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Order 99-12-27



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

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Petition of

DELTA AIR LINES, INC.

to revoke allocation of U.S.-Brazil frequencies to
Continental Airlines, Inc.

Dockets OST-99-6259 - 17
OST-98-3863 - 186

Petitions of

AMERICAN AIRLINES, INC.

and

UNITED AIRLINES, INC.

for reconsideration of Order 99-9-23 (the *1999 U.S.-
Brazil Combination Service Case*)

Docket OST-99-6284 - 18

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

Docket OST-99-6284

**ORDER ON RECONSIDERATION AND
MODIFYING SCOPE OF PROCEEDING**

Summary

By this order, we address several pending petitions that raise issues involving service to Brazil and our recently instituted *1999 U.S.-Brazil Combination Service Case*, Docket OST-99-6284, Order 99-9-23 (*1999 Brazil Case*). We also address various procedural questions and motions relating to the *1999 Brazil Case*.

Background

Over the past three years, the Department has completed two proceedings to award U.S.-Brazil authority to U.S. carriers, along with related frequency allocations, and has now instituted a third proceeding for that purpose.

In the *1997 U.S.-Brazil Combination Service Proceeding*, Docket OST-2016 (*1997 Brazil Case*), the Department, among other things, awarded Continental Airlines seven weekly frequencies for service in the Newark-Rio de Janeiro market.¹

In the *1998 U.S.-Brazil Combination Service Case*, Docket OST-98-3863 (*1998 Brazil Case*), the Department awarded Continental Airlines certificate authority and an allocation of seven weekly frequencies to operate service between Houston and Sao Paulo.² Under the terms of the award, Continental was required to commence service no later than December 1, 1999. Continental published schedules and filed submissions with the Department, indicating that the carrier would initiate service, beginning November 30, 1999, (which it did) with four weekly flights, would increase its services to daily flights for the period December 21, 1999- January 4, 2000, but will decrease its services to four weekly flights thereafter, with no precise date for restoration of daily service.

Most recently, by Order 99-9-23, the Department instituted the *1999 Brazil Case* to consider allocation of seven weekly frequencies on a long-term basis for services in the U.S.-Brazil market. The seven weekly frequencies in question in the proceeding are those that had previously been allocated to American for its New York-Rio de Janeiro services.³ The order established a procedural schedule, which we have subsequently suspended.⁴

We have received a number of motions, petitions and responsive pleadings relating to the above matters.⁵ They fall into two broad subject areas, one relating to certain frequencies allocated to Continental and the other relating to an evidentiary issue raised by United.

The Continental Frequencies

A number of the submissions concern the status and proper disposition of Continental's frequencies from the *1997* and *1998 Brazil* cases.

¹ Continental also received seven weekly frequencies for Newark-Sao Paulo service, and Delta Air Lines was awarded seven weekly frequencies for Atlanta-Sao Paulo/Rio de Janeiro services. See Order 97-4-13.

² Order 99-3-26. Delta was selected for the backup award for service in the New York-Sao Paulo market.

³ See Order 99-9-23 for a description of the history of the frequencies at issue in the proceeding. The order authorized American to use those seven frequencies on a *pendente lite* basis in the New York-Rio de Janeiro market, effective October 1, 1999. American claims that since an earlier allocation of frequencies to American had been of indefinite duration, the Department had already decided on their long-term use and no further proceeding was necessary. For the reasons set forth in Order 99-9-23, we disagree.

⁴ Notice, dated October 22, 1999, in Docket OST-99-6284.

⁵ See the attached appendix for a complete description of the pleadings.

Delta, American, and United Air Lines each request that the Department revoke and reallocate the seven weekly frequencies awarded to Continental for its Houston-Sao Paulo services.⁶ They contend that through Continental's published schedules, Continental has indicated that it will not fulfill the service requirements for the Houston award. Delta seeks the seven frequencies for New York-Sao Paulo service, and argues that it is entitled to those frequencies under the terms of its backup award. Delta also seeks three of Continental's Houston frequencies immediately to augment Delta's Atlanta-Brazil services. American and United urge the Department to place all seven of Continental's Houston frequencies into issue in the *1999 Brazil Case*. Furthermore, American urges the Department to place into issue one of Continental's Newark frequencies, which American argues is dormant. Delta opposes placing any of Continental's frequencies into issue in the *1999 Brazil Case*, arguing that doing so will unduly delay the current proceeding. Delta does, however, ask that it immediately be given the one allegedly dormant Newark frequency to go with the three Houston frequencies, thereby enabling it to add four frequencies to its Atlanta-Brazil service. United takes no position as to whether the one Newark frequency should be placed at issue in the proceeding.

American argues that there is no need for the *1999 Brazil Case* as the Department could reallocate the seven Continental frequencies from the *1998 Brazil Case* to Delta. United and Delta disagree. Delta argues that taking the Houston frequencies away from Continental would not obviate the need for the *1999 Brazil Case* because in that case the Department is seeking to determine the best long-term allocation of the seven Brazil frequencies which American was required to use at New York, but instead moved to Miami. United maintains that even if the Department were to reallocate the seven 1998 frequencies to Delta, the Department would still have to consider the competing applications of American and United for the seven weekly frequencies already at issue in the 1999 proceeding.

Continental and the Houston Parties (the City of Houston and the Greater Houston Partnership) oppose the attempts to reallocate Continental's Houston frequencies. They argue that they have dedicated themselves to realizing the public benefits of the Continental Houston award and that they should be afforded an opportunity to operate that service. Houston argues that Continental has decided to introduce service on a phased, seasonal basis, beginning November 30, and maintains it is inconceivable that the Department could consider revoking Continental's Houston-Sao Paulo service rights before Continental and the City of Houston have even had the opportunity to implement service and develop long-term success, after they have invested heavily in that success. At the same time, Continental maintains that it has no objection to an award to Delta or another carrier on an interim basis until Continental reinstates daily Houston-Sao Paulo service. Regarding the Newark-Rio de Janeiro frequency, Continental has indicated that it intends to use the frequency in the peak January-February season and has in fact sold transportation for that frequency and urges that the Department deny the Delta request for that frequency.

⁶ Delta further requested that we stay the effectiveness of Continental's Houston award, pending resolution of Delta's revocation request and that, following revocation, we activate Delta's New York-Sao Paulo backup award from the *1998 Brazil Case*.

The United Petition Regarding Data Release

United has asked that the evidence request for the *1999 Brazil Case* be expanded to include traffic data for operations between the United States and both Argentina and Chile as well as operations between the United States and Brazil. The City of Los Angeles supports United's position.

Continental and Delta oppose releasing additional data for the *1999 Brazil Case*.

Decision

A. The Continental Frequencies

Summary

We have decided not to revoke Continental's allocated frequencies for Houston-Sao Paulo authority or to stay Continental's Houston-Sao Paulo authority. We have also decided to deny the requests to place all seven of Continental's Houston-Sao Paulo frequencies into issue in the *1999 Brazil Case*. We are deferring on the question of whether three of these frequencies should in fact be placed into issue, pending receipt of clarifying information from Continental as discussed below. We will expand the scope of the *1999 Brazil Case* to include allocation of one frequency allocated to Continental for Newark-Rio de Janeiro service, which we conclude is now dormant. We will authorize Continental, on a *pendente lite* basis, to use the one dormant Newark-Rio de Janeiro frequency, effective immediately. We will also grant Delta temporary authorization to use three of Continental's Houston-Sao Paulo frequencies, effective January 5, 2000, until further order of the Department.

Discussion

In Order 99-3-26 we selected Continental to serve the Houston-Sao Paulo market and allocated it seven weekly frequencies for that service. In making this award, we concluded that the opening of a new gateway for Brazil service and the increased gateway competition from the award offered significant public benefits to consumers not available under the other proposals. Based on the record of that case, we extended the startup date for Continental's Houston service to be no later than December 1, 1999. The frequencies allocated to Continental were subject to our standard 90-day dormancy condition. Delta was awarded backup authority for services in the New York-Rio de Janeiro market.

In the submissions before us here, Continental has confirmed its commitment to commence Houston-Sao Paulo service on November 30 (and in fact has done so), consistent with the startup provisions of its certificate and to begin that service with four weekly flights. In these circumstances, at least with respect to four of seven weekly frequencies, Continental's operations are fully consistent with the conditions of its certificate and frequency allocations and we, therefore, find no basis to withdraw the authority awarded. Contrary to Delta's assertions and those of the other petitioning carriers, we do not believe that Continental's service plans warrant

revocation or reconsideration of its full award. The factors supporting our award to Continental--the opening of a new gateway and the regional and competitive benefits of service from Continental's hub at Houston--continue to be compelling, and we believe that Continental should have the opportunity to implement that service. Furthermore, we note that our decision in the *1998 Case* specifically provided for circumstances where a portion of the frequencies might become available should Continental not institute all of the frequencies allocated to it.⁷ Thus, the record of the *1998 Brazil Case* does not support arguments that Continental's failure to use all of the frequencies should subject its award to complete forfeiture. For the reasons stated above, we do not find that such a result would best serve the public interest.

We are not persuaded, however, that Continental should retain the remaining three frequencies for Houston-Sao Paulo service unless it has firm plans to use them before the dormancy date applicable to the award. Under published schedules and the service plans set forth in the pleadings before us, Continental will operate daily service in the market only during the period December 21, 1999-January 4, 2000. After January 4, it will revert to a level of four weekly flights. Thus, under the conditions imposed on the frequency award, Continental's three unused frequencies would be dormant April 3, 2000, if not used before then by Continental.

Continental has not stated when it would resume a full level of daily service, but rather has urged us to allocate the flights on temporary basis until Continental is prepared to use them. We can readily agree on the merits of a short-term reallocation so as not to see these valuable rights lie unused. Since Delta stands ready immediately to implement these rights on its Atlanta-Brazil operations and no party is contesting its request to do so, we conclude that the public interest favors a temporary award to Delta of the authority, effective January 5, 2000, pending further order of the Department.

At this time, the duration of such award must be subject to certain contingencies, and so rather than impose a time limit here we will make the award subject to further order of the Department. We do not believe that the duration of this temporary reallocation should depend on an untested, unilateral assertion by Continental, particularly where, as here, another carrier is expressing interest in using Continental's flights on a permanent basis. At the same time, we recognize the public interest in providing Houston with an opportunity to receive daily nonstop service to Brazil. Therefore, if Continental can present demonstrable, concrete evidence (solicitation material, published schedules, aircraft availability, etc) that it will use the remaining three frequencies before they become dormant, then we would consider allowing Continental to keep them so that Houston can receive daily service. On the other hand, if Continental does not present such evidence, then we believe that the frequencies should be included in the scope of the *1999 Brazil Case* for long-term reallocation to other carriers that have firm plans to use them. In this regard, we will require Continental to submit such evidence within 10 days of the date of service of this order and will permit comments from interested parties. Upon review of all these submissions we will issue a notice further defining the scope of the *1999 Brazil Case*.

⁷ Order 99-3-26 at 8.

Finally, we will also expand the scope of this proceeding to include one frequency allocated to Continental for Newark-Rio service. According to uncontroverted materials of record, Continental ceased operating one of the Newark frequencies in May 1999 and at no time resumed service. Thus, in August 1999, (*i.e.* 90 days from cessation), that frequency became dormant and reverted to the Department. As that frequency is now available, we will grant American's request that allocation of this frequency be included in the scope of the *1999 Brazil Case*. While Continental has now stated that it plans to operate the frequency on a seasonal basis and seeks waiver of the applicable dormancy conditions, its request was filed beyond the 90th day of dormancy. Therefore, the frequency had already automatically reverted to the Department, and Continental's request cannot be considered retroactively. Continental will be free to apply in the *1999 Brazil Case* for reallocation of the frequency.

There remains the question of what action we should take with respect to the Newark-Rio de Janeiro frequency during the pendency of the *1999 Brazil Case*. We note that Delta has asked for the frequency to expand its Atlanta-Brazil service, but we further note that Continental has sold transportation that would use this frequency during the forthcoming months. We are referring the matter of these sales to the Office of Aviation Enforcement and Proceedings for whatever action that they might deem appropriate in the circumstances. Nevertheless, we conclude that in light of the short-term nature of the award at issue here, the public interest favors a result which would produce the least inconvenience for passengers. On that basis, we shall award *pendente lite* authority to Continental for the use of the seventh Newark-Rio de Janeiro frequency.

B. Release of Data

United has requested that we release additional O&D traffic data relevant to markets beyond Brazil that may be authorized in the *1999 Brazil Case*. United has limited its request to traffic in the U.S.-Argentina and U.S.-Chile markets. Continental and Delta have both opposed the request. Continental contends that the information is not necessary and that release of such data would be contrary to Department precedent in other cases. Delta contends that it would unnecessarily delay the proceeding.

We have decided to grant United's request. However, we will not limit the release of data to the two countries that United requested. The U.S.-Brazil aviation agreement permits the authorized U.S. carriers to operate services beyond Brazil to Argentina, Chile, Paraguay, and Uruguay, and we stated in Order 99-9-23 instituting the *1999 Brazil Case* that we were prepared to consider requests for such authority in this proceeding. Indeed, one applicant, Delta, has specifically requested authority in this case to serve Uruguay beyond Brazil. In these circumstances, and contrary to the objections raised by Continental and Delta, we believe that the data are relevant to this proceeding and should be released.⁸ We will release this data as an additional DOT Information Response. While United had only requested release, not reproduction, of the data,

⁸ Continental cited no cases in support of its position that release of the data would be contrary to Department precedent. To the contrary, we have previously released additional traffic data in carrier selection cases where it was deemed relevant to the proceeding. See, *e.g.*, the U.S.-Japan Gateways Case, Order 85-11-29.

we believe that the interests of all parties and the Department are best served if the Department produces a source exhibit to be used by all parties. Finally, as more recent traffic data for U.S.-Brazil services are now available (through June 30, 1999), we will amend the DOT Information Responses already released to include these data.

Reestablished Procedural Schedule

By Notice dated October 22, 1999, we suspended the procedural schedule for this proceeding and stated that we would reestablish the filing dates in our order on reconsideration. Based on the decisions set forth in this order, we reestablish the procedural schedule for this proceeding as follows:

Amended DOT Information Responses:	January 7, 2000
Continental's Response to Directive:	January 7, 2000
Answers to Information Supplied by Continental:	January 13, 2000
Replies to any answers filed:	January 18, 2000
Department Notice on Scope of Proceeding:	January 25, 2000
Direct Exhibits:	February 15, 2000
Rebuttal Exhibits:	March 7, 2000
Briefs to Decisionmaker:	March 28, 2000

ACCORDINGLY,

1. We deny the petition of Delta Air Lines, Inc. to revoke the Houston-Sao Paulo frequencies of Continental Airlines, Inc. and to stay the effectiveness of Continental's certificate awarded in the *1998 U.S.-Brazil Combination Service Case*;
2. We grant the separate petitions of American Airlines, Inc. and United Air Lines, Inc. for reconsideration of Order 99-9-23;
3. Upon reconsideration, we (a) deny the requests to place Continental's seven Houston-Sao Paulo frequencies at issue in the *1999 U.S.-Brazil Combination Service Case*, Docket OST-99-6284; (b) direct Continental Airlines, Inc. within ten calendar days of the service date of this order in Docket OST-99-6284 to provide evidence (i) of public announcements for use of the three weekly Houston-Sao Paulo frequencies commencing prior to April 3, 2000, (ii) of schedules for such service in its computer reservations system, and (iii) that it is accepting reservations and sales for such service, or to confirm to the Department it will not use the frequencies prior to the date on which the frequencies would become dormant under the terms of the frequency allocation; (c) expand the scope of the *1999 U.S.-Brazil Combination Service Case*, Docket OST-99-6284, to include (i) the three frequencies allocated to Continental for Houston-Sao Paulo service, absent clear evidence from Continental of firm plans to use the frequencies, and (ii) one U.S.-Brazil frequency allocated to Continental for Newark-Rio de Janeiro service, but that automatically reverted to the Department; and (d) publish and release O&D data

for U.S.-originating services to Argentina, Chile, Paraguay, and Uruguay that operate over Brazil;

4. We amend the Evidence Request attached to Appendix A to Order 99-9-23 to add a new section, IV.A.1.(e), to read as follows:
 - (e) For the 12 months ended June 30, 1999, O&D traffic from the Department's O&D Survey, between all U.S. points, on the one hand, and any of the following countries: Argentina, Chile, Paraguay, and Uruguay, on the other, via points in Brazil.
5. We amend the Evidence Request attached to Appendix A to Order 99-9-23 so that sections IV.A.1(c) and (d) read as follows:
 - (c) For the Calendar Years 1995 through 1998, and the twelve months ended June 30, 1999, O&D traffic from Table 15 of the Department's O&D Survey between all U.S. points, on the one hand, and Rio de Janeiro, Sao Paulo, and Manaus, Brazil.
 - (d) For the 12 months ended June 30, 1999, from the Department's O&D Survey between all U.S. points, on the one hand, and Rio de Janeiro, Sao Paulo, and Manaus, Brazil, on the other hand, that used the following gateways: Atlanta, Chicago, Los Angeles, Miami, New York/Newark, San Francisco, Washington DC, and "all others."
6. We temporarily authorize Delta to use three of the seven frequencies awarded to Continental in the *1998 Brazil Case*, for services in the Atlanta-Brazil market, effective January 5, 2000, until further order of the Department;⁹
7. We grant Continental *pendente lite* authority to use one frequency for additional service in the Newark-Rio de Janeiro market as described in the text of this order, effective immediately for a period of one year, or until 90 days after a final decision in the *1999 U.S.-Brazil Combination Service Case* in Docket OST-99-6284, whichever occurs earlier¹⁰;
8. The frequency allocations granted in ordering paragraphs 6 and 7, above, are subject to the condition that if the frequencies are not used for a period of 90 days, they will automatically expire and will revert to the Department;¹¹
9. We grant the separate motions of American Airlines, Continental Airlines, Delta Air Lines, and United Air Lines for leave to file an unauthorized document;

⁹ In the event we were to consider these frequencies in the *1999 Brazil Case*, Delta would be accorded no preference in the long-term case by virtue of this temporary award.

¹⁰ As in all such awards, Continental would be accorded no preference in the long-term case by virtue of a *pendente lite* award. The 90-day period referred to in ordering paragraph 7 is standard for awards of this type and we saw no reason to deviate from it here.

¹¹ The 90-day period will begin January 1, 2000, for Continental and January 5, 2000, for Delta.

10. To the extent not granted or deferred, we deny all requests in the captioned dockets; and
11. We will serve this order on American Airlines, Inc., Continental Airlines, Inc., Delta Air Lines, Inc., United Air Lines, Inc., the Houston Parties, the New York Parties, the City of Los Angeles, the Ambassador of Brazil in Washington, D.C., the U.S. Department of State (Office of Aviation Negotiations), and the Federal Aviation Administration.

By:

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

(SEAL)

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Chronology of Pleadings

9/23/99 Petition of Delta Air Lines (Docket OST-99-6259) to revoke allocation of U.S.-Brazil frequencies awarded to Continental Airlines in the 1998 U.S.-Brazil Combination Service Case (1998 Brazil Case), Docket OST-98-3863. Delta requests the Department to revoke Continental's 1998 award for Houston-Sao Paulo services; to make effective Delta's backup authority for Route 759 (New York-Sao Paulo); to allocate to Delta seven weekly frequencies in order to initiate New York-Sao Paulo service; and to stay immediately the effectiveness of Continental's Houston-Sao Paulo authority, pending a final decision on this petition. Delta argues that Continental has materially breached its service proposal in the *1998 Brazil Case* by failing to implement daily nonstop service between Houston and Sao Paulo. Delta states that Continental's published schedules indicate four flights per week indefinitely and that Continental's serious default on its route case commitment warrants revocation of Continental's entire frequency award

9/24/99 Continental's Answer to Delta's Petition. Continental urges the Department to deny Delta's petition so that Continental can operate daily nonstop Houston-Brazil service for the long term and suspend three weekly flights on a seasonal basis until daily nonstop service is reinstated. In support, Continental states that it intends to provide a daily service by beginning Houston-Sao Paulo nonstop service four days a week until December 20, 1999, when it will increase service to daily flights through January 4, 2000, at which time it will decrease to four weekly flights. It argues that it would not object to award of three frequencies to Delta until Continental reinstates daily Houston-Sao Paulo service; that its temporary suspension is seasonal; and that Continental has been selling its Houston-Sao Paulo service since August 3, 1999.

10/1/99 Answer City of Houston and Greater Houston Partnership (the Houston Parties). The Houston Parties oppose Delta's petition and urge its denial so that Continental can continue with its ongoing plans to implement nonstop Houston-Sao Paulo service on a long-term basis. They state that Continental and Houston are working closely together to establish daily nonstop service and that the fundamental soundness of the Department's analysis of the superior long-term public benefits of Continental's Houston service has not been undermined by Delta's petition.

American's Answer to Delta's Petition. American supports Delta's petition to revoke Continental's allocation of seven weekly frequencies. American argues that Continental has published schedules whereby it will not use three of its Houston-Sao Paulo frequencies. Furthermore, Continental holds seven frequencies to operate Newark-Rio de Janeiro services but operates only six frequencies. Therefore, American argues that Continental does not use (or will not use) a total of four weekly frequencies; that there is no basis for the Department to institute a proceeding to take away frequencies from American; instead, that the Department should revoke Continental's frequencies, grant those seven to Delta for New York-Sao Paulo service, and dismiss the *1999 Brazil Case* as moot.

Delta Reply and Amendment No. 1 to Petition. Delta requests immediate reallocation of three weekly frequencies, pending a decision on the remainder of its petition. It states that it is prepared to use the frequencies to provide three additional round-trip flights between Atlanta and Brazil. It argues that it is entitled to permanent reallocation for dormant frequencies and that Continental has provided the Department with the necessary notice to trigger the dormancy condition.

10/7/99 Petition of American Airlines for Reconsideration of Order 99-9-23 and Motion to Consolidate Proceedings, Dockets OST-99-6284, OST-98-3863, and OST-99-6259. American argues that the Department should review Continental's entire award just as the Department is reviewing American's New York-Rio de Janeiro service. American maintains that had the Department known that Continental intended to operate Houston-Sao Paulo service for an extended time with only four weekly flights, American doubts that the Department would have awarded the frequencies to Continental. On reconsideration, American argues that the Department should place Continental's seven Houston frequencies and one dormant Newark-Rio de Janeiro frequency at issue in the *1999 Brazil Case*, thus placing a total of 15 frequencies for reallocation (not just the seven the Department has threatened to remove from American. American also seeks reconsideration of the statement in Order 99-9-23 that no carrier holds a long-term allocation of these frequencies, noting that while the frequencies were initially awarded to American by Order 96-3-47 for a temporary period, they were renewed for an indefinite term. American believes that it does not need a *pendente lite* award for its New York-Rio de Janeiro service as those frequencies never became dormant.

Petition of United Air Lines, Inc. for Reconsideration of Order 99-9-23, Docket OST-99-6284. United seeks expansion of the evidence request for the *1999 Brazil Case* to include traffic data for operations between the United States and both Argentina and Chile as well as operations between the United States and Brazil. United also requests that Continental's seven Houston-Sao Paulo frequencies be placed into issue in the *1999 Brazil Case*. United takes no position on the one dormant Newark frequency.

10/13/99 Continental's Answer to Delta's Petition. Continental argues that since establishing a Houston gateway over the long term requires daily Continental service, Delta's request for long-term reallocation of the three frequencies should be denied and that the Department should reconfirm its allocation of those frequencies to Continental. Continental states that as long as its ability to operate daily Houston-Sao Paulo service between December 21, 1999 and January 4, 2000, and in the future is preserved, Continental has no objection to another carrier using those frequencies on an interim basis. Continental argues that Delta does not seek modification of its backup award but rather seeks authority to implement an entirely new proposal which bears no relation to Delta's proposal in the *1998 Brazil Case*.

Delta's Motion for Leave to File and Reply to Answers of the Houston Parties and American. While Delta agrees with American that taking frequencies away from Continental for service defaults, such action would not, as American suggests, obviate the need for the *1999 Brazil Case*. Delta notes that in the *1999 Brazil Case* the Department seeks to determine the best long-term allocation of the seven weekly frequencies which American was required to use at New York but instead moved to Miami. Delta maintains that the Department should promptly reallocate Continental's dormant frequencies to Delta in light of Continental's wasting valuable Brazil frequencies.

Consolidated Reply of United Air Lines to Amendment No. 1 and to American's October 1 Answer, and Motion for Leave to File. United maintains that revocation of Continental's allocation is fully warranted based on the pleadings of American, Delta and Continental. United points out that under the terms of Delta's backup certificate, the backup certificate would become effective in the event Continental either allowed frequencies to become dormant or failed to start any Houston-Sao Paulo service by December 1, 1999; that so long as Continental operates some level of Houston-Sao Paulo service, Continental would only lose the dormant frequencies. United states that United and American have urged the Department to revoke Continental's seven

frequencies and to place them into issue in the *1999 Brazil Case*, allowing 14 frequencies to be available to reallocation, which is enough for two full daily service patterns. United states that Houston need not lose service since Continental could use some of its Newark frequencies for Houston service. United further states that American's request to terminate the *1999 Brazil Case* has been taken over by events since United has applied to use seven frequencies for Los Angeles-Brazil service; thus, even if the Department were to give Delta all of Continental's Houston frequencies, the Department would still have to consider competing applications of American and United for the seven frequencies already at issue in the *1999 Brazil Case*.

10/14/99 United's Answer to American and Delta Applications in Docket OST-99-6284 and American's Petition for Reconsideration. United objects to the applications of American and Delta to the extent that grant of either would exclude grant of United's application. United joins American's request to include seven Continental's frequencies into the *1999 Brazil Case* with fourteen frequencies available for reallocation. United repeats that it takes no position on the 15th (the Newark-Rio de Janeiro Continental frequency) but notes that the addition of a single frequency is unlikely to result in optimal allocation were each applicant seeks seven for daily service pattern.

Consolidated Answer of the City of Los Angeles. The City of Los Angeles supports the answer of United.

Consolidated Answer of Delta in Opposition to Applications and Petitions for Reconsideration. Delta opposes consolidation and consideration of seven frequencies awarded to Continental in the *1998 Brazil Case* into the *1999 Brazil Case*, as such consolidation will unnecessarily complicate and delay the proceeding. Delta argues that its own proposed startup date of October 1 has lapsed due to procedural delays and that it is essential that the Department conduct the proceeding in due haste. Delta maintains that it stands ready to begin service within 90 days of receipt of an award. Delta argues that the Department should reject the petitions for reconsideration and should proceed with a decision on the frequencies that have already been placed at issue. Delta notes that should the Department expand the scope of the proceeding Delta would amend its application to seek further frequencies to operate a second daily Atlanta-Brazil service in addition to the New York-Sao Paulo service. Alternatively, if the Department does not consolidate Continental's frequencies in the proceeding and awards Delta the New York-Sao Paulo route, Delta would apply to use Continental's frequencies to operate a second daily Atlanta service. Delta argues that United could already introduce Los Angeles service and maintain daily nonstop service at all three of its other Brazil gateways with its present allocation of frequencies.

Answer of Continental to Petitions for Reconsideration and Motion to Consolidate. Continental argues that together American and United hold 77 of the available 105 Brazil frequencies available for U.S. carrier services and that each carrier seeks to preserve its dominance at the expense of Continental. Continental urges the Department to preserve competition in the U.S.-Brazil market and to deny the petitions of American and United and American's motion to consolidate Delta's petition for revocation of the Continental Houston-Sao Paulo frequencies into the *1999 Brazil Case*. Continental argues that seasonal traffic declines forced it to reduce Newark-Rio de Janeiro frequencies temporarily and that Continental's perseverance in serving the route should be rewarded not punished. Continental urges the Department to ensure Continental's ability to restore daily seasonal Newark-Rio de Janeiro service in January 2000. Continental opposes United's request to expand the evidence request, arguing that the Department has refused to do so in the past.

Consolidated Answer of City of Houston/Greater Houston Partnership (the Houston Parties).

The Houston Parties oppose the requests of United and American to amend Order 99-9-23 to incorporate seven Continental Houston frequencies into the 1999 Brazil Case. They argue that the public benefits associated with the Continental award remain, and they further argue that it is inconceivable that the Department could consider revoking Continental's Houston-Sao Paulo service rights before Continental and the City of Houston have had even the opportunity to implement that service and develop long-term success, yet after they have invested heavily in that success.

11/2/99 Delta's Motion for Leave and Amendment No. 2 to Its Petition. Delta requests to amend its petition to include revocation of a fourth frequency held by Continental (one Newark-Rio de Janeiro frequency). Delta states that it is prepared immediately to use the additional frequency together with the three Houston frequencies sought in amendment no. 1 to provide four additional round-trip flights between Atlanta and Brazil.

11/12/99 Continental's Answer to Delta's Amendment No. 2 to Delta Petition, and Motion for Leave to File. Continental urges the Department to deny Delta's second amendment to its petition, arguing that Continental will offer daily nonstop service between Newark and Rio de Janeiro during the peak January-February 2000 season and has already sold numerous seats on the seventh frequency. Continental argues that under these circumstances, it should be permitted to continue operating seasonal daily nonstop New York/Newark-Rio de Janeiro services until demand increases for year-round daily nonstop service on that route. Continental also states that it does not object to a temporary award of three weekly Houston frequencies, pending the Department's decision on the unused American frequencies but does oppose permanent reallocation of those frequencies.

Answer of United and Contingent Motion for Leave to File. United argues that whatever may be Delta's rights as a backup carrier with respect to Continental's dormant Houston-Sao Paulo frequencies, it has no claim to permanent reallocation of any Continental frequencies for additional Atlanta-Sao Paulo service, noting that both American and United have urged that Continental's seven Houston-Sao Paulo frequencies should be revoked and placed at issue in Docket OST-99-6284. United opposes any permanent reallocation to Delta of any of the four dormant Continental frequencies identified by Delta, but has no objection to the temporary allocation to Delta on a *pendente lite* basis. United maintains that any such temporary allocation should be subject to the conditions that it will expire 60 days after a final order in Docket OST-99-6284 and that the Department will not grant any preference to Delta in deciding the long-term disposition of these frequencies based upon Delta's services pursuant to such a temporary allocation.

11/19/99 Consolidated Reply of Delta and Motion for Leave to File. Delta argues that Continental's dormant frequencies should be immediately and permanently reallocated to Delta. Delta argues that Continental is not entitled to any recall rights in its expired frequencies and that there is no public interest basis to allow Continental to retain the dormant Brazil frequency Continental is not using to provide Newark-Rio de Janeiro service. Delta argues that there is no reason to award frequencies to Delta on a *pendente lite* basis. Delta urges the Department to revoke for dormancy the four unused frequencies held by Continental for U.S.-Brazil service and to award those frequencies to Delta for use between Atlanta and Brazil.