

**BEFORE THE  
DEPARTMENT OF TRANSPORTATION  
WASHINGTON, D.C.**

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**2002 U.S.-Ecuador All-Cargo**  
**Service Case**  
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**Docket OST-2002-12503**

**REPLY OF FLORIDA WEST INTERNATIONAL AIRWAYS, INC.**

Communications with respect to this application should be addressed to:

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DATED: August 29, 2003

**BEFORE THE  
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**REPLY OF FLORIDA WEST INTERNATIONAL AIRWAYS, INC.**

Florida West International Airways, Inc. (“FWIA”) respectfully replies to the objection of Arrow Air, Inc. (“Arrow”) to the Department’s tentative decision to allocate 15 new U.S. Ecuador all-cargo frequencies to four new entrant carriers—Atlas (5), FWIA (5), Custom Air (3) and Evergreen (2). The Department’s decision reflects one of the more fundamental and well-established carrier selection preferences, to wit, the decision to allocate new service opportunities to new entrant carriers to maximize competition and provide a greater diversity of price and service options rather than award more frequencies to incumbent carriers.<sup>1</sup> With the tentative allocation of new frequencies to four new entrant carriers, the Department’s decision will more than double the number of U.S. carriers providing U.S.-Ecuador all-cargo service from three to seven—an unquestionably significant and long awaited injection of new all-cargo competition in the historically highly restricted U.S.-Ecuador all-cargo market. Arrow, however, would still enjoy a preeminent position in the market because it holds the same or more frequencies

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<sup>1</sup> *2002 U.S.-Ecuador All-cargo Service Case*, Order 2003-8-11, dated August 12, 2003 (“U.S.-Ecuador decision”).

than six of the soon-to-be seven U.S. carriers in the market. Arrow's arguments that the Department failed to contemporaneously consider its application as well as the financial impact on Arrow of the addition of four new entrant carriers are reminiscent of the carrier protection arguments that were prevalent prior to the advent of deregulation. They have no place in today's deregulated environment and should be summarily rejected to allow the four new U.S. carriers to embark upon the remaining process of obtaining the necessary approvals from the Government of Ecuador.

In further support hereof, FWIA argues as follows:

1. Although Arrow's objection suggests otherwise, the Department's carrier selection preference for new entrants over incumbent carriers is well established in both combination as well as all-cargo carrier decisions.<sup>2</sup> Arrow itself has been the beneficiary of the preference for new entrant carriers<sup>3</sup> and, in fact, the Department's two prior all-cargo frequency allocation decisions in the U.S.-Ecuador market leave absolutely no doubt that new entrant carriers will be afforded a strong preference over incumbent carriers. In 1997, the Department selected American International Airways, Inc., a new entrant carrier, to receive all of the available all-cargo frequencies in preference to two other new entrant carrier applicants and, more significantly, three incumbent carriers, including Arrow and Fine Airlines (with which Arrow was later consolidated).<sup>4</sup> Similarly, in 2000, the Department again denied Arrow, which then held the same five frequencies it has today, newly-available all-cargo frequencies in favor of a new entrant

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<sup>2</sup> See, e.g., *U.S.-Argentina Combination Service Case*, Order 2000-12-13, dated December 19, 2000 (pp. 8-9); *1997 U.S.-Chile Combination Service Proceeding*, Order 97-11-27, dated November 14, 1997 (pp. 6-9); *U.S.-Peru All-Cargo Service Proceeding*, Order 96-10-2, dated September 16, 1996 (p. 4); *U.S.-Mirabel All-Cargo Case*, Order 92-8-7, dated July 17, 1992 (pp. 11-12); *Applications of Northwest Airlines, Inc. and United Air Lines, Inc. (U.S.-Philippines)*, Order 97-7-35, dated July 30, 1997 (p. 5).

<sup>3</sup> *U.S.-Peru All-cargo Service Proceeding*, Order 96-6-32, dated June 14, 1996.

<sup>4</sup> *U.S.-Ecuador All-cargo Frequencies*, Order 97-7-14, dated July 14, 1997 (p. 5).

carrier<sup>5</sup> For the Department to have acceded to Arrow's desires and allocated several of the available frequencies to Arrow would have represented a sharp and, FWIA submits, unwarranted departure from the overwhelming thrust of the Department's carrier selection decisions in general and, most certainly, in the U.S.-Ecuador all-cargo market.

2. Arrow's legal argument that its application was denied the contemporaneous consideration required by the Ashbacker Doctrine<sup>6</sup> is unreasonable in the extreme. The Department's decision contains not only a detailed description of Arrow's service proposal (p. 4) and summary of Arrow's arguments why it should receive additional frequencies (p. 5), but also, in denying new frequencies to Arrow, an explanation that Arrow may now increase at will the capacity of its scheduled flights in view of the elimination of the capacity equivalency restrictions (p. 7). Arrow's claim that the Department failed to afford Arrow contemporaneous consideration is simply baseless. The Department unquestionably considered and decided that Arrow could implement much of its illustrative service proposal by availing itself of the new opportunity to introduce wide-bodied all-cargo aircraft free of the longstanding capacity equivalency restrictions.

3. The gravamen of Arrow's objection—the only objection filed by any of the three incumbent carriers—is, of course, that Arrow would prefer not to have to face the rigors of the enhanced competition that will ensue from the addition of four new carriers to the U.S.-Ecuador all-cargo market. Arrow's protectionist objection refers, among others, to the Department's decision as “. . . potentially devastating . . .”, to how the addition of “. . . four new carriers in the markets will adversely effect [sic] Arrow”

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<sup>5</sup> *U.S.-Ecuador All-cargo Frequency Allocation*, Order 2000-9-23, dated September 25, 2000 (pp. 4-5).

<sup>6</sup> *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945).

and to the prospect that Arrow “. . . could literally be driven from the market by reckless aggressive services”. The short answer is that these once commonplace arguments prior to the advent of deregulation are now irrelevant. The marketplace, rather than the Department, is now the principal determinant of which carriers provide service desired by shippers and consignees and no carrier, whether incumbent or new entrant, is deserving of, nor should expect, governmental protection. For its part, FWIA does not.<sup>7</sup>

4. Arrow also argues that FWIA should be denied new entrant status because FWIA operates an extensive number of charters in the U.S.-Ecuador market. The fact that FWIA has invested in serving the U.S.-Ecuador market, albeit on a charter basis, and is familiar with the needs of certain planeload shippers in the market, is a decided advantage for FWIA. FWIA will almost certainly find it much easier than several of the other new entrant carriers to use its knowledge of the U.S.-Ecuador market and to convert its charter authority from the Government of Ecuador to scheduled authority. More importantly, however, Arrow’s argument completely ignores the significant attributes of scheduled service in terms of schedule reliability and the ability to fulfill the needs of customers with varying shipment volumes. The reliability of scheduled all-cargo service

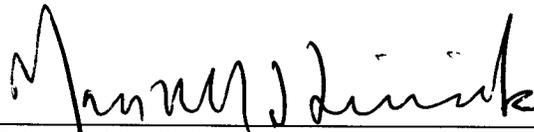
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<sup>7</sup> Arrow once again contends that the fact that FWIA leases a B-767 aircraft from Lan Chile, which also has an equity interest in FWIA, should result in FWIA being denied any new frequencies. GECAS owns the B-767 aircraft and FWIA subleases that aircraft from Lan Chile. FWIA’s relationship with Lan Chile has been reviewed by the Department on several occasions and FWIA’s B-767 lease agreements, including all amendments, have similarly been filed with the Department. Arrow’s suggestion that an applicant carrier’s lease of aircraft from another carrier should disqualify the applicant-lessee would in fact rebound to Arrow’s detriment. Arrow proposed to lease much of its new wide-bodied capacity from Atlas, itself an applicant. As Arrow well knows, it is quite common for all-cargo carriers to lease aircraft from others consistent with the needs of a particular market. The Department found unpersuasive Arrow’s argument with respect to FWIA and Lan Chile as well as a similar argument with respect to Arrow and Atlas. *U.S.-Ecuador Show Cause Order* at 7, n. 21. Arrow’s objection provides no basis for the Department to reconsider that finding.

takes on even greater importance in a market such as the northbound U.S.-Ecuador market, which has significant volumes of perishable commodities. For Arrow to ignore the significant differences between all-cargo charter and scheduled service in a market such as U.S.-Ecuador is to deny marketplace reality.<sup>8</sup>

WHEREFORE, Florida West International Airways, Inc. respectfully urges that the Department dismiss Arrow's objection and finalize its tentative decision.

Respectfully submitted,



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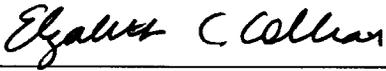
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<sup>8</sup> It is also difficult to reconcile the intellectual inconsistency between Arrow's attempt to equate scheduled and charter all-cargo services in an effort to deny FWIA new entrant status while at the same time Arrow deliberately ignores the fact that its unrestricted right to operate all-cargo charters to supplement its scheduled frequencies allows Arrow to establish an even larger presence in the U.S.-Ecuador market than Arrow has today. Arrow therefore should not experience any difficulties in remaining a substantial participant in the U.S.-Ecuador market.

**CERTIFICATE OF SERVICE**

I hereby certify that one copy of the foregoing Application of Florida West International Airways, Inc. has this day been served on each of the following persons via first class mail, postage prepaid.



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