



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

Issued by the Department of Transportation on June 29, 2007

**NOTICE OF ACTION TAKEN -- DOCKET OST-2007-28057**

This serves as notice to the public of the action described below, taken by the Department official indicated (no additional confirming order will be issued in this matter).

Application of **SPIRIT AIRLINES, INC. (SPIRIT)** filed **4/26/07** for:

**XX** Exemption for two years under 49 U.S.C. 40109 to provide the following service:

**Scheduled foreign air transportation of persons, property, and mail between Fort Lauderdale, Florida, on the one hand, via intermediate points, and Barranquilla and Bogota, Colombia, on the other hand, and beyond to points in the Western Hemisphere.**

**XX** Designation and 14 combination frequencies in the U.S.-Colombia market

Applicant reps: **Joanne W. Young and David M. Kirstein (202) 742-6644**

DOT Analyst: **Robert J. Finamore (202) 366-2405**

Responsive pleadings: On May 3, American Airlines, Inc. (American) filed an answer in opposition to Spirit's application. American states that the 70 weekly combination frequencies available under the U.S.-Colombia Air Transport Agreement are all already allocated as follows: American – 42; Continental Airlines, Inc. (Continental) – 21; and Delta Air Lines, Inc. (Delta) – 7. American contends that 35 of its frequencies and 14 of Continental's are grandfathered frequencies that are not restricted to specific city-pairs or by dormancy conditions. American states that its U.S.-Colombia service pattern has varied according to market demand, and while it is currently only using 28 of its frequencies, it expects to be utilizing all of its 42 frequencies later this year.

On May 8, Delta filed a consolidated answer in opposition to both Spirit's application and American's answer. With regard to Spirit's application, Delta states that it also seeks to commence new U.S.-Colombia service and requests that the Department institute a comparative selection proceeding to consider the merits of competing applications. As to American, Delta notes that American admits that it has not operated all 42 of its frequencies since Summer 2005, and Delta states that, with the exception of a brief period during January 2006, American has consistently operated only 28 frequencies for two years. Delta contends that, although the unused frequencies are not subject to automatic dormancy, it has long been the Department's position not to permit valuable operating rights to remain unused for a long period, particularly when another carrier has firm plans to use them and the incumbent carrier does not.<sup>1</sup> Delta asserts that American's service plans through April 2008 indicate that, at most, American would be operating 30 of its frequencies.

On May 15, American filed a reply to Delta's answer and supplemented its May 3 answer to Spirit's application. American notes that it has issued a press release announcing firm plans to operate its 14

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<sup>1</sup> Delta cites its award of five U.S.-Brazil frequencies, Order 2005-4-13, and the *2005 U.S.-Argentina Combination Frequency Proceeding*, Order 2005-10-8, as precedents for unused frequencies being re-allocated from incumbent carriers to other applicants.

unused frequencies beginning on December 13, 2007, and that these flights will be open for reservations and sales on May 20. American states that it will operate the 14 unused frequencies as follows:

1) institute daily nonstop service in the Miami-Barranquilla market; 2) add four weekly nonstop flights in the Miami-Bogota market; and 3) add three weekly nonstop flights in the Miami-Medellin market.

American maintains that it is well established that the Department will not act to take away a carrier's temporarily dormant frequencies when the carrier has announced firm plans to use them.

On May 16, Spirit filed a reply to the answers of American and Delta, stating that the Department should ignore American's suddenly announced plan to use the 14 frequencies at issue. Spirit states that it is clearly not in the public interest to allow these frequencies to remain dormant for an extensive period of time and contends that Department policy has not permitted valuable operating rights to go unused for an extended period, particularly when another carrier has firm plans for them while the incumbent holding the authority does not. Spirit states that none of the incumbent carriers serve Fort Lauderdale or Barranquilla with nonstop service, and contends that the incumbents cannot match its proposed low-fare service, which would substantially increase competition in the high-priced U.S.-Colombia market. With regard to Delta, Spirit maintains that because Delta already serves the U.S.-Colombia market itself and by code share with Avianca, Delta would have known of the unused frequencies and only chose to intervene when a new competitor stepped forward. Spirit states that a comparative selection proceeding is not necessary and that it should be immediately allocated the 14 frequencies.

Delta and American both filed additional responsive pleadings.<sup>2</sup> Delta contends that American could have used the dormant 14 frequencies at any time and has only recently announced plans to do so only as a result of the desire of Spirit and Delta to use the frequencies. Delta states that if the Department decides to allow American to keep the frequencies, it should impose a December 13, 2007 start-up date on the frequencies at issue here and a 90-day dormancy condition on all 35 of American's grandfathered frequencies. With regard to Spirit, Delta states that nothing filed by American or Spirit undermines Delta's position that the Department should institute a carrier selection proceeding to consider the allocation of American's dormant frequencies. American filed a response to Delta's pleading, reiterating its previous position and noting that there are frequencies allocated in numerous markets other than Colombia that are similarly not subject to dormancy conditions. American states that the Colombia market should not be singled out in that regard and restates its commitment to its December 13 start-up date.

## **DISPOSITION**

**XX Dismissed** (see remarks below)

The above action dismissing Spirit's application was effective when taken: **June 29, 2007**.

**Action taken by: Paul L. Gretch, Director, Office of International Aviation**

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**Remarks:** We have decided to dismiss Spirit's application and permit American to retain use of its 14 unused U.S.-Colombia frequencies. Although the 14 frequencies have been unused by American for an extended period, it has generally been our policy to permit incumbent carriers to retain dormant frequencies if the carrier demonstrates firm plans to use them, even if another seeks use of the frequencies.<sup>3</sup> We note that in both of the cases cited by Delta, the incumbent carriers holding the unused frequencies did not demonstrate firm plans to use them. In this case, American has presented a firm plan for use of its 14 unused frequencies, and began marketing and selling its service on May 20, based on a proposed start-up date of December 13, 2007. Therefore, we find that, in the circumstances presented, it

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<sup>2</sup> These pleadings were accompanied by motions for leave to file, which we grant.

<sup>3</sup> See, e.g., Orders 95-1-27 and 95-3-52.

is consistent with the public interest to permit American to retain its 14 frequencies based upon its firm commitment to use them.

However, we also note that it is not the Department's policy to permit valuable operating rights to remain unused, particularly when another carrier has plans to use them. Therefore, in order to ensure that steps can be taken to reallocate these 14 frequencies in the event American does not re-establish use of them as proposed, we have decided to take additional steps. First, we will require American to report to the Department every 60 days its progress towards instituting its proposed services. Such reports should contain samples of promotional material and OAG advertisements, identify whether the aircraft for these services are on hand, and identify any issues that could have an impact on American's proposed startup date of December 13, 2007. These reports will begin on July 20, 2007, and shall be addressed to the Director, Office of International Aviation, and also served on Spirit and Delta.

Second, based on the representations made here by American, it is our full expectation that American will institute service by December 13, 2007.<sup>4</sup> Failure to do so will result in automatic expiration of the allocation for these 14 frequencies, and they will revert to the Department.

Our dismissal of Spirit's application is without prejudice to refile on the understanding that if these frequencies become available for any reason, Spirit will be free to resubmit its application.

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Under authority assigned by the Department in its regulations, 14 CFR Part 385, we found that our action was consistent with Department policy. We may amend, modify, or revoke this Notice at any time without hearing at our discretion.

Persons entitled to petition the Department for review of the action set forth in this Notice under the Department's regulations, 14 CFR §385.30, may file their petitions within seven (7) days after the date of issuance of this Notice. This action was effective when taken, and the filing of a petition for review will not alter such effectiveness.

An electronic version of this document is available on the World Wide Web at:  
[http://dms.dot.gov/reports/reports\\_aviation.asp](http://dms.dot.gov/reports/reports_aviation.asp)

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<sup>4</sup> We expect usage of the first frequency by December 13, 2007, and prompt usage (*i.e.*, within 10 days) thereafter of all 14 frequencies.