

BEFORE THE
DEPARTMENT OF TRANSPORTATION
WASHINGTON, D.C.

Motion of

DELTA AIR LINES, INC.

in the matter of 2019 U.S. Haneda Combination
Services Allocation Proceeding

Docket DOT-OST-2019-0014

MOTION FOR LEAVE TO FILE AND
SUR-REPLY OF
UNITED AIRLINES, INC.

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United¹ hereby submits its Sur-reply to Delta’s latest filing in this docket and respectfully requests leave from the Department to do so.² While Delta may be encouraged by American and Hawaiian’s “enthusiastic”³ and “elegantly”⁴ drafted half-page filings in support of a proposal that would empower American and Hawaiian with flexibility over two-thirds of their Haneda slot portfolio,⁵ as the Department well knows, a majority does not – and should not – rule in a proceeding for scarce, highly sought-after commercial opportunities.⁶ In short, nothing in Delta’s

¹ Common names are used for airlines.

² United respectfully requests leave from the Department to respond to Delta’s Reply. Good cause exists for the Department to accept and consider this response as it is necessary to respond to and correct Delta’s allegations.

³ See Motion for Leave to File and Reply of Delta Air Lines, Inc. at 1 (May 17, 2023), Docket DOT-OST-2019-0014 (“Reply of Delta”).

⁴ See *id.* at 2.

⁵ Delta’s pilot program proposes flexibility for two Haneda slot pairs. American and Hawaiian hold three slot pairs, thus Delta proposes to give American and Hawaiian flexibility over two-thirds of their Haneda slots. The Delta proposal would be far less generous for United and Delta in terms of the percentage of Haneda slot holdings granted flexibility.

⁶ See *infra* at 17.

Reply supports a departure from the Department's tried-and-true methods for allocating these highly prized and scarce rights in a manner that prioritizes the public interest over carrier interest.

For the reasons stated herein, United requests that the Department:

- Deny the motion for gateway flexibility of Delta, American, and Hawaiian;
- Institute a carrier selection proceeding for the two slot pairs that Delta is struggling to effectively use and not currently using during the waiver period;
- Require carriers to notify the Department immediately regarding the slot pairs they do not intend to operate when Japan's slot waiver period ends, currently scheduled for July 2023; and
- Award United back-up authority now and/or in any future Tokyo Haneda carrier selection proceeding with a condition permitting it to implement the authority within the first year should any primary carrier, i.e., Delta or Hawaiian, withdraw from a Haneda route.

I. Introduction

While Delta's Haneda service history may be inconsistent, it exhibits remarkable consistency in its strategy in these proceedings. Delta's Reply is a main course that dishes out and repeats every unsuccessful argument it has made in previous Haneda proceedings as well as in other recent contexts,⁷ with generous sides of extraneous arguments and falsehoods, meant to distract from the main issue before the Department: does the current demand environment in U.S.-Japan support a sudden departure from the Department's standard process in carrier selection

⁷ See, e.g., Reply of United Airlines, Inc. at 2 (June 1, 2022), 2022 U.S.-South Africa Combination Frequency Allocation Proceeding, Docket DOT-OST-2022-0050 ("At every turn in this process – from the initial filings in the earlier dockets to the current proceeding – Delta has been less than transparent, with filings to the Department filled with omissions, misrepresentations, half-truths and even blatant falsehoods.").

proceedings? The answer to that remains a clear and resounding no. Nevertheless, United finds it necessary to address Delta's incorrect and irrelevant arguments.

II. Delta Cries Wolf One Too Many Times for a Competitive Edge; United's Asia and Japan Strategy is Pro-Consumer and Pro-Competitive

As always, Delta masquerades as the underdog, peppering its filing with buzz words like “protectionist,” “mercurial,” “parochial,” “antagonistic” and grandstanding that United's well-founded opposition to Delta's pilot program is “antithetical to competition” or “fear of competition.” The reality is the contrary – United embraces competition as its unequivocal support of a Department-instituted carrier selection proceeding demonstrates. Delta, on the other hand, is singularly focused on enhancing its own competitive position at the expense of the public interest – even referencing “competition” *27 times* in its most recent “verbose”⁸ 16-page filing (since we are now counting words). If anyone is seeking to avoid competition in this proceeding, it is Delta, in its apparent unwillingness to risk returning its slots to the Department and having to prove the benefits of its proposed gateways in a competitive proceeding. United, conversely, would welcome the opportunity to share the merits of its proposed service for the slots Delta is unable to use. In that vein, United, remains steadfastly focused on ensuring that the Haneda slots in question – highly prized and scarce assets – remain in the Department's capable hands to allocate in a manner that it deems most beneficial for the public.

Given the repetitive, rehashed nature of Delta's claims against United, United is now compelled to refresh the Department's memory of its steadfast position. United reiterates its comprehensive strategic approach to recognizing the numerous benefits of each of Tokyo's airports. Haneda is important for consumers due to its convenient, close-in location to central

⁸ See Reply of Delta at 3.

Tokyo as well as its connectivity to points across Japan. Narita remains highly important for travelers in this region outside of Tokyo and importantly for Narita's connectivity to the broader Asia/Pacific region. With this in mind, United thoughtfully crafted a Tokyo strategy that has resulted in consumers having access to both Tokyo airports from the east coast, central, and west coast regions of the U.S. For example, United offers Narita service from Newark/New York City and Haneda service from Newark/New York City and Washington, D.C. United serves Haneda from Chicago and Narita from Houston and Denver. Should United and Houston work collectively to connect Houston to Haneda, the central region will still have service to/from Narita at Denver. On the west coast, United offers Haneda service from Los Angeles and San Francisco and Narita service from San Francisco with Narita re-launching from Los Angeles in this coming winter season. Unequivocally, United has made the right Haneda and Narita decisions for consumers, communities, and businesses across the U.S. mainland.⁹

Despite an abundance of opportunities to serve both Haneda and Narita to meet the demand base each airport serves, Delta to date has consciously chosen not to do so. Now, in seeking this unprecedented relief, Delta is effectively admitting that its Japan strategy has not worked, and that has resulted in a lower share of traffic between the U.S. and Japan. Delta has had a number of advantages that could have allowed it to be a material competitor at Tokyo for Japan-U.S. and Japan-Asia flying: 1) Delta holds seven Haneda slot pairs, the most of any U.S. carrier, two more than United, and four more than American and Hawaiian, 2) Delta has a new Seoul/Incheon hub in partnership with Korean, and 3) Delta held a sizeable slot portfolio at Narita that it used for years to serve the U.S. and points across Asia from Japan. When looking at Delta's Haneda

⁹ United's Guam-Tokyo and other Japan flying not detailed.

holdings, its joint partner hub at Seoul/Incheon, and the slot portfolio Delta held at Narita – Delta could have “had it all”. But instead, Delta chose to 100% abandon Narita, relinquishing all of those slots, and to substitute its inter-Asia flying with its own aircraft and crews for that of Korean. If these Narita decisions have proven wrong, as it now seems based on Delta’s filings in this proceeding, there is only Delta to blame. United, instead of pulling down a hub, has invested in two hubs at Tokyo and nonstop routes between the U.S. mainland and Asia/Pacific that total 14 and growing. United is confident in its strategy while Delta seems to be regretting its. As United has stated before, “Delta’s claims that it is disadvantaged at Haneda are misleading, its own doing, and it is not the Department’s job in this proceeding to favor Delta’s Asian network....”¹⁰

Outside of Japan, United has given careful thought to its broader Asia strategy and has invested significant money, aircraft, employees, and many other assets to build a transpacific network that today serves (or will soon serve) 14 points in the region nonstop, with nine points served more than once daily, and six Asia/Pacific points served via multiple United U.S. gateways.¹¹ Neither Delta, nor American for that matter, have made similar *significant* strategic investments in the region – but they could if they chose to. It is high time the Department sees through Delta’s claims against United’s size and “protectionism” for what they are: distracting maneuvers intended to secure an unfair advantage and special treatment in Haneda proceedings. The Department should see through these tactics and recognize that Delta is where it is today at Haneda and in the Asia/Pacific region because of Delta’s own decisions. Contrary to Delta’s assertions designed to deflect focus on its own motives, United has continually recognized air

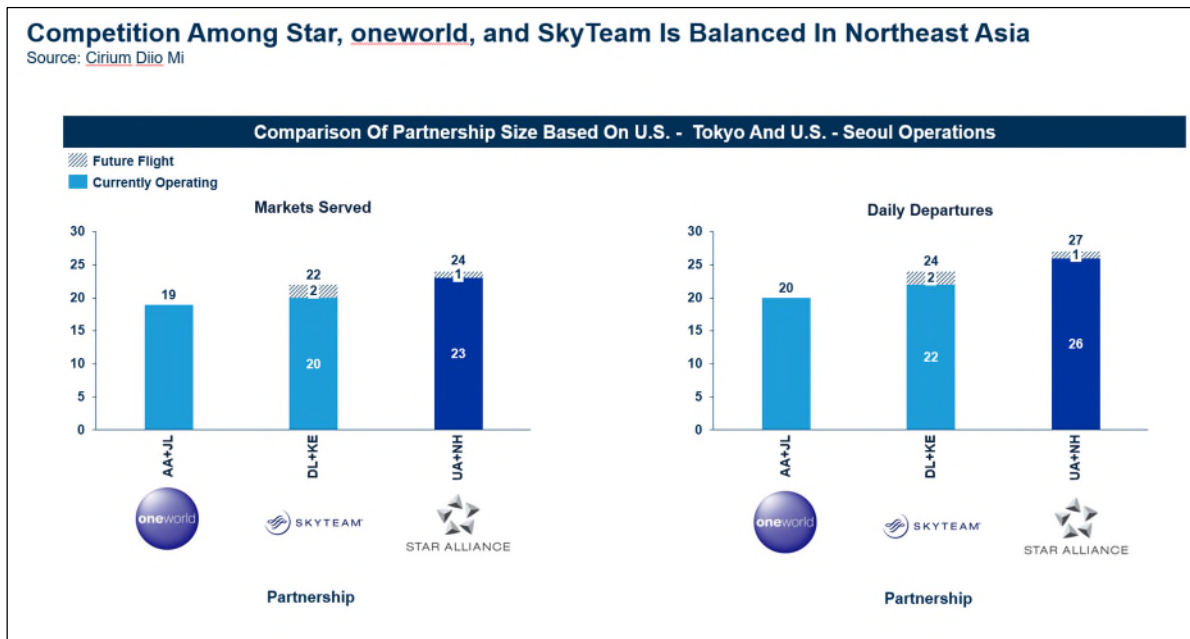
¹⁰ See Consolidated Reply of United at 25 (Mar. 7, 2019), Docket DOT-OST-2019-0014.

¹¹ This is based on the schedule planned as of May 2023 and does not include certain flights not operating due to China and Russian overflight restrictions.

travel demand in the Asia/Pacific region and worked to find a way to serve it meaningfully, effectively, and efficiently. The Department should resist Delta's machinations to induce it into misguided actions designed to shelter Delta from the repercussions of its own stratagem.

Notwithstanding Delta's self-serving conjectures, competition in Northeast Asia remains balanced with Star and oneworld at Tokyo and SkyTeam at Seoul Incheon. Neither United/ANA at Tokyo nor Delta/Korean at Seoul Incheon are operating with significant gaps between the two on flights between these two Asia gateways and the U.S. See Figure 1, below.¹²

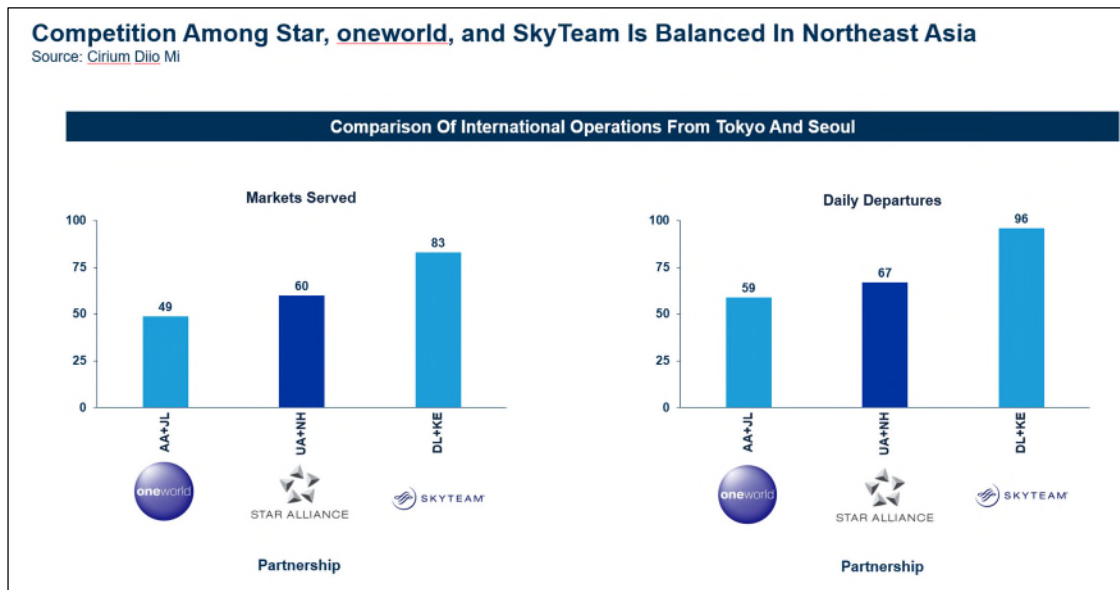
Figure 1



¹² Figure 1 includes flights by all six carriers between the U.S. and Tokyo and the U.S. and Seoul. Excludes Guam. Source: Cirium July 2023.

Delta/Korean at Seoul/Incheon, however, surpass the oneworld and Star joint ventures (JVs) with operations to points in the Asia Pacific region. See Figure 2, below.¹³

Figure 2



While Delta's decisions to divert resources from Tokyo to build a Seoul/Incheon JV hub are unobjectionable, Delta should not now be allowed to use its strategic maneuvers to act as an underdog – laughably citing 1% share of all Haneda departures – to achieve unprecedented, unwarranted flexibility at Haneda at the expense of the public interest. And in the event the comparisons matter, United's share of all departures at Delta's JV Seoul/Incheon hub in Northeast Asia is 0.4% and United's share of Seoul/Incheon – U.S. departures is 7.2% – both smaller than Delta's share of similar operations at Haneda. When combining Delta/Korean and Korean's

¹³ Figure 2 includes flights by all six carriers between Tokyo and Seoul on the one hand and the following popular destinations on the other hand: Cambodia, China, Hong Kong, Indonesia, Japan, Korea, Malaysia, Micronesia, Philippines, Singapore, Taiwan, Thailand, United States, Vietnam. Excludes JL and NH Japan domestic operations and KE domestic Korea operations. Source: Cirium July 2023.

proposed takeover of Asiana – the trifecta today holds 84% of Seoul/Incheon – U.S. departures.

See Figures 3 and 4, below.

Figure 3

All ICN Depts	May'23	Share
UA	53	0.4%
DL	124	1.0%
KE	2,544	21.4%
DL / KE	2,668	22.5%
OZ	1,618	13.6%
DL / KE / OZ	4,286	36.1%
Total	11,865	-

Figure 4

ICN - Cont US Depts	May'23	Share
UA	53	7.2%
DL	124	16.7%
KE	334	45.1%
DL / KE	458	61.8%
OZ	165	22.3%
DL / KE / OZ	623	84.1%
Total	741	-

Having now corrected the record against Delta's efforts to make it seem small so as to get outsized flexibility at Haneda, the Department should feel confident in denying Delta's motion for flexibility.

III. Delta Does Not Dispute the Key Facts Regarding the Demand Environment for Japan Air Travel, the Underpin of Delta's Meritless Motion

Delta does not dispute United's data-supported position regarding the robust resurgence of demand. This is because Delta cannot refute the data. Given that a false proposition that future demand is weak is the fundamental basis of Delta's motion for flexibility, and given that United has successfully countered that falsehood, Delta's motion should be denied on this fact alone. Delta attempts to distract the reader by saying different routes can rebound differently, and at different rates, and at different levels of success compared to pre-COVID demand levels. All of this is hyperbole and "what-if" scenarios that should not form the basis for granting Delta's motion. The facts are:

- U.S. Point of Origin for travel to Japan has rebounded to 73% and is above the long-haul average of 67%;¹⁴
- Multiple other Asia/Pacific routes showed significant rebound after all COVID restrictions were lifted, Japan is expected to act the same. These rebounds stretch from a 19-point increase in demand (Australia) to a 28-point increase in demand (Korea and Singapore);¹⁵ and
- In May 2023, Haneda is scheduled to operate at pre-COVID (i.e., May 2019) levels. All carriers that serve Haneda – except seemingly Delta (and Hawaiian) – are fully back in business. The large growth in ASMs, compared to flights and seats, demonstrates that long-distance flights have returned more quickly than shorter flights. See Figure 5, below.

Figure 5

HND Capacity Comparison (One Direction, Full Month)			
	May 2019	May 2023	Diff
Flights	19,066	19,470	2.1%
Seats	4.6M	4.5M	(2.1%)
ASMs	4,448M	5,126M	15.2%

- Industry ticketing data (a data source called DDS) further substantiates that demand is returning. This data for all carriers for the first 12 days of May 2023 versus the same 12 days of May 2019 shows passenger ticketing volumes increasing by 10% in total, with U.S. point of origin increasing 19%, and Japan point of origin reaching

¹⁴ See Objection of United at 4 (May 8, 2023), Docket DOT-OST-2019-0014.

¹⁵ See *id.* at 5-6.

2019 levels. Further, the same data, which also tracks revenue per ticket, shows an increase of 15% in U.S. point of origin revenue and an increase of 13% in Japan point of origin revenue for an overall increase of 14%. The industry ticketing data demonstrates that Japan point of origin revenue has continued to improve each month. Revenue for March 2023 versus 2019 was down 3%, April revenue for the same comparison period is up 3%, and now May for the same comparison period is up by double digits of 13%.

- Finally, United's average load factor on flights between U.S.-Japan for the last two weeks was approximately 86%, with last week's load factor for flights to Japan reaching 95% and for flights from Japan to the U.S. reaching 80%.

The key takeaway from the above facts is that passenger traffic for Tokyo is on an upward trajectory rendering Delta's claims of a weak and uncertain demand environment meritless. Without this key argument, Delta's motion lacks any credibility.

IV. Delta Fails to Dispute that Its Pilot Program Experiment is Arbitrary and Lacks Forethought

United has been transparent and clear about where it believes these slot pairs could be optimally utilized in the United network. And the communities of Houston and Guam have signaled their readiness for new Haneda flights operated by United. Delta, on the other hand, and after two filings promoting a random pilot program for flexibility, still has not stated where and when it would move its two slot pairs under the program. At a minimum, it would be important for the Department in considering the Delta pilot program to know what other U.S. gateways Delta would move the slot pairs to and why Delta believes these other U.S. communities and groups of consumers and businesses would benefit more from a Haneda flight than an existing Delta gateway

that enjoys Haneda service now, even if not being currently operated under the waiver program, e.g., Portland and Honolulu.

Delta should also be required to explain why so soon after Japan's final reopening and upon an observed increase in demand for Japan, Delta has two slot pairs (Portland and Honolulu) not scheduled to restart this summer and which may never serve the public in these communities as Delta promised in order to receive them. Nearly 30% of Delta's Haneda slots are currently not operating (and 67% for Hawaiian). See Figure 6, below.

Figure 6

Airline	Market	Month of Full Utilization
AA	DFW	Mar23
	LAX #1	Oct22
	LAX #2	Mar23
DL	ATL	Nov22
	DTW	Nov22
	HNL	Not Operating ("Begins" W23)
	LAX	Mar23
	MSP	Mar23
	PDX	Not Operating ("Begins" W23)
	SEA	Nov22
HA	HNL #1	Aug22
	HNL #2	Not Operating ("Begins" W23)
	HNL #3	Not Operating ("Begins" W23)
	KOA	Not Operating ("Begins" W23)
UA	EWR	Mar23
	IAD	Mar23
	LAX	Mar23
	ORD	Jan22
	SFO	Aug22

Short of Delta's outrageous pricing¹⁶ for flights post-Summer 2023 season for Portland – Haneda,¹⁷ how can Delta know now that Portland, Honolulu, or the other gateways Delta is considering stripping Haneda service from for three years will not perform as expected? Maybe it is because Delta has let Portland and Honolulu – Haneda routes languish without service since being awarded Haneda slot pairs. See Figure 7. But no matter the reason, the Department should not grant Delta gateway flexibility on Delta's premise that these routes do not work given that Delta has not attempted to operate them.

Figure 7

Delta Portland-Haneda Departures – Award Date through Present						
0	0	0	0	0	0	0
Su'20	Wi'20	Su'21	Wi'21	Su'22	Wi'22	Su'23

Delta Honolulu-Haneda Departures – Award Date through Present						
0	0	0	0	0	0	0
Su'20	Wi'20	Su'21	Wi'21	Su'22	Wi'22	Su'23

¹⁶ As of May 18, 2023, Delta continues to sell an approximately \$10,000 lowest economy fare in November 23 for this route.

¹⁷ See Objection of United at 8 (May 8, 2023), Docket DOT-OST-2019-0014.

Additionally, Delta's pilot program proposal glaringly omits any mechanism to manage asset duplication, which undermines the slots' public benefits. For example, what if both American and Delta decide to move their frequencies to the same U.S. gateway, which would at least double new flights by U.S. airlines at one U.S. city (if that city does not already have existing Haneda service)? What if American, Delta, and Hawaiian all decide to move slot pairs to Honolulu and/or Kona? How could any of these potential, self-initiated airline outcomes serve the overarching interests of communities, consumers, and businesses across the entirety of the U.S.? This theme of substituting carrier judgment for the Department's thoughtful consideration via an extensive carrier selection proceeding is wrought with risk to the public, undermines the Department's authority, and undermines the utility of these valuable assets.

Indeed, United has advocated for a slot pair to operate Houston – Haneda where there is also an ANA flight. But United strongly believes in the benefits of operating between these two points in addition to the ANA flight. And if done as United proposes – through standard, unbiased, long-established Department carrier selection procedures, the Department would be the arbiter of the facts and the final decisionmaker of allocating a slot pair to United and Houston – and it would not unilaterally be United, nor Delta, nor American, nor Hawaiian making the decision. United and its proposed gateway cities believe that the cities that were not selected in the 2019 case merit an opportunity to be heard on their application for the slot pairs before Delta gets to determine what is best for Delta.

V. Weight of Department Precedent and Policy Supports Denial of Gateway Flexibility

A. The Department Should Disregard Delta's Repeated Comparison of Brazil in 2004 Just as It Did in The U.S.-Cuba Case

Despite Delta's incessant assertions, the Department's 2004 Brazil decision does not stand for the proposition that a "still-recovering and volatile market" – which United disputes and the facts do not support – should be construed as a *carte blanche* for carriers to do what they wish with limited and scarce Haneda slot pairs without standard Department oversight. Rather, it was a meticulous act of rebalancing, aimed at rectifying a disparity among U.S. carriers. This disparity existed when some U.S. carriers enjoyed unfettered frequencies not afforded to others; a critical fact that is absent in this proceeding.

Indeed, the current environment at Haneda bears no resemblance to the 2004 Brazil environment, and it is absurd for Delta to suggest such a comparison. The Department awarded U.S. carriers at Haneda identical underlying rights to the Haneda slots with identical restrictions. In contrast, the U.S. carriers in Brazil had differing underlying rights. The Brazil decision was born out of a two-tiered licensing regime that yielded a disparity in gateway flexibility among the U.S. carriers related to the underlying Department-awarded rights. It was this lopsided state of affairs in the U.S. domestic competitive landscape, where some carriers enjoyed gateway flexibility while others did not, that prompted the Department's discrete grant of gateway flexibility in the Brazil proceeding, which the Department "limited to the specific circumstances and context before [it]."¹⁸ Even the Department has recognized this in other contexts. As highlighted in the Department's dismissal of American's application for gateway flexibility for

¹⁸ See Order 2004-6-25 at 2-3 ("[W]e believe that the disparate treatment of otherwise similarly situated carriers in the Brazil market, along with the particularities of the current market environment, call for our according a greater degree of flexibility here than might be the case in other circumstances or settings.").

U.S.-Cuba frequencies, which involved the same issue, “unlike the Brazil market in 2004, in the Cuba context, we do not have a two-tiered licensing regime with some carriers holding gateway flexibility and others not. On the contrary, in the U.S.-Cuba market, all U.S. carriers are on equal footing with respect to their ability to change U.S. gateways.”¹⁹

Recognizing this distinguishing set of facts, Delta grasps at straws to claim that the operating environment at Haneda mirrors the dualistic regime in Brazil in 2004. In a desperate leap of logic, Delta suggests United enjoys gateway flexibility through its Japanese joint venture partner, ANA. Delta’s argument holds as much water as a sieve. The slot privileges of a JV partner are not an inheritable asset that United can lay claim to. As United has said before, United does not, and cannot, control ANA’s Haneda slots.²⁰ The simple truth is that United is “on equal footing with respect to [its] ability to change U.S. gateways” to the other U.S. carriers and the circumstances do not “warrant the abandonment of the gateway-specific public interest determinations [the Department] has made in the [U.S.-Haneda] market.”²¹ As it did in Cuba, the Department should deny Delta’s request for gateway flexibility.²²

B. The Law and Policy Is on United’s Side; The Department Should Remain Steadfast in Its Objective to Maximize Public Benefits

Delta’s proposal ignores established legal precedent as well as long-standing Department policy. As Delta itself argued in 2016, “the *Ashbacker* doctrine supports allocation of these slots

¹⁹ See Order 2018-11-5 at 4-5.

²⁰ See Application of United Airlines at 40 (Feb. 21, 2019), Docket DOT-OST-2019-0014.

²¹ See *id.* at 5.

²² See also *id.* at 4, fn. 16 (regarding any arguments about procedural delays, the Department found “While we are sensitive to concerns about procedural delays during reallocation proceedings, we find, on balance, that preserving the Department’s ability to make reasoned public interest determinations based on a full record best serves the interests of the traveling and shipping public.”).

through a competitive process.”²³ The Supreme Court of the U.S. has held that when a government agency is considering applications for the same award, granting an application without due process would deprive the loser of an opportunity to be heard.²⁴ If the Department were to allow carriers to move their slots, while other carriers have expressed interest in applying for those rights, it would be contrary to procedural due process. As Delta noted then,²⁵ no basis exists now for the Department to give carriers the unilateral right to move their slots without inviting all applicants to submit their proposals for those slots and providing them an opportunity to be heard.

In addition, Delta’s proposal undermines the Department’s policy and prior public interest findings in awarding the slots that considered a myriad of public benefits, including but not limited to which carrier would offer and maintain service that best meets the needs of the traveling and shipping public, the overall effects on the competitive environment, promotion of geographic diversity, types of U.S. markets to be served, capacity, etc. In the Department’s most recent U.S.-Haneda slot allocation proceeding, for example, its decision centered around ensuring geographically diverse gateways to Haneda to ensure that the benefits of increased air connectivity to Japan extended to all corners of the U.S., not just to the most populous or commercially attractive areas.²⁶ To that end, the Department carefully balanced the slots among different gateways and awarded slots to carriers serving hub cities that lacked nonstop Haneda service to ensure diverse options for passengers in all regions of the U.S. Delta’s proposal would undermine

²³ See Consolidated Answer of Delta Air Lines at 3-4 (Apr. 5, 2016), DOT-OST-2016-0048.

²⁴ See *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945).

²⁵ See Consolidated Answer of Delta Air Lines at 4 (Apr. 5, 2016), DOT-OST-2016-0048 (“[N]o basis exists for the Department to unilaterally award these newly acquired daytime slot pairs to Haneda Airport without inviting all applicants to submit their proposals and providing them an opportunity to be heard.”).

²⁶ See Order 2019-5-13 at 5 (noting its allocation decision was designed to expand service from concentrated existing Western gateways to a number of Central and Eastern gateways).

those findings and the public's vested interest in broadening access to air travel service across the U.S., aiming instead to channel service to the gateways Delta, in its self-serving commercial interest, deems lucrative.

C. The Department Can Disregard Carrier Alignment on Gateway Flexibility

Delta attempts to milk Hawaiian and American's lukewarm support of its proposal for all its worth. But as the Department well knows, majority consensus does not substitute the Department's analysis and Department should not weigh into its analysis Delta, American, and Hawaiian's alignment on gateway flexibility. What is most relevant is the Department's statutory obligation to rule in the public interest after carefully balancing factors in favor of the path that maximizes the use of these highly prized assets. Two such examples in the Haneda context are instructive.

First, in 2016, Delta was alone in its support²⁷ for the Department's decision in its Instituting Order to reallocate the nighttime slot pairs after negotiating to shift the nighttime slots to daytime hours. United, Hawaiian, American, and even Airlines for America were unified in their strong opposition to the Department's decision and each filed petitions for reconsideration. The Department decided to move forward anyway and denied the petitions for reconsideration in spite of the majority of the carriers' objections.²⁸

Second, also in the 2016 proceeding, Hawaiian filed a motion for the immediate grant of authority to operate its Haneda-Kona/Honolulu route during nighttime operating hours while the

²⁷ See Consolidated Answer of Delta at 2-3 (Apr. 5, 2016), Docket DOT-OST-2016-0048.

²⁸ See Order 2016-4-11 at 7 (Apr. 14, 2016), Docket DOT-OST-2016-0048.

remaining daytime slots were being adjudicated.²⁹ While American Airlines did not object, Delta and United filed objections arguing that Hawaiian's motion would unfairly prejudice competing service proposals.³⁰ The Department, despite recognizing the consensus among these carriers, granted Hawaiian's motion finding that approval of Hawaiian's request was consistent with the public interest.³¹

In each of these cases, the Department dutifully adhered to its statutory obligations under the law to protect the public interest, despite carriers' alignment on a particular issue. The Department should do the same here and deny the American, Delta, and Hawaiian requests for gateway flexibility.

VI. Delta Distracts with Extraneous Matters to Deflect Attention from the Weakness of its Position

A. Delta Re-Writes 2019 History

As for Delta's purported "damaging rebuttal"³² concerning United's alleged "lack of opposition to" Delta's prior request for gateway flexibility, this is simply false. It is unconscionable for Delta to continue to re-write history with patently false claims, particularly when the record is so clear.

As Delta noted, flexibility was at issue in both the China and Haneda dockets in 2019. United did file a notice on January 7, 2019, that it would not be filing a response to Delta's motion in the Haneda docket as a result of an administrative and strategic decision to file one consolidated

²⁹ See Motion of Hawaiian Airlines, Inc. for Immediate Grant of Uncontested Application for Route Authority, (May 4, 2016), DOT-OST-2016-0048.

³⁰ See Notice of Action, at 2-3 (May 13, 2016), DOT-OST-2016-0048.

³¹ See *id.* at 4.

³² See Reply of Delta at 10.

objection in both the China and Haneda dockets given that the underlying issue in both dockets was the same – whether Delta and American’s self-interested motivations were an appropriate substitute for the Department’s public interest analysis. Only a week later, on January 14, 2019, United filed its Consolidated Objection to both Delta and American’s request for flexibility in both the Haneda and China dockets.

Rather than belabor the point, and for the avoidance of doubt, United provides a few quotes directly from its 2019 filing confirming United’s objection to Delta’s gateway flexibility request then, which is consistent with its position today:

- “United is on record for good cause **objecting** to the Haneda gateway flexibility request [emphasis added].”³³
- “[T]he Department **should reject the requests for gateway flexibility** at Tokyo Haneda and China – just as the Department did in reviewing the Havana gateway flexibility request – and continue its long-standing policy of allocating rights based upon its unbiased assessment of public benefits [emphasis added].”³⁴
- “In seeking blanket gateway flexibility in U.S.-China and U.S.-Japan, Delta, American and Hawaiian have it backwards. **Their requests for gateway flexibility rely on benefits to the carriers** [emphasis added].”³⁵
- “United **fully supports the Department’s long-standing focus on ensuring maximum public benefits** are being recognized and that the greatest number of passengers and communities, who should be the central focus of any route proceeding, are provided access to service to limited entry markets such as China and Haneda [emphasis added].”³⁶
- Just as in Cuba, **the recent requests for gateway flexibility in U.S.-China and U.S.-Haneda risk undermining the Department’s process and past selections.** Putting passengers and communities first, the **public interest supports the existing manner of allocating valuable and restricted frequencies, not carrier-focused gateway flexibility** [emphasis added].³⁷

³³ See Consolidated Objection of United Airlines, Inc. at 1 (Jan. 14, 2019), Docket DOT-OST-2016-0048.

³⁴ See *id.* at 2.

³⁵ See *id.* at 7.

³⁶ See *id.* at 8.

³⁷ See *id.* at 9.

- “United respectfully requests that the Department . . . deny Delta’s motion for gateway flexibility in U.S.-Haneda [emphasis added].”³⁸

The above are excerpts from a much longer filing discussing the benefits of the Department’s established procedures for allocating scarce rights over giving carriers blanket gateway flexibility and make abundantly explicit that United was opposed to Delta’s gateway flexibility request at Haneda. It is unfathomable to think that Delta would actually ignore the facts so clearly stated then in 2019 and again now to patently mislead the Department and readers into believing United said or did something it never did. If the Department does not see fit to dismiss the Delta motion for all the other reasons noted in United’s Objection and Sur-reply above, it should give serious consideration for dismissing the Delta motion for its dishonest intent to mislead and distort. It calls into question the veracity of all of Delta’s statements and position.

B. Delta’s Cuba Example Further Deflects from the Crux of its Weak Position

Delta again stretches the imagination by shoehorning a wholly unrelated Cuba proceeding into the mix that has no bearing on its gateway flexibility proposal. The issue in the Cuba proceeding that Delta references was unique, entirely distinguishable from, and much lesser in scope than what Delta is proposing to do in this proceeding.

In the Cuba example, United’s request related discretely to aircraft fleet utilization and would have allowed United to use either its mainline aircraft or its regional partner’s aircraft on its proposed Houston – Havana frequencies, but not both.³⁹ Unlike Delta, American, and Hawaiian in this proceeding, United was not seeking flexibility to change the proposed gateway and move

³⁸ See *id.*

³⁹ Joint Answer and Application of United Airlines and Mesa Airlines for an Exemption and Frequency Allocation at 3 (May 5, 2017), Docket DOT-OST-2016-0021.

the frequencies without Department approval – i.e. the fundamental nature of the underlying rights granted by the Department.

Importantly, United’s request for this limited operational fleet flexibility in the Cuban context was included in its application and considered during the frequency allocation proceeding when carriers were still submitting proposals for the frequencies, not after the Department had already made frequency awards. United’s request for operational flexibility in fleet optimization was memorialized in the Department’s Order to Show Cause allocating the frequencies⁴⁰

Here, Delta asks for too much and too late. The Department did not include gateway flexibility in any of its Haneda awards and for good reason. Delta is seeking unprecedented relief and effectively asking for a free pass from the Department’s awarded gateways without having to go through proper channels of returning its slots and going through a competitive proceeding. Delta may claim it is pro-competitive but undermining prior competitive proceedings and trying to evade future competitive proceedings is inherently anti-competitive.

Finally, United is fully in favor of Delta having the same operational flexibility in fleet optimization that United enjoys in the Cuba example. If Delta wants to better size aircraft with demand for routes like Portland–Haneda, Delta is welcome to do so just as United did in Houston–Havana. Delta may be unwilling to change the aircraft, but this is no reason that Delta should now be able to move Portland–Haneda. Should Delta want to move its gateway, Delta should be

⁴⁰ See DOT Order 2018-3-16 (Mar. 30, 2018), Docket DOT-OST-2016-0021 (awarding United/Mesa frequencies and granting them flexibility on operational decisions on aircraft capacity. The Department also found that other carrier objections arguing that approval of United/Mesa’s request would violate the *Ashbacker* doctrine were without merit as all parties already “had the opportunity to comment on the *merits of the request and submit competing service proposals* (emphasis added).”).

required to return the slots to the Department for reallocation in accordance with process and precedent.

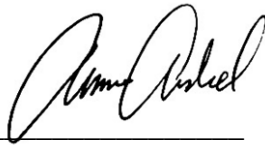
VII. Conclusion

United reiterates that the Department should continue to use its long-standing procedures to adjudicate access to limited entry routes in a manner that maximizes the public interest.

WHEREFORE, United reiterates its request that the Department:

- Deny the motion for gateway flexibility of Delta, American, and Hawaiian;
- Institute a carrier selection proceeding for the two slot pairs that Delta is struggling to effectively use and not currently using during the waiver period;
- Require carriers to notify the Department immediately regarding the slot pairs they do not intend to operate when Japan's slot waiver period ends, currently scheduled for July 2023; and
- Award United back-up authority now and/or in any future Tokyo Haneda carrier selection proceeding with a condition permitting it to implement the authority within the first year should any primary carrier, i.e., Delta or Hawaiian, withdraw from the market.

Respectfully submitted,



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May 23, 2023

CERTIFICATE OF SERVICE

I certify that I have this date served the foregoing document on the following persons by causing a copy to be sent electronically in accordance with the Department's Rules of Practice:

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