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**4:15 p.m.**

**Order 2001-7-16**



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

**Issued by the Department of Transportation  
on the 27th day of July, 2001**

**Served: July 27, 2001**

**2001 U.S.-ARGENTINA COMBINATION  
SERVICE PROCEEDING**

**Docket OST-2001-10198- 7**

**1999 U.S.-ARGENTINA COMBINATION  
SERVICE CASE**

**Docket OST-1999-6210 364**

**Application of**

**CONTINENTAL AIRLINES, INC.**

**Docket OST-2001-9853- 23**

**for an exemption pursuant to 49 USC 40109  
(New York/Newark-Buenos Aires start-up delay)**

**Applications of**

**DELTA AIR LINES, INC.**

**and**

**AMERICAN AIRLINES, INC.**

**Docket OST-2001-9984- 12**

**Docket OST-2001-10008-12**

**under 49 USC 41102 and 41108 for certificates of  
public convenience and necessity and/or allocation  
of frequencies**

**ORDER ON RECONSIDERATION**

**Summary**

By this order, we grant the petition of Continental Airlines, Inc., for reconsideration of Order 2001-7-12, and, on reconsideration, affirm our decision to deny Continental's request for an exemption that would permit it to delay institution of its New York/Newark-Buenos Aires service until December 1, 2002. We will also deny Continental's request that its 2002 service proposal compete in this proceeding for either a primary or a backup award, as well as its request that we expand the evidentiary submissions in this case.

**Background**

Under a November 2000 Exchange of Notes between the U.S. and Argentina, 14 additional frequencies became available for U.S. carrier U.S.-Argentina scheduled combination services. Under the agreement seven of these frequencies could be used beginning April 1, 2001 and seven would be available on December 1, 2001. By Order 2001-1-14, the Department selected Delta Air Lines to serve the Atlanta-Buenos Aires market using the seven weekly frequencies available in April and Continental Airlines to serve the Newark-Buenos Aires market using the frequencies available in December. In addition, the Department selected Continental, for services from Houston, as backup to Delta's award, and United Air Lines, for services from Los Angeles, as backup to Continental's award.

On June 6, Continental requested an exemption from the startup provisions of its award in order to delay implementation of its Newark-Buenos Aires service until December 1, 2002. That request was opposed by the other three carriers now serving Argentina--American, Delta, and United--each of which stated that it would use the frequencies for services commencing this December.

By Order 2001-7-12, the Department denied Continental's request, withdrew the seven Continental frequencies, and instituted an expedited carrier selection proceeding to reallocate the frequencies for services beginning this December.<sup>1</sup> The Department also established a procedural schedule for the filing of additional evidentiary material. In addition, the Department required that any petitions for reconsideration of the order be filed by July 23 and that answers to any petitions be filed by July 25.

**Petition for Reconsideration**

Continental filed a petition urging the Department to reconsider its denial of Continental's exemption request. Continental states that given the severe economic crisis in Argentina, the huge losses reported by the applicant incumbents and stated plans of those carriers to reduce their aircraft fleets, the proposals of these carriers to institute new Argentina service will likely generate even greater losses, impacting other services by these carriers, and is aimed solely to

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<sup>1</sup> In response to a Department notice dated July 5, 2001, United notified the Department that it would not use its backup award for service from Los Angeles. Order 2001-7-12 made clear that United's proposal to use the frequencies for service from Washington (Dulles) would have to compete with the proposals of other interested carriers.

limit competition in the U.S.-Argentina market to the detriment of the traveling and shipping public. In these circumstances, Continental argues that the Department should reconsider its decision to deny Continental's exemption request. Continental maintains that only by granting Continental's request can a fourth network be added to the U.S.-Argentina market for the benefit of competition in this market in the long run.

If the Department nonetheless decides to conduct a new carrier selection proceeding, Continental requests that its 2002 service proposal be given comparative consideration with the proposals of the other airlines and thereby enable the Department to consider in that proceeding the relative merits of four-carrier competition on U.S.-Argentina routes commencing on December 1, 2002 with the selection of an incumbent carrier to commence service on December 1 of this year, which would limit U.S.-flag competition to three U.S. carriers for the foreseeable future.<sup>2</sup>

Continental also requests that, if a proceeding is conducted, we expand the evidence requested of applicant carriers to ensure that the Department evaluates the public detriments and benefits of instituting new Argentina service this year. Specifically, Continental suggests that the Department require that the applicant carriers provide (a) specific information on where the aircraft proposed for new Argentina service will be used by the applicants if they are not awarded the Argentina frequencies at issue and what traffic would be carried on those flights; (b) details on their schedule reductions planned for the winter 2001-2002 season; and (c) their load factor, yield, and internal profitability analyses for their U.S.-Argentina routes during 2000 and 2001 on a monthly basis continuing through the termination of this proceeding. Continental maintains that although such information is not normally required in the Department's route proceedings, this information should be at the disposal of each of the applicant carriers, and that the extraordinary circumstances affecting U.S.-Argentina routes and the severe losses already being incurred by the incumbent applicants require extraordinary analysis.

Finally, Continental requests that it be granted backup authority in the new proceeding so that it could institute its New York/Newark-Buenos Aires service on December 1, 2002, if the successful applicant in the 2001 proceeding does not institute service or does not use all of its frequencies for any 90-day period. In this regard, Continental urges that the Department require the successful applicant in the 2001 proceeding to institute service as of December 1, 2001, when the rights become available.<sup>3</sup>

### **Responsive Pleadings**

Answers to Continental's petition were filed by Delta, American, United, and the Dallas/Ft. Worth International Airport (DFW).

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<sup>2</sup> Continental maintains that, in any event, the Department should exempt Continental from the startup provision in its certificate so Continental will continue to hold Buenos Aires authority that it could use for code sharing.

<sup>3</sup> Continental states to the extent necessary the Department should amend the evidence request appended to the instituting order.

All of the commenting parties oppose Continental's petition and urge the Department to deny the petition, and to proceed with the carrier selection proceeding instituted by Order 2001-7-12. Delta, American, and United argue that the Department correctly determined that it was in the public interest to ensure that the rights at issue are fully and promptly used, and that Continental's petition fails to provide any valid reason to disturb the Department's decision in Order 2001-7-12. All three carriers also oppose Continental's request to compete in the proceeding with its December 2002 proposal, stating that to do so would be inconsistent with the Department's unequivocal statements that it intends to consider only proposals for service commencing on December 1 or shortly thereafter. In this regard, Delta urges the Department to reinforce this position further by stating that service proposals that do not provide for a December 1, 2001 start date and a *bona fide* implementation plan to achieve that target date are non-responsive to the instituting order and will be rejected. American and United argue that permitting Continental's 2002 proposal to be considered would burden the record in a highly expedited case and serve only to complicate and delay a Department decision. DFW does not object to Continental's participation in the case, but argues that the Department does not have to grant Continental's petition for it to compete in the case. Rather, DFW contends that Continental could file an application on July 30 along with any other new applicants.

Finally, all of the commenting carriers oppose Continental's call for further evidentiary information, arguing that such information is unnecessary and would unduly delay this proceeding. Delta argues that since Continental is not a viable December 1, 2001, applicant the Department should not entertain Continental's request to heap superfluous evidentiary requests upon the viable applicants. American and United argue that the information sought is highly confidential and irrelevant to the Department's role in choosing a replacement carrier.

### **Decision**

We have decided to grant Continental's petition for reconsideration, and, on reconsideration, to affirm our decision to deny Continental's request to delay startup of the New York/Newark-Buenos Aires authority awarded Continental in Order 2001-1-14. We will also deny the other relief sought by Continental in its petition.

As noted in our instituting order, the frequencies at issue constitute valuable rights that we do not believe should be wasted. While Continental is not prepared to use the authority it was awarded when the rights become available, three other carriers have reaffirmed their plans to use the frequencies should they be selected in the *2001 Argentina Proceeding*. Moreover, these three carriers have done so with the full understanding of our expectation that the carrier we select implement such service when the rights become available this December. In these circumstances, and given our desire to ensure the maximum levels of service possible to the public and to make full use of the rights available under our agreement with Argentina, we are not persuaded that the public interest is better served by withholding the re-awarding of these

rights. Therefore, we affirm our decision to deny Continental's request in the captioned docket for an exemption from the startup conditions on its award in Order 2001-1-14.<sup>4</sup>

These same considerations persuade us that it is not in the public interest to permit Continental's 2002 proposal to compete in this proceeding for either the primary or backup award. Our goal in this case is to authorize service to the public commencing this December, when the frequencies become available under the U.S.-Argentina aviation agreement. Continental's proposal for 2002 service is not consistent with that objective. Further consideration of such a proposal would serve only to complicate and delay unnecessarily a case that is already being processed in an expedited manner to ensure timely reallocation of the frequencies.

We will also deny Continental's request that we expand the evidentiary information requested in this case. We have made clear in the instituting order that we are prepared to consider only proposals for service commencing this December. The supplemental evidentiary material that we requested in our instituting order calls for evidence concerning the carriers proposed routings, traffic forecasts, traffic diversion and service changes, as well as information from the carriers about their aircraft availability and service implementation plans to demonstrate their commitment and ability to commence the services proposed. Continental has not demonstrated that information beyond that which we requested is needed to generate an adequate record for decision.

**ACCORDINGLY,**

1. We grant the petition for reconsideration filed by Continental Airlines, Inc., in the captioned proceedings and, on reconsideration, affirm our decision in Order 2001-7-12 and deny the relief requested as discussed in the text of this order; and
2. We will serve this order on American Airlines, Inc.; Continental Airlines, Inc.; Delta Air Lines, Inc.; United Air Lines, Inc.; and all other U.S. certificated carriers holding foreign scheduled authority to operate transoceanic aircraft; the Dallas/Ft. Worth International Airport; the Washington Airports Task Force; the Metropolitan Washington Airports Authority; Regional

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<sup>4</sup> We also will not extend the startup condition in Continental's certificate to preserve its underlying authority for code-share purposes. Continental already has pending an application for U.S.-Buenos Aires exemption authority (Docket OST-2001-9950) in conjunction with its pending application to serve Argentina under a code-share arrangement with Transbrasil. We will consider Continental's request for underlying Argentina authority in that context.

Business Partnership (Newark); Los Angeles World Airports; the Ambassador of Argentina in Washington, DC; the U.S. Department of State (Office of Aviation Negotiations); and the Federal Aviation Administration.

By:

**SUSAN McDERMOTT**  
Deputy Assistant Secretary for  
Aviation and International Affairs

(SEAL)

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