

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

Application of)	
)	
SPIRIT AIRLINES, INC.)	Docket OST-2007- 28057
)	
for an exemption pursuant to)	
49 U.S.C. § 40109)	
(U.S.-Colombia))	
)	

**REPLY AND MOTION FOR LEAVE TO FILE
OF SPIRIT AIRLINES, INC.**

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July 20, 2007

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Spirit Airlines, Inc. (“Spirit”), submits this brief Reply to the Answers of American Airlines (“American”) and Delta Airlines (“Delta”). American wrongly asserts that allowing it to retain 14 Colombian frequencies that have essentially gone unused for at least four years is consistent with Department precedent and raises no important policy question. Delta wrongly asserts that the Department is required to hold a comparative selection proceeding in the event the 14 U.S.-Colombia frequencies are reallocated.¹

American Misstates Department Policy on Dormant Authority. For at least four years, American has held, but largely failed to use 14 of the 42 (33%) Colombia frequencies allocated to it. On April 25, 2007, Spirit applied for these unused frequencies to provide new entry and low-fare service from Ft. Lauderdale to Bogota and Barranquilla, Colombia. Barranquilla has no U.S. carrier service. American then

¹ To the extent necessary, Spirit requests leave to file this Reply. Spirit’s Reply addresses important legal and policy issues and its brief reply will aid the Department in having a full and complete discussion of the issues. Acceptance and consideration of Spirit’s Reply will aid the Department in determining whether to reverse the dismissal of Spirit’s application and whether to approve Spirit’s application for the reallocation of unused frequencies.

announced it would begin using the 14 frequencies as of mid- December 2007. Contrary to American's assertion, the Department's fundamental policy is to reallocate unused frequencies in restricted international markets. American would mislead the Department regarding the policy discussed in Order 2005-4-13, April 12, 2005, which reallocated five Brazil frequencies from United to Delta. In that Order, the Department noted its "longstanding policy not to permit valuable operating rights to remain unused for an extended period." *Id.* at 3.

In the Brazil case the Department, based on the particular facts, found that permitting United to retain the five frequencies was not in the public interest. This decision demonstrates a Departmental policy that is rationally related to the pro-competitive requirements of the law and longstanding policy to transfer unused rights in restricted markets. American's untenable position is that regardless of how many frequencies are unused – in this case 33 percent of American's total – and how long the frequencies have remained unused, all an incumbent carrier has to do is announce it will start using these frequencies in another seven months to keep them. This is not and cannot be the "well-established" policy of the Department.

Almost 25 years ago, in the *Braniff-South American Route Transfer Case*, Order 83-6-74, April 20, 1983, at 17, the CAB pointed out that in limited entry international markets, the incumbent "might not exercise all its route rights to benefit consumers." The concern expressed by the CAB, was fully realized in the instant case, where American for at least 4 years has failed to fully utilize a substantial number of its frequencies, presumably to limit capacity and keep up prices. In *Braniff*,² the CAB also stated that: "Despite foreign restrictions on price and entry, intergateway competition

between a diversity of carriers can have a positive impact on fare competition.” *Id.*
Spirit would provide exactly this kind of competitive impact.

Spirit’s Petition raises fundamental legal and policy issues as to how the Department should implement its pro-competitive policies in the context of a blatant failure to use these valuable rights.² Spirit respectfully submits that the Department affirm its longstanding policy that limited international authority must be used. Moreover, in a case like this involving an extended period when the incumbent failed to use a substantial percentage of those rights, the Department *will* transfer them to other carriers, like Spirit, that have made a firm commitment to fully utilize them.³ In its assessment of the public interest, the Department must consider that Spirit would be a new low-fare entrant with fares 20 percent to 40 percent below American and serving an important alternative South Florida gateway for the growing ethnic community.

No Additional Proceeding is Required to Allocate the Frequencies to Spirit.

Delta argues that the *Ashbacker* doctrine (*Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945)) requires the Department, if it reallocates the 14 unused frequencies, “to conduct a comparative selection proceeding to allocate the frequencies.”⁴ However, *Ashbacker* simply seeks to insure that mutually exclusive applications are both weighed when deciding which applicant will be granted the rights in question. There is no “black-letter law” that *Ashbacker* specifically requires a separate selection proceeding. Indeed, the U.S. Court of Appeals for the District of Columbia has said that the “*Ashbacker* rule is

² Indeed with Mexican authority the Department has for almost 20 years considered authority dormant and subject to reallocation unless a carrier can essentially show circumstances beyond its control that has prevented it from starting service. See Order 88-10-2 (October 5, 1988).

³ American said it will start service in December but has made no commitment to continue to operate these frequencies even through the Holiday season. If American operates for two months or three months and then stop will the Department then immediately transfer the frequencies.

⁴ Answer of Delta Airlines, Inc. at 2 (July 10, 2007).

basically a rule of fairness in comparative consideration, that it must be applied with common sense and in a practical fashion.”⁵ In this case the Department has more than adequate information available to it to fairly compare the proposed service of Spirit and Delta. A decision based on the available information would satisfy the *Ashbacker* requirement. This is not a case where two applicants are so similarly situated in their proposals that the Department has no choice but to hold a proceeding to delve into the minutiae of the applications. The major policy goals laid out by Congress seek to place “maximum reliance on competitive market forces and on actual and potential competition.”⁶ Spirit’s service clearly advances the intent of Congress, while Delta’s proposal does not.

Allocation of the unused frequencies to Delta would not serve the public interest in increased competition in the U.S.-Colombia market by the addition of a new carrier. Delta already holds seven weekly frequencies in this market, and it has an extensive code-share with Avianca, the national flag carrier of Colombia, on Avianca flights between various points in Colombia to major U.S. cities. Allocation of the unused frequencies to Delta creates no new competitor in the market by a low-fare carrier and only further entrenches an incumbent airline. Spirit’s walk up fare would be approximately 40 percent below Delta’s current fare on its code-share flights with Avianca in the Ft. Lauderdale-Bogota market. Adding a new low-fare carrier to the Colombia market from Ft. Lauderdale is the best way to benefit consumers in a market where there is a strong community of interest with Colombia, given the current frequency

⁵ *Delta Air Lines, Inc. v. Civil Aeronautics Board*, 497 F.2d 608, 612-13 (DC Cir. 1973), *citing* *National Airlines v. Civil Aeronautics Board*, 392 F.2d 504 (DC Cir. 1968).

⁶ 49 U.S.C. 40101(a)(6).

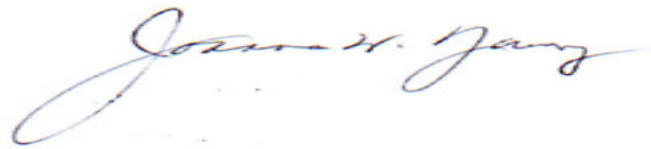
limitation.

CONCLUSION

As discussed above, to the extent the Staff has accepted American's position that no matter how many frequencies go unused and no matter how long these hard bargained for rights are wasted, the incumbent can retain them by starting service months in the future, Spirit respectfully believes the Staff has misinterpreted the Department's long held position. Based on the facts of this case, Spirit believes the governing law and the Department's long held policy demands that these 14 frequencies be reallocated.

For the reasons discussed above, the Department can allocate these frequencies to Spirit without an additional comparative selection proceeding to advance the overriding public interest in establishing new service by low-fare carriers in restricted international markets.

Respectfully submitted,



Joanne W. Young

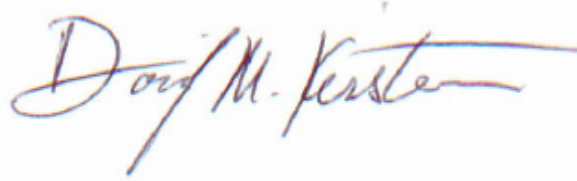
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CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing "Application of Spirit Airlines, Inc. for an Exemption" by email on the following persons:

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