

Order 2007-12-21



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

Issued by the Department of Transportation
on the 21st day of December, 2007

Served: December 21, 2007

In the Matter of

**2007/2008 U.S.-COLOMBIA
COMBINATION FREQUENCY
ALLOCATION PROCEEDING**

Docket DOT-OST-2007-0006

ORDER ON RECONSIDERATION

SUMMARY

By this order we grant the petition of American Airlines, Inc. (American) for reconsideration of Order 2007-11-23 in the above-captioned proceeding. On reconsideration, we deny the relief requested.

BACKGROUND

On April 26, 2007, Spirit Airlines, Inc. (Spirit) filed an application for reallocation of 14 weekly U.S.-Colombia combination frequencies currently held, but not being used, by American. American subsequently presented firm plans for use of the 14 frequencies effective December 13, 2007, with seven frequencies in the Miami-Barranquilla market, four in the Miami-Bogota market, and three in the Miami-Medellin market. By two separate actions in Docket DOT-OST-2007-28057, the Department permitted American to retain these 14 frequencies based upon its firm commitment to use them, subject to the condition that American institute service using the frequencies as it had proposed.¹

Subsequently, the governments of the United States and the Republic of Colombia negotiated a new understanding, referred to in this proceeding as the 2007 Understanding, which, among other things, resulted in the removal of frequency limitations for scheduled combination services

¹ See Notice of Action Taken (NOAT) dated June 29, 2007, and Order 2007-8-28 issued on August 27, 2007.

to Barranquilla. American reported to the Department by letter dated October 11 that, in light of there being no need to use allocated frequencies for Barranquilla services, it would use three of the seven frequencies previously announced for Miami-Barranquilla services to provide additional Miami-Bogota services and the remaining four frequencies to provide additional Miami-Medellin services, beginning on December 13.² Delta Air Lines, Inc. (Delta), JetBlue Airways Corporation (JetBlue), and Spirit each filed comments objecting to American's proposed change in use of these frequencies, and American filed a reply.

On November 26, 2007, by Order 2007-11-23, we instituted the *2007/2008 U.S.-Colombia Combination Frequency Allocation Proceeding* and invited interested U.S. carriers to submit applications for 21 newly available U.S.-Colombia weekly combination frequencies. We also stated that we would include in the proceeding the issue of retention by American of seven of its weekly U.S.-Colombia combination frequencies, as a result of American's change in proposed services using the seven frequencies, previously unused by American, as discussed in greater detail below.

In light of American's announced changed use of the frequencies in other U.S.-Colombia markets, rather than as it had proposed for Miami-Barranquilla services, we stated in Order 2007-11-23 that we would reexamine the allocation of those frequencies in this proceeding. In doing so, we noted that nothing in our decision should be construed to prevent American from competing for the allocation of these seven frequencies.

PETITION FOR RECONSIDERATION

On December 6, 2007, American filed a petition for reconsideration of Order 2007-11-23. American requests that Order 2007-11-23 be vacated insofar as it places in issue the possible reallocation of seven of American's U.S.-Colombia combination frequencies. American states that the Department has previously taken two separate actions to permit American to retain the frequencies in question based upon its firm plans to use them by December 13, 2007. In making these decisions, American contends that the Department was obligated to follow precedent to permit incumbent carriers holding temporarily unused frequencies to retain them based upon demonstration by the incumbent carrier of firm plans for use of the frequencies.³

American further argues that, by now including reexamination of these seven frequencies in this proceeding, the Department has violated American's right to due process, "stripping" it of the seven frequencies that are now no longer required for Barranquilla service, and that American firmly plans to use to augment existing services from Miami to Bogota and Medellin, still beginning on December 13. American contends that the Department thus acted arbitrarily and capriciously, ignoring the "firm plans" test, and imposing limitations on the use of these grandfathered frequencies that are not city-pair specific or otherwise subject to conditions.

² American's plans to reinstitute service with the seven frequencies at issue here included a firm startup date of December 13, 2007.

³ American cites Orders 95-3-52 and 2005-4-13 as examples where the Department declined to reallocate dormant frequencies held by United Air Lines, Inc. (United) to American after United announced firm plans for their use.

American cites *CAB v. Delta Air Lines*⁴ in support of its contention that it has long been established that certificated air carriers should enjoy “security of route” and that their operating authorizations are protected from summary revocation.

American also argues that the Department’s decision is based on the improper premise that American should have been prescient in May in foreseeing that Barranquilla operations would, in late September, no longer require the use of U.S.-Colombia frequencies. To that end, American maintains that had it known that frequencies would no longer be required to serve Barranquilla, it would have proposed in May to use them on other U.S.-Colombia routes. In the present circumstances, American asserts that there is no proper basis upon which the Department may confiscate the frequencies, which are not city-pair specific, to reassess whether the carrier’s choice of routes best serves the public interest.

Continental Airlines, Inc. (Continental), Delta, Spirit, and JetBlue filed answers in opposition to American’s petition.

The carriers state that the Department correctly and fairly decided to include in the proceeding the reexamination of the allocation of American’s seven frequencies. They maintain that when the Department earlier permitted American to retain its frequencies, it did so subject to the condition that the frequencies be used by American for its proposed Miami-Barranquilla services. The carriers contend that American’s subsequent unilateral change in use of the frequencies to different U.S.-Colombia markets is not consistent with that condition. As a result, the carriers argue that the seven frequencies should be available in this proceeding, in order for the Department to compare the public interest benefits of American’s newly proposed Miami-Bogota/Medellin services with those provided by the proposals of other applicants. Continental and Spirit state that American’s reliance upon *CAB v. Delta Air Lines* is without merit, as that case was specifically limited to certificate authority and not frequency allocations.

The carriers also reiterate that American is, by far, the dominant carrier in the U.S.-Colombia market and has not used the valuable limited-entry frequencies at issue here for a significant length of time. In addition, the carriers note that American can still introduce its Miami-Barranquilla service as it had proposed.

DECISION

We have decided to grant American’s petition. However, on reconsideration, we deny American’s request and affirm our decision in Order 2007-11-23, to include in this carrier selection proceeding the issue of American’s retention of the seven allocated frequencies that it had originally announced for Miami-Barranquilla service.

Prior to instituting this proceeding, we twice permitted American to retain the seven frequencies at issue here based upon its demonstration of firm plans to use the frequencies to provide its proposed Miami-Barranquilla service beginning on December 13, 2007. In taking these actions,

⁴ 367 U.S. 316, 321-325 (1961).

we expressly put American on notice that we were permitting it to retain the frequencies subject to the condition that they be used as American had proposed.⁵ Specifically, in Order 2007-8-28, we explicitly stated that “[s]hould American not institute service, and use its frequencies, as announced and affirmed by American in its pleadings, we would, of course, reexamine this matter.”⁶ We noted that we have placed such conditions on other incumbent carriers under similar circumstances, to successfully ensure that utilization of frequencies was carried out as represented by the carrier.⁷

We reject the notion that our decision effectively amounts to requiring American to have predicted the 2007 Understanding before it occurred. The issue is not whether American could have predicted the 2007 Understanding in the late summer. Rather, the issue is whether American was on notice that a change in its proposed plans could lead to a reexamination of the frequency allotment. The record demonstrates that it was given such notice.

In light of the 2007 Understanding, American proposed to take the seven frequencies which it had announced it would use for Miami-Barranquilla service and move them to the Miami-Bogota and Miami-Medellin markets. As a result of American’s proposed alternative use of the frequencies, we are taking precisely the action that we stated we would take by reexamining the allocation of those seven frequencies in this proceeding. As we stated in the instituting order, nothing in our decision shall be construed to prevent American from competing for the allocation of these seven frequencies. American will be free to argue that its new proposed use for these frequencies would represent the best public interest outcome, while other applicants will be free to argue that their services would provide results that better serve the public interest.⁸

Against this background, we are not persuaded by American’s claims that reexamination of the allocation of its seven frequencies in this proceeding is arbitrary and capricious, or that we have violated its due process rights. In our previous actions permitting American to retain its frequencies noted above, we explicitly put American on notice that we would reexamine the matter if it did not use its frequencies as proposed. Subsequent to that notice, American changed its proposed use of the frequencies. With regard to American’s due process rights, we note that, contrary to the assertions in American’s petition, we have not taken any frequencies away from American. All seven frequencies remain available for American’s use, subject to the outcome of this proceeding in which American can participate fully. American will have the opportunity to seek to demonstrate on a record the public interest benefits of its alternative use of these frequencies in the Miami-Bogota and Miami-Medellin markets, and to assert that the public interest favors its retention of the frequencies. Under these circumstances, we see no persuasive basis to remove from this proceeding our consideration of the seven frequencies that American had previously proposed for solely Miami-Barranquilla service.

⁵ NOAT, at 3 and Order 2007-8-28, at 4.

⁶ Order 2007-8-28, at 4.

⁷ *Id.*

⁸ Order 2007-11-23, at 3.

ACCORDINGLY,

1. We grant the petition of American Airlines, Inc. for reconsideration of Order 2007-11-23, and, upon reconsideration, deny the relief requested by the petitioner;
2. Upon reconsideration, we affirm our decision in Order 2007-11-23 to consider in the *2007/2008 U.S.-Colombia Combination Frequency Allocation Proceeding* whether American Airlines, Inc. should retain its seven frequencies for additional service to Bogota and Medellin as discussed in Order 2007-11-23 and, if not, which carrier(s) should be awarded these frequencies; and
3. We will serve this order on the parties to this proceeding, the National Air Carrier Association, the Air Transport Association, the U.S. Department of State, the Federal Aviation Administration, and the Ambassador of the Republic of Colombia in Washington, D.C.

By:

Andrew B. Steinberg
Assistant Secretary for Aviation
and International Affairs

(SEAL)

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