

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

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

**REPLY OF SPIRIT AIRLINES, INC TO THE ANSWER  
OF JETBLUE AIRWAYS CORPORATION AND  
DELTA AIR LINES, INC.**

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November 1, 2007

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**REPLY OF SPIRIT AIRLINES, INC TO THE ANSWER  
OF JETBLUE AIRWAYS CORPORATION AND  
DELTA AIR LINES, INC.**

Spirit Airlines, Inc. (Spirit) submits this Reply to the Answers of JetBlue Airways Corporation (“JetBlue”) and Delta Air Lines, Inc. (“Delta”) to Spirit’s Renewed Application for an Exemption in Docket OST-2007-28057.

As a result of the hard-earned amendments to the air transport agreement between the U.S. and Colombia, seven existing frequencies have become available to reallocate immediately because they are no longer needed by American to serve Barranquilla. Spirit urges the Department to disregard the misdirected views of JetBlue and Delta that those existing frequencies should be considered in the proceeding to allocate the 21 new frequencies created by the U.S.-Colombia agreement. The Department

should not be misled or confused by the multiplicity of filings by various carriers in other Dockets.

These seven frequencies should be immediately allocated to Spirit in this Docket which has been open since April 2007. As discussed below, the holding in *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945) does not require that these existing frequencies be considered in the same proceeding as the new frequencies, nor does it require additional process in this Docket before making an award.

In April, 2007, during the ongoing negotiations with Colombia, Spirit brought to the Department's attention the fact that there were 14 frequencies held by American which had been virtually unused for more than 5 years. At that time – specifically April 25, 2007 - Spirit applied to use the 14 frequencies. On May 3 American filed an Answer and on May 8 Delta filed a response saying it would apply for the frequencies. On May 15 American filed a reply announcing new service including the use of seven frequencies for Barranquilla service.

JetBlue, Continental, US Airways and every other U.S. carrier had every opportunity to participate in that proceeding and seek those unused frequencies. None of them, except Delta, chose to participate. Accordingly, no carrier has or will be prejudiced by allocating those 7 frequencies which are available to use today, in the current proceeding in this Docket. Indeed, merging those frequencies into the proceeding to allocate the new frequencies would be unfair and prejudicial to Spirit, which came forward with a plan to use the frequencies that American had been wasting and is still not using, seven months later. JetBlue is not even seeking these immediately available

existing frequencies but rather is applying for new frequencies that become available on April 1, 2008 and October 1, 2008. It is ridiculous for JetBlue to argue that these existing frequencies should be included in a new proceeding, when it is only applying for the new frequencies that become available in mid- 2008.

In the Notice of Action Taken, June 29, 2007 in this Docket, permitting American to retain the frequencies that it wasted for five years, the Staff stated that if American did not use the frequencies as proposed “for any reason,” Spirit could resubmit its application. In Order 2007-8-28 (August 27, 2007), the Department affirmed the Staff action, again in this Docket, and said that frequencies not needed by American for the specific service it announced, would “result in automatic expiration...and their reversion to the Department for allocation.” American does not need the frequencies for Barranquilla, and Spirit has renewed its application.

The only legitimate applicants for the seven existing or old frequencies that are available now for reallocation are Spirit and Delta. As Spirit discussed in detail in its Reply and Renewed Application filed on October 16, 2007, and contrary to Delta’s continued assertion, the Department does not need “more process” to allocate these immediately available frequencies to Spirit. *Ashbacker* only requires that the Department make clear that it gave fair consideration to the competing applications and that its findings make clear the public interest basis for its decision. As discussed in *Delta Air Lines, Inc. v. CAB*, 497 F.2d 608, 612-613 (DC Cir. 1973), the “Ashbacker rule is basically a rule of fairness in comparative consideration, that must be applied with common sense and in a practical fashion.” The Department can apply this standard in this Docket and make an award.

As discussed in Spirit's Reply and Renewed Application, Congress in 49 U.S.C. §40101(a) has established the public interest criteria to guide the Department's decision.

They specifically include:

- Avoiding “excessive market domination and monopoly powers;”
- developing an air transport system that relies on competition;
- “encouraging entry” by “new carriers” and “strengthening of small carriers to ensure a more competitive industry;” and
- “to provide efficiency, innovation and low prices.”

Applying these Congressional criteria and Department precedent, it is apparent awarding these seven frequencies to Spirit, a new entrant, ultra low-fare carrier that promotes both intragateway and intergateway competition, will provide greater immediate public interest benefits than an award to Delta which now operates daily service to Bogotá from Atlanta and codeshares on Avianca flights from multiple gateways including New York, Miami and Ft. Lauderdale. There is sufficient information in the docket, including publicly available information of which the Department can take notice, to support an award to Spirit. Delta is not a new entrant, it will not bring needed competition to the most important U.S.- Colombia market (South Florida – Bogotá) and it will not offer every seat everyday at fares that are 20% to 40% below the current fares established by American and Avianca (Delta's codeshare partner) in the South Florida - Bogotá market. Delta has made clear that its surge into international markets which far exceeds any other legacy carrier is driven by a desire to increase yields in markets with no low fare competition. *See, e.g.* “Delta Exits

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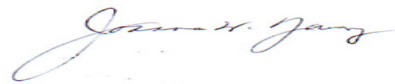
Bankruptcy with New Routes, Fewer Workers (Update 2) at

<http://www.bloomberg.com/apps/news?pid=20670001&refer=us&sid=aBFs036vx7m4>.

See also, "U.S. Majors Keep Expanding Internationally, Contracting Domestically," *Aviation Week & Space Technology*, October 29, 2007, at 52 noting Air Transport Association data that member international yields have increased every month in 2007 over the same period in 2006, while domestic yields have been mostly down.

Accordingly, Spirit urges the Department to take the steps it said it would take with respect to these seven frequencies. It should properly withdraw the frequencies from American and based on the filings in this Docket, award those frequencies to Spirit.<sup>1</sup> As soon as possible the Department should issue a Notice starting a proceeding to allocate the newly acquired 21 frequencies by requesting applications or supplemental applications from all interested carriers.

Respectfully submitted,



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November 1, 2007

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<sup>1</sup> If the Department believes that any additional process is required to allocate these seven frequencies it should issue a show cause order and request comments.

**CERTIFICATE OF SERVICE**

I hereby certify that I have this day served the foregoing "Answer to Application of JetBlue and Reply to Answers of JetBlue and Delta" by email on the following persons:

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November 1, 2007