



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

**Issued by the Department of Transportation
On the Second day of October, 2012**

TEM Enterprises d/b/a Xtra Airways

**Violations of 49 U.S.C. § 41712 and
14 CFR Parts 212 and 380**

Docket OST 2012-0002

Served October 2, 2012

CONSENT ORDER

This consent order concerns violations of certain consumer protection provisions of the Department of Transportation's Public Charter regulations by TEM Enterprises d/b/a Xtra Airways, a direct air carrier for a number of Public Charter programs filed by Southern Sky Air & Tours, d/b/a Myrtle Beach Direct Air & Tours (Direct Air). In violation of 14 CFR Parts 212 and 380, Xtra Airways operated numerous Public Charter flights on behalf of Direct Air without first receiving the full charter price for those flights, thereby operating on the basis of a prospective payment or credit and it failed to make reasonable efforts to ascertain before undertaking Public Charter flights that the charter operator was in compliance with 14 CFR Part 380. In addition, subsequent to the cessation of Direct Air's operations and in violation of 14 CFR Parts 212 and 380, Xtra Airways cancelled charter flights less than ten days before the scheduled departure date and failed to return to their points of origin all passengers who purchased round-trip transportation on Xtra Airways' operated Public Charter flights and whom Xtra Airways had already transported on their outbound flights. These activities constituted unfair and deceptive practices and unfair methods of competition in violation of 49 U.S.C. § 41712. This order directs Xtra Airways to cease and desist from future violations of section 41712 and the aforementioned Federal regulations and assesses the carrier a compromise civil penalty of \$300,000.

Applicable Law

Public Charter operators and direct air carriers must comply with the requirements of 14 CFR Parts 212 and 380, which are designed to prevent economic harm to and the stranding of charter passengers. Under 14 CFR 380.34(b)(ii), the Public Charter operator's depository bank must pay

to the direct air carrier's depository bank the funds owed to the direct air carrier no more than 60 days prior to the flight's operation. Under 14 CFR 212.3(e) and 380.11, the full charter price must be received by the charter carrier prior to the operation of the pertinent flight. Pursuant to 14 CFR 380.40, "A direct air carrier shall not perform air transportation in connection with such a charter unless it has made a reasonable effort to verify that all provisions of this part have been complied with." *See also* 14 CFR 212.3(d). Moreover, 14 CFR 380.43 prohibits the cancellation of charter flights less than ten days before the scheduled departure date and 14 CFR 212.3(f) charges the direct air carrier with the responsibility of ensuring the return at no additional cost of all U.S.-originating, round-trip passengers whom the carrier has transported on their outbound leg.

In addition, violations of 14 CFR Parts 212 and 380 also constitute violations of 49 U.S.C. § 41712, which prohibits carriers from engaging in unfair and deceptive practices and unfair methods of competition.

Facts and Conclusion

Xtra Airways was the direct air carrier in the Public Charter program covered by Public Charter Prospectus 11-183, which involved a large number of flights on a variety of routes between cities in the Midwest and Northeast and points in Florida and Myrtle Beach, South Carolina, for the period from November 10, 2011, to October 31, 2012. The Public Charter operator was Southern Sky Air & Tours, d/b/a Myrtle Beach Direct Air & Tours (Direct Air).

Beginning with all flights departing on or after March 3, 2012, sufficient funds were not transferred from Direct Air's escrow account to Xtra Airways prior to the operation of the pertinent flights. Several flights prior to March 3 also involved late payments. Xtra Airways thus had early notice that Direct Air was not complying with the Department's Public Charter regulations. With such late payments, pursuant to 14 CFR 212.3(d) and 380.40, Xtra Airways should have undertaken reasonable efforts to verify that Direct Air was operating in compliance with Part 380. Rather, Xtra Airways suffered Direct Air's conduct and, in violation of 14 CFR 212.3(e) and 380.11, continued to operate flights listed in Public Charter Prospectus 11-183 without requiring from Direct Air payment in full of the total charter price. By March 13, 2012, Direct Air owed several hundred thousand dollars to Xtra Airways for flights Xtra Airways had completed on Direct Air's behalf.

On March 13, 2012, Xtra Airways ceased all flights under the Public Charter program. The Office of Aviation Enforcement and Proceedings (Enforcement Office) immediately contacted Xtra Airways about this matter. The Enforcement Office reminded Xtra Airways of the carrier's obligations under 14 CFR 380.43 to not cancel charter flights less than ten days before the scheduled departure date and under 14 CFR 212.3(f) to return all passengers who had purchased round-trip transportation and whom it carried on their outbound journeys. Nevertheless, Xtra Airways failed to ensure the return of stranded passengers.

Mitigation

By way of mitigation and explanation, Xtra Airways believes that it did not cancel flights on less than 10 days' notice because Direct Air had already terminated its charter program and notified

the public on its website to seek other means of transportation. There were thus, in Xtra Airways' view, no flights left to be cancelled. The carrier maintains that it was prepared to return passengers to their points of origin at its own expense, but that it was physically impossible to do so because it did not have, and could not obtain, the passenger information required by the Transportation Security Administration (TSA) regulations to prepare a manifest and issue boarding passes. Xtra Airways states that after Direct Air's abrupt cancellation of the program, the carrier repeatedly sought passenger lists and contact information, but that Direct Air and the service provider it used for reservations declined to provide any information.

Xtra Airways further states that while it did operate a number of flights after Direct Air fell behind on its payments, Xtra Airways believes that this did not cause any harm to passengers because Xtra Airways was prepared to operate return flights at its own expense and would have done so but for the lack of the required information.

Rebuttal and Decision

Xtra Airways' claim that it did not cancel flights on less than 10 days' notice because the flights in question were cancelled by Direct Air ignores the independent obligations of direct air carriers and Public Charter operators. In fact, the Department has consistently found the obligations of direct air carriers to be independent of those of charter operators. In the instant case, on March 2, 2012, Xtra Airways could have complied with the Department's cancellation rule had it cancelled all flights it was to operate on behalf of Direct Air on or after March 13, 2012.

In addition, while the Department appreciates Xtra Airways' asserted efforts to obtain the passenger information necessary to repatriate stranded passengers *after* the cancellation of flights, adherence to the Department's regulations *before* the cancellation of flights would have avoided the need to make these efforts. Further, Xtra Airways failed to take any reasonable steps, e.g. incorporating the transfer of passenger data into its contract with the Public Charter operator, to ensure that it would be able to fulfill its regulatory obligation to return stranded passengers to their points of origin.

The Department takes compliance with the Federal aviation statutes and regulations very seriously. The Office of Aviation Enforcement and Proceedings (Enforcement Office) has carefully considered the information provided by Xtra Airways but continues to believe that enforcement action is warranted. The Enforcement Office and Xtra Airways have reached a settlement of this matter in order to avoid litigation. Xtra Airways consents to the issuance of an order to cease and desist from future violations of 49 U.S.C. § 41712 and 14 CFR Parts 212 and 380 and to the assessment of \$300,000 in compromise of potential penalties otherwise due and payable pursuant to 49 U.S.C. § 46301.

This compromise assessment is appropriate considering the nature and extent of the violations described herein and serves the public interest. It represents a strong deterrent to future noncompliance with the Department's Public Charter requirements.

This order is issued under the authority contained in 49 CFR Part 1.

ACCORDINGLY,

1. Based on the above discussion, we approve this settlement and the provisions of this order as being in the public interest;
2. We find that TEM Enterprises d/b/a Xtra Airways violated 14 CFR 212.3(d) and 380.40 by failing to make reasonable efforts to ascertain before undertaking Public Charter flights that the charter operator was in compliance with 14 CFR Part 380;
3. We find that TEM Enterprises d/b/a Xtra Airways violated 14 CFR 212.3(e) and 380.11 by transporting passengers without having first received from the charter operator full payment of the total charter price;
4. We find that TEM Enterprises d/b/a Xtra Airways violated 14 CFR 380.43 by cancelling charter flights less than ten days before the scheduled departure date;
5. We find that TEM Enterprises d/b/a Xtra Airways violated 14 CFR 212.3(f) by failing to return to his or her point of origin each passenger who purchased round-trip transportation on its Public Charter flights, and whom TEM Enterprises d/b/a Xtra Airways transported on his or her outbound flight;
6. We find that by violating 14 CFR Parts 212 and 380, as described in ordering paragraphs 2, 3, 4, and 5, above, TEM Enterprises d/b/a Xtra Airways engaged in unfair and deceptive practices and unfair methods of competition in violation of 49 U.S.C. § 41712;
7. We order TEM Enterprises d/b/a Xtra Airways and all other entities owned or controlled by, or under common ownership and control with TEM Enterprises d/b/a Xtra Airways and its successors, affiliates, and assignees, to cease and desist from future violations of 49 U.S.C. § 41712 and 14 CFR Parts 212 and 380. Failure to comply with this cease and desist provision shall subject TEM Enterprises d/b/a Xtra Airways and its successors, affiliates, and assignees to further enforcement action;
8. We assess TEM Enterprises d/b/a Xtra Airways \$300,000 in lieu of civil penalties that might otherwise be assessed for the violations described in ordering paragraphs 2, 3, 4, 5, and 6, above. Of this penalty amount, \$25,000 shall be due and payable within thirty (30) days of the date of the issuance of this order; \$25,000 shall be due and payable within 120 days of the date of the issuance of this order; \$25,000 shall be due and payable within 210 days of the date of the issuance of this order; \$25,000 shall be due and payable within 300 days of the date of the issuance of this order; \$25,000 shall be due and payable within 390 days of the date of the issuance of this order; and \$25,000 shall be due and payable within 480 days of the date of the issuance of this order. The remaining portion of the civil penalty amount, \$150,000, shall become due and payable if, within two years of the date of issuance of this

order, TEM Enterprises d/b/a Xtra Airways violates this order's cease and desist provisions or fails to comply with this order's payment provisions, in which case TEM Enterprises d/b/a Xtra Airways may become subject to additional enforcement action for violation of the order; and

9. We order TEM Enterprises d/b/a Xtra Airways to pay the penalty through Pay.gov to the account of the U.S. Treasury. Payments shall be made in accordance with the instructions contained in the Attachment to this order. Failure to pay the compromise penalty assessment as ordered will subject TEM Enterprises d/b/a Xtra Airways to an assessment of interest, penalty, and collection charges under the Debt Collection Act and to possible enforcement action for failure to comply with this order.

This order will become a final order of the Department ten days after its service date unless a timely petition for review is filed or the Department takes review on its own initiative.

BY:

SAMUEL PODBERESKY

Assistant General Counsel for
Aviation Enforcement and Proceedings

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