Order 97-7-14

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

Issued by the Department of Transportation
on the 14th day of July, 1997

SERVED: JULY 14, 1997

In the Matter of

**U.S.-ECUADOR ALL-CARGO FREQUENCIES** — **Docket OST-97-2711**

Applications of

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| **AMERICAN INTERNATIONAL AIRWAYS, INC.** | **Docket OST-97-2342** |
| **ARROW AIR, INC.** | **OST-97-2492** |
| **CHALLENGE AIR CARGO, INC.** | **OST-97-2443** |
| **FINE AIRLINES, INC.** | **OST-97-2423** |
| **FLORIDA WEST INTERNATIONAL AIRWAYS, INC.** | **OST-97-2325** |
| **POLAR AIR CARGO, INC.** | **OST-97-2444** |

for exemption and/or reallocation of U.S.-Ecuador all-cargo frequencies

Request of

**MILLON AIR, INC.** — **Docket OST-96-1913**

for Renewal of Frequency Allocation
(U.S.-Ecuador scheduled all-cargo)

## ORDER RESCINDING FREQUENCY ALLOCATION AND TO SHOW CAUSE

### Summary

By this order, we rescind the allocation of frequencies to Millon Air for U.S.-Ecuador services, and we tentatively (1) grant American International Airways, Inc., an exemption to perform scheduled foreign air transportation of property and mail between Miami, Florida, and Quito and Guayaquil, Ecuador, and to integrate this authority with the carrier’s certificate authority to serve points in Colombia, and (2) allocate AIA three U.S.-Ecuador all-cargo frequencies for these services for a one-year period. In addition, we propose to condition the frequencies tentatively allocated here, as well as frequencies allocated to incumbent carriers, with our standard 90-day dormancy rule. We dismiss the request of Millon Air, Inc. for renewal of its frequency allocation.

**Background**

Under the U.S.-Ecuador Air Transport Agreement, while the number of U.S. carriers that may provide all-cargo services to Ecuador is not limited, the number of frequencies U.S. carriers collectively may operate in all-cargo services is limited to 15 weekly round-trip frequencies with narrow-body aircraft or their wide-body equivalent.[1] The Department allocated the 15 frequencies as follows: Challenge Air Cargo, 7 weekly frequencies; Arrow Air, 3 weekly frequencies, Million Air, 3 weekly frequencies; and Fine Airlines, 2 weekly frequencies.[2]

On October 24, 1996, Millon Air voluntarily grounded its aircraft fleet to facilitate a safety review of the carrier's aircraft and operations after a fatal accident in Ecuador. As a result of this cessation, the Department advised Millon that it had ceased operating for the purposes of section 204.7 of our rules, that its DOT economic authority had been suspended, and that the carrier could not recommence certificated operations, advertise such services, or conduct wet-lease operations until its fitness had been redetermined. On January 17, 1997, the Department denied a subsequent request by Millon to resume operations immediately using wet-lease services of other certificated U.S. air carriers.[3] To date, Millon has not been authorized by the Department to resume its operations. Since Millon ceased its operations in October 1996, the three frequencies allocated to Millon for U.S.-Ecuador services have not been used.

**Applications and Responsive Pleadings**

Six U.S.-carriers have applied for reallocation of frequencies previously allocated to Millon to conduct U.S.-Ecuador all-cargo services: American International Airways, Inc. (AIA), Fine Airlines, Inc. (Fine), Florida West International Airways, Inc. (Florida West), Polar Air Cargo, Inc. (Polar), Arrow Air (Arrow), and Challenge Air Cargo, Inc. (Challenge). Three of the applicants--AIA, Florida West, and Polar--are new entrants; and three--Fine, Arrow, and

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[1] The agreement stipulates that narrow-body aircraft may be substituted by wide-body aircraft at the following rates of conversion: one wide-body aircraft (L-1011, DC-10, A-300, B-747SP, B-767 or similar aircraft) shall be equivalent to 1.5 narrow aircraft (DC-8, B-707, B-727, B-737, B-757, MD-80 or similar aircraft), except that one B-747-100 or similar aircraft will be equivalent to two-narrow-body aircraft, and one B-747 combi (with main deck cargo) shall be equivalent to 1.5 narrow-body passenger aircraft and one narrow body all-cargo aircraft. The agreement also states that U.S. carriers may operate from the United States via the intermediate points Mexico City, Mexico; Guatemala City, Guatemala; San Salvador, El Salvador; San Pedro Sula and Tegucigalpa, Honduras; Panama City, Panama; Cali, Bogota and Medellin, Colombia; to the coterminal points Quito and Guayaquil, Ecuador; and beyond Ecuador to Lima, Peru; Santiago, Chile; Buenos Aires, Argentina; La Paz and Santa Cruz, Bolivia; Asuncion, Paraguay; and Rio de Janeiro and Sao Paulo, Brazil.

[2] See Department Notice dated June 7, 1994 and Order 95-2-19. As discussed below, Millon Air currently holds only two frequencies; one of its previously allocated frequencies is unallocated at this time since Millon did not file a timely application for renewal of the frequency.

[3] See Order 97-2-27.

Challenge--are incumbent carriers seeking to expand their services in the market.[4] A chart summarizing the applicants' proposals is attached in Appendix A.

All three new entrants would serve the Miami-Quito/Guayaquil markets. AIA seeks three frequencies and would use narrow and/or wide-body aircraft depending on traffic flows. Polar and Florida West seek two frequencies each for their services. Polar would operate wide-body aircraft; Florida West proposes service with narrow-body aircraft. Polar and Florida West propose service via intermediate points on the southbound leg; AIA states that it will make an intermediate stop if necessary to support southbound traffic flows.

The three incumbent carriers also propose service in the Miami-Quito/Guayaquil markets. Fine seeks all or a portion of the three unused frequencies; Arrow and Challenge seek one flight each. All three would operate a narrow-body aircraft in the market.

All of the applicants for new frequency allocations maintain that the frequencies should be reallocated from Millon, either on a permanent or interim basis. They state that the frequencies have been unused since Millon suspended operations last October and that the demands of the marketplace require U.S. carrier service. Generally speaking, all of the applicants are willing to accept the frequencies on a temporary or longer-term basis, and all, except Polar, are prepared to begin services within one to two weeks of obtaining all necessary government approvals.[5] Polar states that it would begin service within 30 days of necessary approval from Ecuador.

A number of answers were filed in response to the applications. Aerofloral, Inc., a flower shipper, filed an answer in support of AIA's application. Millon Air filed a consolidated answer in opposition to the applications of AIA and Florida West.[6] AIA filed an answer to the Florida West application and a consolidated answer to the applications of Arrow, Challenge, Fine, Florida West, and Polar.[7] Florida West filed a consolidated reply to the answers of Millon and AIA.

The incumbent carriers favor allocations to themselves, arguing that they are in the best position to operate the flights since they are already serving. The new entrants, on the other hand, support increasing competition by authorizing new competitors in the market.

Several applicants argue against further allocation to Challenge since it already holds the majority of the available frequencies, while Challenge argues that additional frequencies are necessary to meet the demand for its services.

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[4] AIA, Fine, and Arrow filed motions to consolidate their respective applications with the other applications filed. We will grant the motions.

[5] Florida West's application states it would begin service within thirty days after it receives approval from the Government of Ecuador. In its reply, Florida West amends its startup date to within one week of receipt of all U.S. and Ecuadorian approvals.

[6] Millon did not submit any answers to the other applications filed.

[7] AIA also requested leave to file a late answer to Fine's application and to file a surreply to the answer of Florida West. We will grant the motion.

Millon argues against any reallocation of its flights, stating that it intends to resume service as soon as its fitness is redetermined by the Department which it expects to occur in the very near future.

The applicants also raise the issue of Millon's claim to any of the frequencies in view of the fact that one frequency expired in February 1996 and the other two frequencies have been unused for over six months. They contend that, given the need for service in the market, the flights should be reallocated to other carriers.

A detailed description of the responsive pleadings is set forth in Appendix B.

**Decision**

We have decided to rescind the allocation of frequencies to Millon Air for U.S.-Ecuador services, and have tentatively decided to grant AIA an exemption for U.S.-Ecuador services and to allocate AIA three U.S.-Ecuador all-cargo frequencies for its proposed services.[8] We also propose to condition this allocation as well as the existing allocations for U.S.-Ecuador frequencies with our standard 90-day dormancy provisions. Finally, we will dismiss Millon's application in Docket OST-96-1913.

A. Disposition of Millon's Ecuador Frequency Allocations

U.S.-Ecuador frequencies are valuable route rights that were obtained by the U.S. in exchange for Ecuadorian carriers' rights to serve the United States. It is not the Department's policy to permit frequencies to go unused, particularly where other U.S. carriers have specific plans to use them.[9] [10]

Millon discontinued its services to Ecuador in October 1996. While Millon may have thought the period of suspension would be short, not requiring the return of its frequencies, circumstances have proven different and the situation has left the United States for eight months with three unused frequencies for U.S.-Ecuador services. Although Millon argues in response to the reallocation applications filed that it expects to resume service in the near future, the fact is that its fitness review is not yet complete and there is no clear indication as to if or when Millon would be in a position to resume Ecuador service. In these circumstances, and given the clear interest of several U.S. carriers in serving the market, we have determined that the public interest requires

[8] Based on data officially noticeable under rule 24(n) of our regulations, we find that AIA is qualified to provide the transportation services. AIA has been found fit to provide scheduled foreign air transportation of property and mail. See 96-6-12.

[9] *See, e.g., U.S.-Brazil All-Cargo Service Proceeding,* OST-95-316, Order 96-6-12 and *U.S.-Russia Combination Service Frequency Allocation,* OST-96-1672, Order 96-10-1.

[10] Pursuant to Order 95-2-19, one frequency expired in February 1996 and Millon failed to seek timely renewal; thus, that frequency is currently unallocated. The other two frequencies were allocated by a June 7, 1994 Notice, which stated that "should frequency allocations not be used, we [the Department] have the power to reallocate them to ensure that they are used effectively and in a manner that best promotes competition and otherwise serves the public interest. To the extent carriers do not use their allocated frequencies, they should return them promptly to the Department for reallocation."

that the frequencies, previously allocated to Millon, be reallocated to another U.S. carrier(s). We have also determined not to make interim reallocations, pending Millon's resumption of service in the market. Given the length of time the frequencies have been unused and the uncertainty over Millon's resumption of service, we do not find that it is in the public interest to reallocate the frequencies on a *pendente lite* basis. Should Millon subsequently be authorized to resume all-cargo operations, and should frequencies be available for Ecuador all-cargo service, Millon would be free to file for such frequencies at that time.

B. Proposed Reallocation

Six U.S. carriers have applied to the Department to operate U.S.-Ecuador all-cargo services. All of the proposals submitted would benefit the shipping public, and were we able, we would authorize all of the applicants to serve the Ecuador all-cargo market. However, the bilateral limitations on frequencies make that impossible, and we must determine which of the proposals will provide the best service to shippers and maximize use of our rights under the U.S.-Ecuador aviation agreement.

We have tentatively decided that our overall goals in the U.S.-Ecuador all-cargo market would be best served by adding new competition rather than authorizing incumbent carriers to increase their services. Three carriers that would be new scheduled entrants to the Ecuador market submitted applications, and all would be qualified to enter the market.[11] All of the new entrants have experience providing either charters and/or scheduled services in the Latin American market. The carriers also propose a range of service options in terms of aircraft types and routing patterns proposed. Florida West proposes service with narrow-body aircraft; AIA also proposes service with narrow-body aircraft, but would substitute wide-body aircraft if demand warranted. Polar would operate a wide-body aircraft. AIA proposes turnaround service but would add a stop in Colombia southbound for additional air traffic support in the event southbound Ecuador loads are light; Florida West proposes to include an intermediate stop in Peru; and Polar proposes to include intermediate stops in Brazil.

We have also tentatively decided that the public would benefit more from the allocation of the three available frequencies to one carrier rather than splitting them. Challenge is currently allocated seven weekly frequencies; Arrow, three; and Fine, two weekly flights. Given the small number of flights available, we tentatively conclude that allocating the frequencies to one carrier will enable that carrier to mount an alternative service that can compete with the carriers already in the marketplace.

Of the three new entrant applicants proposing service to Ecuador, we tentatively find that AIA's proposal offers the greatest public benefits and is superior to those of the other two applicants. First, AIA proposes the most frequencies, three, and thus would fully use the three available frequencies. AIA proposes to operate three narrow-body flights or where demand warrants to use L-1011 or B747 aircraft. Polar and Florida West, on the other hand, would use only two of

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[11] While Florida West has in the past served Ecuador, it is not currently in the market; thus we are considering it a new entrant applicant.

the available frequencies. In Polar's case, this would result in only one weekly round-trip flight since it proposes service with B-747 wide-body aircraft.

Second, AIA proposes to provide turnaround service in the market, maximizing the capacity available for Ecuador traffic. All of the existing services in the market are operated on a turnaround basis.[12] While all of the applicants would operate nonstop service northbound, only AIA has proposed to offer nonstop service southbound as well. Given that existing services operate on a nonstop basis in both directions, we tentatively find that AIA's proposal offers greater public benefits and competition with existing services. Moreover, to the extent that southbound loads may not provide sufficient traffic, AIA has stated that it could include an intermediate stop in Colombia to ensure the viability of Ecuador service. On the other hand, Polar and Florida West both propose intermediate stops on their southbound flights--Polar in Brazil, one of the largest U.S.-South America markets, and Florida West in Peru, both of which could be expected to preempt space on a regular basis that might otherwise have been available for U.S.-Ecuador traffic.

Finally, we note that AIA has a diverse fleet, including both narrow-body and wide-body aircraft, which affords it greater flexibility to adjust service to the demands of the marketplace. While some applicants have criticized AIA regarding the diversity of its fleet, we view this factor as a positive advantage of its proposal in this case. All applicants have cited the growing nature of the Ecuador market and the need for service. AIA's diverse fleet is consistent with the developing nature of the market. Polar, on the other hand, proposes service with wide-body aircraft only, which not only limits the number of frequencies that it can provide, but also, increases the need for additional support traffic when traffic is not as heavy. Florida West currently operates only one narrow-body aircraft and does not have any wide-body aircraft in its fleet. Absent wet-leasing for the entire Ecuador service, Florida West does not have as great a capability to respond to changing flows of traffic in the market as does AIA.

In these circumstances, we tentatively conclude that AIA should be granted an exemption to conduct U.S.-Ecuador all-cargo service and should be allocated the three available weekly frequencies to perform these services.

**90-Day Dormancy Condition**

The frequencies available for Ecuador service are extremely valuable, and we do not intend that they should be wasted. It has been our normal practice to subject frequency allocations in limited entry markets to a 90-day dormancy condition. Consistent with our standard practice, we propose to subject the frequency allocation awarded here to the condition that it will expire automatically and the frequencies will revert back to the Department if they are not used for 90 days from the date of a final order in this case. In addition to the award we are proposing here, we believe that the dormancy condition is also appropriate for the existing frequency allocations to incumbent carriers. Therefore, we also propose in this order to subject the carriers currently providing service (i.e., Challenge, Arrow, and Fine) to the same condition, namely, that if they are

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[12] See July OAG All-Cargo Guide. We note that Fine's service is not in the July OAG, but Fine in its application states that it will operate turnaround service and this service would augment its existing services.

not using any existing allocated frequencies and those unused frequencies remain dormant for 90 days after issuance of a final order in this proceeding, the dormancy conditions will apply to such frequencies and they will automatically expire and revert to the Department. Moreover, subsequent lapses of frequency use would also be subject to a 90-day dormancy provision.

**Millon's Application in Docket OST-96-1913**

On October 29, 1996, Millon filed a "Request for Renewal of Frequency Allocation."[13] In its application it states that by Order 95-2-19, the Department allocated Millon one weekly scheduled all-cargo frequency between the United States and Ecuador for a one-year period and that all three of its frequencies have been operated on a continuous basis. Millon states that through inadvertence the request for renewal of the third frequency was not submitted at the expiration of the one-year period on February 8, 1996. No answers were received to this request.

Millon's application was not filed until after the authority had expired and, thus, it is not in fact an application for renewal of the frequency allocated by Order 95-2-19. Rather, it constitutes a new request for allocation of the unused available frequency. As discussed above, however, Millon currently holds no effective Department authority to conduct air carrier operations. Thus, it is not eligible to compete for allocation of the frequencies at issue here, and we will dismiss its application. Should Millon subsequently be authorized to resume air carrier services and frequencies for Ecuador services become available, it would be free at that time to seek the necessary frequencies to serve the Ecuador market.

ACCORDINGLY,

1. We establish a new docket, OST-97-2711, for consideration of the Allocation of U.S.-Ecuador All-Cargo Frequencies, and consolidate therein the applications of American International Airlines (OST-97-2342), Arrow Air (OST-97-2492), Challenge Air Cargo (OST-97-2443), Fine Airlines (OST-97-2423), Florida West Airlines (OST-97-2325), and Polar Air Cargo (OST-97-2444);

2. We rescind our previous allocations of frequencies to Millon Air for services in the U.S.-Ecuador market;

3. We tentatively (a) exempt American International Airways, Inc., from the provisions of 49 U.S.C. 41102 to the extent necessary to engage in scheduled foreign air transportation of property and mail between Miami, Florida, on the one hand, and Quito and Guayaquil, Ecuador, on the other; and to integrate these services in order to provide the all-cargo services described in this order; and (b) allocate American International Airways, Inc., three weekly frequencies

[13] Millon's October 29, 1996 application, filed four days after the carrier suspended its operations, was styled a request for renewal. We note that in its response to applications filed for U.S.-Ecuador frequencies, Millon acknowledges that it used the frequency in question for eight months without U.S. authority. While no carriers during that time sought U.S.-Ecuador authority, Millon was remiss in not seeking renewal at the appropriate time. We have referred Millon's use of this frequency without authorization to the Office of Aviation Enforcement and Proceedings for its review.

(narrow-body aircraft or wide-body equivalent) to conduct the authorized services, effective upon a final order in this proceeding, and subject to a 90-day dormancy condition;

4. We tentatively conclude that the authority in ordering paragraph 2 above be effective for a period of one year from the service date of a final order in this proceeding;

5. We tentatively deny the applications of Arrow Air, Challenge Air Cargo, Fine Airlines, Florida West International Airways, and Polar Air Cargo in the captioned dockets;

6. We tentatively subject the current frequency allocations held by Arrow, Challenge, and Fine, to the same 90-day dormancy condition regarding frequency allocations as proposed in this order for award to AIA;

7. We grant all motions to consolidate and all motions for leave to file otherwise unauthorized documents with respect to the applications filed in the captioned dockets;

8. We dismiss the application of Millon Air, Inc. in Docket OST-96-1913;

9. We direct any interested parties having objections to our tentative decisions in this order to file their objections with the Department, Dockets, Attention: Docket OST-97-2711, U.S. Department of Transportation, 400 7th Street SW, Washington DC 20590, no later than 10 calendar days from the date of service of this order; answers to any objections are due no later than seven calendar days thereafter;

10. If timely and properly supported objections are filed, we will accord full consideration to the matters or issues raised by the objections before we take further action;

11. If no objections are filed, we will deem all further procedural steps to be waived and will proceed to a final order; and

12. We will serve this order on American International Airways, Inc.; Arrow Air, Inc.; Challenge Air Cargo, Inc.; Fine Airlines, Inc.; Florida West International Airways, Inc.; Millon Air, Inc.; Polar Air Cargo, Inc.; Aerofloral, Inc.; the Ambassador of Ecuador in Washington DC; and the United States Department of State (Office of Aviation Negotiations).

By:

**PATRICK V. MURPHY**
Deputy Assistant Secretary for
Aviation and International Affairs

(SEAL)

*An electronic version of this order is available on the World Wide Web at http://www.dot.gov/general/orders/aviation.html.*

Appendix A

**Ecuador Applications**

| Carrier | Routing | Frequencies | Aircraft | On Hand/ Lease | Startup |
|---|---|---|---|---|---|
| **I. New Entrants:** | | | | | |
| **AIA** | MIA-UIO-GYE-MIA | 3 | DC-8 or B747/L1011 if necessary | On hand | 2 weeks fr govt approval |
| **Florida West** | MIA-LIM-UIO-GYE-MIA | 2 | DC-8 or larger aircraft | Not stated | 1 week fr govt approval |
| **Polar** | MIA-GIG-VCP-GYE-UIO-MIA | 2 | B747 | On hand | 30 days fr govt approval |
| **II. Incumbents:** | | | | | |
| **Arrow** | MIA-UIO/GYE-MIA | 1 | Not stated | Not stated | Immediate |
| **Challenge** | MIA-UIO/GYE-MIA | 1 or more | 757-200PF | On hand | Immediate |
| **Fine** | MIA-GYE/UIO-MIA | 3 | Not stated | On hand | Immediate |

Appendix B

Summary of Responsive Pleadings

**Millon** states that it has no intention of abandoning service between the United States and Ecuador; that it fully intends to recommence service immediately upon completion of the DOT re-fitness proceeding, which it states is within sight; and that requests for withdrawal from Millon of its U.S.-Ecuador frequencies should be denied.  Millon states that although its third frequency lapsed through inadvertence, Millon continued to operate three flights per week with approval of Ecuadorian authorities and that Millon submitted an application for renewal of the allocation on October 29, 1996.

**Florida West**, in reply to Millon, argues that Millon asks too much of the Department, considering the length of time that has already elapsed during which Millon's US-Ecuador flights have been unused, the "indisputable" fact that any residual claim to one of the three slots has long since expired, the uncertainty about when Millon may be found operationally and financially fit, and the additional uncertainty whether, in the aftermath of Millon's serious accident in Ecuador, the Government of Ecuador will permit Millon to reenter the market even assuming all other issues were resolved in Millon's favor.  As for Millon's other two frequencies, Florida West maintains that given the dormancy of the frequencies for at least six months, Millon should have no superior claim to any of its frequencies.

Florida West further argues that the Department should remove all three U.S.-Ecuador all-cargo allocations from Millon and should allocate the three frequencies between Florida West and AIA. It maintains that Florida West is the better choice for two frequencies in this relatively small market; that the diversity of AIA's fleet is irrelevant to the question of which carrier should be assigned two frequencies and that the market is predominantly northbound with an exclusive focus on the Miami gateway for Ecuadorian perishables.  Florida West states that it has begun to make substantial preparations for resuming service and for filing the necessary application with Ecuador to reactivate its certificate authority.

**AIA** argues that it proposes to use all of the unused frequencies with its own aircraft and speculates whether Florida West is planning to wet lease larger aircraft when needed.  AIA disagrees with Florida West's assessment of fleet diversity and states that the AIA fleet diversity is one of the greatest advantages in the market.  It maintains that a diverse fleet will permit it to meet various demands of the market such as accommodating bulky and light weight cargo (e.g. flowers) with the L1011.  AIA maintains that Florida West, with its proposed routing, would not have sufficient room on its aircraft for Ecuadorian exports.

Regarding the other applicants, AIA opposes Arrow's suggestion of dividing the three frequencies among the incumbents (except Challenge) and Florida West, noting that the Department has held in other proceedings that the market would best be served by adding new competitors rather than authorizing incumbent carriers to increase their services.  AIA further states that the Department's goal should be to improve the competitive structure in the market, not to ensure prompt use of currently unused frequencies by awarding additional frequencies to the largest carrier in the market, such as Challenge. AIA maintains that Fine argues that the dominance of Challenge has distorted prices in the market, but that Fine fails to explain how awarding Fine frequencies will lower prices in the market.[1] AIA maintains that Polar's proposed aircraft departing Quito for Miami would have to take an enormous weight penalty because of altitude and notes that Polar plans to serve Ecuador after two stops in Brazil and its U.S.-Ecuador capacity would be much diminished unless Polar intends to significantly limit its loads out of Brazil.

[1] AIA also corrects a misunderstanding on Fine's part regarding the proposed startup of service by AIA and Florida West, noting that both AIA and Florida West projected their startup of services from the time the required approval from the Ecuadorian government was received.