

BEFORE THE  
DEPARTMENT OF TRANSPORTATION  
WASHINGTON, D.C.

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In the matter of	:	
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U.S.-COLOMBIA COMBINATION	:	Docket OST-00-7655
SERVICE PROCEEDING	:	
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Applications of	:	
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CONTINENTAL AIRLINES, INC.	:	Docket OST-00-7186
DELTA AIR LINES, INC.	:	Docket OST-00-7104
	:	
for allocation of U.S.-Colombia frequencies	:	
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Application of	:	
	:	
DELTA AIR LINES, INC.	:	Docket OST-97-3218
	:	
under 49 U.S.C. § 41102 for a certificate of public	:	
convenience and necessity (Atlanta-Bogota)	:	
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PETITION OF  
CONTINENTAL AIRLINES, INC.  
FOR RECONSIDERATION

Communications with respect to this document should be sent to:

Rebecca G. Cox  
Vice President, Government Affairs  
CONTINENTAL AIRLINES, INC.  
1350 I Street, N.W.  
Washington, DC 20005

Hershel I. Kamen  
Staff Vice President, International  
& Regulatory Affairs  
CONTINENTAL AIRLINES, INC.  
P.O. Box 4607 – HQSGV  
Houston, TX 77210-4607

R. Bruce Keiner, Jr.  
Thomas Newton Bolling  
CROWELL & MORING LLP  
1001 Pennsylvania Avenue, N.W.  
Washington, DC 20004-2595  
(202) 624-2500

Counsel for  
Continental Airlines, Inc.

October 11, 2000

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Continental<sup>1</sup> petitions the Department to reconsider its decision awarding seven frequencies and related route authority to Delta for Atlanta-Bogota service because the Department's failure to institute full comparative proceedings to consider the relative merits of Continental's Houston-Cali proposal and Delta's Atlanta-Bogota proposal and develop the facts necessary to evaluate the relative

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

merits of the two applications fails to comport with relevant judicial standards. The Department's decision is arbitrary and capricious and an abuse of the Department's discretion. Moreover, the decision is not based on substantial evidence and fails to comply with relevant procedural standards. Only through the Department's normal evidentiary process can Continental and Houston be given the requisite due process they deserve so the Department can make a rational decision based on a fully-developed factual record.

Continental states as follows in support of its petition for reconsideration:

1. Continental's objections to the Department's show cause order argued that the Department had failed to establish standards for defining when a normal evidentiary proceeding is held and when a truncated proceeding with no exhibits or factual investigation, such as the proceeding here, suffices. The Department's only response is that the applicants have "presented full descriptions of their proposed services and arguments in support of their proposals," that "all parties have had a full opportunity to comment on each applicant's proposal" and that they have had further opportunities to comment in response to the show-cause order. (Order 2000-9-21 at 5) Since the same could be said of every contested route application, the Department continues to fail to meet its obligation to explain why some cases require normal evidentiary procedures while others can be truncated. When the Department diverges from its normal standards, judicial decisions require adequate explanations which the Department has failed to provide. (See, e.g., Delta Air Lines, Inc., v. CAB, 561 F.2d 293, 311 (D.C.Cir. 1977)).

2. Although Continental had pointed out numerous factual discrepancies in the Department's show-cause order demonstrating the need for further factual consideration, the Department's final order recognizes those discrepancies but fails to evaluate them rationally. Absent further proceedings, the parties have no opportunity to explore those discrepancies. The Department cited 51 weekly U.S.-Bogota frequencies which were already being operated (see Order 2000-7-19 at 5), in fact 68 weekly U.S.-Bogota frequencies were currently being operated, and Continental pointed out that adding seven additional frequencies would neither significantly develop new U.S.-Bogota traffic nor expand the range of service options available to consumers other than the small number of Atlanta consumers who would receive nonstop Bogota service for the first time. Although the Department says an award to Delta would increase "the number of U.S. cities receiving nonstop service" and enhance "the price and service options available to consumers in the U.S.-Colombia market" (Order 2000-9-21), the same is true of Continental's Houston-Cali proposal, which would have added the first nonstop Cali service at Houston, the only gateway competitive with American's monopoly U.S.-Cali service at Miami, and increase price and service options for U.S.-Cali passengers. Similarly, the Department notes that Atlanta is a Delta hub which would provide convenient connections for U.S.-Bogota passengers who already have convenient U.S.-flag connections via three other gateways, but Houston is a Continental hub which would provide convenient connections for U.S.-Cali passengers who have extremely limited connections in the U.S., all of them on American at Miami.

Houston is also a “principal hub” for Continental, and Continental has an established track record of developing Latin American service and expanding service options to the public at Houston. Similarly, the Department has said that its failure to consider the full scope of the service already offered between the U.S. and Bogota, including service by foreign-flag carriers, “further convinces us of the need for additional competitive U.S. carrier service” with no explanation why passengers should be deprived of the first competitive Cali service so other passengers can receive the sixth competitive U.S.-Bogota service. The Department also says that its reliance on the statement that because “U.S. [Bogota] services are now provided by U.S. carriers from only two U.S. cities, the addition of a new gateway will increase significantly the service options for Colombia passengers” (Order 2000-7-19 at 5) when service is offered by U.S. carriers through three gateways is not “decisionally significant” since the Department elsewhere had noted that service was offered at three gateways. Once again, the Department has failed to explain why the number of alternative gateways is not “decisionally significant” in this case but is in others although it is obligated to do so. (See, *e.g.*, *Delta Air Lines v. CAB, supra*, at 311) The Department’s refusal to hold a full comparative proceeding to find out how much traffic would be benefited on either route proposed is arbitrary and capricious, an abuse of its discretion and a denial of due process to Continental and Houston.<sup>2</sup> The Department has failed to provide any rational

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<sup>2</sup> The Department itself recognizes that a “court may reverse Department  
(continued...)

distinction between the Delta and Continental proposals which would withstand judicial scrutiny, and it has failed to meet minimum due process standards.

3. In the Department's rush to judgment, it has reached factual conclusions which are erroneous and inadequately explained, as noted above, and failed to develop a sufficient factual basis for its decision to add a seventh carrier to U.S.-Bogota routes rather than a second carrier to U.S.-Cali routes. Had the Department held a full comparative proceeding, it would have before it actual numbers of passengers who would receive their very first online Cali service and their first competitive online Cali service to compare with the minimal number of passengers who would receive their first online Bogota service or their first competitive online Bogota service. Similarly, the Department could compare the number of Bogota seats available per passenger with the number of Cali seats available per passenger to evaluate which new competition would provide more significant benefits. The Department is well aware of the effects of monopolies in air transportation generally but ignored them in this proceeding, and a full proceeding would enable it to consider the actual adverse effects of continuing American's monopoly on U.S.-Cali service. Without evaluating such factors, the

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(...continued)

findings and conclusions . . . if they are arbitrary and capricious, an abuse of discretion . . . or they fail to observe procedural requirements required by law. (See, DOT's Brief to the Fifth Circuit in *American Airlines v. DOT*, August 13, 1999 at 33-34.)

Department cannot reasonably conclude that Delta's proposal would provide greater benefits. Thus, the Department's conclusion that there are "no unresolved issues of relevant fact that would benefit from further evidentiary procedures" (Order 2000-7-19 at 7, Order 2000-9-21 at 5) is simply incorrect.

4. Although the Department cites orders in other proceedings as precedent for proceeding directly to a show cause order, it has failed to explain what standards it applies in determining whether to hold a full proceeding or not. The Department decided cases on Japan and China routes using truncated proceedings, but it has required full proceedings – and imposed long delays – in route cases involving Argentina and Brazil at the same time it was rushing to judgment on Colombia routes. In the absence of clear standards for distinguishing decisions which can be based only on applications and answers from decisions which must be based on direct and rebuttal exhibits as well as full briefing, the Department cannot lawfully grant Delta U.S.-Colombia authority without granting Continental and Houston full comparative consideration. Thus, the Department's refusal to provide a full evidentiary proceeding for the Colombia case should be reversed on reconsideration.

For the foregoing reasons, Continental urges the Department to reconsider Order 2000-9-21 and to establish further procedures for comparative consideration of the Continental and Delta Colombia proposals and to grant Continental's request for seven frequencies to offer daily nonstop Houston-Cali service.

Respectfully submitted,

CROWELL & MORING LLP

/s/ R. Bruce Keiner, Jr.

R. Bruce Keiner, Jr.  
rbkeiner@cromor.com

/s/ Thomas Newton Bolling

Thomas Newton Bolling  
Tbolling@cromor.com

Counsel for  
Continental Airlines, Inc.

October 11, 2000

CERTIFICATE OF SERVICE

I certify that I have this date served the foregoing document on all parties served with the Department's Order 2000-9-21 in accordance with the Department's Rules of Practice.

/s/ Thomas Newton Bolling  
Thomas Newton Bolling

October 11, 2000

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**SERVICE LIST**

His Excellency Luis Alberto Moreno  
Ambassador of the Republic of  
Colombia  
Embassy of the Republic of Colombia  
2118 Leroy Place, N.W.  
Washington, DC 20008  
(by mail)

Richard M. Vacar, Director  
Hoyt L. Brown, Deputy Director  
Department of Aviation  
City of Houston  
16930 John F. Kennedy Boulevard  
Houston, TX 77032  
(by mail)

Allan I. Mendelsohn  
Deputy Assistant Secretary  
for Transportation Affairs  
State Department  
2201 C Street, N.W.  
Room 5830  
Washington, DC 20520  
Email:mendelsohnai@state.gov

Nathaniel P. Breed, Jr.  
Shaw Pittman  
2300 N Street, N.W.  
5th Floor  
Washington, DC 20037  
Email:  
nathaniel\_breed@shawpittman.com

Rebecca Lynn Taylor  
Leftwich & Douglas, P.L.L.C.  
1401 New York Avenue, N.W.  
Suite 600  
Washington, DC 20005  
Email:rltaylor@ldpllc.com

Air Carrier Branch AFS-220  
Federal Aviation Administration  
800 Independence Avenue, S.W.  
Washington, DC 20591  
(by mail)

Robert E. Cohn  
Shaw Pittman  
2300 N Street, N.W.  
5th Floor  
Washington, DC 20037  
Email:robert\_cohn@shawpittman.com