



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

Issued by the Department of Transportation  
on the 29th day of December, 1998

SERVED: December 29, 1998

**1998 U.S.-Brazil Combination Service Case**

**Docket OST-98-3863**

**ORDER TO SHOW CAUSE**

**Summary**

By this order, we tentatively select Continental Airlines, Inc. for the primary award in this proceeding to operate seven weekly frequencies in the Houston-Sao Paulo market and Delta Air Lines, Inc. for the backup award for the New York-Brazil market. We also tentatively propose to issue Continental and Delta certificates of public convenience and necessity for their proposed services. In addition, we tentatively grant United Air Lines, Inc., on an interim basis, seven weekly frequencies for Los Angeles-Sao Paulo services and tentatively select American Airlines, Inc., on an interim basis, for backup to United's award should United not institute service.

We will afford interested parties 10 calendar days to file objections to our tentative findings and conclusions and 5 calendar days to file any answers to such objections.

**Background**

The U.S.-Brazil market is the largest U.S.-South America market, generating over 2.5 million annual passengers on U.S. and foreign carrier services and has steadily grown over the past six years.<sup>1</sup> Under the U.S.-Brazil Air Transport Agreement, as amended, the United States may designate a total of four U.S. carriers for scheduled combination services, and effective October 1,

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<sup>1</sup> For the year ended December 31, 1997, Department T-100 data indicate that 1.15 million passengers traveled between the United States and Brazil on U.S.-flag services and 1.48 million passengers traveled on foreign-flag carrier services. According to O&D data, Sao Paulo and Rio de Janeiro are the most popular Brazil destinations, accounting for over 800,000 passengers carried on U.S. carrier services (562,070 in the Sao Paulo market and 277,790 in the Rio de Janeiro market).

1998, the designated carriers may operate collectively a total of 105 weekly frequencies. American, Continental, Delta and United hold the four U.S. carrier designations. Weekly frequencies are currently allocated among them as follows: American, 49; United, 28; Continental, 14; and Delta, 7. That leaves seven unallocated, and those seven are the subject of this proceeding.

By Order 98-5-27, the Department (1) instituted this proceeding to select a carrier to operate the newly available seven weekly frequencies and (2) established a procedural schedule for the proceeding. In our instituting order, we stated that in determining which carriers/gateways would be authorized, our principal objective would be to maximize the public benefits that would result from award of the authority in this case. In this regard, we stated that we would consider which applicants would offer and maintain the best service for the traveling and shipping public, and the effects of the service proposals on the overall market structure and level of competition in the U.S.-Brazil market and any other market shown to be relevant, in order to promote an air transportation environment that would sustain the greatest public benefits.

### **Applicant Proposals**

All four designated U.S. carriers filed applications for the seven available weekly frequencies and submitted direct and rebuttal exhibits and briefs.<sup>2</sup> The New York Parties<sup>3</sup> and the Massachusetts Port Authority (Massport) filed in support of Delta's proposal. The City of Houston and Greater Houston Partnership (the Houston Parties) filed in support of Continental's proposal.<sup>4</sup>

Of the four applicants in this proceeding, Continental and Delta seek certificate authority as well as frequency allocations to operate their proposed services.<sup>5</sup> American and United seek only additional frequencies since they already hold the necessary certificate authority for their proposed U.S.-Brazil services. Continental, Delta, and United propose service with wide-body aircraft, and American proposes service with narrow-body aircraft. Each applicant has a Brazilian-flag code-

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<sup>2</sup> In addition, each applicant submitted letters in support of its proposal. In connection with its Direct Exhibits, Delta filed a motion for confidential treatment pursuant to Rule 39 concerning portions of exhibits that contain confidential international O&D data not publicly released under the Department's instituting order. See below at 12.

<sup>3</sup> The New York Parties represent the Empire State Corporation, the Queens Borough President, and the Port Authority of New York and New Jersey.

<sup>4</sup> In connection with its rebuttal exhibits, the Houston Parties filed a motion for confidential treatment pursuant to Rule 39 concerning portions of exhibits that contain confidential international O&D data not publicly released under the Department's instituting order. See below at 12.

<sup>5</sup> Continental's application requests certificate authority between Houston, Texas, on the one hand, and Sao Paulo, Rio de Janeiro, Belo Horizonte, Brasilia, Curitiba and Porto Alegre, Brazil, on the other hand, and seeks authority to combine this authority with Continental's other exemption and certificate authority consistent with applicable international agreements. Delta's application requests certificate authority between New York (JFK) and Brazil and beyond Brazil to a point or points in Paraguay, Uruguay and/or Chile.

sharing partner, and Delta and United state that they will receive traffic support from their code-share partners.<sup>6</sup>

Continental proposes nonstop service from its hub at Houston to Sao Paulo. Delta proposes nonstop service from New York (JFK) to Sao Paulo, with behind gateway single-plane service from Boston and beyond single-plane service to Montevideo, Uruguay.<sup>7</sup> United proposes nonstop service from Los Angeles to Sao Paulo. American proposes service to a new city, Manaus, from its Miami hub. The carriers' proposals are fully described in the chart in Appendix A.

### **Positions of the Parties**

**Continental** argues that it should be allocated the available seven weekly frequencies for its proposed new Houston-Sao Paulo service, which will open a new gateway for U.S.-Brazil traffic. In support of its proposal, Continental states that it will carry more U.S.-Brazil passengers than any other applicant and will offer first-time nonstop Brazil service to Houston passengers. It further argues that it will add an additional domestic network to the U.S.-Brazil hub services currently available and will compete effectively with American's Dallas/Fort Worth-Sao Paulo service. Continental further states that it will provide an alternative to American's Miami and Dallas/Ft. Worth hubs, Delta's Atlanta hub, and United's Miami gateway and Chicago hub and provide enhanced competition between the United States and Brazil. Continental argues that the other three applicants would duplicate already existing service in the U.S.-Brazil market and, thus, would not maximize use of this valuable opportunity. It maintains that its service from a new gateway for Brazil in an under-served region of the United States will provide more U.S. carrier access to Brazil and will enhance competition.

Continental's proposal is supported by the Houston Parties, which state that Houston is the nation's fourth most populous city and the second largest U.S. port for trade with Brazil in dollar terms and the largest in terms of exports. They maintain that an award to Continental will result in the most improved intergateway competition for a large portion of the United States and that only its selection will create a new and effective gateway for U.S.-Brazil travelers.

Continental's proposal is criticized by the other applicants and by Massport. American, United, and Massport argue that Continental would duplicate service that American and United already provide via their respective mid-continent hubs at Dallas/Ft. Worth and Chicago or other existing gateways. Delta argues that Continental's proposal would provide no new or enhanced service benefits; that it would serve fewer local market passengers than Delta's proposal; that Continental

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<sup>6</sup> American has a code-share relationship with TAM-Transportes Aereos Meridionais, S.A.; Continental has a code-share relationship with Viacao Aerea Sao Paulo, S.A. (VASP); Delta has a code-share relationship with Transbrasil S/A Linhas Aereas; and United has a code-share relationship with Varig, S.A. See Direct Exhibits AA-611; CO-T-1 and CO Brief at 6, DL-T-2 at 10; UA-T-1 at 6, UA-T-2 at 5-6, and UA-203.

<sup>7</sup> We stated in our instituting order that the U.S.-Brazil agreement provides for beyond services to Paraguay, Uruguay, and Chile and that we would consider the award of beyond authority set forth in the agreement, provided that such authority was consistent with, and may be implemented under, the relevant bilateral aviation agreements. (Order 98-5-27, at 3-4.)

has inflated its traffic forecast and has no basis for the claimed 95% market share of the Houston-Sao Paulo market; and that an award to Continental would thus be a waste of valuable rights. In response to Continental's contention that Houston warrants nonstop service, United maintains that Continental has adequate frequencies to accomplish this and is wasting seven of its fourteen frequencies by operating two daily services between Newark and Brazil.

**Delta** argues that it is the U.S. carrier with the least capacity to Brazil and that it should be awarded the available seven weekly frequencies for its proposed Boston-New York-Sao Paulo service with continuing single-plane Montevideo service. Delta states that the Department could significantly enhance competition in the U.S.-Brazil market by awarding Delta the needed frequencies since Delta's competitors hold between two and seven times the number of Brazil frequencies authorized to Delta. It argues that every U.S.-Brazil competitor except Delta serves Sao Paulo nonstop from New York, which is the largest local market at issue in this case; that JFK service is the critical missing piece in Delta's Latin America expansion program; that its Boston-New York-Sao Paulo-Montevideo proposal will be the anchor route for an entire array of planned new services from JFK to South America; and that its large competitive presence at JFK will enable it to provide online Brazil service to over 20 European cities via JFK. Delta states that its proposal marks the first single-plane service between Boston and any city in South America and notes that Boston is the third largest local market without direct service to Brazil. It maintains that the Department can maximize public benefits and best ensure effective competition by granting Delta's application. Delta states that it would maximize efficient use of limited U.S.-Brazil and beyond rights by timing its JFK-SAO flight to cross connect with its Atlanta service, permitting Atlanta passengers to make connections at Sao Paulo to/from Montevideo and New York passengers to make connections at Sao Paulo to/from Rio de Janeiro.

Delta's proposal is supported by the New York Parties and Massport. Both note their communities' strong ethnic ties to Brazil and the benefit that would be afforded their communities by increased access to the important U.S.-Brazil/Uruguay markets. The New York Parties also maintain that competition in these vitally important markets will be enhanced if Delta is awarded the available frequencies and permitted service from the New York region.

The other applicants oppose Delta's proposal, arguing that Delta already serves Brazil from five U.S. gateways and that its operations combined with those of its code-share partner Transbrasil give Delta authority to serve as many U.S. gateways to Brazil as any of the applicants in this proceeding; that Delta's proposal places undue reliance on sixth-freedom traffic between Europe and Brazil and that the fundamental purpose of this proceeding is not to serve Europe-Brazil but rather to select a carrier to provide new U.S.-Brazil service. They further argue that New York/Newark does not need additional service and that existing New York (JFK)-Sao Paulo nonstop flights can easily accommodate all of Delta's forecast traffic; that the Department should not give any decisional weight to Delta's behind-gateway proposal, since Delta has demonstrated that it is unable to sustain behind-gateway, single-plane service on Brazil routes; that Delta does not operate a hub at JFK; and that its proposed service extensions at Boston and Montevideo offer no real net benefits to passengers in those markets.

**United** seeks seven additional frequencies to operate a daily nonstop service between Los Angeles and Sao Paulo. United states that its proposed services will connect the largest city in Brazil with the largest U.S. air service market which lacks U.S.-flag services to South America, will provide connecting service to the ten largest markets to Brazil in the Western U.S., and will offer improved online service benefits to 85 cities, including passengers throughout the Western U.S., as well as cities in Canada, Mexico, the Asia/Pacific region and Brazil. Further, United argues that its proposed services will enable West Coast-Brazil passengers to bypass the Miami gateway. United states that existing foreign carrier services are limited to less-than-daily operations and that United's nonstop daily pattern will make travel between Los Angeles and Brazil more accessible to both business and leisure travelers. United further states that its new services will be an integral part of its expanding presence in Latin America.

The other parties oppose United's proposal, arguing that United relies too heavily on sixth-freedom Asia traffic; that when its proposal is adjusted to delete this traffic, its load factor declines from 66% to 35%; that United is unlikely to forego the higher yield Tokyo-Los Angeles and Tokyo-Sao Paulo traffic in favor of Los Angeles-Sao Paulo passengers; and that there is no significant demand for the proposed Los Angeles service. Delta adds that the Los Angeles local service area is four times smaller than Delta's New York-Sao Paulo service area. Massport argues that Boston should have its first single-plane service before Los Angeles gets additional nonstop service.

**American** proposes new nonstop service between Miami and Manaus, and would provide the first nonstop service between the United States and Manaus operated by an U.S. carrier. It argues that nonstop service between Miami and Manaus will enable American to use its hub strength at Miami to develop a new market for the benefit of the traveling and shipping public. American further argues that it will provide vigorous competition to the limited services now offered by foreign-flag carriers.

All of the parties argue that American's proposal has previously been considered and rejected by the Department before and should be rejected again in the face of other superior proposals, some of which involve cities with no U.S. carrier service. In this regard, they state that American proposes service with the smallest aircraft, in the smallest market, and in a market that already has nonstop service. They further argue that American could operate the service within its existing frequency allocation, and that given American holds the largest single allocation of frequencies, an additional award to American would offer few competitive or service benefits and would serve only to entrench further American's position in the market.

### **Subsequent Pleadings**

On November 16, 1998, Continental advised the Department that Continental had reviewed its proposed U.S.-Brazil plans and would not be in a position to commence the new service for 18 months. It filed a request to amend any startup and dormancy conditions that would be imposed on the awards in this case and stated that because Brazil has experienced a severe economic downturn since the Department instituted the proceeding, new Brazil service cannot become

economically viable within the required 90 days.<sup>8</sup> Continental urged the Department to award it the seven frequencies and to grant its application for Houston-Sao Paulo authority subject to an extended dormancy period of 18 months.

Delta, United, Massport and the New York Parties filed answers to Continental's November 16 submission.<sup>9</sup> Delta, United and Continental filed replies; Delta filed a surreply, and United submitted a consolidated response.<sup>10</sup> Delta filed a response to United's consolidated response.<sup>11</sup>

Delta reaffirms its desire to offer its proposed services and to commence service in 1999. It acknowledges that its aircraft for the summer 1999 international services have already been committed and seats sold for the summer season. Delta states that it is now prepared to commence proposed U.S.-Brazil-Uruguay services in the beginning of the 1999 winter season.

United states that it continues to be prepared to accept a startup date for its proposed services effective 90 days after a final DOT order allocating the frequencies and that it would be prepared to start as early as April 1, 1999, assuming the Department issues a final decision by December 31, 1998.

Massport opposes Continental's request, and the New York Parties urge the Department to grant Delta's application.

Delta, in its reply, argues that the modest difference between Delta's and United's start dates does not outweigh the superiority of Delta's proposal and further argues that the delay in the issuance of the Department's decision forced its reallocation of aircraft for the summer 1999 season. United, on reply, argues that it should be selected over the other carriers based on its more timely startup, as well as the superior service benefits of its proposal.

Continental, in its reply, states that it now plans to institute its services no later than the end of 1999 and agrees with Delta that a 12-month startup condition would be appropriate. The Houston Parties urge the Department to focus on the question of which proposal is the strongest and produces the greatest public benefit.

In its surreply, Delta argues that Continental has again changed its plans after Delta submitted a response and that rather than beginning services in May or June 2000 as stated in Continental's November 16 filing, Continental now states that it can begin services by the end of 1999. Delta maintains that Continental's startup date is still contingent on its view of whether or not the Brazil

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<sup>8</sup> Continental's request was accompanied by a motion for leave to file an otherwise unauthorized document. We will grant the motion.

<sup>9</sup> By Notice issued November 18, 1998, we established an accelerated timetable for the filing of comments.

<sup>10</sup> Delta's surreply and United's consolidated motion were accompanied by motions for leave to file unauthorized documents. We will grant the motions.

<sup>11</sup> Delta's response was accompanied by a motion for leave to file an unauthorized document. We will grant the motion.

economy has improved and that Continental's attempt to match Delta's proposal should be disregarded.

In its consolidated response, United reasserts its commitment to an April 1, 1999 startup date for Brazil services and urges the Department to award United the frequencies without further delay. United argues that under the Delta and Continental proposals at least an additional 214 frequencies (and perhaps more) would be wasted.

Delta in its response to United argues that it should not be penalized by the processing delay and the impact it has produced on the near-term availability of aircraft for use on the U.S.-Brazil route. It maintains that its proposed winter season 1999 start date is reasonable and does not detract from the superior public benefits offered by its service proposal.

On December 14, 1998, Continental filed a response to Delta's comments, questioning Delta's commitment to serve the Brazil route.<sup>12</sup>

### **Tentative Decision**

We have tentatively decided to: (1) allocate the seven available frequencies to Continental for its proposed Houston-Sao Paulo service, (2) issue Continental a certificate of public convenience and necessity authorizing such service, (3) select Delta for backup authority to Continental and (4) issue Delta a backup certificate of public convenience and necessity for New York-Sao Paulo service.<sup>13</sup> In light of Continental's and Delta's delayed startup, we have tentatively decided to permit United to use the seven available frequencies on an interim basis and to select American as backup to United for that interim period.

Based on our review of the record, we tentatively conclude that Continental's proposal will offer the greatest overall public benefits.

Continental is the only applicant in this proceeding that would provide consumers with the special convenience of nonstop service in a market that does not receive it. It is also the only applicant that would open a new gateway to Brazil. These considerations provide Continental with an initial advantage in this case because they create the opportunity for significant service and competitive benefits that are not available under the other proposals.

Houston is the largest U.S. city now without nonstop service to Brazil. All of the other applicants have chosen gateways that already have nonstop service to Brazil. These gateways now host seventy-five percent of the nonstop departures in the U.S.-Brazil market.

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<sup>12</sup> Continental's response was accompanied by a motion for leave to file an unauthorized document. We will grant the motion.

<sup>13</sup> Based on officially noticeable data, we find that all applicants are fit, willing and able to provide the proposed services. All of the applicants have previously been found fit to provide scheduled foreign air transportation of persons, property, and mail. See, *e.g.*, Order 98-8-18 for American; Order 97-11-27 for Continental; and Order 98-4-3 for Delta and United.

Moreover, Houston is one of this country's major airline hubs, and Continental proposes to use it to benefit a large number of local and connecting passengers. Continental's proposed new gateway service would connect to thirty-seven behind-gateway points. The record supports a finding that Continental would provide more consumers and more cities with one-stop connecting service than any other applicant in this proceeding.

Continental's proposal also offers significant structural benefits. Continental would provide intergateway competition with Dallas/Fort Worth, Atlanta and Miami, as well as regional competition with American from Dallas/Fort Worth, thereby providing passengers not in the local market a range of travel alternatives for services to Brazil. The additional Continental service would also serve flow traffic from the western states. To this extent, it would thus compete with the foreign-flag service provided at Los Angeles. We already pointed out in our 1997 Brazil proceeding how the frequency constraints of the U.S.-Brazil market, coupled with the fact that three carriers—American, United, and Varig—hold the majority of those frequencies, make the competitive benefits to be obtained from a new frequency allocation particularly significant. Order 97-3-8 at 6. These considerations continue to apply to the U.S.-Brazil market. In this regard, we tentatively find that the strength of the Continental network at its Houston hub offers compelling procompetitive elements that neither of the other Sao Paulo applicants match. Finally, since Continental has the second fewest frequencies of the four U.S. carriers seeking an award, we tentatively find that this element, when combined with its other competitive attributes, makes Continental the clearly preferable structural choice.

All this is not to say that the Delta and United proposals are without certain attractive features.

An attractive feature of Delta's proposal is that it would provide the only new one-stop single-plane U.S.-Brazil service in this case (Boston-Sao Paulo). Delta would also provide single-plane service to Uruguay. However, Delta's chosen gateway to Brazil, New York, now receives more service to Brazil than any other, except Miami. Consequently, Continental would provide its chosen gateway with a more significant service upgrade, since Houston is without any nonstop service to Brazil. Continental would also provide far greater on-line service benefits than Delta. While Delta would offer on-line connecting service behind New York, Continental would offer such service to more than twice as many points, benefiting substantially more consumers than Delta. These considerations provide Continental with a service benefit advantage over Delta that is not offset by other features of Delta's proposal, including its proposed service to Uruguay.

Continental's advantage over Delta in this case is increased by its ability to provide greater competitive benefits. We appreciate that the selection of Delta would enhance its competitive presence in the market, reduce airline concentration in the market, and promote intragateway competition. These are important potential public benefits. However, the selection of Continental would also enhance the ability of a relatively new Brazil entrant to compete and to reduce concentration. Moreover, the interrelationship between Continental's route system and its Houston hub allows it to provide significantly greater competitive benefits than Delta's system in and out of New York.

It is in these circumstances that we have tentatively decided to select Continental over Delta, noting that were it not for the even more compelling series of benefits deriving from Continental's proposal, Delta would be our tentative choice in this case.

For its part, United would introduce first U.S.-carrier service in the Los Angeles market, which is the largest U.S. gateway without such service, and provide intragateway competition with four foreign-flag carriers. United has also proposed the greatest cargo capacity in this case. Although United's proposal would improve service in the U.S.-Brazil market, it does not offer the service and competitive benefits presented by Continental's proposal.

As noted, Continental would provide nonstop service in a market that now has none. By contrast, United's Los Angeles gateway already has nonstop service to Brazil, and United already offers code-share service between Sao Paulo and Los Angeles on Varig flights. In addition, Continental has proposed on-line connecting service to more points than United, and it is likely that Continental would benefit significantly more passengers with that service than United. It is also likely that Continental would provide more U.S.-Brazil passengers with new or improved service than United. United's proposal relies heavily on Asia-Brazil connecting passengers. This traffic may strengthen United's ability to compete in the Los Angeles-Brazil market, and improve service between Asia and Brazil. But it does not enable United to improve service in the overall U.S.-Brazil market to the extent proposed by Continental. Continental has a marked advantage in this area, and we attached significant weight to this advantage in the context of this case. In these circumstances, any advantage that United may have with other features of its proposal, including its proposed cargo capacity and intention to begin new Brazil service before either Continental or Delta, does not outweigh the overall superior service benefits under Continental's proposal.

Moreover, there is no question that an award to Continental would enhance competition in the U.S.-Brazil market to a far greater degree than an award to United. That advantage stems in large part from the fact that United is a major incumbent in that market. Next to American, United has more access to Brazil than any other U.S. airline, and now serves Sao Paulo via the Chicago, Miami, and New York gateways.

Similar considerations affect American's proposal. It is the dominant U.S. airline in the U.S.-Brazil market, Miami is the dominant gateway to Brazil, and its selection would provide the fewest competitive benefits in the case. In this setting, it is significant that American's proposal does not present sufficient service benefits to offset Continental's considerable advantage in the area of enhanced competition. American does offer the first U.S.-carrier nonstop service in the Miami-Manaus market. But that market already has nonstop service, while Houston has no such service to Brazil. It is also likely that Continental would provide significantly more cities and consumers with the convenience of new or improved on-line connecting service to Brazil than American.

On balance, then, we tentatively do not find that the positive features of either Delta's New York service or United's Los Angeles service outweigh the greater benefits that would be derived from Continental's Houston service. Nor would we tentatively regard American's proposed Manaus service as worthy of selection ahead of any of the preceding three.

## **Backup Award**

We have tentatively decided to grant Delta a backup award to Continental's primary authority. As we indicated, Delta's proposal offers greater service and competitive benefits than any other proposal in this case other than Continental. Selection of Delta for backup services will ensure that, should Continental not inaugurate and maintain service, a carrier will be authorized to enter the market quickly without further regulatory proceedings should its services be needed. As Delta currently provides service in the U.S.-Brazil market and has existing international operations at New York, it is well positioned to step in quickly to institute its proposed service should Continental not inaugurate services or cease service during the first year of operations.

## **Proposed Interim Allocation**

As noted above, we have a strong interest in achieving the most effective use of the valuable route rights at issue. Continental and Delta have now indicated that they are not in a position to offer their services until the winter season 1999. We have taken this matter into consideration in tentatively finding that the selection of either airline would provide greater public benefits than would the selection of American or United. We have concluded that, taking into account all the circumstances presented, the inability of Continental and Delta to start service immediately does not outweigh the other advantages of their service proposals in this case. At the same time, we would like to take action which allows the public to receive the benefits of the superior proposals that we have selected in this case and at the same time, provide for the possibility that consumers may enjoy the benefits of immediate service. We believe that we can do this in the context of this case by granting Continental use of the frequencies beginning December 1, 1999 and by granting United permission to use the frequencies until then. In this regard, we have noted that United has indicated that it can enter the market quickly (within 90 days of issuance of a final order) and that American has said nothing to indicate that it cannot enter the market quickly. In these circumstances, we believe that the immediate public interest would best be served by allowing United to use the available seven frequencies on an interim basis, with American as backup.<sup>14</sup> We propose to make United's interim award effective immediately upon issuance of a final decision in this proceeding and to make the award effective until December 1, 1999, consistent with Continental's service plans for its Houston-Brazil service.<sup>15</sup>

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<sup>14</sup> See Order 94-9-2 at 5.

<sup>15</sup> We propose to require Continental to notify the Department and United, Delta, and American 90 days prior to its proposed inauguration of service in order to facilitate a smooth transition from the interim service.

## **Terms, Conditions and Limitations**

Consistent with our policy with respect to limited-entry routes, we propose that the certificate authority awarded in this case will be in the form of five-year, temporary, experimental certificates of public convenience and necessity under 49 U.S.C. section 41102(c). However, given the unique circumstances of this case, we believe that modification of our normal startup conditions, as well as the backup certificate conditions, is appropriate.

In response to interrogatories included in the evidence request to our instituting order, Continental and Delta stated that they would accept a condition that the carriers would be required to institute service within 120 days. These responses, however, were provided before the carriers changed their proposed startup dates. Given the extended startup already proposed by Continental and Delta and their stated commitment to institute services no later than winter 1999, we propose to make Continental's certificate effective upon issuance of our final order with an expiration date of December 1, 1999, the date on which it has committed to begin service. Given the extended startup period already provided, we tentatively see no need to provide any further startup period for Continental's award. Consistent with our standard practice, should Continental commence service by December 1, 1999, the authorization will continue in effect until five years after its effective date unless the Department earlier suspends, modifies, or deletes the authority.

Due to the extended startup date, our standard one-year backup provisions would not provide a meaningful backup award. Therefore, we propose that Delta's backup award would be effective for a period of eighteen months rather than one year. In addition, while we have tentatively concluded that there is no need for an additional startup period for Continental's award, we recognize that there is considerably more uncertainty with respect to whether the backup award will be implemented, making it more difficult for the backup carrier to plan for its services. Therefore, we have tentatively decided to include in Delta's backup award a 90-day startup provision should its backup certificate be activated. We would also be prepared to make Delta's backup award effective if Continental does not operate all of its allocated frequencies. The frequencies available for U.S.-Brazil services constitute valuable rights that we do not intend to be wasted. Thus, should any portion of Continental's frequencies become dormant under the dormancy provisions set forth in this order, we would be prepared to activate Delta's backup certificate for its New York-Brazil service, even in circumstances where Continental's dormant frequencies were fewer than the seven weekly frequencies Delta sought for its New York proposal. We would then allocate the dormant Continental frequencies to Delta.

As is our standard practice, the authority to be awarded will be only for those points specifically proposed for service in the carrier's service plans and will not include all points in the United States and all points in Brazil and beyond services (other than those specifically detailed in carrier service plans).

We also propose that the Continental/Delta frequency allocations be awarded for an indefinite duration, but subject to the continued effectiveness of the holder's underlying economic authority

awarded here, as well as to our standard condition that we may amend, modify, or revoke the allocation at any time and without hearing, at our discretion.

Finally, consistent with our standard practice, we propose that the frequencies allocated in this proceeding will be subject to our standard 90-day dormancy condition, wherein the frequencies would be deemed dormant if they are not operated for 90 days except where service in the market is seasonal. Where seasonal services are at issue, however, a carrier must notify the Department that its operations are of a seasonal nature; otherwise, the dormancy condition would apply. Under the dormancy condition, if flights allocated are not used for 90 days, the frequency allocation would expire automatically and the frequencies revert to the Department for reallocation.<sup>16</sup>

### **Motions for Confidential Treatment**

Delta filed a Rule 39 motion for confidential treatment of O&D data between the United States and other international destinations other than Brazil. Similarly, the Houston Parties filed a Rule 39 motion for confidential treatment of data not publicly released by the Department regarding international O&D data. No objections to these motions were filed. We have reviewed these submissions under the disclosure guidelines of Rule 39 and have determined that they warrant confidential treatment. Because of the commercially sensitive nature of the information in these documents, including the numbers of passengers from international destinations, we have determined that the documents fall within the Freedom of Information Act exemption for proprietary information and would adversely affect the competitive position of an air carrier in foreign air transportation under section 40115 of Title 49 of the United States Code.<sup>17</sup> Therefore, we conclude that it is in the public interest to grant the separate motions of Delta and the Houston Parties.

### **ACCORDINGLY,**

1. We tentatively select Continental Airlines, Inc. for award of primary authority to engage in foreign scheduled combination air service between the terminal point Houston, Texas, and the terminal point Sao Paulo, Brazil;
2. We tentatively select Delta Air Lines, Inc. for award of backup authority to engage in foreign scheduled combination air service between the terminal point New York, New York and the terminal point Sao Paulo, Brazil with beyond service to Montevideo, Uruguay;

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<sup>16</sup> Consistent with our standard practice, the 90-day dormancy period would begin on the carrier's proposed startup date for service in the proposed market. However, since Continental's certificate would expire by its terms should Continental not inaugurate service by December 1, 1999, the 90-day dormancy provision would have meaning in Continental's case only if the carrier began service by the prescribed date and thereby retained an effective certificate.

<sup>17</sup> Under Rule 39, this confidentiality determination concerning the Motion for Confidential Treatment becomes effective 5 business days after the date of service of this order unless a petition for reconsideration, or a statement of intent to seek judicial review, is filed before the effective date.

3. We tentatively allocate Continental Airlines, Inc. 7 weekly frequencies to perform its proposed operations; and Delta Air Lines, Inc. up to 7 weekly frequencies should its backup certificate become activated;
4. We tentatively allocate United Air Lines, Inc., on an interim basis, 7 weekly frequencies for services in the Los Angeles-Sao Paulo market, effective immediately upon issuance of a final order in this proceeding until December 1, 1999; such allocation would be subject to our standard 90-day startup and dormancy conditions;
5. We tentatively select American Airlines, Inc. as a backup to United's interim award in this proceeding to become effective if United does not inaugurate service within 90 days of issuance of a final order in this proceeding; such service, if inaugurated, would be subject to our standard 90-day startup and dormancy conditions;
6. We direct any interested parties having objections to our tentative decisions set forth in this order and in ordering paragraphs 1 through 5 above, to file their objections with the Department, Dockets, Docket OST-98-3863, U.S. Department of Transportation, 400 Seventh Street SW Room PL-401, Washington DC 20590, no later than 10 calendar days from the date of service of this order; answers thereto shall be filed no later than 5 calendar days thereafter;<sup>18</sup>
7. If timely and properly supported objections are filed, we will afford full consideration to the matters or issues raised by the objections before we take further action;<sup>19</sup> If no objections are filed, we will deem all further procedural steps to be waived and will proceed to enter a final order;
8. We grant the separate motions of Delta Air Lines, Inc., and the City of Houston and the Greater Houston Partnership for confidentiality under Rule 39 of our Procedural regulations;
9. We grant all motions to file otherwise unauthorized documents; and
10. We will serve this order on American Airlines, Inc., Continental Airlines, Inc., Delta Air Lines, Inc., United Air Lines, Inc., The City of Houston and the Greater Houston Partnership, the New York Parties, The Massachusetts Port Authority, the Ambassador of Brazil in Washington

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<sup>18</sup> The original submission is to be unbound and without tabs on 8½" x 11" white paper using dark ink (not green) to facilitate use of the Department's docket imaging system.

<sup>19</sup> As we are providing for the filing of objections to this tentative decision, we will not entertain petitions for reconsideration of this order.

DC, the Federal Aviation Administration, and the U.S. Department of State (Office of Aviation Negotiations).

By:

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

(SEAL)

*An electronic version of this order is available on the World Wide Web at  
[http://dms.dot.gov/reports/reports\\_aviation.asp](http://dms.dot.gov/reports/reports_aviation.asp)*

APPENDIX A

CARRIER PROPOSALS IN 1998 U.S.-BRAZIL COMBINATION SERVICE CASE, DOCKET OST-98-3863

Applicant	Routings	Wkly Freq.	Aircraft	Seats	Capacity	Propd Pax	% Local	% Flow U.S.	%Flow Other	Load Factor	Startup Date
American	MIA-MAO	7	B757-223ER	186	135,780	90,903	85%	14%	1%	66.9%	10/1/98
Continental	IAH-GRU	7	DC-10-30	242	176,660	105,777	39%	48%	13%	59.9%	Winter '99
Delta	BOS-JFK-GRU-MVD	7	B767-300ER	212	154,760	120,422	65%	3%	32%	77.8%	Winter '99
United	LAX-GRU	7	B777-222B	292	213,160	141,003	43%	7%	51%	66.1%	4/1/99*

\* or 90 days from issuance of a final order

**Applicant Forecasts**

	<b>American MIA-MAO</b>	<b>Continental IAH-GRU</b>	<b>Delta BOS-JFK-GRU-MVD</b>	<b>United LAX-GRU</b>
<b>Traffic</b>				
Nonstop	77,446	41,496	63,315	60,009
One-stop single plane	-	-	14,908	-
Online connecting	12,919	50,588	3,352	9,543
Interline	-	2,763	2,533	-
Subtotal	<b>90,365</b>	<b>94,847</b>	<b>84,109</b>	<b>69,551</b>
Fifth Freedom	538	4,516	2,873	66,010
MAO-SAO Totals	90,903	99,363	86,982	135,562
Beyond SAO**	-	6,414	33,440	5,442
<b>Overall Total</b>	<b>90,903</b>	<b>105,777</b>	<b>120,422</b>	<b>141,003</b>
Capacity	135,780	176,660	154,760	213,160
Pax. Load Factor (%)	66.9%	59.9%	77.8%	66.1%

\*\*Within Brazil except for Delta, which includes traffic to Montevideo, Uruguay.

Routing legend: MIA=Miami, MAO=Manaus, IAH=Houston International, GRU=Sao Paulo, BOS=Boston, JFK=New York, MVD=Montevideo, LAX=Los Angeles