

Order 2004-3-24



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UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY
WASHINGTON, DC

Issued by the Department of Transportation
on the 23rd day of March 2004

Served: March 23, 2004

In the matter of

**U.S.-Israel Third-Country
Code-Share Opportunity**

Docket OST-2003-15993 - 14

Application of

US Airways, Inc.

Docket OST-2003-15993

for an exemption under 49 U.S.C. 40109 and
route integration and U.S.-Israel Third-Country
Code-Share Opportunity

ORDER TO SHOW CAUSE

SUMMARY

By this order we tentatively select US Airways, Inc. (US Airways) to conduct third-country code-share services via Frankfurt with Lufthansa German Airlines (Lufthansa), in the U.S.-Israel market.

BACKGROUND

Under a Memorandum of Consultations (MOC) signed January 10, 2001, representatives of the United States and Israel reached an *ad referendum* agreement on the text of a Protocol amending the 1950 U.S.-Israel Air Transport Agreement, as amended. Under the terms of the Protocol, U.S. carrier opportunities were expanded to permit the operation of up to four code-share arrangements with third-country airlines for services in the U.S.-Israel market on a phased-in basis as follows: Phase 1 – up to two arrangements until March 31, 2002; Phase 2 – up to three arrangements from April 1, 2002, through March 31, 2003; and Phase 3 – up to four arrangements from April 1, 2003, through

March 31, 2004.¹ The Protocol provides that, until March 31, 2004, designated U.S. airlines may serve Tel Aviv, plus seven additional points to be selected by the United States on a code-share basis only, without local traffic rights between third-country points and points in Israel when the U.S. airline is not the operating carrier.²

We have already awarded authority for Phases 1 and 2. By Notice dated August 22, 2003, we requested that all U.S. air carriers interested in making use of the Phase 3 third-country code-share opportunity described above file applications with the Department.³

CURRENT U.S. CARRIER SERVICES TO ISRAEL

Under our Phase 1 and 2 awards, Northwest Airlines (Northwest), United Air Lines (United), and American Airlines (American) hold authority to serve the U.S.-Israel market via intermediate points with their respective code-share partners, KLM Royal Dutch Airlines (KLM), Lufthansa German Airlines (Lufthansa), and Swiss International Airlines (Swiss). Each is using this authority.

In addition, Continental Airlines, Inc. (Continental) operates direct daily service in the U.S.-Israel market from the Newark gateway. Delta Air Lines, Inc. (Delta) provides bilateral third and fourth-freedom code-share operations with the Israeli carrier, El Al Israel Airlines, Ltd. (El Al).

APPLICATIONS

American, Continental, Delta, and US Airways filed applications.⁴ Each applicant proposes to operate code-share services in the U.S.-Israel market via an intermediate European point with a third-country carrier: American proposes third-country code-share service with its partner British Airways, from 5 U.S. gateways via London; Continental proposes new third-country code-share service with its partner, KLM, from two U.S. gateways via Amsterdam; Delta proposes new third-country code-share service with its partner, Alitalia-Linee Aeree Italiane S.p.A. (Alitalia), from six U.S. gateways via Milan and Rome; and US Airways proposes new third-country code-share service with its partner, Lufthansa, from three U.S. gateways via Frankfurt and Munich. Since US Airways does not now serve Israel, it also requests both the fourth opportunity and an exemption in order to operate in the U.S.-Israel market.

¹ The Protocol provides that the frequency of such code-share operation shall be limited only by the number of frequencies that the operating airline is entitled to use on the relevant segments, consistent with relevant bilateral agreements.

² Selection of points to be served on a code-share basis only may be made or changed with 30-days' notice to the Government of Israel.

³ Our Notice consolidated the previously filed applications for U.S.-Israel third-country code-share opportunities of American (Docket OST-2003-15516), Continental (Docket OST-2003-15519), and Delta (Docket OST-2003-15440) into Docket OST-2003-15993.

⁴ We summarize the applicants' proposals in an Appendix.

RESPONSIVE PLEADINGS

All of the applicants filed answers and replies.

American states that its five U.S. gateways are among the top six traffic-generating points in the U.S.-Tel Aviv market, and its proposed services will result in far broader coverage than the proposal of any other applicant using its own aircraft to serve transatlantic segments. American maintains that its current code-share with Swiss cannot effectively compete with Delta/El Al and Continental in the U.S.-Israel market, and, unlike Delta/Continental/Northwest or United/US Airways, American does not have overlapping U.S. domestic alliance partners. American argues that under its code share with El Al, Delta has myriad opportunities to expand its code sharing via a large number of third-country points where their two networks interconnect, and that, in these circumstances, there is no public interest basis for Delta to seize the last remaining U.S.-Israel third-country code-share opportunity. American further states that Continental operates daily service to Tel Aviv from its Newark hub. It argues that KLM's Amsterdam-Tel Aviv service is minimal, consisting of just one flight five days a week with 120-seat B737 aircraft. Further, American states that US Airways' proposed gateways generate little traffic to Israel and argues that Frankfurt is already a code-share connect point to Tel Aviv used by United.

Continental states that it would provide service from two U.S. gateways via Amsterdam to Tel Aviv and that it requires third-country code-share authority to supplement and support its nonstop New York/Newark (Liberty International)-Tel Aviv service. Continental further states that without the ability to code-share via a European point, it is unable to offer on-line stopovers in Europe, unlike American (with Swiss), Delta (with El Al), United (with Lufthansa), and Northwest (with KLM). Continental maintains that granting it the last third-country code-share opportunity would enable it to compete more effectively with foreign airlines and their U.S. partners for U.S.-Israel traffic, providing far more public benefits than awarding authority to the other applicants. Continental argues that American's proposed code share with British Airways would duplicate the existing American/Swiss service and that awarding American half of the U.S.-Israel code-share opportunities would waste a valuable limited-entry code-share opportunity. Continental also argues that Delta offers U.S.-Israel services with El Al and that Delta could expand its code-share service with El Al to offer service via Rome and Milan. Continental maintains that adding the US Airways' code to Lufthansa's Frankfurt-Tel Aviv flights will provide no on-line routing which could not already be offered by both United and Lufthansa.

Delta asserts that no carrier has effectively challenged the numerous service and competitive advantages of Delta's proposal which include service from the most U.S. gateways, superior connecting schedules with the shortest round-trip elapsed travel times, two new European connecting gateways and stop-over options, and the only new fully

immunized and integrated alliance for service to Israel. With regard to the other applicants, Delta argues that US Airways would serve half the number of gateways as Delta, and the quality of its connections and elapsed travel times are inferior to Delta's. Delta further argues that American already occupies one of the four limited-entry third-country code-share opportunities for service with Swiss and should not be allocated a second opportunity for service over the highly restrictive London Heathrow gateway for service with British Airways. Delta further states that Continental would offer only two U.S. gateways and would offer less than daily service, and the small aircraft operated by KLM on the Amsterdam-Tel Aviv route, which already carries both KLM and Northwest codes, negates any minimal benefits that might be claimed for this service. Delta maintains that while it does not believe that direct service should preclude a carrier from receiving third-country authority, such a factor should be considered by the Department.

US Airways states that it is the only applicant for new entry into the U.S.-Israel market and its selection would bring competition from a new carrier into that market. It further states that it is the only U.S. carrier that proposes to offer genuinely new services by introducing service at two new U.S. gateways (Charlotte and Pittsburgh) for "nonstop-to-nonstop" U.S.-Israel service via a third country, and that it will offer competitive service with the existing United/Lufthansa service at Philadelphia. It further states that it offers the most efficient connections to and from Israel, more connecting seats between the U.S. and Israel, the shortest layovers, with the exception of the connection on the eastbound Philadelphia-Tel Aviv route, and offers more daily frequencies between the U.S. and Israel than Delta or Continental. In addition US Airways maintains that the other applicants duplicate services already being provided by the existing code-share opportunities and in some cases by direct flights to Tel Aviv. US Airways states that American's proposal provides less efficient versions of routes that can already be flown on a single carrier, but also that the limited number of connecting seats on British Airways' two daily flights between London (Heathrow) and Tel Aviv will be further reduced by British Airways passengers flying the exact same routes on transatlantic flights operated by British Airways. US Airways further states that Continental proposes only five weekly frequencies from each of two U.S. gateways, Houston and New York/Newark, that are already being served with the same or better type of service by multiple carriers. US Airways maintains that Delta is already a strong competitor in the U.S.-Israel market through its code-share with El Al. US Airways further maintains that Delta's proposal lists flights mostly operated by Alitalia, and that this final opportunity should not be used to facilitate services that are primarily operated by a foreign carrier.

TENTATIVE DECISION

We have tentatively decided to award the fourth third-country code-share opportunity for service to Israel to US Airways. We tentatively believe, after a careful review of the pleadings in this case, that US Airways' proposal would offer greater benefits than those of the other applicants.

We tentatively find that the selection of US Airways, which does not now serve Israel, constitutes an important opportunity to maximize the number of U.S. carriers serving Israel and the level of competitive services offered, thereby furthering the development of the market. US Airways would be a new entrant in the U.S.-Israel market, and thus the authorization of US Airways' services will enhance the overall level of U.S. carrier competition in the market. Furthermore, US Airways proposes to serve two new U.S. gateways, Pittsburgh and Charlotte. We tentatively find that this holds the promise of offering travelers in these markets significantly improved service opportunities. US Airways proposal will provide new non-stop to non-stop U.S.-Israel service via a third country to travelers and shippers who have not had the benefit of such service in the past. US Airways would also offer the Philadelphia passenger the benefit of intra-gateway competition with other services now available to Israel from that point. We note that US Airways' overall elapsed times are not significantly different from those of the other applicants in this proceeding, and to the extent differences might exist, we tentatively believe they are outweighed by other factors. Thus, we tentatively find that US Airways' proposal in this proceeding would represent a realistic competitive alternative in the market place.

While the proposals of the other three applicants would provide public benefits, we tentatively do not believe that those benefits outweigh the important positive elements of US Airways' proposal. For example, we are aware that other applicants have proposed quantitatively more gateways than US Airways, but none of their proposals would achieve the overriding qualitative benefits that we tentatively see as deriving from the new gateway/new entrant services proposed by US Airways. As to Continental's argument regarding the existence of a United-Lufthansa routing to which US Airways' code would simply be added, we tentatively believe that the existence of the United-Lufthansa service does not outweigh the service benefits that would be available for the first time to passengers of US Airways' proposed new U.S. gateways.

All of the U.S. gateways that American and Delta would serve have service to Israel now, whether by code sharing or direct online service. Continental already operates daily nonstop service from Newark to Tel Aviv and can offer a range of online-to-online nonstop connections, including from Houston, the only non-New York area point it proposes for third-country code sharing. Furthermore, while Continental proposes a daily service over Amsterdam, Continental's code-share partner, KLM, operates between Amsterdam and Tel Aviv only five days a week. Thus, we tentatively do not believe that the benefits of providing American, Delta, or Continental with a further opportunity to provide U.S.-Israel service outweigh providing US Airways with its first such opportunity in this market, and providing the traveling public with an additional competitive choice.

ECONOMIC AUTHORITY

Should we make final our tentative decision in this case, we would grant US Airways' request for exemption authority to serve the U.S.-Israel market under its code-share arrangement with Lufthansa, and its request for route integration. Consistent with our standard practice, the exemption and route integration authority tentatively granted would be subject to the conditions we normally attach to such authorizations.

US Airways and Lufthansa hold a blanket statement of authorization to conduct code-share services subject to certain notification requirements and, thus, no additional code-share authority would be necessary, subject to compliance with the notice provisions.⁵

As the final opportunity permitting the operation of up to four code-share arrangements will expire March 31, 2004, we are calling for objections to this order within 7 calendar days of from the service date of this order.

ACCORDINGLY,

1. We tentatively select US Airways, Inc. to operate third-country code-share services in the U.S.-Israel market under its code-share arrangement with Lufthansa German Airlines, and tentatively grant US Airways exemption authority under the provisions of 49 U.S.C. 40109 to the extent necessary to provide scheduled foreign air transportation of persons, property, and mail between points in the United States and Tel Aviv, Israel, and to integrate this authority with its existing certificate and exemption authority;
2. We tentatively deny the applications of American Airlines Inc., Continental Airlines, Inc., and Delta Air Lines, Inc. for the U.S.-Israel third-country code-share opportunity at issue in this proceeding;
3. We direct all persons to show cause why we should not issue an order making final our tentative findings and conclusions;
4. We direct any interested parties having objections to our tentative decisions set forth in ordering paragraphs 1-3 above, to file their objections with the Department, Dockets Operations, Docket OST-2003-15993, U.S. Department of Transportation, 400 Seventh Street, SW, Room PL 402, Washington, DC 20590 no later than March 30, 2004; answers thereto shall be filed no later than April 5, 2004. For the convenience of the parties, service by facsimile or email is authorized;⁶

⁵ US Airways and Lufthansa have not yet filed the necessary notification of these services, and if they desire to pursue this opportunity, they should do so promptly.

⁶ The original submission is to be unbound and without tabs on 8 ½" x 11" white paper using dark ink (not green) to facilitate use of the Department's docket imaging system. In the alternative, filers are encouraged to use the electronic submission capability available through the Dockets/DMS Internet site (<http://dms.dot.gov>) by following the instructions at the web site.

5. If timely and properly supported objections are filed, we will afford full consideration to the matters or issues raised by the objections before we take further action;⁷
6. If no objections are filed, we will deem all further procedural steps to have been waived and will proceed to enter a final order; and
7. We will serve a copy of this order on US Airways, Inc.; Delta Air Lines, Inc.; American Airlines, Inc.; Continental Airlines, Inc.; Alitalia-Linee Aeree Italiane-S.p.A; British Airways; Lufthansa, and KLM Royal Dutch Airlines; the U.S. Department of State (Office of Aviation Negotiations); the Ambassador of Israel in Washington, DC; and the Federal Aviation Administration.

By:

SUSAN McDERMOTT
Deputy Assistant Secretary for
Aviation and International Affairs

(SEAL)

*An electronic version of this document is available on the World Wide Web at
http://dms.dot.gov/reports/reports_aviation.asp*

⁷ As we are providing for the filing of objections to this tentative decision, we will not entertain petitions for reconsideration of this order.

Applications for U.S.-Israel Third-Country Code-Share Opportunity

U.S. Carrier	Code-Share Partner	U.S. Gateways	Intermediate Points	Europe-Israel Weekly Freq.	Europe-Israel Aircraft
Delta	Alitalia	Atlanta, Boston, Chicago, Miami, New York, Newark	Milan, Rome	Daily	B-767-300ER, 777-200, A-321
American	British Airways	Boston, Chicago, Los Angeles, Miami, New York	London	Daily	B-777
Continental	KLM	Houston, New York/ Newark (Liberty International)	Amsterdam	Daily (US-Amsterdam) 5/wk (Amsterdam-Tel Aviv)	B-737
US Airways	Lufthansa	Pittsburgh, Philadelphia, Charlotte	Frankfurt, Munich ¹	Daily	B-747, A-340

¹ US Airways states that Lufthansa is not now providing nonstop Munich-Tel Aviv service. Were Lufthansa to resume nonstop Munich-Tel Aviv service, US Airways would code-share on those flights.