

BEFORE THE  
DEPARTMENT OF TRANSPORTATION  
WASHINGTON, D.C.

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1999 U.S.-BRAZIL COMBINATION :  
SERVICE CASE : Docket OST-99-6284  
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Application of :  
CONTINENTAL AIRLINES, INC. :  
 : Docket OST-00-6759  
for exemptions pursuant to 49 U.S.C. § 40109 :  
(Houston-Lima-Sao Paulo and Houston-Brazil :  
Dormancy) and a Peru-Brazil frequency allocation :  
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MOTION FOR LEAVE TO FILE AND RESPONSE OF  
CONTINENTAL AIRLINES, INC. TO SURREPLY

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January 24, 2000

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Delta's<sup>1</sup> surreply contains so many egregious errors that Continental is constrained to add yet another pleading to an all-too-numerous list of pleadings on the allocation of Brazil frequencies. Since Delta casts a blind eye on its own defaults, has failed to apply for authority it requires to implement the proposed service it is already selling and cannot even count the number of frequencies held by Continental, the Department should accept this surreply so Continental can set the

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<sup>1</sup> Common names are used for airlines.

record straight before the Department issues its scope order in this proceeding and decides on temporary or permanent allocation of any Brazil frequencies at issue.

Continental responds as follows to Delta's surreply:

1. Delta's claim that it holds Atlanta-Brazil authority to implement its proposed thrice-weekly Atlanta-Rio de Janeiro service June 1, 2000, fails to recognize that Delta automatically loses those frequencies April 5, 2000, if it has not instituted service by then. Thus, Delta itself "has now defaulted on its [Atlanta] award and allowed the frequencies to lapse into dormancy" if, as Delta claims, Continental's unused frequencies have lapsed into dormancy. (Delta Surreply at 6) This default comes on top of Delta's default on its Boston-JFK-Sao Paulo-Montevideo backup authority, its switch from Atlanta-Sao Paulo to Atlanta-Rio de Janeiro and its elimination of through service between Cincinnati and both Sao Paulo and Rio de Janeiro.

2. Since Delta cannot rely on its dormant frequencies to provide Atlanta-Rio de Janeiro service, it must now apply for an exemption from its start-up requirement or authority to operate the frequencies starting June 1, 2000. Delta's claims of "compelling public interest benefits" for its proposed Atlanta-Rio de Janeiro service simply would not apply to its proposal for Atlanta-Sao Paulo service. Thus, Delta points out correctly that "new benefits will be provided by the establishment of Rio de Janeiro nonstop service" because "new nonstop flights will substantially reduce travel times between Atlanta and Brazil." (Delta Surreply at 6) The institution of additional Atlanta-Sao Paulo flights, on the other hand, would

not reduce travel times between Atlanta and Sao Paulo one bit because Delta already operates nonstop service on that route. Delta also claims that its Atlanta-Rio de Janeiro service would “improve the competition of the Atlanta gateway to compete against other nonstop Rio de Janeiro gateways” (Delta Surreply at 6), but additional Sao Paulo service would not. Like Houston, Atlanta “already has nonstop Sao Paulo service.” (Delta Surreply at 7) Although none of the benefits claimed for nonstop Atlanta-Rio de Janeiro service in Delta’s surreply would apply to Atlanta-Sao Paulo service, Delta claims the Department must give it carte blanche to determine on its own “where [the frequencies] will produce the greatest public benefits.” (Delta Surreply at 8, n. 3)

3. If the Department is going to permit carriers to retain dormant frequencies and determine where they will produce the greatest public benefits, Continental must be permitted to retain its three Houston-Brazil frequencies which become dormant in April and use them on the Houston-Lima-Sao Paulo route where Continental has determined they will produce the greatest public benefits. If not, the Department must consider whether to grant Continental’s request for a deferral of its startup date to provide Houston-Lima-Sao Paulo service starting June 15 or Delta’s request for a deferral of its startup date to provide Atlanta-Rio de Janeiro service starting June 1. To make that determination, the Department must decide whether the provision of daily Brazil service at Houston and new Lima- Sao Paulo service provide more important public benefits than adding three Atlanta-Rio de Janeiro nonstops to Delta’s daily Atlanta-Rio de Janeiro one-stops. Continental and

Houston continue to believe that Continental's additional Houston-Sao Paulo service via Lima provides far more public benefits than Delta's Atlanta-Rio de Janeiro or Atlanta-Sao Paulo service.<sup>2</sup> Moreover, since Delta apparently has not even requested a waiver of the dormancy requirement imposed on its frequency award, the Department at present has no other applicant besides Continental for the three frequencies which become available in April.<sup>3</sup>

4. If Continental held 25 Brazil frequencies, even after three frequencies were given to Delta, and if all those frequencies were transferable to whatever routes Continental believed best served the public interest, Continental would happily drop out of this proceeding. Unfortunately, Delta cannot count.

Continental currently holds only 21 weekly frequencies: seven awarded for New

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<sup>2</sup> Clearly, Delta's adding three weekly nonstops between Atlanta and Sao Paulo in addition to the daily service already offered would provide far fewer public benefits than Continental's Houston-Lima-Sao Paulo service. Thus, any award to Delta should be limited to Atlanta-Rio de Janeiro service, and Continental should be given backup authority to operate Houston-Lima-Sao Paulo service in the event Delta discontinues its Atlanta-Rio de Janeiro service.

<sup>3</sup> Unlike Delta, Continental instituted service using its Houston frequencies within the authorized startup period, Continental used its seventh New York/Newark-Rio de Janeiro frequency for two years, Continental has continued using it on a seasonal basis, Continental is currently operating daily New York/Newark-Rio de Janeiro service, and Continental began using the pendente lite frequency during the 90-day startup period imposed by the Department. (See Order 99-12-27 at 8, n. 11) Thus, no dormancy waiver should be required for that frequency. If the Department concludes that seasonal utilization is not permissible, however, it should grant Continental a waiver of the dormancy requirement imposed on its pendente lite frequency to restore the use of its seventh New York/Newark-Rio de Janeiro frequency on September 12, 2000, when Continental will be providing daily year-round service on that route.

York/Newark-Sao Paulo flights, seven awarded for New York/Newark-Rio de Janeiro flights and seven awarded for Houston-Sao Paulo flights.<sup>4</sup> If three of the frequencies held by Continental were awarded to Delta, as Delta has urged, Continental would hold only 18 weekly frequencies.

5. Both Delta and Continental have asked for immediate, permanent awards of the three frequencies at issue between them, but only Delta has asked the Department to institute two separate Brazil proceedings to run parallel courses, one dealing with seven frequencies and the other dealing with four frequencies.

Continental continues to believe that an immediate, permanent award eliminating the cloud which hangs over pendente lite frequencies would provide important benefits. If the Department nonetheless determines to hold further proceedings

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<sup>4</sup> United previously argued that “Continental has the ability to start its proposed service at Houston by transferring seven of its Newark-Brazil frequencies” and that Continental “would need only exemption authority for Houston-Sao Paulo service in order to effectuate a transfer of its frequencies.” (See United’s August 7, 1998 brief in Docket OST-98-3863 at 47-48) Thus, now that Continental holds Houston-Sao Paulo authority, United’s position in 1998 was that Continental could move the frequencies without any additional authority. United’s position in 2000 seems to be that Continental requires specific, additional authority to move Brazil frequencies for which it already holds route authority. Delta claims neither Continental nor Delta would require any authorization to move frequencies. Thus, however the Department structures the proceeding, it presents an important opportunity for it to determine the extent to which carriers require authorization from the Department to alter their Brazil frequency utilization.

with respect to any of these four frequencies, Continental sees no merit in Delta's proposal that the Department hold two separate proceedings on Brazil frequencies at the same time. Since the Department must of necessity now reconsider at least the pendente lite award of three frequencies because neither Delta nor Continental would use them in early April and since it has at least three separate procedural proposals before it, it should not rush to judgment simply because it set a date of January 25 to issue a scope order in this proceeding. Although the Department should act as promptly as possible since both Continental and Delta have proposed services to be introduced in June, due process requires the Department to consider fairly the points of view expressed by all interested parties and make a reasoned decision on how to proceed further on the Brazil frequencies issues.

6. Delta's surreply is right about one point, however. Although "the Department has already made the determination that Continental's" deferred use of three weekly Houston-Sao Paulo frequencies "does not 'warrant revocation or reconsideration of its full award,'" at least as to the four weekly nonstop Houston-Sao Paulo flights Continental has consistently operated, American and United have asked the Department to reconsider that issue. (See Delta's Surreply at 2-3) Since neither American nor United has advanced any reason to withdraw those

frequencies from Continental which has not already been considered and rejected, the Department should not give their request any serious consideration.<sup>5</sup>

7. As demonstrated above, Delta's surreply contains inaccuracies which Continental must be permitted to correct on the record for this proceeding. This being so, Continental's motion for leave to file this response should be granted.

For the foregoing reasons, Continental urges the Department to grant its motion for leave to file this response, to award Continental permanently all four of its frequencies placed at issue in this proceeding without further proceedings or, failing that, to award Continental four frequencies pendente lite to operate the New York/Newark and Houston-Brazil services it has proposed.

Respectfully submitted,

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January 24, 2000

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<sup>5</sup> Although United lost the frequencies awarded to American for New York-Rio de Janeiro service, United lost those frequencies only because it decided "to defer indefinitely its plans to use the seven weekly frequencies" allocated to it previously. (See Order 96-3-47 at 2). In sharp contrast, Continental is now using its four Houston-San Paulo nonstop frequencies and has stated specific plans to use its other four frequencies.



CERTIFICATE OF SERVICE

I certify that I have this date served a copy of the foregoing document on all parties to this proceeding in accordance with the Department's Rules of Practice.

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R. Bruce Keiner, Jr.

January 24, 2000

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