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Order 2000-7-28



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

Issued by the Department of Transportation  
on the 25th day of July, 2000

**Served: July 25 , 2000**

**U.S.-France Frequency Allocation  
Proceeding**

**Docket OST-2000-7628 -9**

Motion of

**DELTA AIR LINES, INC.**

**Docket OST-2000-7628**

for leave to file and amend application for  
frequencies

Motions of

**AMERICAN AIRLINES, INC.  
and  
UNITED AIR LINES, INC.**

**Docket OST-2000-7628**

to strike and/or dismiss amended application  
of Delta Air Lines for U.S.-France frequencies

**ORDER**

**Summary**

By this order, we (a) grant the motion of Delta Air Lines, Inc., to amend its application in the above-captioned proceeding; and (b) deny the motions of American Airlines, Inc. and United Air Lines, Inc. to strike or dismiss the amended application. We also confirm our oral action of July 21, 2000, extending the period for filing answers to the applications in this proceeding until July 31 and for filing replies to answers until August 3.

### **Background**

By Order 2000-7-13, the Department instituted the *U.S.-France Frequency Allocation Proceeding*, Docket OST-2000-7628, to allocate 15 weekly frequencies available for U.S.-France combination services. We also consolidated into that proceeding previously filed applications of United, Delta, and American. In addition, we provided a further opportunity for interested carriers to file applications for the available frequencies and notified the existing applicants that they should supplement their applications in accordance with the procedural dates set forth in the instituting order with any information requested by the Department's order and not already included in their originally filed applications. New and supplemented applications were due July 18; answers to applications were due July 24, and replies to answers were due July 27. On July 18, United and American supplemented their applications. No new applications were filed.

### **Delta's Motion**

On July 19, Delta filed an amendment to its original application together with a motion for leave to file since its amendment was not timely filed. Delta's original application was filed on May 26 and requested seven weekly frequencies to operate a second daily flight in the New York-Paris market beginning October 29, 2000. In its amended application, Delta seeks a total of 14 weekly frequencies, proposing to operate seven weekly frequencies in the Atlanta-Paris market beginning October 29, 2000, and seven weekly frequencies in the New York-Paris market beginning April 1, 2001.

In support of its motion for leave to file, Delta states that the one-day delay in filing its amendment was due to the short procedural time-frame in the Department's order and internal difficulties coordinating the revisions with work and travel schedules. Delta further argued that no party would be prejudiced by Delta's amended application and that all interested parties would have ample opportunity to comment on Delta's revised proposal in the context of the allocation proceeding.

### **Motions of American and United/Responsive Pleadings**

On July 20, 2000, American filed a motion to strike Delta's late-filed amendment.<sup>1</sup> American argues that the late filing causes irreparable harm to the other applicants, is inexcusable, and has prejudiced the ability of the other parties to respond. American maintains that Delta had more than ample time to file its amended request and that if additional time was necessary, Delta should have sought an extension of the application date. It further argues that extending the procedural dates in the case is not sufficient, since Delta has had a competitive advantage by seeing all of the other applications, as well as knowledge of what parties did not file, prior to the filing of its amendment. In these circumstances, American argues that the only fair remedy is to strike Delta's amended application and consider Delta's originally filed application in this case.

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<sup>1</sup> American states that as of July 20, the Department's Docket Section had no record of Delta's filing and that American did not receive its faxed copy until 5:30 p.m. on July 19.

On July 20, United filed an answer in support of American's motion and its own motion to dismiss Delta's amended application. United echoes American's arguments and maintains that acceptance of Delta's application would clearly prejudice the other applicants that made timely submissions, and that Delta's motion should be denied and its application dismissed.

The City of Chicago filed an answer in support of the American and United requests, arguing that Delta has failed to demonstrate good cause for its late filing and that to avoid prejudice to the other parties, the Department should grant the relief requested by American and United. Chicago further argues that extending the procedural deadlines is not sufficient as it would send the wrong signal about the need for adherence to Department deadlines and the importance of avoiding "gamesmanship" in frequency allocation proceedings.

Delta filed a consolidated reply, stating that it regrets any inconvenience to the Department and the other applicants. It maintains, however, that the Department has accepted similar amendments in route cases as well as less formal proceedings at the outset of a case, and that it is in the public interest for the Department to choose among the best proposals. Delta further maintains that accepting its one-day late amended application<sup>2</sup> will not prejudice any party, as the initial applications of all parties were already on file, and that the actions proposed by American and United are unwarranted, unjustified, and inconsistent with prior Department practice in comparable cases.

#### **Decision**

We have decided to grant Delta's motion and to accept its late-filed amended application for consideration in this proceeding. We deny the motions of American and United to strike or dismiss the amended application.<sup>3</sup>

By Order 2000-7-13, we instituted an expedited proceeding to allocate 15 frequencies available for U.S.-France combination services. We had provided for an accelerated procedural schedule to ensure that we could complete the proceeding in time for carriers, including Delta, that had proposed operations beginning this October. It remains our goal to complete this proceeding in a timely manner.

We are not pleased that Delta chose to file a late amendment to its application, rather than the preferable course, which would have been to seek a one-day extension of the answer date prior to the filing date for new and supplemented applications. However, given the particular circumstances of this case, including the unchanged applications of American and United that

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<sup>2</sup> Delta maintains that its amended application was electronically filed at 5:00 p.m. on July 19.

<sup>3</sup> Because of the existing procedural schedule that called for answers to applications on July 24, it was not possible to issue a decision on the various motions before the date that answers were due. To avoid inconvenience to the parties, on July 21, 2000, Department staff orally notified all parties of our decision to extend the answer and reply dates to July 31 and August 3, respectively, to afford the Department sufficient time to rule on the motions and still provide interested parties adequate time to prepare answers based on our decisions on the pertinent motions. We confirm that oral action here.

had already been on file, we are not persuaded that Delta's late-filed amended application warrants the proposed remedies requested by American and United.

We have extended the period for filing answers and replies to take into consideration our decision on the relevant motions affecting the scope of applications under consideration. We believe that the extension provided will afford all parties a full opportunity to comment on the applications while still facilitating the ability of the Department to make a timely decision in this case.

That said, we emphasize to all parties that we expect adherence to our procedural deadlines. Our decision here is based only on the particular circumstances of this case and should not be viewed as a general policy of the Department to accept late-filed pleadings.

**ACCORDINGLY,**

1. We grant the July 19, 2000, motion of Delta Air Lines, Inc. for leave to file a late amendment to its application in the captioned proceeding;
2. We deny the motion of American Airlines, Inc. to strike and the motion of United Air Lines, Inc. to dismiss the amended application of Delta Air Lines, Inc. in this proceeding;
3. We confirm our oral action of July 21, 2000, amending the date for filing answers to the applications in the *U.S.-France Frequency Allocation Proceeding*, Docket OST-2000-7628, to July 31, 2000, and the date for filing replies to August 3, 2000; and
4. We will serve this order on American Airlines, Inc.; Delta Air Lines, Inc.; United Air Lines, Inc.; the City of Chicago; the Ambassador of France in Washington, D.C.; and the U.S. Department of State.

By:

**A. BRADLEY MIMS**  
Acting Assistant Secretary for Aviation  
and International Affairs

(SEAL)

*An electronic version of this order is available on the World Wide Web at  
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