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

Issued by the Department of Transportation
on the 6th day October, 2000

Served: October 6, 2000

1999 U.S.-BRAZIL COMBINATION SERVICE CASE

Docket OST-99-6284 - 194

ORDER

Summary

By this order, we tentatively select American Airlines, Inc. for allocation of seven weekly frequencies for services in the New York (JFK)-Rio de Janeiro market and Delta Air Lines, Inc. for allocation of three weekly frequencies for services in the Atlanta-Rio de Janeiro market. In addition, we have decided, by final action in this order, to allocate Continental Airlines, Inc. one additional frequency for its operations in the Newark-Rio de Janeiro-Belo Horizonte market.

Background

Under the U.S.-Brazil aviation agreement, four U.S. carriers may be authorized for combination services in the U.S.-Brazil market. American Airlines, Delta Air Lines, Continental Airlines, and United Air Lines are the four authorized U.S. carriers. These carriers may operate a total of 105 weekly frequencies. Over the past three years the Department has conducted several proceedings to allocate the available frequencies.¹

By Order 99-9-23, as modified by Order 99-12-27 and by Order 2000-2-12, we instituted this proceeding for reallocation of eleven previously allocated U.S.-Brazil weekly frequencies.² Seven of those frequencies became available after American, citing economic conditions in Brazil, temporarily suspended its daily New York-Rio de Janeiro service, with the intent of using the frequencies for Miami-Rio de Janeiro service until economic conditions favored restoration of the New York-Rio de Janeiro operation. Delta, for its part, sought the frequencies for new

¹ See Orders 96-12-9 at 5, 98-5-27 at 3, and 99-9-23 at 5

² Order 2000-2-12 at 6. For a chronology of events leading up to the institution of, and the scoping of, this proceeding, see Orders 99-7-1, 99-9-23, 99-12-27, and 2000-2-12. Pending a decision in this case, we authorized American to use 7 of the frequencies at issue on a temporary basis in the New York-Rio de Janeiro market (Order 99-7-1), and we authorized Continental to use one frequency in the Newark-Rio de Janeiro market (Order 99-12-27).

service in the New York-Sao Paulo-Montevidео market. The Department in Order 99-7-1 noted that since the frequencies had been expressly allocated for use in the New York-Rio de Janeiro city-pair market (see Order 96-3-47) neither American nor Delta, in the circumstances presented, could be granted a long-term allocation of the frequencies without comparative selection procedures.³ Since American, unlike Delta, had immediate plans for use of the frequencies, the Department granted American a *pendente lite* exemption award for their use in the Miami-Rio de Janeiro market. When American subsequently stated that it would restore its daily nonstop New York-Rio de Janeiro operation, effective October 1, 1999, the Department amended American's exemption to permit the change. (See Order 99-9-23 at 9) American has continued to provide daily service in the New York-Rio de Janeiro market under that *pendente lite* exemption.

Three more frequencies became available after Continental first failed to inaugurate, and then started but ceased operating, three of the seven frequencies it had been allocated for Houston-Sao Paulo service in Order 99-3-26. When Continental began serving, it did so at a level of only four weekly flights. While Continental did ultimately operate seven weekly flights, it did so for only a single two-week period, after which it permitted three of the seven flights to become dormant under the terms of our standard dormancy condition, meaning that the frequencies automatically reverted to the Department for reallocation.

The final frequency became available when one of Continental's Newark-Rio de Janeiro frequencies became dormant in August 1999. By Order 99-12-27, the Department stated that the frequency had reverted to the Department and thus would be available for reallocation in this proceeding. Continental would be free to apply for reallocation of the frequency. Since Continental stated that it had firm plans to use the frequency in the forthcoming months, the Department granted Continental *pendente lite* authority to use the frequency (see Order 99-12-27 at 6), and Continental in fact has been using the frequency for nonstop Newark-Rio de Janeiro service.

The Market

The U.S.-Brazil market is the largest U.S.-South America market with service by four U.S. carriers and five foreign-flag carriers. For the year ended December 1999 the market generated over 2.35 million annual passengers on U.S. and foreign carrier services with 1.03 million passengers traveling between the United States and Brazil on U.S.-flag carriers and 1.32 million passengers on foreign-flag carriers. Sao Paulo and Rio de Janeiro are the most popular Brazilian markets, accounting for 852,000 annual O&D passenger on U.S.-flag services (556,150 in the Sao Paulo market and 296,090 in the Rio de Janeiro market).

The majority of U.S. and foreign-flag services are provided to Sao Paulo. The four designated U.S. carriers operate 77 weekly nonstop Sao Paulo flights. The five foreign-flag carriers operate 63 weekly nonstop Sao Paulo flights. Thus, Sao Paulo enjoys 140 weekly nonstop flights from the U.S. In terms of service at specific cities, Miami receives daily nonstop service to Sao Paulo from a total of five U.S. and foreign-flag carriers; the New York area receives daily nonstop service from a total of four U.S. and foreign carriers at JFK, and daily nonstop service from one

³ Order 99-7-1 at 2-3.

U.S. carrier at Newark.⁴ Compared to Sao Paulo's 140 weekly flights, Rio de Janeiro receives only 28 nonstop weekly flights from U.S. carriers and only six weekly flights from one foreign-flag carrier, a total of 34 flights. Compared to the 32 weekly Sao Paulo flights from New York/Newark, the New York area receives only seven weekly Rio de Janeiro flights from American at JFK (*pendente lite*) and seven weekly flights from Continental at Newark.⁵ The Brazilian carrier Varig operates six weekly nonstop Rio de Janeiro flights from Miami.⁶

O&D data indicate that New York/Newark is the largest O&D market for Sao Paulo and Rio de Janeiro, followed by Miami and Orlando.

Applications/Responsive Pleadings

All four U.S. carriers designated for U.S.-Brazil combination services have submitted applications for some of the available eleven frequencies. Three carriers (American, Delta and United) have applied for seven weekly frequencies, while two carriers (Continental and Delta) seek all or a portion of the remaining four frequencies.

A. Seven-frequency proposals:

American proposes daily nonstop service between New York (JFK) and Rio de Janeiro. Delta proposes daily nonstop service between New York (JFK) and Sao Paulo, with single-plane service beyond Sao Paulo to Montevideo, Uruguay. United proposes daily nonstop service between Los Angeles and Sao Paulo, with behind gateway single-flight number service to San Francisco. All three carriers propose to use wide-body aircraft for their seven-frequency proposals.

⁴ The other U.S. gateways to Sao Paulo are Atlanta, Chicago, Dallas/Ft. Worth, Houston, Los Angeles, and Orlando. With the exception of Los Angeles, none receives service by more than one U.S. or foreign carrier.

⁵ According to the September 2000 Official Airline Guide, the following nonstop U.S.-carrier services are operated between the United States and Brazil: (a) for Rio de Janeiro service, American operates 14 weekly flights (7 from New York and 7 from Miami), placing TAM's code on its flights; United operates 7 weekly flights in the Miami-Rio market, placing Varig's code on its flights; and Continental operates 7 weekly flights in the Newark-Rio market; (b) for Sao Paulo service, American operates 7 weekly flights from New York (JFK); 10, from Dallas/Ft. Worth and 14, from Miami, placing TAM's code on its flights; Continental operates 4 weekly flights from Houston and 7, from Newark; Delta operates 7 weekly flights from Atlanta, placing Transbrasil's code on its flights; and United operates 7 weekly flights each from Chicago and New York (JFK) and 14 flights from Miami, placing Varig's code on its flights.

⁶ According to the September 2000 Official Airline Guide, the following nonstop foreign-flag carrier services are operated between the United States and Brazil: (a) for Rio de Janeiro service, Varig operates 6 weekly flights from Miami and places United's code on its flights; (b) for Sao Paulo service, Japan Airlines operates 4 weekly flights from New York (JFK) and 1 weekly flight from Los Angeles; Korean Airlines operates 3 weekly flights from Los Angeles; TAM operates 13 weekly flights from Miami, placing American's code on its flights; Transbrasil operates 7 weekly flights from Miami and 7 weekly flights from Orlando, placing Delta's code on its flights; Varig operates 14 weekly flights from Los Angeles and 7 weekly flights each from Miami and New York (JFK), placing United's code on all its flights.

B. Proposals for remaining four frequencies:

Continental and Delta each request three of the four weekly frequencies for additional services from their hubs at Houston and Atlanta, respectively. Continental proposes one-stop service between Houston and Sao Paulo over Lima, Peru, with narrow-body aircraft, and Delta proposes nonstop service between Atlanta and Rio de Janeiro, with wide-body aircraft.

Continental also requests one weekly frequency to operate nonstop service in the Newark-Rio de Janeiro market, with wide-body aircraft. Continental proposes to use the additional frequency to augment its existing six weekly frequencies in the Newark-Rio de Janeiro market and proposes to operate beyond Rio de Janeiro to Belo Horizonte, beginning September 12, 2000.⁷ No other carrier requested allocation of a single frequency.⁸

All of the carriers' proposals are fully described in the chart in Appendix A.

Several civic parties filed in support of carrier proposals.⁹ The Georgia and Atlanta Parties filed in support of Delta's proposals; the New Jersey Parties filed in support of Continental's Newark proposal; the Houston Parties filed in support of Continental's Houston Proposal; and the Los Angeles Parties filed in support of United's proposal.

All four carriers and the civic parties submitted Direct Exhibits, Rebuttal Exhibits, and Briefs in this proceeding.

Subsequent to the closing of the record, several parties submitted additional material. Specifically, on August 8, 2000, Delta filed comments concerning a press release of American Airlines that stated that American intended to discontinue four weekly nonstop flights between Orlando and Sao Paulo, effective September 6, 2000. American, United, and the Houston Parties filed answers to Delta's comments. American filed a reply to the Houston Parties' comments. Delta and United filed separate consolidated replies.¹⁰

⁷ Continental holds exemption authority for Newark-Belo Horizonte services (Notice of Action Taken January 24, 2000).

⁸ On April 18, 2000, Continental filed a motion for immediate action on its request for one frequency in the Newark-Rio de Janeiro market and stated that if the Department is unwilling to grant Continental's motion for immediate permanent reallocation of a single frequency, Continental applies for renewal of its *pendente lite* frequency allocation for one year or until 90 days after a final decision in this case. American, Delta and United opposed the motion, and Continental filed a consolidated reply; United filed a response to Continental's consolidated reply. Continental's motion for immediate action and its consolidated reply were accompanied by motions for leave to file unauthorized documents. United's response was also accompanied by a contingent motion for leave to file an unauthorized document. We will grant the requests for leave to file unauthorized documents.

⁹ The Atlanta and Georgia Parties (the Georgia Parties) consist of the State of Georgia, the City of Atlanta, Hartsfield Atlanta International Airport, and the Metro Atlanta Chamber of Commerce. The New Jersey Parties consist of the Regional Business Partnership (Newark). The Houston Parties consist of the City of Houston and the Greater Houston Partnership. The Los Angeles Parties consist of the Los Angeles World Airports and the Los Angeles Convention and Visitors Bureau.

¹⁰ Delta's comments and responsive comments thereto were accompanied by separate motions for leave to file. We will grant the motions.

Positions of the Parties¹¹

Each applicant maintains that it should receive the number of frequencies it has sought for its proposed services and that its proposal is superior to the other applicants'.

American argues that without its proposed service there will be no nonstop JFK-Rio de Janeiro service from any carrier, U.S. or foreign-flag, and that JFK-Rio de Janeiro would become the largest U.S.-Brazil airport-pair without nonstop service. American argues that its principal competitor for the award of seven-weekly frequencies is Delta, which proposes to operate in the already extremely well-served New York-Sao Paulo market, and the Department should first insure that there is daily nonstop service by one carrier between JFK and Rio de Janeiro before authorizing another carrier for New York-Sao Paulo service. Regarding United, American argues that the Los Angeles-Sao Paulo market enjoys nonstop service by four carriers, including United's own code-share service with Varig, the largest airline in South America. American does not take a position on the disposition of the remaining four frequencies as long as American receives seven frequencies to continue operating New York (JFK)-Rio de Janeiro service.

Delta argues that its entry into the New York-Sao Paulo market is critical to its development for service in Latin America and that awarding it the ten frequencies it seeks (seven for New York-Sao Paulo service and three for Atlanta-Rio de Janeiro service) will enable Delta to compete more effectively against American, Continental, and United. Delta argues that American could use other U.S.-Brazil frequencies for New York-Rio de Janeiro service and that American has under-performed at New York. Delta further argues that United with its code-share partner has 58 weekly frequencies and should not be allocated additional frequencies. Delta maintains that it will add a new entrant competitor at the largest and most important U.S. gateway to Brazil and thus will enhance intragateway competition at New York for travel to Sao Paulo, and that only an award to Delta for its three-frequency proposal for Atlanta-Rio de Janeiro service will establish a new nonstop U.S.-Rio de Janeiro competitor. Delta maintains that its nonstop Atlanta-Rio de Janeiro proposal would deliver over 34,000 more annual seats to Brazil than would Continental's one-stop service.

Delta's proposal is supported by the Georgia Parties, who argue that the single objective of improving the competitive structure in the U.S.-Brazil market warrants the award of ten Brazil frequencies to Delta in preference to the other applicants' proposals. They note that Delta serves more U.S. cities and offers more total flights at its massive Atlanta hub than any other applicant at any other gateway at issue.

United argues that it should be allocated frequencies to operate nonstop service from Los Angeles to Sao Paulo before New York receives additional service; that the west coast needs service by a U.S. carrier; that Los Angeles, the fourth largest local market to Brazil, would stimulate a strong market attracting almost 20,000 new annual passengers; and that the proposed route is critical to United's expansion of Latin American service. It maintains that American would exclude United from offering intergateway competition at Los Angeles that would challenge American's dominant position at Miami; that New York needs no additional service;

¹¹ See Appendix B for a more detailed description of the Parties' positions.

and that the lack of support for Delta's New York service recognizes that the levels of services operated by three U.S. and two foreign carriers between New York and Sao Paulo are sufficient for the needs of New York consumers. United also argues that an award to Continental promises no benefits to the public.

United's proposal is supported by the Los Angeles Parties, who argue that Los Angeles is the only gateway involved in the proceeding without nonstop U.S.-flag service to Brazil or to anywhere in South America.

Continental states that the Department's first priority should be to grant Continental the one additional frequency it needs for daily Newark-Rio de Janeiro service and its second priority should be to restore daily Sao Paulo service for the Houston gateway. With respect to its Newark proposal, Continental argues that no other carrier has proposed a need for one frequency and that the Department should permanently award the frequency to Continental. Regarding its three-frequency Houston proposal, Continental argues that the Houston hub is the only U.S. gateway currently without daily Brazil service and that permitting Continental to complement its four weekly nonstop Houston-Sao Paulo service with three Houston-Sao Paulo flights via Lima will benefit the traveling and shipping public more than permitting Delta to add three weekly flights in the Atlanta-Rio de Janeiro market. Continental argues that American's goal is to weaken new entrants and that American should not be allocated frequencies; that neither of Delta's proposals is credible; and that United's proposed Los Angeles-Sao Paulo service will provide minimal benefits to connecting western U.S. cities.

The Houston Parties and the New Jersey Parties support Continental's proposal. The Houston Parties state that Houston is the largest U.S. city that lacks daily service to Brazil and that Continental's proposal will enhance intergateway competition in the U.S.-Brazil market by offering an alternative to established Brazil gateways. The New Jersey Parties argue that since Continental is the only applicant for one frequency, the Department can extend substantial benefits by granting Continental's request without affecting the applications of the other applicants.

Tentative Decision

We have tentatively decided to award American seven weekly frequencies for services in the New York (JFK)-Rio de Janeiro market and Delta three weekly frequencies for services in the Atlanta-Rio de Janeiro market.

Seven-frequency award:

Three carriers applied to provide daily services to Brazil: American for the New York-Rio de Janeiro market; Delta for the New York-Sao Paulo market; and United for the Los Angeles-Sao Paulo market.

After reviewing the record and examining all services between the U.S. and Brazil, we have tentatively decided that American's proposal will offer the greatest overall public benefits.

The record demonstrates that Rio de Janeiro is the second largest destination point for U.S.-Brazil passengers, and for those U.S.-Rio passengers, the Newark/New York area generates the most traffic.¹² In this proceeding, only American proposes to operate nonstop between New York JFK and Rio de Janeiro, thereby linking New York, the largest U.S. gateway, to the second largest Brazilian gateway. Moreover, American's service would be the only nonstop service by any carrier, U.S. or foreign, in the New York JFK-Rio de Janeiro market. American's service would also generate competition for Continental's Newark-Rio de Janeiro service to the extent that the JFK and Newark markets compete for the same traffic pool. Against this background, we tentatively find that American's proposal, providing the only nonstop service between New York JFK and Rio de Janeiro, gives American a decisive edge over the other two proposals for daily services for markets which already have existing nonstop service and that American should therefore be allocated seven weekly frequencies for nonstop New York-Rio de Janeiro service.¹³

Delta proposes to increase service in the well-served New York-Sao Paulo market, a market in which five carriers currently operate 32 weekly frequencies. While Delta's entry into the New York-Sao Paulo market would not be without benefits, such as additional intragateway competition, we tentatively do not find that the benefits to be derived from the introduction of Delta service in an already well-served market outweigh the benefits of a U.S. carrier providing the only nonstop service between New York JFK and Rio de Janeiro.

We reach the same tentative finding in regard to United. United proposes the first U.S.-flag carrier service in the Los Angeles-Sao Paulo market using its own aircraft, would provide intragateway competition with three foreign-flag carriers and would introduce U.S.-operated nonstop service for west coast passengers. We must, nevertheless, take into consideration that the market United proposes to serve already has considerable existing nonstop service and that United itself has an existing service in the Los Angeles-Sao Paulo market through its code share with Varig. United is currently holding out daily Los Angeles-Sao Paulo service and needs no authority in this proceeding to continue doing so. American's service, on the other hand, will be the only nonstop service in the New York JFK-Rio de Janeiro market.¹⁴ While United argues that it will offer the strongest competitive challenge to foreign-flag carriers at the largest U.S.

¹²O&D data for YE 12/31/99 rank the top five US-Rio passenger traffic sources as Newark/New York with 94,100 passengers; Miami with 65,680 passengers, Orlando with 31,070 passengers; Los Angeles with 16,920 passengers; and Houston, 14,510 passengers.

¹³We note that American holds a *pendente lite* award of seven weekly frequencies for services in the New York-Rio de Janeiro market and has filed a timely renewal for that service. (See American renewal application in Docket OST 96-1065, filed April 28, 2000.) The temporary award will continue in effect pending a final decision in this case.

¹⁴According to latest O&D statistics, the Los Angeles-Sao Paulo area generated 27,730 passengers versus 94,100 for the New York-Rio de Janeiro market. If San Francisco figures are added to the Los Angeles figures, the combined LAX-SFO area generated 56,720 passengers for Sao Paulo service. United argues that the local passengers are constrained/displaced due to foreign carrier fill from Asian traffic, but United does not demonstrate that passengers cannot get to Sao Paulo. In any event, since Brazilian carriers have many unused frequencies under their bilateral agreement limits, Varig would be free to add capacity to address any need to accommodate further traffic. We note that in July Varig did increase its services at Los Angeles. American, on the other hand, notes that, without its nonstop service in the New York JFK-Rio de Janeiro market, 65,326 passengers will lose nonstop service whereas if Delta's and United's applications were denied, no passengers would lose service. (American Brief at 6)

gateway that lacks U.S. carrier-operated nonstop service, we note that United already does provide competition to such service through its existing code-share with Varig. United also argues that no other New York international city pair enjoys service by more carriers than does the New York-Sao Paulo market. American's proposal, however, is for New York JFK-Rio de Janeiro service, not for Sao Paulo. Therefore, we tentatively do not find that United's proposal would offer the benefits that would derive from American's Rio de Janeiro proposal as discussed above.

Each of the carrier parties has challenged the traffic forecasts of the other applicants. While we tentatively believe that all of the proposals may be somewhat optimistic as to the number of passengers they forecast, we tentatively find that all of the forecasts are viable for purposes of the decision in this proceeding.

While the other applicants have argued that American could use some of its existing frequencies for its proposed services, we are not inclined, in the circumstances presented, to consider such an approach here when we tentatively believe that strong public interest reasons favor according American this additional allocation.¹⁵ We note in this regard, however, that all frequencies awarded in this proceeding (see discussion below) will be subject to a 90-day dormancy provision and will be subject further to the restriction that frequencies awarded in this proceeding are for city-pair specific markets and cannot be moved without prior written Department permission.

Three-frequency Award:

Two carriers seek three frequencies for U.S.-Brazil service. Delta proposes to use three frequencies for new nonstop Atlanta-Rio de Janeiro service whereas Continental proposes to add to its existing four weekly Houston-Sao Paulo flights with a one-stop service via Lima.

Delta proposes to offer new nonstop service to Rio de Janeiro from its large hub in Atlanta. It thus seeks to complement its existing Atlanta-Brazil services by introducing three weekly nonstop flights in the Atlanta-Rio de Janeiro market. Delta, without an allocation of frequencies dedicated to the Atlanta-Rio de Janeiro market, has served Rio passengers through its daily Atlanta-Sao Paulo-Rio de Janeiro services, but now seeks to afford those passengers with more convenient nonstop service. As we stated in the *U.S.-Colombia Combination Case*, Docket OST-2000-7655:

Delta has successfully inaugurated service to several South America cities from Atlanta. It currently serves Venezuela, Peru, and Brazil, all of which it has operated on a continuous basis, and has announced plans to begin service to Chile this fall. Therefore, ... we believe that the Atlanta gateway has demonstrated its ability to provide valuable competitive services for travelers in the South America market...¹⁶

¹⁵ For the same reasons we will not reach here the matter of the four frequencies discontinued by American at Orlando.

¹⁶ *U.S.-Colombia Combination Case*, Order 2000-7-19, at 6.

Moreover, through its proposal, Delta will provide more U.S. cities with nonstop connections to Rio de Janeiro than Continental would through its proposal.¹⁷ Thus, more U.S. passengers will have convenient connections for Atlanta-Rio de Janeiro service than are proposed in Continental's proposal and, even with three weekly frequencies, will provide intergateway competition for nonstop Rio de Janeiro services from Newark, New York and Miami.

Continental's proposal requires the Houston-Sao Paulo passenger to travel one-stop through Lima, Peru. In the absence of compelling countervailing factors, it has been longstanding policy in carrier selection cases to prefer carriers proposing nonstop service rather than one-stop service, since we generally regard nonstop service as that most favored by passengers.¹⁸ Thus, while we certainly think the Houston community deserves the opportunity for daily nonstop service to Sao Paulo, we tentatively find that the one-stop service proposed by Continental is not as beneficial to the traveling public as Delta's proposed nonstop service.

Our ultimate goal in any frequency allocation proceeding is to ensure that allocated frequencies are used in the most beneficial manner to serve the overall traveling public. We believe that our selections of American for New York-Rio de Janeiro service and Delta for Atlanta-Rio de Janeiro will best benefit the public interest.

Conditions, and Limitations

We intend to impose startup conditions on the frequency awards to American and Delta. Delta had indicated in its exhibits that it would begin services within 120 days of the award, and we propose to subject the frequencies awarded to such a condition. American had indicated that it was prepared to go into the market immediately and we propose that its frequency award be subject to a condition requiring immediate startup upon a final award in this proceeding.

We propose to allocate the frequencies in this proceeding for an indefinite duration, but subject to the continued effectiveness of the holder's underlying economic authority to serve the city-pair Brazil market for which the frequencies were allocated. We also propose that the frequency awards in this case be subject to our standard condition that we may amend, modify, or revoke the allocation at any time and without hearing, at our discretion. While we note that carriers' plans may not materialize as envisioned, the carriers in this case were selected based on the specific city-pair service that they proposed. Therefore, we intend that the allocations in this proceeding be for city-pair specific markets and we also propose that the frequency awards in this case be further conditioned so that the carriers may not move the frequencies for service in another market without prior written approval from the Department.

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 and revert automatically to the Department if they are not operated for

¹⁷ See DL-311 and CO-302. Even discounting Delta's proposed double connects and backhaul passengers, Delta's proposal will benefit significantly more passengers than will Continental's proposed one-stop service.

¹⁸ See, e.g., *Baltimore-London Service Case*, Docket 44485, at 4.

any 90 day-period, except where service in the market is seasonal.¹⁹ 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.

Continental's Application for One Frequency

We have decided, as a final action by this order, to allocate one frequency to Continental for service in the Newark-Rio de Janeiro market. Continental is the only applicant for the one remaining frequency in this proceeding. In these circumstances, we find no public interest basis to withhold a final award. There are no competing requests for the frequency and therefore no issues that prevent us from reaching a final decision on this aspect of the case now. Nor do we believe that it would be in the public interest to delay such an award. Continental is now using this frequency for seasonal service in the New York-Rio de Janeiro market under the *pendente lite* award granted by Order 99-12-27. The carrier has stated that it will commence year-round service in the market on September 15, 2000, or 120 days from a final award, whichever occurs later. A final award here will facilitate the carrier's plans to begin service as close to the proposed September 15, 2000, date as possible. The frequency allocation is effective immediately and will remain in effect indefinitely, subject to the condition that Continental continues to hold the underlying economic authority in the New York-Rio de Janeiro market and to the further condition that we may amend, modify, or revoke the allocation at any time and without hearing, at our discretion. It is further subject to our standard 90-day dormancy condition.²⁰

ACCORDINGLY,

1. We allocate one weekly frequency to Continental Airlines, Inc., for use in the Newark-Rio de Janeiro market, effective immediately;
2. The frequency awarded in ordering paragraph one is subject to our standard 90-day dormancy condition, wherein the frequency will be dormant and revert automatically to the Department if the frequency is not operated for 90 days, except where service in the market is seasonal; we may amend, modify, or revoke the allocation at any time and without hearing, at our discretion;²¹
3. We dismiss Continental's application for renewal of its *pendente lite* frequency allocation;

¹⁹ Consistent with our standard practice, the 90-day dormancy period would begin on the carrier's proposed startup date for service in each market or the date that the carrier begins service, whichever is earlier.

²⁰ We note that Continental holds a *pendente lite* allocation of this one frequency granted by Order 99-12-27, effective for one year or until 90 days after a final decision in this case, whichever occurs earlier, and has filed a timely renewal of that award. Based on our decision here, we will dismiss Continental's renewal application.

²¹ We note that Continental has been using this frequency under its *pendente lite* award on a seasonal basis. Continental has stated that it now plans to use the frequency on a year-round basis. Continental must notify the Department in writing in Docket OST-99-6284, within 10 days of the date of this order, as to the actual startup date for this frequency on a year round basis. The 90-day startup period for allocation of this one frequency will begin 120 days from the date of service of this order or the date on which Continental begins service, whichever is earlier.

4. We tentatively allocate seven weekly frequencies to American Airlines, Inc. for nonstop services in the New York (JFK)-Rio de Janeiro market and three weekly frequencies to Delta Air Lines, Inc. for nonstop services in the Atlanta-Rio de Janeiro market;
5. We direct any interested parties having objections to our tentative decision set forth in the text of this order and in ordering paragraph four, above, to file their objections with the Department, Dockets, Docket OST-99-6284, 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 7 calendar days thereafter;²²
6. 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;²³
7. If no objections are filed, we will deem all further procedural steps to be waived, and will proceed to enter a final order awarding the frequencies in this proceeding;
8. We grant all motions for leave to file otherwise unauthorized documents in this proceeding;
9. To the extent not granted or tentatively granted, we tentatively deny all other motions and requests in this docket; and
10. We will serve this order on American Airlines, Inc.; Continental Airlines, Inc.; Delta Air Lines, Inc.; United Air Lines, Inc.; the Georgia and Atlanta Parties; the New Jersey Parties; the Houston Parties; the Los Angeles Parties; the Ambassador of Brazil in Washington DC; the

²² 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. In the alternative, filers are encouraged to use the electronic submission capability available through the Dockets/DMS Internet site (<http://dms.dot.gov>) by following the instructions on the web site.

²³ As we are providing for the filing of objections to this tentative decision, we will not entertain petitions for reconsideration of this order.

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

By:

SUSAN MCDERMOTT
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*

TRAFFIC	APPLICANTS' FORECASTS									
	AMERICAN		CONTINENTAL			DELTA			UNITED	
	NYC-GIG	(3-Wkly) IAH-LIM-GRU	(1-Wkly) EWR-GIG-BEL	(3-Wkly) ATL-GIG	JFK-GRU-MVQ	SFO (SFN)	LAX-GRU			
Nonstop	83,046	16,373	7,211	6,848	75,143	71,229	16,916			
One-stop Single Flt. Num	-	-	-	-	-	-	22,376			
Online connecting	9,365	3,838	2,153	34,097	5,080	16,916	22,376			
Interline	328	-	281	1,250	2,482	-	-			
Subtotal	92,739	20,212	9,645	42,195	82,706	110,52	-			
Fifth Freedom	2,352	12,436	468	724	2,526	17,172	-			
GIG/SAO Totals	95,091	32,648	10,113	42,919	85,232	127,69	-			
Beyond SAO/RJO 1/	13,199	-	4,993	-	26,745	15,605	-			
Overall Total	108,290	32,648	15,106	42,919	111,977	143,29	-			
Nonstop to Total	76.7%	50.2%	47.7%	16.0%	67.1%	49.7	-			
Other US Orig. to Total	9.0%	11.8%	16.1%	82.4%	6.8%	27.4	-			
Aircraft/Seats	B767/188 Seats	B757/172 Sts.	B767/235 Sts.	B767/195 Sts.	B767/195 Sts.	B777/278 Sts				
Capacity 2/	137,240	53,811	24,507	61,007	142,350	202,94				
Pax. Load Factor (%)	78.9%	60.7%	61.6%	70.4%	78.7%	70.6				

1/ Within Brazil except for Delta, which includes traffic to Montevideo, Uruguay.

2/ Applicants' forecast as reported.

Positions of the Parties

American argues that it should be permitted to retain permanently its seven-weekly frequencies now being using on a *pendente lite* basis in the New York (JFK)-Rio de Janeiro market. Without its existing service, American maintains that there will be no nonstop JFK-Rio de Janeiro service by any carrier, U.S. or foreign flag, or daily nonstop flights to Rio de Janeiro from any airport in the New York region, and that New York (JFK)-Rio de Janeiro would become the largest U.S.-Brazil airport-pair without nonstop service. American argues that without its service, some 65,326 base-year passengers will lose nonstop service, while no passengers would lose nonstop service if the applications of Delta and United were denied. American notes that it has operated JFK-Rio service since 1996, except for a five-month period in 1999 when operations were temporarily suspended due to poor economic conditions in the U.S.-Brazil market. American argues that before the Department installs a fourth nonstop carrier from Los Angeles to Sao Paulo, the Department should insure that New York (JFK) continues to have its only nonstop carrier service to Rio de Janeiro. American further argues that there is no evidence that the JFK-Sao Paulo market is an underserved market, requiring entry by Delta. American takes no position on the disposition of the remaining four frequencies provided that American receives seven weekly frequencies in order to continue operating New York-Rio de Janeiro service. American states that it is the Department's responsibility to determine the best use of limited resources in contested proceedings where there are insufficient frequencies to satisfy all requests.

Continental, Delta and United maintain that American as holder of the largest number of U.S.-Brazil frequencies can maintain its proposed New York services without an additional allocation; that the service would be feasible within American's allocation of frequencies by American's using larger aircraft, freeing up frequencies in other markets. Because of its position in the market, they maintain that American's proposal offers few competitive benefits. Continental maintains that American's goal is to weaken the position of new entrants like Continental, and it should not be allocated any frequencies at this time. United argues that American is trying to exclude United from offering intergateway competition at Los Angeles that would challenge American's dominant position at Miami. Delta argues that American's forecast lacks credibility since American claims it will achieve a 79% load factor while its best load factor over the past three years in the New York-Rio market was only 57% and that it would not be in the public interest for the Department to waste seven valuable *pendente lite* frequencies on American's chronically under-performing New York-Rio de Janeiro service. Delta suggests that American could use four recently discontinued Orlando frequencies for New York-Rio de Janeiro service, thereby freeing up frequencies for Delta's proposed services. In response to this Delta suggestion, American says that the fact that American, based on market conditions, has determined to end its service to Brazil from Orlando, and use those frequencies in another U.S.-Brazil market, is completely unrelated to allocation of the 11 U.S.-Brazil frequencies that were placed at issue in this case by Order 2000-2-12. American notes that the frequencies it has been using for Orlando-Sao Paulo service are not city-pair specific, and that American has announced they will be used for additional service in the Miami-Rio de Janeiro market, effective November 1, 2000. Also, the Houston Parties argue that there are no grounds on which the Department can award three of the eleven available frequencies to American for service between New York and

Rio de Janeiro since American has not asked the Department for an award of fewer than seven frequencies.

Continental states that the Department's first priority should be to grant Continental the one additional frequency it needs for daily Newark-Rio de Janeiro service and its second priority should be to restore daily Sao Paulo service for the Houston gateway. Continental argues that both services are needed for Continental to remain an effective long-term competitor with American and United in the U.S.-Brazil and U.S. Latin American markets. With respect to its Newark proposal, Continental argues that no other carrier has proposed a need for one frequency and that the Department should permanently award the frequency to Continental.

Regarding its three-frequency proposal, Continental argues that the Houston hub is the only U.S. gateway currently without daily Brazil service. It states that it currently operates four weekly nonstop Houston-Sao Paulo flights and that permitting Continental to complement those flights with three Houston-Sao Paulo flights via Lima will benefit the traveling and shipping public more than permitting Delta to add three weekly flights in the Atlanta-Rio de Janeiro market. Continental argues that by awarding Continental the four frequencies it seeks, the Department will further the goal of enhancing market structure, increasing competition, and guaranteeing continued service over U.S.-Brazil routes.

The Houston Parties and the New Jersey Parties support Continental's proposal. The Houston Parties state that Houston is the largest U.S. city that lacks daily service to Brazil. They also argue that Continental's proposal will enhance intergateway competition in the U.S.-Brazil market by offering an alternative to established Brazil gateways, including Miami, New York (JFK), Dallas/Ft. Worth and Atlanta, and will enhance intercarrier competition in the U.S.-Brazil market whereas awards to United and American would not. They further argue that to deliver maximum benefits to the public, daily service is a necessity and that, without the additional three frequencies to provide such service, Continental will be handicapped significantly in its ongoing efforts to develop Houston as a competitive alternative to the existing U.S. gateways to Brazil.

The New Jersey Parties argue that since Continental is the only applicant for one frequency, the Department can extend substantial benefits by granting Continental's request without affecting the applications of the other applicants. They maintain that there are close ties to Brazil in New Jersey, supporting the need for the additional frequency, and they urge the Department to foster the competitive growth of Newark International Airport by awarding Continental the one frequency it needs to operate daily Newark/New York-Rio de Janeiro-Belo Horizonte service.

Delta, United, and the Georgia Parties criticize Continental's three-frequency proposal. Delta argues that Continental's proposed one-stop service to Sao Paulo over Lima would be an exceedingly poor use of valuable U.S.-Brazil rights and maintains that Delta's Atlanta proposal would deliver over 34,000 more annual nonstop passengers to Brazil than Continental's one-stop Houston-Lima-Sao Paulo service. Delta further notes that Continental's 13.5 hour one-stop flight would not be competitive with the numerous nonstop options that are available in the U.S.-Brazil marketplace and further argues that Continental's forecast is grossly exaggerated by using a projected 160% stimulation rate at Houston. United argues that an award to Continental promises no benefits to the public and that Continental has resorted to gamesmanship in its quest

for Brazil frequencies. The Georgia Parties maintain that allocation of any frequencies to Continental would offer only limited public benefits and Continental's history of failing to use its allocated frequencies fully in U.S.-South America markets demonstrates that Continental would not be a vigorous and effective competitor to United and American.

Delta urges the Department to rectify the competitive imbalance in the U.S.-Brazil and U.S.-Latin America marketplaces by awarding Delta the full package of ten frequencies it seeks to compete against American, Continental, and United. Such action, Delta maintains, would rectify Delta's handicap of having the fewest number of frequencies for U.S. carrier service in the Brazil market. Delta argues that its new competitive entry in the New York-Sao Paulo market is critical to its effort to develop a comprehensive Latin American network and will facilitate the introduction of first single-plane service between New York and Montevideo by Delta. Delta maintains that it will add a new entrant competitor at the largest and most important U.S. gateway to Brazil and thus will enhance intragateway competition at New York for travel to Sao Paulo, and that only an award to Delta for its three-frequency proposal will establish a new nonstop U.S.-Rio de Janeiro competitor.

Delta's proposal is supported by the Georgia Parties, who argue that the single objective of improving the competitive structure in the U.S.-Brazil market warrants the award of ten Brazil frequencies to Delta in preference to the other applicants' proposals. They maintain that allocation of ten frequencies to Delta will enhance its competitive presence in the overall U.S.-Brazil market and will, thus, result in benefits to Atlanta-Brazil passengers. They note that Delta serves more U.S. cities and offers more total flights at its massive Atlanta hub than any other applicant at any other gateway at issue.

Delta's proposals are criticized by the other applicants as well as by the Houston Parties. American argues that Delta's forecast is exaggerated, claiming that Delta should not have assumed growth or stimulation, given the existing services in the New York-Sao Paulo market. Continental argues that neither of Delta's proposals is credible, maintaining that Delta has stimulated many connect markets behind Atlanta that do not warrant stimulation and has forecast double-connect passengers on the Atlanta-Rio de Janeiro route. United argues that the New York market needs no additional service and that the lack of support for Delta's New York service indicates recognition that the levels of services operated by three U.S. and two foreign carriers between New York and Sao Paulo are sufficient for the needs of New York consumers. The Houston Parties argue that Delta does not have a deep-rooted commitment to add more service between Atlanta and Rio de Janeiro and has offered the Atlanta proposal solely to deny Continental and Houston the opportunity for daily service.

United argues that it should be allocated frequencies to operate nonstop service from Los Angeles to Sao Paulo before New York receives additional service. It maintains that there is a need for west coast service by a U.S. carrier and that Los Angeles, the fourth largest local market to Brazil, would stimulate a strong market attracting almost 20,000 new annual passengers. United notes that current foreign-flag service load factors from Los Angeles to Sao Paulo average 81% and approach 100% on Brazil-flag carriers during peak periods. United argues that its proposed service would enhance U.S. service for all of California and the West and would correct the geographic imbalance of U.S. carrier service to Brazil. United further argues that the

proposed route is critical to United's expansion of Latin American service and development of Los Angeles as a new gateway to South America, and that Los Angeles is a credible alternative to Miami as a gateway to South America because of its large local market, its hub status and its location in extreme south of its region of the country. United further notes that it was the only U.S. carrier that operated all of its allocated U.S.-Brazil frequencies during the economic crisis in Brazil in 1998-99.

United's proposal is supported by the Los Angeles Parties, who argue that United's proposed service would provide Los Angeles, the second largest U.S. metropolitan area and largest local air travel and trade market to Brazil that lacks U.S. flag service to Brazil, with nonstop service. The Los Angeles Parties maintain that the long-term needs of the U.S.-Brazil market require enhanced competition, which the Department must place at the center of the U.S.-Brazil case, and that Los Angeles is the only gateway involved in the proceeding without nonstop U.S.-flag service to Brazil or to anywhere in South America.

United's proposal is criticized by the other applicants and the Georgia Parties. The other applicants argue that United already has a presence in the market through its code-share relationship with Varig. They also note that United has the second largest number of frequencies to serve Brazil and suggest that United can use some of those frequencies to serve Brazil from the Los Angeles gateway. American argues that United has exaggerated the stimulation factor in its forecast, given the fact that United already serves the market through its code-share arrangement with Varig, and maintains that United's proposal would offer few public benefits. In addition, American argues that United should be ranked last among the three applicants proposing daily service, noting that United was previously in the market for a five-month period in 1993 but withdrew from the market. Continental argues that United has projected only minimal traffic from domestic connecting cities and, thus, that its proposed additional Los Angeles-Sao Paulo service will provide minimal benefit to connecting western U.S. cities. Delta argues that United should not be allocated any of the available frequencies since United with its code-share partner, Varig, has a total of 58 weekly frequencies and operates more than one-third of all Brazil frequencies for U.S. and Brazilian carriers. Delta also notes that the Department has previously determined that Delta's New York service would offer greater public benefits than United's Los Angeles service.¹ The Georgia Parties argue that United's Los Angeles gateway proposal suffers from the very limited local traffic generated by the Los Angeles-Brazil market and the limited value of Los Angeles as a non-circuitous gateway for connecting traffic.

¹ Delta cites the Department's decision in the *1998 U.S.-Brazil Combination Case* where Delta's New York-Sao Paulo service was selected for backup over United's Los Angeles-Sao Paulo service. Delta argues that United has recently withdrawn from the France cases before the Department and implies that United may withdraw from the instant proceeding. United responds that there is no such implication in this case.