

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

Application of

Sky King, Inc. and
Polar Express Group, LLC

Docket OST-07-28795

For an emergency exemption pursuant to 49
§40109 and 14 C.F.R. § 302.11 to engage in
charter air transportation between points within
the State of Alaska

**SURREPLY OF ALASKA AIRLINES INC. AND MOTION FOR LEAVE TO FILE AN
UNAUTHORIZED DOCUMENT**

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Dated: August 10, 2007

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Alaska Airlines, Inc. (“Alaska”) submits this Surreply in response to the Consolidated Reply (“Consolidated Reply”) submitted by Sky King, Inc. (“Sky King”) and Polar Express Group, LLC (“Polar Express” collectively the “Applicants”) in this proceeding.¹ The Applicants have offered no new facts in support of their Application for Emergency Exemption (“Application”), and the legal arguments they advance are either based on citations taken out of context or otherwise seriously flawed. The facts are that §41104(c) of the Transportation Code mandates an affirmative finding that additional charter services between points in Alaska are required by the public convenience and necessity before the Applicants’ proposed service may be authorized.. Alaska, however, each and every day—both before as well as after the July 31 engine outage-- continues to meet the needs of the only customer that the Applicants specifically

¹ Alaska hereby requests leave to submit this Surreply as an unauthorized document. Consideration of this Surreply will enable the Department to make a more thoroughly informed decision on the merits in this proceeding, and will not unduly burden the record in any respect. Alaska notes that it is not responding to the Reply submitted by the Applicants on August 3, 2007 other than to note that the letter from ConocoPhillips to Secretary Peters that forms the linchpin of the Applicants’ Reply was not placed in the Department’s electronic docket until after the Alaska Answer to which the Applicants were responding had been filed. The issues raised by that letter were addressed in Alaska’s answer, also filed on August 3.

claim is in need of service. To state it bluntly, that means the Applicants have utterly failed to satisfy their burden of proof to demonstrate that the daily services of Alaska as well as the supplemental backup services offered by Alaska and the other carriers in the State are deficient. Nor would the grant of the Applicants' request be a "modest determination" as the Applicants argue. Instead it would be nothing short of a reversal of nearly 30 years of aviation policy and the contravention of explicit statutory and regulatory provisions. Moreover, in determining what is required by the public convenience and necessity, the applicable legislative history calls on the Department to consider the impact of the proposed services on scheduled and charter passenger and cargo services operated in the State of Alaska, including those offered by Alaska and the other Alaskan carriers that have submitted answers to the Application.

The current record offers no reason why the Application should not be denied. At most, as Alaska has already said it would not oppose, the Department may wish to consider initiating a rulemaking proceeding to decide whether and to what extent additional interstate charter service between points in Alaska is warranted, consistent with the terms of the Transportation Code.

I. THE APPLICANTS HAVE STILL NOT MET THEIR BURDEN TO SHOW THAT THE PROPOSED SERVICE IS REQUIRED BY THE PUBLIC CONVENIENCE AND NECESSITY

The Applicants have once again failed to demonstrate a need for the service they propose. While the Applicants acknowledge the existence of Alaska's previous scheduled services between Anchorage and Deadhorse, they completely ignore the comprehensive and continuing steps that Alaska has taken starting July 31 to respond to ConocoPhillips/Shared Services needs because of problems with their aircraft fleet. Much of this information was set out in Alaska's

Answer filed on August 3, but it may be instructive if Alaska briefly recaps the measures it has taken since this Spring to assist Shared Services.

Specifically:

- In March 2007 Alaska received a letter from ConocoPhillips asking for Alaska's participation in a long-term planning process concerning its transportation needs.
- On April 3, 2007 Alaska received a specific request for services (two flights per day Monday through Friday) from ConocoPhillips in light of the planned August removal of one of its aircraft for heavy maintenance. Alaska responded with both a long-term as well as short-term proposal.
- Later in April 2007, after Alaska had offered Shared Services/ConocoPhillips a daily extra section flight, Shared Services told Alaska that it no longer needed this additional capacity and that it could meet its needs with its remaining aircraft and planned to rely on Northern Air Cargo to assure availability.
- On June 3, 2007 Alaska added a daily nonstop roundtrip between Anchorage and Deadhorse with B737-400 "combi" aircraft. Alaska's most recent data, however, show that this new service operated in July at a disappointingly low load factor of approximately 56% northbound and 60% southbound, after achieving sub-par results during June. These numbers are below industry norms, especially during the summer peak season.
- Also during 2007, Alaska in response to requests from Shared Services/ConocoPhillips periodically upgauged the equipment on its flights between Anchorage and Deadhorse to all-passenger aircraft offering twice the seating capacity of its "combi" aircraft and additionally provided a number of extra section flights.
- On July 31, 2007, a Shared Services aircraft experienced an unscheduled engine outage. Alaska responded the same day by immediately substituting larger B737-700 aircraft on its scheduled nonstop flight.
- On August 1, Alaska, at Shared Services' request, doubled the seating capacity of its nonstop roundtrip flight to 288 seats and additionally operated an extra section flight providing Shared Services with a further 288 seats.
- On August 2, Alaska operated an additional extra section flight offering another 288 seats to Shared Services. Shared Services told Alaska that it did not need upgauged aircraft on the regularly scheduled nonstop roundtrip flight that day. Shared Services also informed Alaska that this flight, plus an upgrade of the scheduled flight on the following day, would be sufficient to take Shared Services through the weekend.
- On August 3 Alaska operated its normal scheduled flight upgauged to larger equipment, thus meeting Shared Services' stated needs through the weekend.
- On August 6, Alaska operated a roundtrip extra section flight for Shared Services with Boeing 737-400 aircraft seating 144 passengers. Alaska also offered to

upgauge the aircraft used on its regularly scheduled operation, but Shared Services declined.

- On August 7, Alaska operated two roundtrip extra section flights for Shared Services with 144 seat B737-400 passenger equipment.
- On August 8, Alaska again operated two roundtrip extra section flights for Shared Services.
- On August 9, Alaska again operated two roundtrip extra section flights for Shared Services.
- On August 10, Alaska will operate two roundtrip extra section flights for Shared Services.

Alaska is continuing to work closely with Shared Services and will be proposing a regular pattern of additional flights over the forthcoming weeks.

The Applicants offer absolutely no new facts to show that there is any unmet need for service in the Anchorage-Deadhorse market. Instead they attempt to disparage Alaska's outstanding work to service one of its customers by claiming Alaska is engaging in "reactive management" or simply responding to pleadings in this docket. In fact, Alaska's various expansions of service to meet Shared Services' needs started months before the Applicants filed their initial application and were in response to requests from ConocoPhillips/Shared Services---not to the Applicants' submissions in this proceeding.

Moreover, Alaska understands that the Shared Services aircraft that is now undergoing heavy maintenance is scheduled to be returned on or about August 26. When that aircraft does return to service, Shared Services will have two fully operational aircraft in its fleet. This is the number of aircraft that Shared Services normally uses in its daily operations.

II. THE DEPARTMENT IS REQUIRED TO CONSIDER THE IMPACT OF NEW CHARTER SERVICES ON BOTH SCHEDULED AND CHARTER SERVICES WITHIN ALASKA

The Applicants also argue that § 41104(c) of the Transportation Code governing intra-Alaska charters should be interpreted to require consideration only of the potential impact on Alaskan charter carriers—not scheduled carriers--when evaluating the public convenience and necessity. That argument is based entirely on selective quotations from various sources taken out of context. It is also inconsistent with the terms of the statute and its legislative history.

Section 41104(c) provides, in relevant part, that:

An air carrier holding a certificate issued under section 41102 of this title may provide charter air transportation between places in Alaska only to the extent the Secretary decides the transportation is required by public convenience and necessity.

This statutory language could not be clearer. Sky King is an air carrier holding a certificate issued under section 41102 of Title 49, and accordingly the Department must first find that the transportation proposed by the Applicants is required by public convenience and necessity if service is to be authorized. In other words, the statute nowhere says that the impact on scheduled carriers should be disregarded. In fact since both scheduled and charter carriers combine to make up the essential air transportation network of Alaska, there is no intellectually sound policy reason to consider the impact on one group of existing carriers, but not the other. Indeed, the legislative history of the predecessor to §41104(c) is quite specific on this point.

In making such determinations [public convenience and necessity], the Committee expects the Board to carefully weigh the availability of services being provided by existing Alaskan scheduled and charter operators, including those not certificated by the Board, as well as the impact that any such authorization might have in impairing the capability of such carriers to maintain or expand their level of Alaskan operations or in causing them economic injury.²

² S.Rept.No. 95-631, 95th Cong., 2d Sess. at 95-96 (1978).

This conclusion is no less true even though Congress, as the Applicants recite, did repeal provisions applicable to scheduled all-cargo carriers in the Civil Aeronautics Board Sunset Act of 1984³, and thereafter the Department removed conditions on Alaska charter services from the certificates of a particular class of all-cargo carriers. However and most importantly, Congress left intact the predecessor of § 41104(c) requiring that the Department affirmatively find that the public convenience and necessity require additional intra-Alaska charter services before such may be authorized. Thereafter, that provision was codified as part of the Transportation Code. Congress in 1984 could have changed the policy it had established in 1978 for Alaska charters if it had wished to do so—but it did not do so. Congress is, of course, presumed by the Courts to be aware of existing law when enacting legislation such as the CAB Sunset Act, and repeals by implication are heavily disfavored⁴. Congress is also presumed to be aware of judicial interpretations of the law, such as the *MarkAir* decision, when subsequently reviewing legislative language.⁵ The decision to retain the special public convenience and necessity requirement in the CAB Sunset Act is a reaffirmation of the vitality of the requirement for an affirmative public convenience and necessity finding. In recognition of that statutory requirement, the standard form of certificate that the Department has continued to issue charter carriers still contains conditions prohibiting interstate charters between points in Alaska. Sky King’s certificate carries that precise condition⁶.

³ ³ Pub.L. No. 98-443, §9(b), 98 Stat. 1703, 1706 (1984).

⁴ *See, e.g., In re: Griffith*, 206 F.3d 1389, 1393 (11th Cir. 2000); *Tapley v. Collins*, 211 F.3d 1210, 1214 (11th Cir. 2000).

⁵ *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 524, 104 S. Ct. 1188, 1195, 79 L. Ed. 2d 482 (1984).

⁶ Certificate of Public Convenience and Necessity issued to Sky King, Inc. pursuant to Order 2002-10-39, condition 5.

**III. WHEN VIEWED IN PROPER CONTEXT, THE APPLICANTS’
SELECTIVE CITATIONS DO NOT SUPPORT THEIR
UNTENABLE LEGAL POSITION**

The Applicants next offer a series of highly selective extracts from an overruled CAB decision, the legislative history of the predecessor of § 41101(c), and the decision of the Ninth Circuit Court of Appeals in *MarkAir, Inc. v Civil Aeronautics Board*, 744 Fed.2nd 1383 (9th Cir 1984)(“*MarkAir*”) which, when taken out of context appear to say something that they in fact do not mean. These red herring arguments can be quickly set aside:

- The CAB’s reference to protection “against deterioration of year-round charter service provided by Alaskan carriers”⁷ came from a discussion by the Board of the positions of the parties in the proceeding in which the Board attempted to establish multiple entry polices for Alaskan interstate charter air transportation. That order was set aside by the *MarkAir* decision for failure to follow congressionally mandated policy.
- The quotations from the legislative history of the predecessor of §41104(c)⁸ that speak of charter operations in Alaska are, again, taken out of context. The Senate Committee Report on this legislation summarized the intent of Congress in the following terms:
- The language from the *MarkAir* decision quoted by the Applicants⁹ is merely an introduction to an extensive quotation from the legislative history, including the language cited in the preceding bulleted paragraph. The court summarized its analysis of that legislative history by stating: “Thus, the overall procompetitive policy of the [Deregulation] Act does not support the CAB’s Order”.¹⁰

**IV. WHAT THE APPLICANTS TERM A “MODEST DETERMINATION”
WOULD IN REALITY BE A COMPLETE REVERSAL OF 30 YEARS
OF POLICY AND AN ATTEMPTED CONTRAVENTION
OF THE GOVERNING STATUTE**

Lastly, the applicants argue that they are asking the Department to make a “modest determination” and not a major policy decision. Here the Applicants attempt to have it both

⁷ Consolidated Reply at 5, quoting Order 83-11-5.

⁸ Consolidated Reply at 6.

⁹ Consolidate Reply at6.

¹⁰ 744 F2d at 1386.

ways. While they argue that they intend to operate services between Anchorage and Deadhorse for passengers and their baggage, they are asking the Department to authorize unrestricted passenger and cargo charter operations throughout the State of Alaska. Section 41104(c) requires the Applicants to demonstrate to the Department that the full scope of charter service for which they are requesting authority is required by public convenience and necessity. They have argued only that such a need exists in the Anchorage-Deadhorse market and completely failed to prove their point. The *MarkAir* decision has already made it clear that § 41104(c) prohibits blanket authorization of charters between points in Alaska, and requires that any finding of public convenience and necessity that is made must be based on a complete record.¹¹

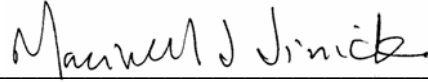
A proper application of the statutory provisions of §41104(c) can only lead to one conclusion—the Applicants have failed to sustain their burden of proof on every score and their request for an “emergency” exemption should be denied. There is no record in this proceeding to support the statutorily required finding that the Applicants’ requested service is required by public convenience and necessity. There are also indications from at least four Alaskan carriers that authorization of services by the Applicants could create varying degrees of risks to their services.¹² Nonetheless, as noted previously, Alaska would not oppose a decision by the Department to institute a rulemaking proceeding to determine whether the longstanding restrictions on additional charter service between points in Alaska should be reconsidered and, if so, to what extent. Such a proceeding, after notice and comment from potentially affected interests within the State, would then allow the Department to make an informed decision. It

¹¹ Similarly the deference called for by *Chevron USA, Inc. v. National Resources Defense Council, et al.* 467 US 837 (1984) would not apply to actions by the Department that are contrary to the clearly expressed intent of Congress. 467 US at 843.

¹² For the record, as any objective reading of its Answer will show, Alaska did not concede that some of its intra-Alaska services would not be at risk.

would also avoid the unavoidable and serious legal and policy risks inherent in the rushed decision the Applicants are seeking.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Marshall S. Sinick". The signature is written in a cursive style and is positioned above a horizontal line.

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Dated: August 9, 2007

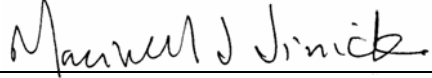
CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Surreply have this day been served by electronic mail or by first-class US mail, postage prepaid, on the following:

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