



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

SERVED: March 12, 2003

Issued by the Department of Transportation  
on the 12th day of March, 2003

Application of

**AEROLANE, LINEAS AEREAS NACIONALES  
DEL ECUADOR S.A. D/B/A LAN ECUADOR**

Docket OST-2003-14291

for an exemption under 49 U.S.C. § 40109

Application of

**LAN CHILE S.A.**

Undocketed

for a statement of authorization under 14 CFR Part 212

**ORDER GRANTING EXEMPTION  
AND STATEMENT OF AUTHORIZATION**

**Summary**

In this order, we grant the requests of (1) Aerolane, Lineas Aereas Nacionales del Ecuador S.A. (d/b/a Lan Ecuador) for exemption authority to conduct scheduled combination services in the Ecuador-U.S. market; and (2) Lan Chile S.A. (Lan Chile) for a statement of authorization under Part 212 of our rules to wet lease aircraft to Lan Ecuador in the conduct of its authorized services.

**Background**

By Order 2002-12-15, we denied an earlier exemption request by Lan Ecuador to provide scheduled foreign air transportation of persons, property and mail between Guayaquil and Quito, Ecuador, on the one hand, and Miami and New York, on the other hand, on the basis that the carrier was not substantially owned and effectively controlled by citizens of Ecuador.<sup>1</sup> In that Order, we found that the record showed that Lan Ecuador, as then

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<sup>1</sup> See Docket OST-2002-13661. Lan Ecuador would have provided the service with aircraft wet leased from Lan Chile.

structured, was ultimately owned, in its entirety, by Lan Chile and that Lan Ecuador's management structure was characterized by the presence of Chilean rather than Ecuadorian influence in the day-to-day operations and the decision making of the company.

## **Application**

On January 15, 2003, Lan Ecuador filed a new application requesting the identical exemption authority, i.e., to engage in scheduled foreign air transportation of persons, property and mail between Guayaquil and Quito, Ecuador, on the one hand, and Miami and New York, on the other hand, with aircraft wet leased from Lan Chile.<sup>2</sup> Lan Ecuador requests that we act on its application in an expedited manner and that we grant its request for at least two years.<sup>3</sup> Lan Ecuador states that the authority requested is consistent with the Agreement; and that it is licensed and designated by the Government of Ecuador to perform the proposed services.

In support of its request, Lan Ecuador states that it recently completed a restructuring of its ownership and management. In that regard, Lan Ecuador states that it is now ultimately 52.5% Ecuadorian and 45% Chilean owned.<sup>4</sup> Lan Ecuador adds that its board of directors now consists of three Ecuadorian and two Chilean citizens and that all of its key management personnel are citizens of Ecuador. Lan Ecuador believes that while the composition of the carrier following its restructuring satisfies the ownership and control provisions of the Agreement, it nevertheless requests a waiver of our policy that it be substantially owned and effectively controlled by homeland nationals, stating that such a waiver would be consistent with Department precedent and in the public interest.<sup>5</sup>

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<sup>2</sup> At the time of Lan Ecuador's original request, Lan Chile filed a corresponding request for a statement of authorization under Part 212 to wet lease aircraft to Lan Ecuador, for a period of two years. Lan Chile's request has remained pending. See application of Lan Chile, dated October 24, 2002 (Foreign Air Carrier Licensing Division reference 2002-447).

<sup>3</sup> By Notice dated January 22, 2003, we modified the procedural schedule for responsive pleadings to Lan Ecuador's request by requiring that answers be filed no later than January 27, 2003 (rather than the January 23 date requested by Lan Ecuador). We also set January 29, 2003, as the due date for reply comments. The notice was served on all parties in Docket OST-2003-14291.

<sup>4</sup> Lan Ecuador provided an exhibit which breaks down in detail its revised ownership structure. See Exhibit LE-1, page 2 of 2, Docket OST-2003-14291.

<sup>5</sup> Lan Ecuador cites the following cases to support its waiver request, noting that most recently, we granted exemption authority, including a waiver of our ownership and control policy, to TACA Ecuador, a similarly situated Ecuadorian carrier. Lan Ecuador also cited waivers we have granted in cases involving Aerovias Nacionales Ecuatorianas, S.A. (Docket OST-95-713); and Air Aruba, N.V. (Order 99-3-21) to support its waiver request.

## **Responsive pleadings**

Northwest and Continental filed answers opposing the requests of Lan Ecuador and Lan Chile. Lan Ecuador filed a reply. Continental, Lan Ecuador and Northwest each filed additional pleadings and Northwest and Continental filed a joint supplemental information submission.<sup>6</sup>

Northwest states that we should deny both requests “at least until Ecuador permits U.S. carriers to engage in same-country code sharing on U.S.-Ecuador routes.” Northwest states that the Agreement does not provide for same-country code-share services and argues that grant of an extra-bilateral ownership and control waiver to Lan Ecuador, without assurances that Ecuador would approve U.S. carrier requests for same-country code-share services, would be inimical to U.S. carrier interests. Northwest further states that we should not expedite Lan Ecuador’s request, noting its own efforts to secure permission from the government of Ecuador to code share with Continental could take three months or more with no assurance that Ecuador will ultimately approve its request. Northwest further adds that press reports concerning Lan Chile’s plans to expand its Latin America operations through the creation of subsidiary companies warrant that the relationship between Lan Ecuador and Lan Chile should be fully investigated by the Department.

Continental states that we should deny the requests until Ecuador commits to approve code sharing between U.S. airlines and their partners and grants Continental’s request to code share with Northwest on Continental’s U.S.-Ecuador services. Continental states that it recently submitted a code-share request to the government of Ecuador, and that Ecuadorian officials subsequently advised Continental that code sharing would not be approved unless each partner is designated to serve Ecuador and has its own allocation of frequencies for the code-share flights. Continental states that because there are not sufficient frequencies available for U.S. carriers, approval of it’s request by Ecuador to carry Northwest’s code is impossible. Continental believes that granting Lan Ecuador the exemption and ownership and control waiver would be “highly inequitable and contrary to U.S. aviation interests.”

Continental states that because Lan Chile will supply aircraft and crews to Lan Ecuador, and because Lan Ecuador’s board members are affiliated with Lan Chile or companies dependent on Lan Chile for business, Continental believes that Lan Chile continues to exert influence over Lan Ecuador and its operations. Continental further cites press reports concerning Lan Chile’s plans to expand its Latin America operations through the creation of subsidiary companies. Continental believes that we should investigate further the relationship between the individuals and companies involved and not grant any ownership and control waiver until we are able to determine that control of Lan Ecuador has been transferred to citizens of Ecuador.

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<sup>6</sup> Each of the pleadings was accompanied by a motion to file an otherwise unauthorized document. We will grant the motions. By letter dated February 7, 2003, and served on all parties, Lan Ecuador states that it would not respond to Northwest’s pleading of the same date.

Lan Ecuador states that neither Continental nor Northwest has presented any basis warranting denial of its request. Lan Ecuador states that the opposition of Continental and Northwest is similar to that raised in the context of its earlier application, and continues to be based on Ecuador's alleged refusal to allow Continental to conduct code-share services with Northwest in the U.S.-Ecuador market. Lan Ecuador further states that neither Continental nor Northwest has provided on the record any details concerning any code-share service that either U.S. carrier would like to implement, adding that as of January 28, the government of Ecuador reports that neither Continental nor Northwest "has submitted to the Consejo Nacional de Aviacion Civil a request for authority to engage in codeshare operations." Lan Ecuador also states that Continental's assertion that Lan Chile continues to exert substantial influence over Lan Ecuador is incorrect, and that further investigation of Lan Chile's relationship with Lan Ecuador would be without foundation and unprecedented. Lan Ecuador argues that Lan Chile holds a minority interest in Lan Ecuador; the majority of Lan Ecuador's board of directors are Ecuadorian citizens; and that all of Lan Ecuador's officers and key management personnel are Ecuadorian nationals, none of which is or has been employed by Lan Chile. Lan Ecuador states that we should not give weight to what it states are inaccurate media reports raised by Continental in our consideration of Lan Ecuador's exemption request.

## **Decision**

We have decided to grant the exemption request of Lan Ecuador. We find that the authority requested is provided for in our bilateral aviation agreement with Ecuador. We will also grant the request of Lan Chile for a statement of authorization to wet lease aircraft to Lan Ecuador in the conduct of its authorized services.<sup>7</sup> The authorities granted will be effective for one year from the service date of this order.<sup>8</sup>

The record before us shows that Lan Ecuador has significantly altered its ownership and control structure from that of its previous application. Instead of ultimate 100% Chilean ownership, the carrier is now ultimately 52.5% owned by Ecuadorian citizens. Concerning its management structure, when we took our action in Order 2002-12-15, the record showed

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<sup>7</sup> Because Ecuador is currently a Category 2 country under the FAA's International Aviation Safety Assessment (IASA) program, we will make the authority granted Lan Ecuador subject to an operational condition that it wet lease aircraft from a duly authorized and properly supervised U.S. or foreign air carrier.

<sup>8</sup> We note that Lan Ecuador and Lan Chile each sought authority for a two-year period. However, as is our usual practice in conferring authority in the circumstances presented, we are limiting the term of authority for each carrier to one year. Lan Ecuador and Lan Chile may, of course, seek renewal of these authorities in accordance with the Department's regulations.

virtually no influence on the day-to-day operations of the carrier by homeland nationals; now there appears to be almost total control by Ecuadorian citizens, none of whom are or has been affiliated with Lan Chile.<sup>9</sup>

Based on the changes to Lan Ecuador's ownership and management noted above, particularly when viewed in light of the bilaterally-provided-for nature of the Lan Ecuador route authority in question, the open-skies regime governing U.S.-Chile aviation relations, and our established ownership precedents,<sup>10</sup> we conclude that there is nothing in the ownership and control of Lan Ecuador that would be inimical to U.S. aviation policy or interests. We therefore find that grant to the carrier of a waiver of our ownership and control standard is warranted.<sup>11</sup>

We remain concerned, however, over the code-share issues raised by Continental and Northwest. We intend to pursue these concerns through diplomatic channels, as well as to continue our efforts to expand opportunities for U.S. carriers generally in the U.S.-Ecuador market.

We also find that the public interest warrants granting Lan Chile's application for a statement of authorization to wet lease aircraft to Lan Ecuador.<sup>12</sup> In cases such as this, we look at a broad range of factors, foremost of which is reciprocity. While Northwest and Continental both oppose Lan Chile's request, neither carrier has shown that the Government of Chile has denied any recent requests by U.S. carriers to conduct a wet lease of the type at issue here. Nor do we see any other factor among our standard criteria arguing for withholding approval. Thus, in the circumstances presented, we are not inclined to interfere with Lan Ecuador's choice of a wet lease provider from our open-skies partner Chile.

In view of the above, and acting under authority assigned by the Department in its regulations, 14 CFR Part 385, we find that grant of this authority is consistent with the public interest, and that our action here does not constitute a major regulatory action under the Energy Policy and Conservation Act of 1975.

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<sup>9</sup> We also find that Lan Ecuador is properly licensed and designated by the Government of Ecuador to perform the proposed services and is financially and operationally qualified, subject to the wet lease condition noted above, to conduct the proposed services. The carrier has experienced management and appears financially sound.

<sup>10</sup> See, e.g., Notice of Action Taken dated November 22, 2002, Docket OST-2002-13608, granting TACA Ecuador exemption authority.

<sup>11</sup> We also find that the record before us contains sufficient information on Lan Ecuador's ownership and control to permit us to proceed without further investigation.

<sup>12</sup> As noted above, Ecuador is a Category 2 country under the FAA's IASA program and, as such, new carriers of Ecuador must wet lease aircraft for their services to and from the United States.

ACCORDINGLY,

1. We grant the request of Lan Ecuador for an exemption from 49 U.S.C. § 41301 to engage in scheduled foreign air transportation of persons, property and mail between Guayaquil and Quito, Ecuador, on the one hand, and Miami and New York, on the other hand, subject to the conditions in Attachment A;
2. We grant Lan Chile a statement of authorization under 14 CFR Part 212 to wet lease aircraft to Lan Ecuador in the conduct of Lan Ecuador's authorized services;
3. The authorities granted in ordering paragraphs 1 and 2 above will be effective for a period of one year from the service date of this order;
4. Lan Ecuador may not conduct U.S. operations with its own aircraft and crews without further order of the Department;
5. We grant all motions to file otherwise unauthorized documents in Docket OST-2003-14291;
6. To the extent not granted or deferred, we deny all requests for relief in Docket OST-2003-14291 and Lan Chile's October 24, 2002, request for a statement of authorization to wet lease aircraft to Lan Ecuador in the conduct of its authorized services;
7. We may amend, modify, or revoke this order at any time and without hearing; and
8. We shall serve a copy of this order on Lan Ecuador; Continental, Airlines, Inc.; Northwest Airlines, Inc.; Lan Chile S.A.; the Ambassadors of Ecuador and Chile in the United States; the Federal Aviation Administration (Miami IFO); and the Department of State.

By:

READ C. VAN DE WATER  
Assistant Secretary for Aviation  
and International Affairs

(SEAL)

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**FOREIGN AIR CARRIER CONDITIONS OF AUTHORITY**

In the conduct of the operations authorized, the holder shall:

(1) Not conduct any operations unless it holds a currently effective authorization from its homeland for such operations, and it has filed a copy of such authorization with the Department;

(2) Comply with all applicable requirements of the Federal Aviation Administration, including, but not limited to, 14 CFR Parts 129, 91, and 36, and with all applicable U.S. Government requirements concerning security;<sup>1</sup>

(3) Comply with the requirements for minimum insurance coverage contained in 14 CFR Part 205, and, prior to the commencement of any operations under this authority, file evidence of such coverage, in the form of a completed OST Form 6411, with the Federal Aviation Administration's Program Management Branch (AFS-260), Flight Standards Service (any changes to, or termination of, insurance also shall be filed with that office);

(4) Not operate aircraft under this authority unless it complies with operational safety requirements at least equivalent to Annex 6 of the Chicago Convention;

(5) Conform to the airworthiness and airman competency requirements of its Government for international air services;

(6) Except as specifically exempted or otherwise provided for in a Department Order, comply with the requirements of 14 CFR Part 203, concerning waiver of Warsaw Convention liability limits and defenses;

(7) Agree that operations under this authority constitute a waiver of sovereign immunity, for the purposes of 28 U.S.C. 1605(a), but only with respect to those actions or proceedings instituted against it in any court or other tribunal in the United States that are:

(a) based on its operations in international air transportation that, according to the contract of

carriage, include a point in the United States as a point of origin, point of destination, or agreed stopping place, or for which the contract of carriage was purchased in the United States; or

(b) based on a claim under any international agreement or treaty cognizable in any court or other tribunal of the United States.

In this condition, the term "international air transportation" means "international transportation" as defined by the Warsaw Convention, except that all States shall be considered to be High Contracting Parties for the purpose of this definition;

(8) Except as specifically authorized by the Department, originate or terminate all flights to/from the United States in its homeland;

(9) Comply with the requirements of 14 CFR Part 217, concerning the reporting of scheduled, nonscheduled, and charter data;

(10) If charter operations are authorized, except as otherwise provided in the applicable aviation agreement, comply with the Department's rules governing charters (including 14 CFR Parts 212 and 380); and

(11) Comply with such other reasonable terms, conditions, and limitations required by the public interest as may be prescribed by the Department, with all applicable orders or regulations of other U.S. agencies and courts, and with all applicable laws of the United States.

This authority shall not be effective during any period when the holder is not in compliance with the conditions imposed above. Moreover, this authority cannot be sold or otherwise transferred without explicit Department approval under Title 49 of the U.S. Code (formerly the Federal Aviation Act of 1958, as amended).

<sup>1</sup> To assure compliance with all applicable U.S. Government requirements concerning security, the holder should, before commencing any new service (including charter flights) from a foreign airport that would be the holder's last point of departure for the United States, inform its Principal Security Inspector of its plans.

