

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

Application of)	
)	
Virgin Nigeria Airways Limited)	
)	
For a foreign air carrier permit)	
pursuant to 49 U.S.C. § 41301, et seq.)	
(U.S. – Nigeria))	
)	Docket OST-2005-23461

Application of)	
)	
Virgin Nigeria Airways Limited)	
)	
For an exemption from)	
49 U.S.C. § 41301, et seq.)	
(U.S. – Nigeria))	
)	Docket OST-2005-23460

REPLY OF VIRGIN NIGERIA AIRWAYS LIMITED

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Dated: January 18, 2006

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REPLY OF VIRGIN NIGERIA AIRWAYS LIMITED

On Thursday, December 22, 2005, Virgin Nigeria Airways Limited (“Virgin Nigeria”) applied in the above-captioned dockets for authority to provide, among other things, scheduled passenger air transportation between the United States and Nigeria. On Friday, January 6, 2006, four carriers – American, Continental, Federal Express and North American – filed answers in opposition to these applications, and Continental on January

17 filed a further Reply.¹ Virgin Nigeria hereby submits the following Reply in response to all of those pleadings.

Before addressing the specific concerns raised by each of the objecting carriers, Virgin Nigeria needs to emphasize a few fundamental points concerning its formation and staff, and the vital role it plays in the economy of Nigeria. Virgin Nigeria believes that many of the criticisms about its formation simply do not take into account the realities of the air transport market in Africa, or the fact that Nigeria at the moment is not rated as Category 1 under the IASA program.

The reality is that, with very few exceptions, Africa is a developing aviation market. Unlike the United States and other countries, there is simply not a large pool of experienced aviation managers in Nigeria from which to draw, although Virgin Nigeria is firmly committed to helping develop that talent over time. Thus, it should not be at all surprising that Virgin Nigeria will be at least somewhat reliant upon expatriate talent for the near term. Moreover, given the fact that Virgin Nigeria is required to wet lease aircraft in order to serve the United States, any non-US carrier which flies on Virgin Nigeria's behalf would be performing an "extrabilateral" Fifth Freedom charter in operating this service.²

Another fact virtually ignored in all of the answers is the process that the Nigerian Government went through when choosing a strategic partner for its new flag carrier. While many of the objectors have expressed displeasure with Virgin Atlantic having been chosen as Virgin Nigeria's technical partner, they overlook entirely that there were a finite number

¹ Continental filed Answers to Virgin Nigeria's exemption and permit applications, with the answer to the permit application essentially incorporating by reference the earlier answer. This Reply will address all outstanding Answers, and the Continental Reply..

² Under DOT's current rules, a wet lease operation such as the one required by Virgin Nigeria would be a Fifth Freedom charter. See 14 CFR 212.10. Fifth freedom charters which are not directly provided for under a bilateral air service agreement can be approved on the basis of reciprocity, and a showing that the carrier performing the service would not be unduly reliant upon fifth freedom traffic.

of bidders, and that the bidders were ranked based upon objective criteria. While one commenter has taken issue with the result of this process,³ the fact is that the Nigerian Government has undertaken to resurrect its aviation sector in a manner entirely consistent with the DOT's own Statement of International Aviation Policy, which states a strong preference for the privatization of state owned airlines, and the use of private sector resources to accomplish these ends. The Department would undermine its own policy if it were to refuse to license Virgin Nigeria merely because the selection of partners made through this process might not have been its own.

American Airlines

American objects to the Virgin Nigeria application because of an alleged failure on the part of the Nigerian Government to approve a code-share arrangement between American Airlines and British Airways. American claims that this alleged denial violates the US-Nigeria Open Skies Agreement.

Virgin Nigeria has no objection at all to the code-share to which American refers. Virgin Nigeria wishes to note, however, that while the US-Nigeria Open Skies Agreement does indeed authorize code-sharing, the UK-Nigeria Air Service Agreement does not, with the understanding between the British and Nigerian governments being that any such arrangements would be approved on an *ad hoc*, case-by-case basis. Virgin Nigeria has been informed that the Nigerian authorities will shortly approve this extra-bilateral application.

American has opted not to comment on Virgin Nigeria's ownership structure, other than to emphasize that any findings concerning the ownership of Virgin Nigeria should

³ See Answer of Federal Express, at 9.

have “no bearing on the application by Virgin America,” as the standards and statutory language upon which the two applications are based are entirely distinct. (See, Answer of American, at 2-3). Virgin Nigeria concurs with American’s observation. With respect to Virgin Nigeria, the DOT must determine whether Virgin Nigeria is “substantially owned” by Nigerian nationals, using the information supplied in the applications referenced in these dockets, or waive this requirement, consistent with the settled policy.

Continental Airlines

Continental has voiced a number of objections to Virgin Nigeria’s application. Continental notes that the service proposed would be provided pursuant to a wet lease operated by Virgin Atlantic, which should be grounds for DOT to deny the application because this would allegedly be an extrabilateral “Seventh Freedom” operation for Virgin Atlantic. Continental takes issue with Bermuda 2, as that agreement “precludes Continental and other US airlines from offering any flights whatever at London Heathrow” (Answer of Continental, at 1-2). Continental also alleges that Virgin Atlantic “has set up shop in Nigeria to exploit Seventh Freedom rights between the US and Africa that Virgin Atlantic could never secure on its own” (Answer of Continental, at 2), and asserts that Virgin Atlantic is in a position to control Virgin Nigeria. Late in its answer, Continental argues that Virgin Nigeria’s application should be denied because the Nigerian Government has not yet approved its own application to offer service between the United States and Nigeria. (Answer of Continental, at 5-6). Continental then goes on to question Nigeria’s commitment to air safety by claiming that “[i]f Nigeria had been serious about promoting safe and secure air transportation between the US and Nigeria last year, it

would have granted Continental's application rather than sitting on it." (Answer of Continental, at 6).

Needless to say, there is much in Continental's answer with which Virgin Nigeria disagrees.

As a practical matter, much of what Continental complains of – the restrictive nature of the US-UK air service agreement – is entirely beyond Virgin Nigeria's control. As a Nigerian airline, Virgin Nigeria has no ties to the British Government, or ability to influence its policies, be it access to Heathrow, or allocation of fuel by the British Airports Authority.⁴ Whatever position the Department of Transportation takes with regards to Virgin Nigeria will also have no impact whatsoever on the US – EU air service discussions.

Of course, Continental asserts that the Department should deny the application because it calls for Virgin Atlantic to perform long-haul services for Virgin Nigeria. However, it is essential to note that unless Virgin Nigeria were to enter into a wet lease arrangement with a US airline, any airline from a country that is not rated under IASA Category 1 simply must have a third country airline perform Fifth Freedom charter services on its behalf. Moreover, under virtually every bilateral agreement the US has signed (including Open Skies agreements), these Fifth Freedom charters are

⁴ Reply of Continental, at 2.

“extrabilateral” in nature, as they have no direct nexus to the third country’s homeland.⁵ In situations such as this, DOT simply cannot focus on whether or not this type of charter is covered by a bilateral agreement, and instead should consider whether the prospective wet lessor is from a Category 1 country, and whether the carrier performing the service would somehow be “unduly reliant” upon Fifth Freedom services.

Using these criteria, this service should be approved. The UK is a Category 1 country, and Virgin Atlantic has a sterling safety record. Moreover, as a carrier which offers 15 daily frequencies to the United States from the United Kingdom, there can be no argument that Virgin Atlantic will somehow be “unduly reliant” upon Fifth Freedom traffic.⁶

Continental also asserts that Virgin Atlantic’s driving motivation for acquiring a stake in Virgin Nigeria was to fly Seventh Freedom services between Nigeria and the United States. While Virgin Nigeria does not know and cannot state what the desires of Virgin Atlantic were or were not at the time, Continental’s assertions have little objective support.

⁵ Under the typical open Skies charter provision, fifth freedom charters that involve a stop in the homeland of the carrier designating the airline are approved as a matter of right, whereas other charters must be approved on the basis of comity. For example, Annex II, section 1 of the US-Nigeria Open Skies Agreement provides, in relevant part, as follows:

A. Airlines of each Party designated under this Annex shall, in accordance with the terms of their designation, have the right to carry international charter traffic of passengers (and their accompanying baggage) and/or cargo (including, but not limited to, freight forwarder, split, and combination (passenger/cargo) charters):

1. Between any point or points in the territory of the Party that has designated the airline and any point or points in the territory of the other Party; and

2. Between any point or points in the territory of the other Party and any point or points in a third country or countries, provided that, except with respect to cargo charters, such service constitutes part of a continuous operation, with or without a change of aircraft, that includes service to the homeland for the purpose of carrying local traffic between the homeland and the territory of the other Party.

...

C. Each Party shall extend favorable consideration to applications by airlines of the other Party to carry traffic not covered by this Annex on the basis of comity and reciprocity.

⁶ The UK CAA on occasion has permitted US carriers to wet lease aircraft to British airlines, such as a series of wet lease arrangements between Atlas and British Airways. This is the case even though British carriers do not enjoy reciprocal opportunities to wet lease their aircraft to US airlines.

The US-Nigeria service, which will be operated three or four times per week, would be a very small part of a much larger operation.

Virgin Nigeria is offering a plethora of services not only within Africa, but also within the Nigerian domestic market. Indeed, as a result of recent air tragedies, Virgin Nigeria has agreed to a government request that it expand the scope of its domestic services. The commitment made by Virgin Nigeria to its homeland, and the assistance offered by its Technical Partner, is quite significant, and should not be given short shrift. Virgin Nigeria has become an important corporate citizen within Nigeria, offering employee training programs, and undertaking to obtain its own AOC, with an ever-growing number of Nigerian staff.

Continental argues that Virgin Nigeria is not owned and controlled by Nigerian nationals, and then goes on to demand that the Department require Virgin Nigeria to provide a virtual truckload of documents to the Department concerning its ties to Virgin Atlantic and to other entities in the Virgin family of companies (Answer of Continental, at 3-5). This list of documents is strikingly similar to that which Continental on December 16, 2005 demanded the Department require from Virgin America.

Although American Airlines has recognized the distinction between the Virgin America and Virgin Nigeria cases, Continental apparently has not. As American correctly observed, the Department has primary jurisdiction over its own carriers, and is required by various statutes to make affirmative findings about the carrier's financing and structure. The role is somewhat different with regard to the licensing of a non-US airline. As everyone agrees, the Department here must adduce whether the record supports a finding that Virgin Nigeria is owned and controlled by nationals of its homeland, and, if such a

finding cannot be made, determine whether or not it wishes to waive this requirement. Given the fundamental differences between these regulatory regimes, it would be entirely inappropriate for the Department to accede to Continental's demand that it bear the same regulatory burdens as an application for US operating authority.

Virgin Nigeria believes that its application warrants DOT approval. Nigerians control a majority of its shares, and have a majority on the Board of Directors. Moreover, it is significant that Virgin Nigeria is considering an IPO which would likely result in an increase in the percentage of shares held by Nigerian nationals. However, if the Department believes that the record does not support such a finding, then the correct course of action would be to decide whether or not it would be appropriate to waive the ownership and control requirement. As Virgin Nigeria has stated, it would be entirely appropriate for the Department to issue such a waiver.⁷ Virgin Nigeria's application would serve the public interest as it would introduce a new service and competitor to the U.S. – Nigerian market. The only way to get to Nigeria at present is to connect via Europe or via expensive charter service. North American is proposing to provide service between the U.S. and Nigeria via Accra, Ghana. Virgin Nigeria's proposed direct service would enhance price and service options available to the traveling public resulting in huge savings in time and money to the end users. This service would result in closer ties being built between the U.S. and Africa consistent with the longstanding DOT policy, and meeting the needs of individuals, corporations, and foundations in both the U.S. and Africa that have long been clamoring for this service.

⁷ The Department very recently waived its ownership and control requirements for African International Airways (Proprietary) Limited, a South African carrier that was partially owned by Intavia, a company owned by British citizens. According to the Notice of Action Taken, Intavia leased aircraft to the carrier, as well as provided day-to-day management services. See African International Airways (Proprietary) Limited, Docket OST-2004-17733, Notice of Action Taken dated July 6, 2004.

Continental also asserts that the Department should deny Virgin Nigeria's application because its own application to serve the Nigeria-US market has not been approved. Indeed, in its latest Reply, Continental goes so far as to assert that the previous non-approval should work as a permanent bar to Virgin Nigeria's service, even if Continental's application were later approved ("Nigeria's failure to honor its bilateral agreements cannot now be cured by claims that Nigeria will start to honor its commitments in the future..."). (Reply of Continental, at 2).

Under Continental's reasoning, the US would never resolve any of its 'doing business' or other bilateral issues. Continental appears to be asserting that even if Nigeria were to promptly approve all outstanding US carrier applications, the Department should nevertheless continue to withhold approvals from Virgin Nigeria, on the theory that past alleged breaches of the US-Nigeria Open Skies Agreement cannot be cured. This position is untenable.

Although Virgin Nigeria has indicated its understanding that the Nigerian Government would approve a US carrier application to serve Nigeria, Continental does not indicate whether it remains interested in serving the Nigeria-US market.

If Continental desires to be licensed to serve the US-Nigeria market, it should so indicate, and Virgin Nigeria will urge both the US and Nigerian governments to approve all pending applications to serve the market.⁸ However, if Continental is no longer interested, it should also state as much, and indicate that its objection to Virgin Nigeria's application rests not so much on its own aspirations for the US-Nigeria market as much as its desire to

⁸ The Nigerian Government has indicated to Virgin Nigeria that it would be willing to grant this authority to Continental. Of course, the Department is free to confer with its Nigerian counterparts to confirm this, and to discuss other matters of mutual importance.

express its disapproval of the US-UK bilateral relationship in every possible wayas well as its continuing unhappiness over what happened in the past.

Before turning to the answer of Federal Express, Virgin Nigeria needs to respond to two extremely intemperate statements made by Continental. In its latest Reply, Continental goes on at length about the problems in Nigeria's aviation sector, and says that DOT "should not even consider an application from a Nigerian airline until Nigeria has taken the steps necessary to join the ranks of responsible aviation countries and to support Nigerian airlines with the necessary regulation and infrastructure to provide safe and reliable air service." (Reply of Continental, at 4). Given Continental's assertions, no carrier from an IASA Category 2 country would be permitted to serve the United States at all, since placement in Category 2 is effectively an FAA finding that a carrier's homeland government does not exercise the requisite level of oversight over its flag carrier. If the Department were to opt to take that position, then it should let all of its trading partners from lesser-developed countries know, so that those nations can understand that they will not be permitted to exercise their bilateral rights to serve the United States. Moreover, Virgin Nigeria takes strong exception to Continental's assertion that the Nigerian Government is somehow "irresponsible." While the aviation sector in Nigeria has its difficulties, the fact is that the Nigerian Government is seeking external help from a number of sources to address these difficulties. In Virgin Nigeria's view, that is a hallmark of responsibility.

Virgin Nigeria also objects to a statement made by Continental that "[i]f Nigeria had been serious about promoting safe and secure air transportation between the US and Nigeria, it would have granted Continental's application" (Answer of Continental, at

6). Taken at face value, this remark casts aspersions on the seriousness and diligence with which the Nigerian Government is seeking to improve its own aviation sector. Nigeria for several years has been working toward this end, and has recently engaged ICAO in its efforts to identify shortfalls in its regulatory oversight, and to offer suggestions as to how its own carriers might improve. The rationale of the Nigerian government in having a technical partner for their new national flag carrier followed from this commitment to ensure safety and security of the airline and meet international best practice. The President recently inaugurated a Special Task Force (of which Virgin Nigeria is a member) on the aviation industry which is reviewing all aspects of the industry to ensure that safety and security of air transportation is maintained. To state that Nigeria is not “serious” about its objective of improving its aviation sector, especially given the recent tragic air crashes in Nigeria, is both intemperate and irresponsible.

Federal Express

Federal Express objects to Virgin Nigeria’s application because Virgin Atlantic is the minority shareholder in the carrier. Federal Express asserts that with its 51/49 ownership structure, DOT cannot find that Virgin Nigeria is “substantially owned and effectively controlled” by Nigerians. (Answer of Federal Express, at 4). Federal Express goes on to assert that DOT should not waive the ownership and control requirements, given the state of US-UK relations. Federal Express on more than one occasion also expresses concern that Virgin Nigeria has requested authority to operate Seventh Freedom all-cargo services

as authorized by the US-Nigeria Open Skies Agreement. (See, e.g., Answer of Federal Express, at 1, 3 and 4).⁹

Federal Express' strongest concern appears to be focused on its deep dissatisfaction with Bermuda 2. Although it does not assert that the UK is not honoring this bilateral agreement, Federal Express takes issue with the fact that Bermuda 2 gives it "commercially worthless" points beyond the United Kingdom, and restricts passenger carrier access to Heathrow. Federal Express says that so long as Bermuda 2 is in force, Virgin Nigeria should not be permitted to fly to the United States.

Once again, Virgin Nigeria must emphasize that it has no ties whatsoever to the British Government, let alone any ability whatsoever to influence its bilateral air policy. It would be far more appropriate for Federal Express to raise these concerns in the context of EU-US negotiations than it would here. Virgin Nigeria submits that the US would undermine its own policies if it were to make its decision on the merits of Virgin Nigeria's application based on a referendum on the US-UK bilateral air service relationship. The US repeatedly has urged state owned carriers to privatize, and staunchly has urged the use of mechanisms such as the comparative selection process that was used to select a strategic partner for Virgin Nigeria. That process has led to the selection of Virgin Atlantic as the Technical Partner. In Virgin Nigeria's view, the Government of Nigeria has followed the US procedural playbook to the letter, and would be enormously disheartened to learn at the end of the game that the United States would block its entry into the US-Nigeria market based on its dissatisfaction with the results of this process.

⁶ While Virgin Nigeria under the US-Nigeria Open Skies Agreement is entitled to hold Seventh Freedom cargo authority as a matter of right, Federal Express might be interested to know that Virgin Nigeria has no plans at present to operate such service.

According to Federal Express, the Nigerian Government should not complain about a denial of its bilateral rights under the US-Nigeria Open Skies Agreement, because it somehow should have recognized that the “circumstances of the US-UK aviation relationship” might make Virgin Atlantic an undesirable strategic partner for its new carrier. (Answer of Federal Express at 9). There would be no Nigerian flag carrier without the participation of a non-Nigerian partner. The two finalists for this role were South African Airways and Virgin Atlantic. Given that the South Africa-US agreement falls far short of Open Skies, and SAA itself is state owned, it is unclear whether either carrier would have passed muster with Federal Express. Given the logic of Federal Express’s argument, Virgin Nigeria should have no strategic partner unless that partner comes from an “open skies” country, or is otherwise desirable to the United States in every way. This position is at odds with the US’ longstanding African Skies initiative, and with the spirit of the US-Nigeria Open Skies Agreement.

North American

North American Airlines opposes Virgin Nigeria’s application on the grounds that its own application for US-Nigeria authority has not yet been approved. In a perfect world, North American should have its approval granted promptly. However, the fact is that US Embassy officials in Nigeria have stated on the record that the U.S. government was disinclined to approve the Virgin Nigeria application.¹⁰ Given this backdrop, it is not at all unreasonable for the Nigerian Government to have done what it did, which was to press Virgin Nigeria to apply as soon as possible for authority from the US, in order to determine

¹⁰ See, “Nigeria to Protest US Ban on National Carrier,” December 20, 2004, Pan African News Agency (PANA) newswire (attached).

whether its concern that Nigeria might not be able to exercise its rights under the Nigeria-US Open Skies Agreement was well founded.

Virgin Nigeria has been informed that, despite the concern about Virgin Nigeria's receipt of operating rights, the Nigerian Government intends to approve the designation request filed by North American. Virgin Nigeria would hope that the US will respond to this step by according similar treatment to Virgin Nigeria.

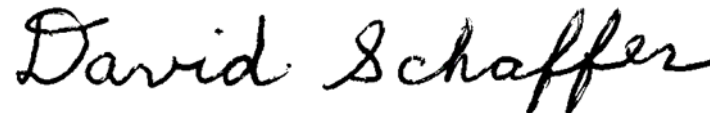
Conclusion

As explained in its initial Applications and in this Reply, Virgin Nigeria represents a textbook example of what the US has promoted for its aviation partners in lesser developed countries. Faced with a failing, state-owned flag carrier, the Nigerian Government chose not to prop up Nigerian Airways, but instead looked to the private sector for a fresh solution. It engaged Western assistance in deciding how to structure its bidding process in order to attract highly qualified and attractive bidders, and it ranked the various bids it received upon objective criteria. The result has been that Nigeria now has a flag carrier that offers travelers to and from Nigeria safe and reliable air transportation. By any reasonable standard, this should be viewed as a success story.

The Department here is faced with a choice. It can choose to approve Virgin Nigeria's Application, and pave the way for the introduction of many new air services in the US-Nigeria market, building closer ties between the US and Africa consistent with longstanding DOT policy, and meeting the needs of individuals, corporations and foundations in both the US and Africa that have long been clamoring for this service. Alternatively, it can refuse to grant the authority sought by Virgin Nigeria because of larger US displeasure with the Bermuda 2 Agreement. In Virgin Nigeria's view, this step would

be unfortunate not only because Virgin Nigeria has no ability to influence this situation, but also because of the mixed message it would send about its own International Aviation Policy.

Respectfully submitted,

A handwritten signature in black ink that reads "David Schaffer". The signature is written in a cursive style and is positioned to the left of a vertical line.

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HEADLINE: NIGERIA TO PROTEST US BAN ON NATIONAL CARRIER

BODY:

Lagos, Nigeria (PANA) - Nigeria is to protest against the US ban on the West African country's new national carrier, Virgin Nigeria, from flying into its airspace, according to Aviation Minister Isa Yuguda. "We have written the Americans before and we will write to remind them that the position they are taking is wrong," Yuguda said at a ceremony in the northern city of Zaria at the weekend. Announcing the ban in Abuja last week, the Economic Counsellor at the US Embassy in Abuja, Joseph Gregoire, said: "We have serious issues with this new concern, Virgin Nigeria, which may apply to serve the US-Nigeria market." "First, in our eyes, this is not a Nigerian airline...It is an airline that is under the control of Virgin Atlantic. It is very difficult and very unfair to permit the airline of an anti-competitive regime, such as the UK, to benefit from the unrestricted opportunity available under the US-Nigeria Open Skies agreement," he told journalists in the Nigerian capital. But the Minister denied claims that Virgin Nigeria was not a Nigerian airline. "In the case of Virgin Nigeria, the ownership and control are fully by Nigeria because 51 per cent of the ownership of the company is Nigeria, and that satisfies the requirement of ownership," Yuguda said. He described as a "misconception" the belief by the US that the airline will be managed by Virgin Atlantic, and expressed optimism that the issue would be resolved very soon. Under an agreement signed between Nigeria and Virgin Atlantic last September, Nigerian institutional investors will own 51 per cent of the Virgin Nigeria, while the balance of 49 percent will be held by Virgin Atlantic. The parent company will invest \$ 24.5 million in the Nigerian carrier, representing 49 per cent of the \$ 50 million of the company's new equity. Lagos-New York is one of the plum routes reserved by the Nigerian government for the new carrier, which is expected to take off early next year following the liquidation of former carrier Nigeria Airways.

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CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of January 2006, a copy of the foregoing Reply of Virgin Nigeria Airways Limited was served in accordance with the Department's Rules of Practice on the parties named below.

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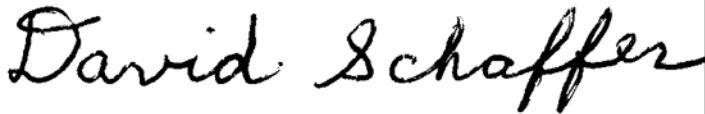
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David E. Schaffer