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Order 2002-6-20



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

Issued by the Department of Transportation
on the 28th day of June, 2002

Served: July 3, 2002

In the Matter of

**2002 U.S.-BRAZIL ALL-CARGO SERVICE
PROCEEDING**

Docket OST-2002-12683 — /

ORDER INSTITUTING PROCEEDING AND INVITING APPLICATIONS

SUMMARY

By this order, we institute the *2002 U.S.-Brazil All-Cargo Service Proceeding* and invite interested carriers to file applications for authority to serve the U.S.-Brazil all-cargo market and for allocation of four U.S.-Brazil all-cargo frequencies under the U.S.-Brazil aviation agreement.

BACKGROUND

Under the Air Transport Agreement between the United States and Brazil, four U.S. carriers may be designated to operate all-cargo services. These carriers collectively may operate a maximum of 24 round-trip all-cargo wide-body frequencies per week between the United States and Brazil.¹ Federal Express Corporation, Polar Air Cargo, United Parcel Service, and Atlas Air are the four carriers now designated to provide all-cargo services in the market. Federal Express is allocated 6 weekly frequencies, Polar 4 weekly frequencies, UPS 4 weekly frequencies, and Atlas 10 weekly frequencies.

Two of these carriers -- Polar and Atlas -- recently reached an agreement, under which they would be owned by the same company but would continue to operate as two separate airlines. By Order 2002-5-24, the Department decided to grant, with the exception of Polar's Brazil designation and frequencies, a *de facto* transfer of the certificate and exemption authority, together with related frequency allocations, held by Polar to Polar under the control of Atlas Air

¹The agreement expresses the number of flights as units representing wide-body freighters. If a carrier chooses, it may substitute two flights using narrow-body aircraft for any of the wide-body frequencies it holds. The agreement provides that designated airlines may operate from a point or points in the United States via intermediate points, to Manaus, Brasilia, Rio de Janeiro, Sao Paulo, Recife, Porto Alegre, Belem, Belo Horizonte, and Salvador de Bahia, and beyond Brazil to Argentina, Uruguay, Paraguay, and Chile.

Worldwide Holdings, the parent company of Atlas Air (Docket OST-01-10239). The order also stated that the Department would institute a proceeding to reallocate Polar's Brazil designation and frequencies.²

PROCEEDING

Consistent with the provisions of the Department's route transfer order, we have decided to institute the *2002 U.S.-Brazil All-Cargo Service Proceeding*, to authorize a fourth U.S. carrier to provide all-cargo service in the U.S.-Brazil market and to allocate the four available weekly frequencies for U.S.-Brazil all-cargo services.

Accordingly, we invite all U.S. carriers interested in providing scheduled all-cargo service between the United States and Brazil as the fourth designated carrier to submit applications for certificate authority as well as for frequencies to perform such scheduled service. To the extent that carriers require new certificate authority to implement their proposed service, we will award the U.S.-Brazil route authority at issue in the form of temporary, experimental certificates of public convenience and necessity under 49 U.S.C. section 41102(c). The duration of the authority will be five years for the primary carrier and one year for the backup carrier, unless the latter authority is activated during that time, in which case it will continue in effect for five years.³

Since the agreement provides for service involving open intermediate and certain beyond points, carriers proposing service involving such points should state whether they already hold the necessary underlying authority to provide such service. Carriers that do not hold the requisite underlying authority should include requests for such authority in their applications.

Whether certificating additional carriers to provide scheduled all-cargo service in the U.S.-Brazil market is consistent with the public convenience and necessity will not be an issue. The available service opportunities represent valuable rights that were obtained through negotiations in exchange for operating rights for Brazilian carriers. The public interest clearly calls for use of these rights.

In selecting carriers for primary and backup authority our primary objective will be to maximize the public benefits that will result from award of this authority. In this regard, we will consider which applicants will be most likely to offer and maintain the best service for the shipping public. We will also consider the effect of the applicants' 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 will sustain the greatest public benefits. In addition, we will consider other factors historically used for carrier selection where they are relevant.

²Under the terms of Order 2002-5-24, Polar's designation and four frequencies reverted to the Department for reallocation. However, Order 2002-5-24 granted Polar the right to continue using its prior U.S.-Brazil designation and four U.S.-Brazil frequencies on a temporary basis until the rights have been reallocated and the carrier receiving those rights begins service.

³See Section 399.120 of our regulations (14 CFR Part 399).

It is possible that carriers will propose services from different gateway cities. We conclude that the backup authority at issue here need not be limited to the gateways where primary service is awarded. The considerations that lead to the selection of a carrier and gateway are interrelated, and a gateway's selection for primary service by a particular carrier does not mean that a different carrier at the same city would necessarily represent the next-best alternative. Moreover, the route rights under the agreement provide for service from any point in the United States to Brazil. Our primary focus here is awarding backup authority to maximize the effective use of the available route rights in the event that the primary carrier does not institute service or discontinues service during the first year, not to ensure the continuation of service from any particular gateway.

We will not, given that the frequencies at issue are available to all U.S. carriers designated to provide all-cargo services to Brazil, preclude incumbent U.S. all-cargo carriers from seeking additional frequencies in this proceeding. Those carriers, Federal Express, UPS, and Atlas, may apply for additional frequencies for their U.S.-Brazil all-cargo operations in the above-captioned docket. We intend to use the same selection considerations described above in determining whether any of the available frequencies should be allocated to incumbent carriers.

DOT Evidentiary Submissions

The Competition and Policy Analysis Division of the Office of Aviation Analysis will make available to the parties the following data in the form of information responses: (a) Schedule T-100 and T-100(f) nonstop segment data (scheduled and nonscheduled), including cargo traffic, by carrier (U.S. and foreign) by month by direction, beginning January 1999, through January 2002, between the United States and Brazil; and (b) Schedule T-100 and T-100(f) on-flight market data (scheduled and nonscheduled), including cargo traffic, by carrier (U.S. and foreign) by month by direction, beginning January 1999, through January 2002, between the United States and Brazil.⁴

New Applicant Carrier Evidentiary Submissions

Carriers seeking the available designation and frequencies for U.S.-Brazil all-cargo scheduled service should file detailed certificate applications. Applicants should submit at a minimum the following information for the twelve months ending June 30, 2003:

1. Proposed schedules showing startup dates, **complete** routings from origin to destination of all flights, days scheduled, equipment types, and variation of frequencies/routings by traffic season, if applicable. Show the available capacity (net of tare) for each equipment type for the critical leg (U.S. gateway-Brazil gateway) of the proposed routing.

⁴Due to the volume of this material we will be unable to print and distribute copies to the parties. One copy of these materials will be made available upon request for the parties' use in Room 4201, 400 Seventh Street, SW, Washington DC. In addition, the Department will issue on request copies of the information responses on computer diskettes. Parties who wish to receive diskette versions of the information responses should contact the Competition and Policy Analysis Division, at (202) 366-2352. The Department will make this material available no later than the date specified in the text of the order. Use of the data contained in the Department's Information Responses (either from hard-copy or computer diskette) is restricted to representatives of applicant carriers and interested U.S. parties (*i.e.*, those that have filed applications or comments) in this docket.

2. Based on the proposed schedules, a cargo traffic forecast, by direction, for the proposed U.S.-Brazil single-plane services, indicating data source of all traffic projections.⁵ Forecasts should specify the traffic and capacity available on the proposed services for U.S.-Brazil, U.S.-third country, third-country-Brazil, and third-country-third-country traffic and a separate breakout for express/small package and general air freight expected to be carried for each market.⁶ If mail is expected to be carried, this should also be shown separately. Show any anticipated traffic changes (generation or diversion) in other markets on the applicant's existing system resulting from the applicant's proposed service. Also show any service level or aircraft changes in the applicant's system as a result of the proposal in this case.
3. A statement as to whether the aircraft to be used in the proposed schedules are (a) on hand or (b) on order. If on hand, indicate where, and to the extent to which those aircraft are currently being used. If on order by purchase or lease, indicate when they will be delivered and how the aircraft will be financed. Indicate whether the aircraft to be used comply with FAR 36. If not, indicate specific plans for achieving compliance.
4. For each U.S.-South American market that the applicant has authority (either by certificate or by exemption) to provide scheduled all-cargo service, provide the number of flights operated by direction, by month, for the period June 1, 2001 – May 31, 2002.
5. A statement as to whether the applicant, if allocated the frequencies, would accept a condition requiring the authority to be inaugurated by a date specified by the Department, and if so, what startup period should be imposed.
6. A statement as to whether the applicant, if not allocated all of the frequencies it desires, would accept and operate an allocation of fewer frequencies, and if so how many fewer.
7. A statement as to whether the applicant, if not selected for primary authorization to be designated, would accept a backup award.
8. A statement as to whether the applicant's services will be operated in conjunction with a cooperative arrangement (*e.g.* wet lease, code share) with any other U.S. carrier or foreign air carrier. If such services are to be operated, a detailed explanation regarding such operations must be provided, as well as a copy of the cooperative agreement. If there is an existing code-share relationship with a carrier(s) involving the U.S.-Brazil market, provide a detailed description of whether the proposed services in this proceeding will replace, supplement, or decrease operations with said code-share partner(s). (Traffic forecasts should separately show connecting feed from the applicant's foreign code-share partner(s).) Any carrier operating under a code-share arrangement that has not filed that agreement, or any revisions thereto, with the Department should provide a copy of the agreement, with any revisions, in its application. If both code-share and separate operations will be conducted, the applicant should clearly reflect the full scope of the carrier's operations, including levels of service under each operational arrangement, the cities to be served, and the traffic forecasts.

⁵Applicants should specify the payload capacity used based on the stage lengths and full routings involved in determining their estimates. Projected load factors should be space-based and carriers should indicate the average density on which the load factor is based. All financial data must be given in U.S. dollars and all weights must be in U.S. pounds. The base year for developing the forecast data should be the 12-month period ending June 30, 2001.

⁶The forecast year is the twelve months ending June 30, 2003.

9. A separate description of collection and distribution systems in the United States and Brazil for freight and express/small package air cargo.

Incumbent Carrier Submissions

Incumbent carrier applications should include a complete description of the carrier's services in the U.S.-Brazil market for the period June 1, 2001– May 31, 2002.

Applications must also be specific as to how any additional frequencies will be used to augment or enhance existing services and must indicate the aircraft type that will be used for the service and the proposed level of weekly service. Each applicant should indicate if aircraft for its proposed services are on hand or on order, and should further indicate the startup date for the additional services. Any anticipated seasonal variations should be noted. The incumbent should also provide a traffic forecast for the proposed services as noted in item 2 above and should also state whether the applicant, if not allocated all of the frequencies it desires, would accept and operate an allocation of fewer frequencies, and if so how many fewer.

PROCEDURES

We have decided to use written, non-oral, show-cause procedures under Rule 210 of our regulations (14 CFR 302.210) in deciding this case. We believe that such procedures are appropriate and that by using these procedures we can establish a complete evidentiary record and make a selection with the least possible delay and without unnecessary costs to the applicants. At this time we are aware of no material issues of fact that would warrant an oral evidentiary hearing.

Finally, consistent with our current practice, the frequencies allocated in this proceeding will be for an indefinite term, provided that the carrier(s) continue to hold the underlying economic authority to serve the market. The frequencies allocated in this proceeding, however, will be subject to a 90-day dormancy provision, wherein for any frequency not used for a period of 90 days, the allocation with respect to that frequency will expire automatically. We intend to allocate frequencies only to carriers that submit applications indicating **firm** plans for regular, ongoing weekly operations for the frequencies obtained. We will not be inclined to award frequencies to carriers that indicate only sporadic proposed use of the frequencies they seek.

TIMETABLE

The designation and frequencies at issue in this proceeding are valuable route rights for U.S. carriers. We believe that it is in the public interest to select carriers on a timetable that will allow the recipients to enjoy these rights as soon as possible. To this end, we are establishing the following procedural schedule for submissions in this case:

DOT Information Responses:	July 12, 2002
Petitions for Reconsideration:	July 10, 2002
Answers to Petitions:	July 16, 2002
Applications:	July 19, 2002

Direct Exhibits:	August 2, 2002
Rebuttal Exhibits:	August 16, 2002
Briefs:	August 30, 2002

All dates are delivery dates and all submissions must be filed in the docket assigned to this proceeding. An original and five copies of all submissions are to be received at the Department of Transportation, Dockets, no later than the dates indicated.⁷ In the alternative, parties are encouraged to use the electronic submission capability through the Dockets DMS Internet site (<http://dms.dot.gov>) by following the instructions at the web site. For the convenience of the parties, service by facsimile or electronic mail is authorized. Parties should include their fax numbers or e-mail addresses on their submissions and should indicate on their certificates of service the method(s) of service used.

ACCORDINGLY,

1. We institute the *2002 U.S.-Brazil All-Cargo Service Proceeding*, Docket OST-2002-12683, which will be decided by non-oral hearing procedures under Rule 210 of our regulations (14 CFR 302.210);
2. The proceeding instituted in ordering paragraph 1 will include the following:
 - (a) Which primary and which backup carrier should be selected to provide scheduled all-cargo service in the U.S.-Brazil market as set forth in the U.S.-Brazil aviation agreement;
 - (b) How many frequencies should be allocated for the authorized services;
 - (c) What additional authority, including route integration authority, should be awarded in conjunction with the U.S.-Brazil authority awarded in this proceeding;
 - (d) Whether any of the available frequencies should be allocated to incumbent carriers and if so, how many should be allocated and to which carrier or carriers; and
 - (e) What terms, conditions, and limitations if any should be placed on any authority awarded in this proceeding.
3. We require that petitions for reconsideration of this order be filed no later than five calendar days from the date of service of this order; answers to such petitions shall be due no later than three calendar days thereafter;

⁷The original filing should be on 8½" x 11" white paper using dark ink and be unbound without tabs, which will expedite use of our docket imaging system.

4. Applications and evidentiary material should be filed in accordance with the procedural schedule set forth in this order; and
5. We will serve this order on all large U.S. certificated all-cargo carriers (listed in Appendix A).

By:

READ C. VAN DE WATER
Assistant Secretary for Aviation
and International Affairs

(SEAL)

*An electronic version of this document is available on the World Wide Web at
http://dms.dot.gov/reports/reports_aviation.asp*

SERVICE LIST
DOCKET OST-2002-12683

Order in the Matter of U.S.-Brazil All-Cargo Frequencies and Designation

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