BEFORE THE
DEPARTMENT OF TRANSPORTATION
WASHINGTON, D.C.

In the matter of the application of **AIR KILROE LIMITED D/B/A EASTERN AIRWAYS** for an exemption from 49 U.S.C. §41301 and blanket statement of authorization pursuant to 14 C.F.R. 212	)	Docket DOT-OST-2024-0025

REPLY OF AIR KILROE LIMITED D/B/A EASTERN AIRWAYS

Communications with respect to this document should be addressed to:

Charles F. Donley II
Edward W. Sauer
Laura J. Ochoa
Pillsbury Winthrop Shaw Pittman LLP
1200 17th Street, N.W.
Washington, D.C. 20036
(202) 663-8448 phone
(202) 663-8007 fax
charles.donley@pillsburylaw.com
edward.sauer@pillsburylaw.com
laura.ochoa@pillsburylaw.com

Counsel to Air Kilroe Limited d/b/a Eastern Airways

DATED: March 11, 2024

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REPLY OF AIR KILROE LIMITED D/B/A EASTERN AIRWAYS

Air Kilroe Limited d/b/a Eastern Airways ("Kilroe") hereby replies to the joint answer submitted by Eastern Airlines LLC and Eastern Air Express, LLC (collectively "Eastern") opposing Kilroe's request for an exemption and statement of authorization permitting it to place Delta's designator code on Kilroe's services between points in the United Kingdom, and between the Netherlands and the UK as part of the transatlantic services offered by Delta Air Lines ("Delta").

Kilroe's application conclusively demonstrates both its fitness for service and the fact that its services are firmly supported by the open skies agreement between the United States and the United Kingdom. Of all the parties served with that application, only Eastern has commented. Eastern does not (and could not) object to Kilroe's application on the basis of fitness or normal public interest criteria. Instead, it argues Kilroe's application should be held in abeyance for 45 days because Kilroe uses "Eastern" as part of its trade name. Eastern's answer is based entirely on a selective reading of Part 215 of the Department's Economic Regulations, unsubstantiated speculation of consumer confusion, and ignorance of the codeshare service operated currently by Kilroe and available to U.S. consumers, with only a vague acknowledgement that the Department requires that carriers resolve name similarity issues between themselves, with resort to the courts if they so choose.

Completely absent from Eastern's answer is any mention of the numerous cases in which the Department has granted route authority to carriers with similar names to others. Eastern ignores more than 36 years of consistent Department policy concluding that issues of carrier name similarity must be dealt with privately between the parties, and through the judicial system, rather than in the Department's licensing or enforcement processes.[1] The Department routinely grants exemptions and statements of authorization of the type requested by Kilroe on an expedited basis. It should do so here.[2]

The Department established its current policies regarding carrier name similarity in 1988 with the adoption of the current version of 14 CFR Part 215. The general framework of that policy is set forth in Part 215.2, which states clearly parties are to utilize the courts—not the Department's licensing procedures—to resolve name disputes:

> [This Part's] purpose is to place the responsibility for resolving private disputes about the use of similar names with the air carriers involved, through recourse to the trade names statutes and the courts. These rules do not preclude Department intervention or enforcement action should there be evidence of a significant potential for, or of actual, public confusion.

The Department elaborated on this framework in Order 89-12-38, which involved a dispute over use of the name "American International Airways":[3]

> The Department adopted the amendments to Part 215 to encourage carriers to resolve disputes in the use of names among themselves informally or to use the alternative legal protections and mechanisms available to them through other governmental agencies, state laws, and the courts.[4]

[1] Complaint of American International Group, Inc., Order 89-12-38 (Dec. 21, 1989); Application of USA Jet Airlines, Inc., Order 94-8-45 at 3 (Aug. 25, 1994); Notice of Action Taken re Challenge Air Luftverkehrs, Docket OST-2001-11057 (Mar. 29, 2002); Application of Jet Airways (India) Ltd., Order 2006-11-9 at 4 (Nov. 14, 2006).

[2] Kilroe and Delta plan to begin codeshare service on March 31, 2024. Kilroe therefore requests immediate approval of its pending application.

[3] Order 89-12-38. Hereafter, "AIG proceeding".

[4] *Id.*

Against this backdrop, the Department turned first to the issue of actual confusion in the AIG case. The only evidence offered in the AIG proceeding was a single mistaken telephone call and delivery of one cargo shipment to the wrong party. The Department made it clear that such scant evidence did not present issues of public confusion that would warrant its action. Meager as the evidence was in that case, it extends far beyond anything that Eastern can or has offered in this proceeding.

Eastern's assertion as to the prospect of future confusion relies exclusively on the similarity of the names. When confronted with such an argument in the AIG case, the Department stated that broad, general assertions of potential confusion would not be sufficient:

> For us to make such an inference [of future confusion] merely from the similarity of the names without being presented with strong evidence of the likelihood of consumer harm would be tantamount to our disregard of the Department's recent amendments to Part 215, and we refuse to do so. In our opinion the record is devoid of evidence that would show the likelihood of consumer harm in the future.[5]

In fact, when evaluating whether the potential for public confusion exists the Department examines several factors, including the region(s) and markets to be served and the type of equipment that will be operated.[6] It is indeed difficult to understand how the public could possibly confuse Kilroe and Eastern. Kilroe operates exclusively on routes between major cities in Europe using smaller aircraft. The two Eastern carriers, on the other hand, appear to have operated a total of only 10 roundtrip flights between Miami and Santo Domingo, Dominican Republic, in the past 12 months. Confusion based on similarity of names between a European business-oriented carrier and a US carrier that appears to cater to leisure traffic in markets that are thousands of miles apart from each other is unlikely in the extreme.

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[5] *Id*. at 19.

[6] *See, e.g.,* Mesa Airlines, Inc., Notice of Registration of Trade Name, Order 2006-6-36 (May 30, 2006).

Notably, the Department has on other occasions granted exemptions and other forms of route authority to carriers proposing service to the United States as direct carriers in competition with other direct carriers. For example, in Jet Airways (India) Ltd., the Department granted an exemption to an Indian carrier on the basis of the US-India open skies agreement despite the opposition of a US carrier using the very same Jet Airways name. The Department emphasized it does not adjudicate disputes over name similarity, and the parties have recourse to the courts if they wish to pursue a claim:

> With respect to the trade name matter raised by Jet Airways, Inc, we would point out that we do not make public interest determinations under our regulations (14 CFR Part 215) concerning name similarity. Rather the responsibility for resolution of name disputes rests with the affected carriers through recourse to trade name statutes and the civil courts. Accordingly, the issue concerning the applicant's name does not support denial of the authority requested by Jet Airways (India).[7]

The prospect of confusion here is even less than in the Jet Airways (India) case. Kilroe's codeshare flights will be marketed and operated under the DL* code. Kilroe's name and d/b/a will be disclosed to the extent necessary to meet the requirements of applicable codeshare disclosure regulations, but the service will not be marketed or held out in Kilroe's name. Thus, unlike Jet Airways (India) the consumer's initial point of reference will be the name of a well-established U.S. carrier completely different from Eastern.

In short, there is nothing in the Department's regulations or decisions to support Eastern's unsubstantiated and unprecedented request for delay. On the contrary, there is ample precedent for expedited action so that consumers can enjoy greater access to points in Europe available on Kilroe's codeshare services. Kilroe therefore urges denial of Eastern's request and immediate approval of its application so codeshare service with Delta can begin no later than March 31, 2024.

Respectfully submitted,

[7] Order 2006-11-9 at 4 (footnotes deleted). *See also* Application of USA Jet Airlines, Inc., Order 94-8-45 at 3 (Aug. 25, 1994) (denying objections and comments made by USAir and Jet USA regarding USA Jet Airlines' name).

Charles F. Donley II
Edward W. Sauer
Laura J. Ochoa
Pillsbury Winthrop Shaw Pittman LLP
1200 17th Street, N.W.
Washington, D.C. 20036
(202) 663-8448 phone
(202) 663-8007 fax
charles.donley@pillsburylaw.com
edward.sauer@pillsburylaw.com
laura.ochoa@pillsburylaw.com

Counsel to Air Kilroe Limited d/b/a Eastern Airways

DATED: March 11, 2024

CERTIFICATE OF SERVICE

I hereby certify that one copy of the foregoing Reply of Air Kilroe Limited d/b/a Eastern Airways has this day been served on each of the following individuals via e-mail.

Charles F. Donley II

DATED: March 11, 2024

chris.walker@delta.com; steven.seiden@delta.com
dan.weiss@united.com; steve.morrissey@united.com; aarshad@crowell.com
bruce.wark@aa.com; molly.wilkinson@aa.com; brent.alex@aa.com
robert.land@jetblue.com; reese.davidson@jetblue.com
sascha.vanderbellen@atlasair.com; keinan.meginniss@atlasair.com
anne.bechdolt@fedex.com; brian.hedberg@fedex.com
jfoglia@cozen.com
mbenge@kmazuckert.com
Kevin.montgomery@polaraircargo.com
dsmalls@ups.com; anita.mosner@hklaw.com; marina.obrien@hklaw.com;
benjamin.slocum@hklaw.com
jyoung@yklaw.com
dkirstein@yklaw.com
dcrowell@yklaw.com