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Order 2000-9-24



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

Served: September 28, 2000

Issued by the Department of Transportation
on the 25th day of September, 2000

In the Matter of

U.S.-BRAZIL ALL-CARGO FREQUENCIES &
DESIGNATION

Docket OST-2000-7559 - 13

ORDER INVITING APPLICATIONS

Summary

By this order, we invite carriers interested in the fourth designation for U.S.-Brazil all-cargo services to file certificate applications for scheduled all-cargo service to Brazil as well as applications for the frequencies they seek to perform such scheduled all-cargo service. We also invite incumbent carriers to file applications for additional frequencies to supplement existing services.

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, Inc., United Parcel Service/Challenge Air Cargo, and Kitty Hawk International are the four designated carriers to provide all-cargo services in the market.²

On May 31, 2000, Atlas Air Cargo filed an application seeking exemption authority to serve the U.S.-Brazil market and allocation of 4.5 frequencies allocated to Kitty Hawk International. Atlas states that Kitty Hawk is no longer conducting airline operations and, thus, its designation and frequencies are available for reallocation. Arrow Air, Inc., filed a competing application for an exemption and the 4.5 frequencies.³ In addition, Federal Express had sought a waiver of the dormancy condition with respect to 5 of its 10 allocated frequencies (Docket OST-96-1196).

¹ The agreement provides that the number of flights are expressed as units representing wide-body freighters. One or more freighters may be substituted by narrow-body freighters in a ratio of two (2) narrow-body frequencies equal one (1) wide-body frequency. 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.

² Kitty Hawk was named American International Airways (AIA) at the time it received its Brazil frequency allocations. AIA was later acquired by Kitty Hawk, Inc. (its current parent company) and its certificates were reissued to its present name by Order 99-1-3.

Against this background, by Notice served June 21, 2000, the Department requested the four designated carriers to provide specific information regarding their designations and the extent to which the designated carriers were using their frequency allocations.⁴ Carriers were directed to file information by July 5, 2000.

Available Frequencies

From information submitted from the carriers, we have determined that Kitty Hawk ceased operations to Brazil in December 1999, and, thus, all 4.5 of its allocated frequencies automatically reverted to the Department and are available for reallocation. Two of Polar's five frequencies reverted in April 1999 and are available for reallocation. From Challenge's information, we have determined that 2.5 of Challenge's 4.5 frequency allocation reverted to the Department in 1999, and are available now for reallocation.⁵ Federal Express, for its part, returned 4 frequencies and sought and obtained a waiver for one frequency.⁶ On our own initiative we are now reconsidering the grant of that waiver. Upon further review of the record we have determined that the frequency in question had become dormant prior to Federal Express' waiver request, and that therefore the frequency had in fact already reverted to the Department and a waiver request was no longer appropriate. Thus, that frequency will also be available for reallocation. Taking into consideration all of the above, we have determined that 14 weekly all-cargo U.S.-Brazil frequencies are available for allocation in this proceeding.

Kitty Hawk's Designation

Kitty Hawk has stated in response to Atlas' application that it does not wish to lose its designation to serve Brazil and that it is too soon to relinquish its certificate authority and designation. Kitty Hawk maintains there is sound reason to retain its Brazil authority if it determines to resume operations or if it determines to sell the carrier. Kitty Hawk discontinued services to Brazil in December 1999. Other carriers desiring to serve Brazil have not been able to do so for lack of a designation. In these circumstances, we have determined that the public interest favors designating another carrier in place of Kitty Hawk for U.S.-Brazil all-cargo services. Therefore, we will rescind Kitty Hawk's designation to serve the U.S.-Brazil all-cargo market. As stated above, inasmuch as Kitty Hawk stopped services in December 1999, it no longer has frequencies allocated to it since they automatically reverted at the end of the 90-day dormancy period (i.e. March 2000), and those frequencies are available for reallocation.⁷

Inviting of Applications

Incumbent Carriers for Additional Frequencies

We invite incumbent U.S. all-cargo carriers to apply for additional frequencies for their U.S.-Brazil all-cargo operations in the above-captioned docket. Applications must be specific as to

⁴ At the time the Notice issued, the frequency allocations were believed to be as follows: Federal Express, 10; Polar, 5; Challenge/UPS, 4.5; and Kitty Hawk International, 4.5.

⁵ In this regard, see Notice of Action Taken of September 1, 2000, in this docket and Docket OST-2000-7814.

⁶ See Notice of Action Taken, dated July 27, 2000 in Docket OST-96-1196. The Department's Notice noted that grant of the waiver did not prejudice our consideration of whether Federal Express should retain the frequency in our overall review of U.S.-Brazil all-cargo frequencies in Docket OST-2000-7559.

⁷ We will not place Kitty Hawk's certificate authority in issue in this proceeding. To do so would unnecessarily complicate the

how any additional frequencies will augment existing services and must indicate the aircraft type that will be used for the service and the proposed level of weekly service. Applicants should indicate if aircraft for 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 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.

Applicants for New Designation & Frequencies

We also invite all U.S. all-cargo carriers interested in providing scheduled all-cargo service between the United States and Brazil to submit applications for certificate authority as well as for frequencies to perform such scheduled service. Although Arrow and Atlas now have exemption applications on file for U.S.-Brazil all-cargo service, we have an established policy of authorizing scheduled U.S.-Brazil all-cargo service by certificate.⁸ Arrow and Atlas may withdraw their exemption applications without prejudice and file the required certificate applications. 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.⁹

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 Brazil market is consistent with the public convenience and necessity will not be an issue. The available service opportunity represents 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 of 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.

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 entirely interrelated, and a gateway's selection for primary service by a particular carrier does not mean

⁸ See Order 95-7-13, July 12, 1995, Docket OST-95-316

⁹ See Section 399.120 of our regulations (14 CFR Part 399)

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 carriers do not institute service or discontinue service during the first year, not to ensure the continuation of service from any particular gateway.

Carriers seeking the fourth designation 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 December 31, 2001:¹⁰

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.
2. Based on the proposed schedules, a cargo traffic forecast (revenue tons), by direction, for the proposed U.S.-Brazil single-carrier services, indicating data source of all traffic projections.¹¹ Forecasts should specify the capacity available on the proposed services for U.S.-Brazil, U.S.-third country, third-country-Brazil, and third-country-third-country traffic and the percentage of express/small package and general air freight expected to be carried.¹² If mail is expected to be carried, this should also be shown separately. Include any anticipated traffic changes in other markets on the applicant's existing system, including service level/aircraft changes 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 certificate or by exemption) to provide scheduled all-cargo service, provide the number of flights operated by direction, by month, for the period January 1, 1999 through December 31, 1999.
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.

¹⁰ 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 1, 1997, through December 31, 1999, 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 1, 1997, through December 31, 1999, between the United States and Brazil.

Due 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 available 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.

¹¹ Applicants 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.

¹² The forecast year is the twelve months ending December 31, 2001.

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

Procedures and Timetable

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. We find no material issues of fact that would warrant an oral evidentiary hearing. We hope to resolve issues on the basis of pleadings before us. If upon review of the applications, however, we determine that additional information is required, we reserve our right to request such information.

Since we have already required the incumbent carriers in the market to file data concerning use of their allocated frequencies in Docket OST-2000-7559, we will not require them to resubmit data concerning frequency use. Material already submitted is available for review in the Docket Imaging System in Docket OST-2000-7559.

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 the frequencies automatically revert to the Department for reallocation if the frequencies are not used for any 90-day period. 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.

Procedural Timetable

The designation and frequencies at issue in this proceeding are valuable route rights for U.S. carriers and are effective now. 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:	October 2, 2000
Petitions for Reconsideration:	October 3, 2000
Answers to Petitions:	October 6, 2000
Applications: ¹³	October 12, 2000
Answers to applications:	October 26, 2000
Replies to any answers:	November 2, 2000

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.¹⁴ 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 is authorized. Parties should include their fax numbers on their submissions and should indicate on their certificates of service the methods of service used.

ACCORDINGLY,

1. We rescind the designation of Kitty Hawk International for U.S.-Brazil all-cargo services;
2. We revoke the waiver granted to Federal Express for one all-cargo frequency in the U.S. - Brazil market;
3. We invite incumbent carriers for U.S-Brazil all-cargo scheduled service to submit applications for additional frequencies as set forth in this order;
4. We invite carriers interested in securing the fourth available U.S. designation for U.S. - Brazil scheduled all-cargo service to submit applications for scheduled all-cargo service between the U.S. and Brazil as set forth in this order;
5. 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; and

¹³ All applications are to be filed in Docket OST-2000-7559

¹⁴ The format of filings should be as set forth in the Department's filing instructions.

6. We will serve this order on all large U.S. certificated all-cargo carriers (listed in Appendix A).

By:

FRANCISCO J. SANCHEZ
Assistant Secretary for Aviation
and International Affairs

(SEAL)

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