



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

Issued by the Department of Transportation  
on the 27<sup>th</sup> day of August, 2007

Served: August 27, 2007

In the Matter of

**Application of**

**SPIRIT AIRLINES, INC.**

for an exemption pursuant to 49 U.S.C. §40109, designation  
and allocation of frequencies  
(Fort Lauderdale-Bogota and Barranquilla, Colombia)

**Docket OST-2007-28057**

**ORDER ON REVIEW**

**Summary**

By this order, we grant the petition of Spirit Airlines, Inc. (Spirit) for review of staff action with respect to the dismissal of its application in the above-captioned Docket, and on review, affirm the action taken by the Director, Office of International Aviation.

**Background**

The U.S.-Colombia aviation regime is limited-entry in nature. Although the U.S.-Colombia Air Transport Agreement (the Agreement) provides no limitation on the number of U.S. airlines that may be authorized to provide combination services in the U.S.-Colombia market, U.S. combination carriers may only operate a total of 70 weekly frequencies.<sup>1</sup> Those 70 weekly frequencies are currently allocated as follows: American Airlines, Inc. (American) – 42; Continental Airlines, Inc. (Continental) – 21; and Delta Air Lines, Inc. (Delta) – 7.

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<sup>1</sup> On March 25, 2000, delegations from the United States and Colombia signed a Memorandum of Consultations that set forth the text of an understanding and amendments to the Agreement that entered into force upon exchange of notes at Bogota on August 11, October 11, and November 22, 2000.

On April 26, 2007, Spirit filed an application for a designation and exemption authority to provide scheduled combination service in the U.S.-Colombia market, and requested allocation of 14 frequencies, held by American, to operate daily Fort Lauderdale-Bogota and Fort Lauderdale-Barranquilla service. American, Delta, and Spirit filed responsive pleadings in this matter. The positions of the carriers are briefly summarized immediately below.

Spirit maintained that 14 of American's U.S.-Colombia frequencies should be reallocated to it because American had allowed the frequencies to remain dormant for a prolonged period of time. Spirit argued that the incumbent carriers in the U.S.-Colombia market could not match its proposed low-fare service, which it alleged would substantially increase competition in the high-priced U.S.-Colombia market. Delta also sought allocation of the frequencies at issue and requested that the Department institute a comparative selection proceeding, citing *Ashbacker Radio Corp. v. FCC*,<sup>2</sup> to consider the merits of competing applications for any available frequencies. Both Spirit and Delta noted the Department's policy in limited entry markets against allowing allocated valuable operating rights to go unused for an extended period, particularly when another carrier has firm plans for using them while the incumbent does not.

American stated that its U.S.-Colombia service pattern has varied according to market demand, and affirmed its intent to utilize all of its 42 frequencies later this year. American issued a press release on May 15 announcing firm plans to operate its 14 unused frequencies beginning December 13, 2007, with reservations and sales commencing May 20. In its answer, American noted that 35 of its frequencies are not restricted to specific city pairs or by dormancy conditions. Finally, American asserted that it is well-established Department policy not to take away a carrier's temporarily dormant frequencies when the carrier has announced firm plans to use them.

By Notice of Action Taken, dated June 29, 2007, the Director, Office of International Aviation, dismissed Spirit's application, without prejudice, and allowed American to retain the 14 frequencies subject to certain conditions. In taking this action, the staff noted that it has generally been Department policy to permit incumbent carriers to retain dormant frequencies if the carrier has demonstrated firm plans to use them, even if another carrier seeks use of the frequencies. In this case, American presented firm plans for use of its 14 unused frequencies, and had begun marketing and selling its services on May 20, 2007, with a proposed start-up date of December 13, 2007. Therefore, the staff found that, in the circumstances presented, it was consistent with Department precedent and in the public interest to permit American to retain its 14 frequencies based upon its firm commitment to use them.

As an additional matter, in taking this action, the staff stated that it is not Department policy to allow valuable operating rights to remain unused, particularly when another carrier has plans to use them. Accordingly, to ensure that the Department can take steps to reallocate the frequencies should American fail to follow through on its plans, the Notice of Action Taken imposed certain conditions on American. It placed reporting requirements on the carrier to

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<sup>2</sup> 326 U.S. 327 (1945).

inform the Department of its progress towards instituting its proposed services.<sup>3</sup> It also stated the Department's full expectation that American will institute service by December 13, 2007, and noted that failure to do so would result in automatic expiration of the allocation for these 14 frequencies and their reversion to the Department for allocation.

### **Spirit's Petition and Responsive Pleadings**

On July 6, Spirit filed a petition for review of staff action and requested that we reverse our decision and allocate to Spirit 14 frequencies to provide daily low-fare service from Fort Lauderdale to Bogota and Barranquilla, Colombia. Delta and American filed answers and Spirit replied.<sup>4</sup>

Spirit asserts that the staff may have overlooked important and material facts concerning Spirit's proposal for first-ever low-fare service to Colombia, and to the extent it did so, may have committed a prejudicial procedural error. Spirit states that the staff action on its application does not advance U.S. policies regarding competition, asserting that its proposed service would encourage competition between carriers and airports with the addition of the first direct flights to Colombia from Ft. Lauderdale, while American's service would simply add more service at Miami. Spirit contends that the staff decision is not consistent with the Department's dormancy policy on frequencies which, Spirit argues, requires reallocation of the frequencies to Spirit, to best serve the public interest and allow low-fare competition by a new entrant in this limited entry market. Spirit states that allowing American to hold, but not use, a significant number of frequencies, is contrary to the public interest and is anti-competitive. Spirit renews its concern, previously expressed in its May 16 reply to American's answer, that American's plan to reinstitute service with the 14 frequencies amounts to a "do-over" and should not be rewarded. Spirit disputes the precedents cited in the staff decision, maintaining that this case presents additional factors that were not present in the other cases. Spirit also contends that the imposition of various regulatory requirements to monitor American amounts to "on-the-fly" regulation and is substantially deficient in meeting statutory mandates to place maximum reliance on competitive market forces and on actual and potential competition.

Delta states that it takes no position regarding the merits of the petition, but reiterates its interest in the Colombia frequencies and the requirement for a comparative selection proceeding in the event any or all of the frequencies become available for allocation.

American reiterates that it has publicly announced its plans to use its 14 frequencies at issue here to re-establish daily nonstop service in the Miami-Barranquilla market, add four weekly nonstop flights in the Miami-Bogota market, and add three weekly nonstop flights in the Miami-Medellin market. American affirms that it has firm plans for fully utilizing these operating rights as these flights were loaded into CRSs on May 18 and were available for reservations and sales on May 20. American states that our decision to allow it to retain the

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<sup>3</sup> We note that American provided its first report on July 20, 2007, including Official Airline Guide schedules indicating the planned operation of all 14 frequencies by December 19, as well as news releases and articles announcing its proposed service. American also states that it is seeking approval for its services from the Colombian government.

<sup>4</sup> Spirit's pleading was filed with a motion for leave to file, which we grant.

frequencies at issue is consistent with longstanding Department policy and precedent where the carrier holding the frequencies has demonstrated firm plans for their use. American also notes that we have imposed similar reporting requirements on incumbent carriers in other situations involving the carrier's future use of authority and provides examples of instances where we have so conditioned a carrier's authority.

In its reply, Spirit asserts that American misstates the Department's policy on dormancy. Spirit reiterates that a comparative selection proceeding is not necessary, given that award of the 14 frequencies to Spirit would introduce a new low-fare carrier into the market and that doing so would best serve the public interest.

## **Decision**

We have decided to grant Spirit's petition for review, and, on review, to affirm the action of the staff. We find that the staff acted properly and in accordance with established Department practices and policies in reaching its decision to dismiss Spirit's application.

We are not persuaded by Spirit's arguments that we should reallocate to it the 14 frequencies that have been held by American and which American has committed to utilizing by introducing the planned Miami-Colombia services involving Barranquilla, Bogota and Medellin. American states that these services are currently available in CRSs for reservations and sales and the carrier has already submitted to the Department information demonstrating that, among other things, it has been selling the services to the public since May 20. The June 29 Notice of Action Taken correctly stated that the Department has generally permitted incumbent carriers to retain unused frequencies when the incumbent carrier presented firm plans for their use.<sup>5</sup> Therefore, in the circumstances presented here, we do not find that it is in the public interest at this time to reallocate American's frequencies in response to Spirit's application.<sup>6</sup>

However, we note that American has been put on notice to report its progress towards instituting its proposed service every 60 days, and stated the Department's expectation that American will institute service by December 13, 2007.<sup>7</sup> Should American not institute service, and use its frequencies, as announced and affirmed by American in its pleadings, we would, of course, reexamine this matter. We note that we have placed such conditions on other incumbent carriers under similar circumstances, successfully ensuring that utilization of frequencies was carried out as represented by the carrier.<sup>8</sup>

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<sup>5</sup> See, e.g., Orders 95-1-27 and 95-3-52. Spirit argues that the orders cited in the June 29 Notice reflect different factual circumstances and are "bad precedents." While the specific circumstances presented here may vary from the cited precedents in terms of number of frequencies at issue and the extent of carrier presence in the market, we remain committed to our longstanding policy, consistent with the public interest, to allow incumbent carriers to retain use of unused frequencies based upon firm plans to use them. See also Orders 96-5-37 and 96-10-16, in which we temporarily reallocated dormant frequencies for interim use by another carrier while allowing the incumbent carrier to retain them on a permanent basis.

<sup>6</sup> The issues raised by Spirit regarding the nature of its services are more appropriately raised in the context of a comparative selection proceeding, which we are not instituting for the reasons explained in this Order.

<sup>7</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.

<sup>8</sup> See, e.g., Orders 95-1-27 and 96-10-16.

**ACCORDINGLY,**

1. We grant the petition of Spirit Airlines, Inc. filed on July 6, 2007, for review of staff action in dismissing the application of Spirit Airlines, Inc., in Docket OST-2007-28057, as reflected in the Notice of Action Taken dated June 29, 2007;
2. We grant the motion of Spirit Airlines, Inc., for leave to file an otherwise unauthorized document;
3. We affirm, on review, the action of the Director, Office of International Aviation, dismissing the application of Spirit Airlines, Inc., described above; and
4. We will serve this order on Spirit Airlines, Inc., American Airlines, Inc., Delta Air Lines, Inc., and other U.S. carriers serving the U.S.-Colombia market, the U.S. Department of State (Office of Aviation Negotiations), and the Federal Aviation Administration.

By:

**ANDREW B. STEINBERG**  
**Assistant Secretary for**  
**Aviation and International Affairs**

(SEAL)

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