

BEFORE THE
DEPARTMENT OF TRANSPORTATION
WASHINGTON, D. C.

2007/2008 U.S.-COLOMBIA COMBINATION : DOT-OST-2007-
FREQUENCY ALLOCATION PROCEEDING : 0006

PETITION OF AMERICAN AIRLINES, INC.
FOR RECONSIDERATION OF ORDER 2007-11-23

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American Airlines, Inc. hereby petitions the Department for reconsideration of Order 2007-11-23, November 26, 2007, insofar as that order places in issue for seizure and re-allocation seven of American's duly allocated U.S.-Colombia combination frequencies which American is using effective December 13, 2007. The Department's action is contrary to precedent and to principles of fundamental fairness, is arbitrary, capricious, and an abuse of discretion, and should be vacated forthwith.

As stated in Order 2007-11-23, American holds an allocation of 42 weekly U.S.-Colombia frequencies (p. 1). Seven of these frequencies are city-pair specific to Miami-Medellin, but 35 may be used to serve between the U.S. and any point in Colombia.

Earlier this year, initially by staff action on June 29, 2007 (OST-2007-28057) and affirmed on review by Order 2007-8-28, August 27, 2007, the Department ruled that American could retain 14 frequencies that had been temporarily unused provided that American started service by December 13, 2007. The Department's decision was based on well-established precedent that when a carrier holding unused frequencies has firm plans to use them, those frequencies will remain with the holder and not be re-allocated. See Order 2005-4-13, April 12, 2005, p. 3 n. 5 (declining to confiscate and re-allocate to American five U.S.-Brazil frequencies held by United which had been dormant since "at least March 2003" where United announced on April 4, 2005 that it had firm plans to use them effective October 31, 2005); Order 95-3-52, March 27, 1995, p. 4 (declining to confiscate and re-allocate to American on a permanent basis four U.S.-Brazil frequencies held by United where United announced on March 1, 1995 firm plans to use them effective August 1, 1995).

American's plans as of May 15, 2007 were to use seven of the 14 frequencies to re-institute daily service between Miami and Barranquilla, and to use the remaining seven to increase service between Miami and Bogota from 14 weekly trips to 18 and between Miami and Medellin from seven weekly trips to 10. Combined with American's daily operations between Miami and

Cali, the planned services would use all of the 42 frequencies the Department has duly allocated to American, effective December 13, 2007.

At the end of September, the United States and Colombia reached agreement on 21 new frequencies, as well as designation of Barranquilla and Cartagena as open skies cities no longer requiring a frequency allocation. Accordingly, the seven frequencies that American had assigned in May to Miami-Barranquilla became available for American to use on other U.S.-Colombia routes. As noted above, these frequencies are not city-pair specific, but may be operated on any U.S.-Colombia segment.

On October 11, 2007, American announced that it would keep its commitment to operate all of its 42 U.S.-Colombia frequencies, as well as Miami-Barranquilla, by re-assigning the seven ex-Barranquilla frequencies to increase service between Miami and Bogota from 18 weekly trips to 21, and between Miami and Medellin from 10 weekly trips to 14, effective December 13, the same date American committed to in May. We promptly published these additional schedules and they became available for reservations and sales on October 20.

Yet on November 26, less than three weeks prior to December 13, the Department, in an unprecedented and manifestly unjust action, issued Order 2007-11-23, arbitrarily stripping American of the seven frequencies no longer required for Barranquilla, notwithstanding American's firm plans to operate additional flights to Bogota and Medellin. While American is invited to compete for its own frequencies in the carrier-selection proceeding the Department has instituted, there is no legitimate basis for placing American's frequencies in issue, as those frequencies represent a license of a continuing nature on which American is entitled to rely. We have firm plans to use them, effective December 13; consistent with well-established precedent cited above, including the Department's affirmation of staff action by Order 2007-8-28, American has every right to retain its seven frequencies.

Order 2007-11-23 is woefully inadequate in explaining the Department's failure to adhere to the "firm plans" line of cases. "An agency acts arbitrarily and capriciously if it 'reverses its position in the face of a precedent it has not persuasively distinguished,'" New York Cross Harbor R.R. v. Surface Transportation Bd., 374 F.3d 1177, 1181 (D.C. Cir. 2004) (citations omitted). That aptly describes what the Department has done here, not only by ignoring the "firm plans" test, but

by imposing limitations on the use of frequencies that are not city-pair specific and that are not otherwise subject to conditions.

The Department's decision to strip American of its frequencies is apparently based on the patently invalid premise that American should have been prescient in May in foreseeing that Barranquilla would become an open skies city in late September. See Order 2007-11-23, p. 3 ("[w]e put American under a strict requirement to report its progress in using the frequencies as proposed," emphasis added). However, "neither the law nor common sense can demand clairvoyance," Conneen v. MBNA, 334 F.3d 318, 325 (3d Cir. 2003), and there can be no dispute that "it is impossible to divine the future," Parada v. Parada, 999 P.2d 184, 191 (Ariz. 2000). Of course, had we been able to predict the future, we would have proposed in May to assign seven of our frequencies to U.S.-Colombia routes other than Barranquilla, as we announced on October 11, and the Department would lack any pretext to take these frequencies away.

There is no proper basis for the Department "to weigh whether the public interest would be better served by letting American use those frequencies in the Miami-Bogota and Miami-Medellin markets or allocating them to other applicants" (Order 2007-11-23, p. 3). The Department cannot simply reach in and

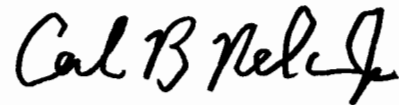
take frequencies away from a duly authorized carrier because it wishes to evaluate whether that carrier's choice of routes using frequencies that are not city-pair specific would serve "the public interest" when considered with applications by other carriers.

The Department's decision to place American's frequencies in issue for re-allocation is fundamentally unfair and violates American's right to due process. It has long been established that certificated carriers should enjoy "security of route" and that their operating authorizations are protected from summary revocation. See CAB v. Delta Air Lines, 367 U.S. 316, 321-325 (1961).

In light of all the circumstances presented, including (1) the Department's affirmation of staff action by Order 2007-8-28 allowing American until December 13 to use all of its U.S.-Colombia frequencies based on "firm plans," (2) the utter impossibility that American could have known in May that Barranquilla would become an open skies city some four months later, and (3) the unprecedented and unexplained nature of the Department's confiscatory action, Order 2007-11-23 should be vacated insofar as it places seven of American's U.S.-Colombia frequencies in issue for seizure and re-allocation.

The scope of the 2007/2008 U.S.-Colombia allocation proceeding should accordingly be limited to the 21 additional frequencies available under the new U.S.-Colombia agreement. The seven frequencies duly allocated to American by the Department should be immediately taken off the table.

Respectfully submitted,



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December 3, 2007

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document by email on the following persons:

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