT and 25 to Tower. The other carriers had a significant portion of their allocations remaining to support services through the charter year, and we therefore did not propose additional allocations to those carriers.<sup>2</sup>

No party has objected to our proposed allocations to SAT and Tower. Therefore, we make final our findings that additional allocations to these carriers are in the public interest. Similarly, no party objected to our tentative decision to accommodate new entrant services through the charter pool and to amend the charter pool rules to permit new entrant carriers to apply for up to eight flights per month to support their services. Therefore, we will make final that aspect of our tentative decision.

The two objections to our tentative decision involve whether additional allocations to incumbent carriers are warranted and the degree of access that scheduled combination carriers should have to the charter pool.

Florida West argues that through December 16, it has operated 43 of its allotted 53 flights and, thus, contrary to the Department's statements in its show-cause order, Florida West does not have the majority of its allocation available and will require additional flights to maintain its services in the market. Given Florida West's previous record of operations in the market and use of its existing allocation, we are persuaded that the carrier has demonstrated that it warrants an additional allocation and we have decided to modify our tentative decision in order to allocate the carrier an additional

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<sup>2</sup> We noted in our order that Millon Air had operated a substantial portion of its services, but had recently ceased operations, and thus could not resume Brazil service until it had again been found fit by the Department. Order 96-12-5 at 6.

25 flights. Similar to SAT and Tower, Florida West has used over 50 per cent of its existing allocation and there is reason to believe that there continues to be demand for its services. Against this background, we believe that the circumstances justify modification of our tentative decision in Order 96-12-5 and award of an additional allocation to Florida West. The additional 25 flights will facilitate continuation of Florida West's services in the market. Furthermore, we note that beginning in January, it also will be able to supplement its services using flights from the charter pool. While we recognize that Florida West would prefer a greater number of flights, we believe this allocation best balances the needs of all carriers in the market given our desire to provide opportunities for both new entrant and incumbent carriers.

We will allocate the flights to Florida West by reducing the number of flights proposed for the charter pool to a total of 175 rather than 200, as originally proposed, as opposed to adjusting our allocations to the other incumbent carriers. While this is a slight reduction, we believe that these flights coupled with the flights already in the charter pool (40) will still provide new entrant carriers with a meaningful opportunity to commence competitive services. On the other hand, SAT, Tower, and Florida West have already used a significant portion of their allocations and demonstrated a continuing need for their services. In these circumstances, and given the number of charters at issue, we do not believe that reducing allocations to SAT and Tower to facilitate Florida West's services best serves the public interest.

United seeks modification of the charter pool rules to permit scheduled combination carriers access to the charter pool at the same level as new entrant carriers, arguing that it may be interested in operating all-cargo charter flights in the market some time in the future. We have decided not to modify the charter pool rules as United requests at this time. United has made no specific proposal for cargo operations in the Brazil market. Indeed, United does not expect delivery of its first all-cargo aircraft until Spring 1997, nearly the end of the current Brazil charter year.<sup>3</sup> In these circumstances we are not now disposed to respond favorably its request. United has cited our recent treatment of Tower as support for its position. However, the fact that Tower, which provides scheduled combination services in the Brazil market, also holds a Brazil cargo charter allocation and may use the charter pool, does not persuade us to make a general modification of the rules. Unlike United, Tower has had a history of operating both passenger and cargo charters in the Brazil market and has a considerably smaller presence in the scheduled combination market than the other combination carriers. Should United commence scheduled all-cargo services and remain interested in operating Brazil cargo charters, we certainly can consider these factors at the time of subsequent Brazil cargo charter allocations.

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<sup>3</sup> United states that it is in the process of developing an all-cargo operation, including the acquisition of aircraft for such services. It states, however, that it intends to use these aircraft primarily for transpacific scheduled services. See Objections of United at 1.

### Reporting Requirements

Finally, we as we stated in Order 96-12-5, we remind incumbent and new entrant carriers of the specific reporting requirements attached to their allocations and to notices of consistency for flights distributed from the charter pool. Incumbent carriers must file a monthly report specifying the number of flights operated, together with other information set forth in Order 96-7-15. Carriers operating from the pool must report no later than the tenth day of the following month, notifying the Department how many of the flights approved by the notice were operated. This information is essential in determining the level of services operated by incumbents and ensuring that flights not operated under notices of consistency are returned to the pool and made available to other carriers. In this regard, carriers that conduct operations under an advance allotment as well as from the charter pool, must make clear the number of flights operated from each type of allocation so that we can maintain an accurate accounting of the number of flights in the charter pool as well as the carriers' allocations. Given the importance of this information, we put all carriers (incumbent and new entrant) on notice that failure to adhere to the reporting requirements could adversely affect consideration of their future applications for flights from the charter pool.

### SAT's Allocation

In our show-cause order, we proposed to allocate SAT 75 of the 300 additional charters available for all-cargo service. Since our show-cause order, SAT has applied for and obtained authority to conduct twelve charters from the charter pool. That allocation, however, was made with the condition that SAT's final allocation in this proceeding would be reduced to reflect the flights that it obtained from the charter pool pending a final decision in this proceeding. While it was our conclusion that SAT should be allocated additional flights to continue its operations, it was not our intent that SAT benefit from the allocation procedures as well as from access to the charter pool in advance of the other carriers holding allocations.<sup>4</sup> Our allocation of flights from the charter pool was intended solely to facilitate SAT's continued operations pending a final decision in this proceeding. Therefore, we will modify SAT's allocation to reflect a total of 63 flights, with the balance of 12 flights returned to the charter pool to replace those allotted earlier to SAT in support of its operations.

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<sup>4</sup> See Order 91-10-20 in which we adopted a similar policy with respect to an allocation to World Airways. Order 91-10-20 at 3.

**ACCORDINGLY,**

1. We allocate the 300 additional charters for U.S. carrier U.S.-Brazil all-cargo services as follows:

Southern Air Transport	63 (75-12 obtained from charter pool)
Tower Air	25
Florida West	25
Charter Pool	187 (175 plus supplement of 12 from SAT)
Total	300

2. We amend ordering paragraph 3(a) of Order 96-7-15 to read as follows:

3.(a) Distributions will be made to eligible applicants on a first-come, first-served basis with operations under such distributions limited to eight per calendar month for each new entrant applicant; and four per month for each incumbent carrier applicant until such time after January 1, 1997, that the incumbent has operated 75 per cent or more of its total allocated flights at which time it may apply for up to eight flights per month;<sup>5</sup>

3. To the extent not granted, we deny all requests in this docket; and

4. We will serve this order on ABX Air, Inc; Arrow Air, Inc; Atlas Air, Inc.; Fine Air, Inc.; Florida West International Airlines, Inc.; Millon Air, Inc.; Southern Air Transport, Inc.; Tower Air, Inc.; TransContinental Airlines, Inc.; USA Jet Airlines, Inc.; the Government of Puerto Rico; the Ambassador of Brazil in Washington, D.C., and the U.S. Department of State (Office of Aviation Negotiations).

By:

**PATRICK V. MURPHY**  
**Deputy Assistant Secretary for**  
**Aviation and International Affairs**

(SEAL)

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<sup>5</sup> A new entrant airline is defined as a U.S. carrier that was not granted an allocation of flights by Order 96-7-15 or in this proceeding, but does not hold scheduled authority to serve the U.S.-Brazil market; an incumbent carrier is a carrier that has been allocated flights by Order 96-7-15 or in this proceeding. Except as otherwise noted in the text of this order, we make no changes to the provisions of Order 96-7-15 which provide that carriers holding scheduled combination or all-cargo authority will not be eligible to obtain flights from the charter pool until after April 30, 1997.

