

28057, for at least half a decade, American chose to not operate 14 or 33% of its weekly Colombia frequencies. When American last used these frequencies in 2005, it was only for a two-month period during the holidays, and outside of that two-month period, these frequencies had not been used since at least 2003. In other words, for at least half a decade, 20% of all the frequencies allocated to all U.S. carriers were withheld from the market by American, presumably to boost its load factors, limit capacity, and maintain the high prices that unfortunately have been the hallmark of the South Florida-Colombia market for years. It is highly likely that, but for Spirit's April 26, 2007 application for reallocation of those frequencies, American would have continued to "warehouse" or withhold these frequencies from use. Under the circumstances presented, American should be thankful the Department is only considering reallocating seven (7) as opposed to all 14 of the warehoused frequencies originally requested for reallocation by Spirit.

The ability of American now to operate to Barranquilla, without using any of the valuable frequencies available for U.S. carriers, may have been the catalyst for the Department's decision to include these seven (7) frequencies in this proceeding. However, it is clear from the Order – the Department's decision was based on its need to meet its statutory obligation to maximize the public interest benefits to consumers from the limited frequencies available. American obviously believed that using the frequencies for Barranquilla was the best use of the frequencies. Once the frequencies were no longer needed for that market, the Department was correct to reassess whether the public interest is best served by allocating those frequencies to another carrier or leaving them with American.

The Department's decision has nothing to do with, as American contends, the Department requiring American to have been "clairvoyant" about Barranquilla becoming an open skies point. Rather, it has to do with both American's abuse of the public interest by restricting the market for at least half a decade and with, under the current circumstances, which carrier will best utilize these frequencies to meet strong public demand today. As Spirit noted in its reply and renewed application filed on October 16, 2007, in Docket 2007-28057, in the 17 years since American acquired these frequencies from Eastern, there has been a dramatic change in the market as consumers have opted in large numbers for service by low fare carriers. In 1990, there were no low fare carriers that had the interest or capability to provide competitive service in the U.S. – Colombia market. By contrast, today, Spirit an ultra low cost carrier ("ULCC"), is anxious to satisfy this unmet demand in the South Florida – Colombia market for low fare service. As the Department stated in the Order at 3:

American's proposed alternative use of the frequencies takes on particular importance given that we have already had interest expressed in serving these very markets, including by potential new entrant carriers. we are required to weigh whether the public interest would be better served by letting American use those frequencies in the Miami-Bogotá and Miami-Medellín market or allocating them to other applicants.
(Footnote omitted)

The Department's decision to reassess the allocation of these few frequencies after 17 years, in light of the current structure of the market and of the industry generally, advances the important Congressional policies set forth in 49 U.S.C. § 40101(a), namely:

- (6) placing maximum reliance on competitive market forces and on actual and potential competition—
- (A) to provide the needed air transportation system;

(10) avoiding unreasonable industry concentration, excessive market domination, monopoly powers, and other conditions that would tend to allow at least one air carrier or foreign air carrier unreasonably to increase prices, reduce services, or exclude competition in air transportation.

(12) encouraging, developing, and maintaining an air transportation system relying on actual and potential competition—

(A) to provide efficiency, innovation, and low prices; and

(B) to decide on the variety and quality of, and determine prices for, air transportation services.

(13) encouraging entry into air transportation markets by new and existing air carriers and the continued strengthening of small air carriers to ensure a more effective and competitive airline industry.

I. THE ORDER WITH RESPECT TO THESE FREQUENCIES DOES NOT VIOLATE DEPARTMENT PRECEDENT

Contrary to the position of American, a frequency allocation is not an entitlement that runs in perpetuity (or a license of an indefinite continuing nature), regardless of how the carrier uses the frequencies or how changes in the competitive environment may affect the public interest in continuing a specific allocation.¹ As the Department stated in instituting the *1997 U.S.-Argentina All-Cargo Frequency Proceeding*, Order 97-11-35 at 8 (November 20, 2007), to consider reallocation of frequencies:

Frequency allocations are *not* certificate awards. We have traditionally deemed them to be in the nature of exemption authority. As with exemptions, we typically grant frequency authority for a limited period of time--in *limited entry markets normally for no more than one year*. As with exemptions, we award frequency allocations on the express basis that we may amend, modify or revoke them in our discretion and without hearing. (Emphasis added)

In explaining the reasons for treating frequencies as subject to revocation, the Department explained:

We have treated frequency awards in this fashion because, in the limited-

¹ The fact that these frequencies were not for specific city pairs and did not contain an explicit dormancy condition does not limit the right of the Department to reallocate them to advance the public interest in serving a restricted market.

service markets where we must make such awards, *we have wanted to preserve maximum flexibility to respond to changing conditions*, whether in terms of the operations of the carriers already serving, the interests of the carriers that might want to serve, the overall state of the applicable bilateral relationship, or any other public interest factors. *Id* at 9. (Emphasis Added)

In fact, all of the factors listed by the Department in the U.S. - Argentina proceeding compel reallocation of these seven frequencies in the instant proceeding.

First, even with the limited additional frequencies created by the amendment to the Colombia bilateral, American's retention of these frequencies is not in the public interest and this retention enables it to preserve its monopoly power in the market by controlling a whopping 46 percent of all U.S. – Colombia frequencies and currently 100 percent of the U.S. carrier service in the South Florida-Colombia market.

Second, American is now using these contested frequencies to add three (3) more flights to Bogotá and four (4) more to Medellín. Accordingly, it is now operating 21 weekly frequencies between Miami and Bogotá and 14 between Miami and Medellín. As the Department recognized in similar contexts, it is extremely difficult to compete against *triple daily* flights in frequency restricted markets. *See*, Order 96-10-23 at 5 (October 17, 1996) (“14 frequencies [for Continental] will make Continental a more effective competitor vis-à-vis American's triple daily Miami-Ecuador services.”) Permitting American to retain these frequencies to augment its Bogotá and Medellín service would continue a single U.S. airline's total dominance of U.S. carrier service in the important South Florida – Colombia market.

Third, failure to reallocate these frequencies ignores the interests of other carriers to serve Colombia. It would specifically ignore Spirit's efforts to bring its unique low-

fare competitive service to the South Florida – Bogotá/Medellín markets.

Finally, and most importantly, the very limited number of new frequencies made available by changes in the U.S. - Colombia bilateral agreement justify reallocation of these frequencies to advance the public interest in generating more consumer options in the Colombia market.

The Department's previous decisions to allow a carrier to retain dormant frequencies are not based on some black-letter or automatic rule as incorrectly argued by American. American obviously has misread the Department's orders relating to permitting a carrier to continue using frequencies if it announces new service in instances when another carrier has requested the frequencies. American cites the results, but not the key language or reasoning, of the Department in these proceedings.

Specifically, in the allocation of Brazil frequencies, Order 95-3-52 (March 27, 2007), the Department *made a public interest determination* that the benefits of permitting Tower and United to retain frequencies, which had been unused, outweighed the benefits of transferring them to American. The Department concluded:

In these circumstances, we find no basis at this time to alter the longer term distribution of frequencies, a *distribution that we believe best promotes competition and service in the U.S.-Brazil market.*

(*Id.* at 3) (Emphasis added). The Department's decision not to reallocate the frequencies was based on a public interest assessment of the current service and how best to promote competition, *not on some rule that simply announcing new service automatically means frequencies will not be reallocated.*

The Department's decision in the instant Order, is based on a similar public

interest analysis of past non-use by American, the current competitive environment, and the best future use of these frequencies that were withheld from use by American, with minor exceptions for holidays, for at least half a decade. Far from being an “arbitrary” departure from precedent, the instant Order to consider reallocating the seven frequencies is completely consistent with the Department’s prior decisions that made reallocation determinations based on assessing the public interest, as it is required to do by statute.

The other decision cited by American – Order 2005-4-13 (April 12, 2007) – also does not support its claim. American references the Department’s cryptic footnote 5 stating that American’s request will be treated separately. This footnote certainly does not support the ironclad rule that American seeks to foist on the Department in this proceeding. Indeed, the main holding of Order 2005-4-13 is just the opposite of American’s position. In that case, the *Department in fact reallocated five frequencies* from United to Delta, notwithstanding United’s contention that it had firm plans to use the frequencies.

Moreover, the Department in Order 2005-4-13 explicitly rejected United’s claim, made here by American, that since the frequencies did not have an explicit dormancy condition, withdrawing them would raise due process issues. In sum, the Department’s decision is consistent with its prior decisions and is adequately explained and supported by the record. Accordingly, the Department’s decision is not arbitrary or capricious as wrongly argued by American. The case of *New York Cross Harbor R.R. v. Surface Transportation Bd.*, 374 F. 3d 1177 (D.C. Cir. 2004), cited by American, is inapposite to the facts presented by the Order in this proceeding because the underlying decision

involved a finding of abandonment of certificate authority when operations were then in use, represented a first time departure from precedent, and involved a lack of an explanation for its decision.

II. THE DEPARTMENT'S ORDER INSTITUTING THIS PROCEEDING DOES NOT VIOLATE AMERICAN'S DUE PROCESS RIGHTS

As noted in the quote from the Department above in *1997 U.S.-Argentina All-Cargo Frequency Proceeding*, Order 97-11-35, a frequency allocation is in the nature of an exemption, and the Department reserves the right to alter, amend, suspend, or revoke a frequency allocation under the Department's discretion and without a hearing.

American's reference to *CAB v. Delta Air Lines*, 367 U.S. 316 (1961), is without any merit because that case was specifically limited to certificate authority. On its face, the 1961 case has no application to frequency allocation decisions by the Department.

Notwithstanding that the Department specifically has held that it can withdraw frequencies without a hearing, in this proceeding, it *is providing* the opportunity to American to justify why it should retain the seven (7) frequencies. This represents more due process than American is entitled to expect. Indeed, as Spirit demonstrated in several filings in Docket 2007-28057, the Department, considering American's abuse of these valuable limited operating rights for more than half a decade, and the current lack of competition in the South Florida – Colombia market, should have immediately withdrawn the frequencies and awarded them to Spirit. Had the Department taken that action, Spirit would likely have started competitive service by July or August 2007. Instead, the frequencies remained unused for an additional four or five months and now

they are being used to tighten American's grip on the market.

III. CONCLUSION

For the reasons set forth above, American's frivolous petition to give it perpetual rights to the seven Colombia frequencies put in issue by the Order must be rejected. Spirit admires the Department commitment to establishing a competitive environment for service to Colombia and recognizes American's effort to hoodwink the Department into allowing it to retain these frequencies. The Department's decision to request applications to reallocate these frequencies is completely consistent with prior Department precedent. Further, given the current market structure, coupled with American's cavalier and monopolistic handling of these highly valuable rights for years, reallocation is compelled by the public interest standards set forth by Congressional directives and compelled to maximize benefits to consumers.

Respectfully submitted,



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December 6, 2007

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing “Supplemental Application of Spirit Airlines, Inc. for an Exemption or a Certificate of Public Convenience and Necessity” by email on the following persons:

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