



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

Issued by the Department of Transportation
on the 1st day of July, 1999

Served: July 1, 1999

Petition of

DELTA AIR LINES, INC.

for reallocation of U.S.-Brazil frequencies held by
American Airlines, Inc.

Docket OST-96-1065

ORDER

Summary

By this order, we have decided to authorize American Airlines, Inc. (American) to use temporarily the seven weekly frequencies allocated to it for New York-Rio de Janeiro service, for service in the Miami-Rio de Janeiro market, pending conclusion of a proceeding for long-term allocation of these frequencies.

Background

By Order 96-3-47, the Department allocated American seven weekly frequencies for service in the New York-Rio de Janeiro market. That allocation was renewed most recently by Notice of Action Taken, January 28, 1999. Consistent with Department practice, the frequency allocation was subject to the condition that the allocation would expire automatically and the frequencies would revert to the Department for reallocation if they were not used as specified for a period of 90 days.

Petition of Delta Air Lines, Inc./Responsive Pleadings

On March 31, 1999, Delta Air Lines (Delta) petitioned the Department to reallocate seven of American's U.S.-Brazil frequencies. Delta states that American has decided to terminate its New York-Rio de Janeiro services on April 30, 1999, making seven weekly frequencies available for U.S. carriers upon expiration of the 90-day dormancy period applicable to the allocation (*i.e.* July 29, 1999). Delta requests the Department to reallocate American's frequencies to Delta so that Delta could inaugurate service in the New York-Sao Paulo market. In support of its request, Delta states that American's termination of JFK-Rio de Janeiro nonstop service provides a timely

and unique opportunity for the Department to authorize Delta to provide service between New York and Brazil with beyond service to Montevideo. Delta further argues that such an award would enhance significantly the U.S.-Brazil market structure, since Delta is the only U.S. carrier serving Brazil that currently cannot operate New York-Brazil flights, and since Delta holds the fewest number of U.S.-Brazil frequencies.

The New York Parties filed an answer in support;¹ American filed an answer in opposition; and Delta filed a reply.²

The New York Parties maintain that service to Brazil is of great importance to their region, that Delta's service would ensure that such a valuable market would not go underserved, and that the New York region will be able to continue to expand its Brazil service and receive new service to Uruguay.

American argues that Delta's petition is without merit and should be dismissed. American acknowledged that it would suspend New York-Rio de Janeiro service on April 30, 1999 and that, effective May 1, 1999, it would temporarily combine its New York-Rio de Janeiro and New York-Sao Paulo flights into a single New York-Sao Paulo-Rio de Janeiro service. American further states that when economic conditions in Brazil improve, it intends to restore its New York-Rio de Janeiro nonstop service. However, American contends that, contrary to Delta's assertions, the frequencies will not be dormant because, beginning July 2, 1999, American will use the frequencies to operate an additional daily Miami-Rio de Janeiro nonstop flight, which will provide convenient online connections to all three New York area airports.

In its reply, Delta argues that American has misread the Department's order granting American the seven New York-Rio de Janeiro frequencies and has ignored the explicit conditional language, which earmarked those frequencies for use only on nonstop service between New York and Rio de Janeiro.

On June 16, 1999, Delta supplemented its March 31 petition, requesting the Department to grant immediately its request for the seven frequencies and stating its intent to begin the New York-Sao Paulo-Montevideo service October 1, 1999, or 90 days after the grant of the authority, whichever is later. Delta argues that, in contrast to the economic conditions cited by American, Delta's Atlanta-Brazil routes have matured and continue to experience healthy loads.

In separate answers to Delta's supplement, American and the New York Parties reiterate their previously-stated positions on Delta's request. American further states that the Department has permitted carriers to use their frequencies in any U.S.-Brazil city-pair market and that the Department should not reverse a principle that was established in 1992.

¹ The New York Parties include The Port Authority of New York and New Jersey and the Empire State Development Corporation.

² Delta's reply was accompanied by a motion for leave to file, which we will grant.

On June 25, 1999, Delta filed a further response, noting the unique circumstances of the original award to American, *i.e.*, that there were no U.S.-Brazil designations available at the time to competitors and that the frequencies would otherwise have been unused.³

Decision

We have decided to grant American *pendente lite* authority to use the seven frequencies in question for service in the Miami-Rio de Janeiro market for a period of one year or until 90 days after the conclusion of a proceeding regarding long-term allocation of the seven New York frequencies at issue, whichever occurs earlier.

In 1996, we allocated American seven weekly frequencies for use in the New York-Rio de Janeiro market. American now states that it intends to move those frequencies to the Miami-Rio de Janeiro market, and that this transfer is fully consistent with the Department's practice concerning frequency allocations. It further argues that, since it will be using the frequencies in question, they are not dormant and, thus, not subject to reallocation to other carriers.

Contrary to American's contention, its allocation of frequencies in this case is specific to the New York-Rio de Janeiro market.⁴ Thus, American is not free to move the frequencies to other markets without specific authorization from the Department.⁵

American now seeks to use the frequencies in a different market. Delta also seeks to use the same frequencies to inaugurate new service. As neither carrier is currently entitled to use the frequencies for the purpose it desires, we intend to conduct a proceeding within a year to determine how the public interest would best be served by allocation of these seven weekly frequencies in the longer term. At the present time, however, economic conditions affecting the U.S.-Brazil market are such that we believe that it would be in the public interest to defer institution of that proceeding until market conditions provide a better gauge for a decision on a long-term allocation.

In the meantime, however, taking into account all the circumstances presented, we believe that it is in the public interest to award American *pendente lite* authority to use the frequencies in the Miami-Rio de Janeiro market for a period of one year, or until 90 days after the conclusion of a future longer-term allocation proceeding, whichever occurs earlier.⁶ As in other *pendente lite* awards, no preference attaches to the grant of such temporary authority.

³ Delta's response was accompanied by a motion for leave to file, which we will grant.

⁴ See Order 96-3-47, page 4, ordering paragraph 1, and subsequent renewals making clear that the frequencies were for service in the New York-Rio de Janeiro market.

⁵ In these circumstances, we need not reach the question as to whether the frequencies are dormant. The present case differs from the case that allocated frequencies to American when it bought the South American route authority held by Eastern Air Lines. There, the transfer of frequencies was not tied to a particular city-pair market or markets. See Order 90-5-5 at 7.

⁶ American's use of these frequencies in the Miami-Rio de Janeiro market will be subject to our normal dormancy provision.

ACCORDINGLY,

1. We authorize American Airlines, Inc., on a *pendente lite* basis, to use seven weekly frequencies, originally allocated for New York-Rio de Janeiro services, for Miami-Rio de Janeiro services;
2. The authorization in ordering paragraph 1, above, will be effective immediately for a period of one year from the date of service of this order, or until 90 days after the conclusion of a proceeding regarding long-term allocation of the seven frequencies, whichever occurs earlier;
3. The authorization in ordering paragraph 1, above, is subject to the condition that the frequencies will automatically revert to the Department for reallocation if they are not used in the Miami-Rio de Janeiro market for a period of 90 days;⁷
4. We grant Delta's motions for leave to file otherwise unauthorized documents in this docket; and
5. We will serve this order on American Airlines, Inc., Delta Air Lines, Inc., the New York Parties, the Ambassador of Brazil in Washington, DC, the U.S. Department of State (Office of Aviation Negotiations), and the Federal Aviation Administration.

By:

A. BRADLEY MIMS
Acting Assistant Secretary for
Aviation and International Affairs

(SEAL)

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http://dms.dot.gov/reports/report_aviation.asp*

⁷ The 90-day dormancy period will begin July 2, 1999, the proposed startup date for American's Miami-Rio de Janeiro service.