BEFORE THE
DEPARTMENT OF TRANSPORTATION
WASHINGTON, D.C.

Motion of **DELTA AIR LINES, INC.** **in the matter of the U.S.-Haneda Combination Services Allocation Proceeding**	))))))))	**Docket DOT-OST-2019-0014**

MOTION FOR LEAVE TO FILE AND
REPLY OF DELTA AIR LINES, INC.

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May 17, 2023

BEFORE THE
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Motion of **DELTA AIR LINES, INC.** **in the matter of 2019 U.S.-Haneda Combination Services Allocation Proceeding**	))))))))	**Docket DOT-OST-2019-0014**

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Delta[1] welcomes the answers of American and Hawaiian expressing support for Delta's request for limited U.S.-Haneda gateway flexibility ("Delta Motion"). American duly recognizes that "[e]nabling flexible, market-based decision-making for U.S.-Haneda service is warranted in the current demand environment."[2] Hawaiian enthusiastically agrees: "In light of the rapidly changing demand trends in the U.S.-Japan market, Hawaiian supports the Delta motion so that carriers holding Haneda authority can respond to market forces and maximize service to the public."[3] Delta commends American and Hawaiian for their support of enhanced competition and consumer choice in the evolving U.S.-Haneda air services environment.

And then there is United. United categorically objects to Delta's Motion and, in doing so, accuses Delta of proposing a "self-serving, risky 'pilot program' scheme" that "prioritize[s] … profits over benefitting consumers."[4] United argues that Delta's proposal represents a "sudden departure from the Department's long-standing procedure and precedent."[5] United alleges that Delta's sole motivation with its Motion is to "maximize profits and not benefit consumers,

[1] Common names are used for airlines.
[2] *See* American Answer in this docket dated May 2, 2023 ("American Answer"), at 1.
[3] *See* Hawaiian Answer in this docket dated May 10, 2023 ("Hawaiian Answer"), at 1.
[4] United Answer in this docket dated May 8, 2023 ("United Answer"), at 1.
[5] *Id*.

communities, and shippers."[6] Delta moves for leave to file this reply to correct the record and address United's baseless arguments and false assumptions.[7]

United's Answer has it backward. It is *United* who is prioritizing profits over consumers and communities by objecting to a proposed solution that would afford all U.S.-Haneda slot holders – not just Delta – the ability to offer enhanced and more convenient flying options between the United States and Tokyo's prized airport. It is *United* who is prioritizing its parochial interests over competition by suggesting that the Department should strip Delta of two Haneda slot pairs and redistribute them to United and ANA – the ATI-enabled transpacific joint venture that has the largest slot portfolio at Haneda and enjoys gateway flexibility on the 10 daily Haneda-U.S. flights operated by ANA[8] – so that they can serve Haneda from two additional U.S. points, Houston and Guam. It is *United's* opposition that is self-serving, as demonstrated by the fact that United is the only U.S.-flag Haneda competitor of the four who opposes Delta's request.

United's objection to Delta's Motion reveals its protectionist posture and fear of competition. Instead of acknowledging the clear pro-consumer and pro-competitive benefits of affording U.S. carriers limited flexibility to serve a still-recovering and volatile market, as American and Hawaiian have done, United pledges allegiance to "long-standing procedure and precedent"[9] as a pretext to avoid competition and to make its joint venture with ANA – currently the largest U.S.-Haneda franchise – even larger. United's thinking is outdated. As Hawaiian elegantly states in its Answer, "the unprecedented disruption caused by the COVID-19 pandemic warrants taking a different approach that places greater reliance on free market principles and competition."[10]

The Department has a unique opportunity in this proceeding to cultivate consumer choice and competition. Delta's request, if granted, would empower U.S. air carriers to tailor their

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[6] *Id*.
[7] Good cause exists for the Department to accept Delta's reply in the interest of ensuring that a full and accurate record is established that will allow the Department to properly adjudicate this matter.
[8] Effective September 2023, based on OAG schedules as of May 15, 2023.
[9] United Answer, at 1.
[10] Hawaiian Answer, at 2.

Haneda flying to actual demand and allow American, Delta, and Hawaiian to compete more meaningfully with United/ANA. By contrast, United's objection, if indulged, would exacerbate a competitive imbalance and deprive American, Delta and Hawaiian of the network flexibility – and consumers of the optionality – that would result from the Department's grant of Delta's request. As further detailed below, United's Answer underscores why the Department should exercise its broad discretion under the public interest standard to grant the relief sought in Delta's Motion.

I. United Seeks Insulation from Competition at Haneda.

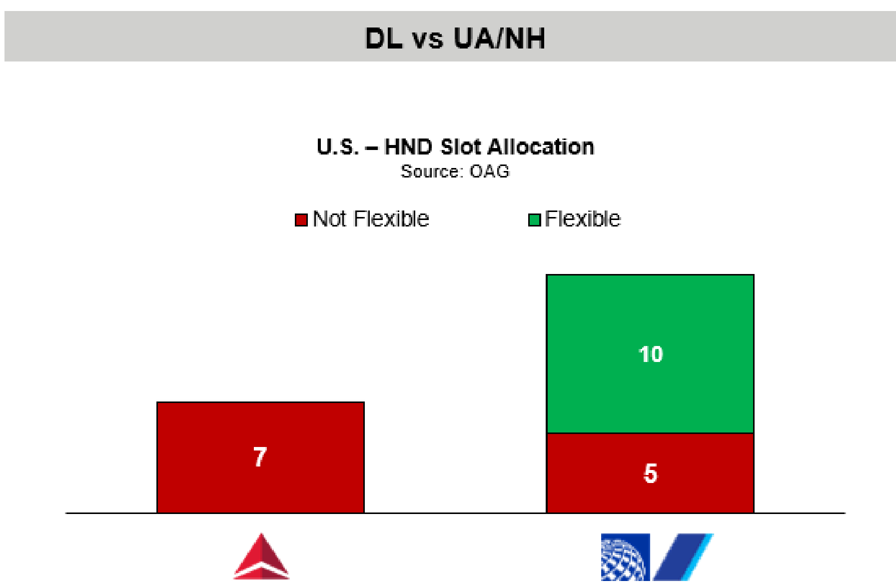
United's position on U.S.-Haneda gateway flexibility is protectionist and antithetical to competition. United proclaims in its Answer that access to Haneda "should continue to be about consumers, communities, and shippers as it always has been, not about carriers' financial performance."[11] The hypocrisy of this statement – which Delta will address below – is not lost on Delta. An even more glaring flaw of this statement, however, is United's omission of the word "competition." Indeed, nowhere in United's verbose 19-page filing does it use the term "competition." This is because, to United, enhanced competition through increased gateway flexibility to serve Haneda would loosen United and ANA's grip on the market. United's objection to Delta's motion, if indulged by the Department, would not serve the public interest; it would only serve to protect the ATI-enabled United/ANA joint venture from more meaningful competition in the U.S.-Haneda market.

As Delta demonstrated in its Motion, its measured request for limited U.S.-Haneda gateway flexibility would intensify competition among U.S.-Haneda competitors – particularly against the immunized metal-neutral United/ANA transpacific joint venture that holds the lion's share of Haneda slots – and foster a more competitive air services environment between the U.S. and Japan.

[11] United Answer, at 2.

United and ANA operate their transpacific joint venture as a unified carrier. Collectively, they control 49% of the departures at the airport and 48% of the Tokyo Haneda-Continental United States flying overall. By comparison, Delta operates just 1% of the departures at Haneda and 21% of the flights between Tokyo Haneda and the Continental United States.[12] Consumers deserve an array of choices and convenient flying options in the U.S.-Haneda market. United and ANA already have sufficient flights to serve the market and can shift their U.S. gateways on a whim as they see fit. As further explained below, Delta currently cannot do so.

The competitive landscape between the United States and Haneda is unique and imbalanced. Haneda is an anomalous, non-Open Skies airport in an otherwise Open Skies country. The current gateway restrictions on U.S. carriers benefit United and its joint venture partner ANA more than any other Haneda competitor. United and ANA already control 15 Haneda slot pairs through their joint venture, more than any other U.S. or Japanese carrier or joint venture. And, as shown below, 10 of the 15 slot pairs controlled by United and ANA are gateway flexible.



Since ANA is free to use its Haneda slots to serve any gateway in the United States, United, through its JV with ANA, has the structural flexibility to offer Haneda service to JV

[12] Based on OAG schedules as of May 15, 2023.

customers at any U.S. gateway – not just those United proposed in contested DOT proceedings. Under the principle of metal neutrality, where joint venture partners endeavor to operate with indifference as to which carrier carries the customer, service to Haneda operated by United is the same as service to Haneda operated by ANA, and vice versa. As such, the gateway flexibility enjoyed by ANA also directly benefits United. If any of ANA's current Haneda-U.S. flights encounter economic headwinds at a particular U.S. gateway, United and ANA have the ingrained flexibility to move the slots to a different gateway without seeking prior approval from the Department.

Delta does not have that luxury. Under the current gateway-specific framework, all of Delta's U.S.-Haneda frequencies require prior Departmental approval to be moved – a process that can take many months to complete. Delta is thus effectively subject to, and disadvantaged by, a different, more stringent regulatory scheme compared to United.

The limited gateway flexibility proposed in Delta's Motion would play a key role in rectifying this imbalance. It would enable Delta to adapt to the evolving demand environment that continues to present unique challenges to U.S. carriers at Haneda. Contrary to United's assertions, Delta would not be the only beneficiary of the Department's grant of limited gateway flexibility. Delta structured its proposal to allow all U.S.-Haneda slot holders, including American, Hawaiian, and even United, to shift up to two U.S. gateways without submitting to an extensive carrier selection proceeding. American and Hawaiian have now filed in support of Delta's Motion precisely because they do see the benefits – not only to them but to the traveling public – of increased competition and consumer choice.

Despite the clear benefits of Delta's solution-oriented gateway flexibility proposal, United clings to "long-standing procedure and precedent" because a consequence of granting Delta's motion would be intensified competition in the U.S.-Haneda market – a market in which United and ANA hold a leading position. If the Department does not grant gateway flexibility it would further insulate United, and its JV with ANA, from more robust competition. Insulation from competition is not one of the 16 statutory public interest considerations in Section 40101. Nor is insulation from competition endorsed in the Biden Executive Order on competition; to the contrary, the Executive Order[13] encourages agencies to "rescind[] regulations that create unnecessary barriers to entry that stifle competition" and notes with emphasis that "[a]gencies can influence the conditions of competition through their exercise of regulatory authority . . ."[14] The gateway-specific framework at Haneda is one such regulation; it perpetuates an unnecessary barrier in the U.S.-Haneda market and stifles opportunities for enhanced competition. Delta is optimistic that when the Department weighs the merits of Delta's Motion against the parochial interests United seeks to protect through its objection, it will decide to strengthen competition and enhance consumer choice by affording all U.S. carriers serving Haneda the flexibility to use up to two of their currently allotted slot pairs to serve Haneda from any U.S. gateway, subject to ongoing Department oversight.

II. United Exaggerates the Scope and Significance of Delta's Request to Fit a Baseless Narrative.

In straining to find fault with Delta's request, United grossly mischaracterizes its scope and significance. United alleges that Delta is asking the Department to categorically "disregard all of the prior efforts and investments by the government regulators, carriers, and cities alike, instead suggesting that [Delta's] own judgments are an appropriate substitute for the Department's."[15] United further describes Delta's request as an "extreme recourse" that is unwarranted in light of the improving U.S.-Haneda demand environment.[16]

As Delta stressed in its Motion,[17] Delta is not asking the Department to nullify or undermine the Department's prior public interest determinations. Nor is Delta seeking to substitute its

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[13] *See* Executive Order 14036 issued July 9, 2021, available at https://www.whitehouse.gov/briefingroom/statements-releases/2021/07/09/fact-sheetexecutive-order-on-promoting-competition-in-theamerican-economy/.
[14] *Id*.
[15] United Answer, at 2.
[16] *Id*., at 6.
[17] Delta Motion, at 2, 10.

judgment for the Department's or requesting gateway flexibility for "all" of its slot pairs. Delta is simply asking the Department to confer all U.S.-Haneda slot holders – which would include United – flexibility to use up to two of their currently allotted slot pairs to serve Haneda from any U.S. gateway of their choosing, subject to ongoing Department oversight. Indeed, Delta went to great lengths in its Motion to clarify that it is only requesting flexibility for two slot pairs for a three-year trial period, subject to a DOT-administered reassessment process and a pre-gateway shift notification requirement.[18] United's characterization of Delta's proposal as a "sudden departure" from precedent and a prospective grant of Delta's motion as an "irresponsible" delegation of authority is hyperbolic and disingenuous;[19] it ignores the measured, modest nature of the request and the degree of oversight that the Department would retain should it grant Delta's Motion. It also ignores that such a policy change is well within the Department's discretion, especially given the anomalous nature of access to Haneda in a purportedly Open Skies country and vastly changed demand patterns for travel resulting from the Pandemic.

United also discounts the demand data that Delta presented in support of its Motion. United argues that Delta "does not paint a realistic picture of U.S.-Japan demand recovery," musing that U.S. carriers "tend to carry U.S. originating customers more often" before noting that U.S.-originating demand to Japan is 73% recovered.[20] United argues from a position of luxury given its structural advantage in the U.S.-Haneda market. Thanks to its metal-neutral joint venture with ANA – the largest Japanese carrier, with a huge sales and marketing presence in that country – United need not concern itself with capturing Japan-originating traffic; it can rely on ANA for that. Delta does not enjoy this luxury. Without a Japanese JV partner, Delta is responsible for capturing both U.S.- and Japanese-originating traffic to support its Haneda flying. Japanese-

[18] *See e.g.,* Delta Motion at 1, 7, 9, 11, 13.
[19] United Answer, at 8.
[20] United Answer, at 3.

originating traffic matters to Delta and, contrary to United's assertions, such traffic is relevant to the U.S.-Haneda demand recovery analysis that underpinned Delta's gateway flexibility request.

Evidently, Japanese-originating traffic matters to United, too. Despite marginalizing the significance of Japanese-originating traffic to undercut Delta's proffered demand data, United proposes a Guam-Haneda flight as an alternative to granting Delta's gateway flexibility motion. Guam-Tokyo is a short haul leisure-oriented market that depends heavily on Japanese-originating traffic. In fact, ***90 percent*** of Guam-Tokyo bookings are Japan point-of-sale.[21] United undoubtedly based its Guam-Haneda proposal on a demand set that includes both U.S.- and Japanese-originating customers. Indeed, when United proposed Guam-Haneda service in the 2019 Haneda proceeding, it highlighted that "the Guam-Tokyo market is large and ***consists primarily of Japan originating traffic*** which comes to the island … for leisure activity" and, further, that the proposed Guam-Haneda flight would "[a]llow Guam to compete with Hawaii for Japanese travelers who prefer Haneda as an origin or connecting point for their travel needs. Japanese tourists are critical to the economy of Guam and its employment base that relies on tourism."[22] It is both disingenuous and contradictory for United to criticize Delta for considering both U.S.- and Japanese-originating customers in its Haneda demand analysis while at the same time reviving its request for additional slots to serve Haneda from Guam.

Delta acknowledges that the U.S.-Tokyo demand environment is improving. But, as Delta emphasized in its Motion, the pace of the rebound has been sluggish and forward-looking demand is difficult to predict based on the volatility in the market. Some U.S.-Haneda markets may recover to 80% or 90% of pre-pandemic levels; others may languish below 40%. Even if a particular market recovers to 90%, that would still be 10% below the demand that Delta forecasted when it applied to the Department for the authority to serve the market in 2019. Contrary to United's rhetoric, the public interest would be better served by the Department affording U.S. carriers

[21] MIDT data based on 12 months ending April 2023.
[22] Application of United in Docket DOT-OST-2019-0014 (Feb. 21, 2019), at 2, 22 (emphasis added).

flexibility to tailor capacity to demand as the U.S.-Japan market continues to evolve post-Pandemic.

United's hyperbolic rhetoric continues with its assertion that Delta "has not – and cannot – demonstrate that ***any*** consumer or community benefits will accrue from its request."[23] This assertion is untrue and easily refutable. Grant of the requested gateway flexibility would authorize Delta and its U.S.-flag Haneda competitors to recalibrate their U.S.-Haneda networks to align capacity to actual demand. Serving demand in a market is inherently good for consumers and good for communities. If Delta or another Haneda competitor were to shift one (or two) of their current U.S. gateways to markets with burgeoning or under-served demand, United could not plausibly take the position that the additional Haneda flight options and competition offered by such carriers would yield ***zero*** consumer or community (or competitive) benefits. United's statements in previous Haneda proceedings acknowledge the pro-consumer virtues of tailoring U.S.-Asia flying to demand: "United has worked hard to develop a robust and efficient network in Asia, making sure it serves the right cities with strong demand, and has smartly invested to build a system of flights giving consumers the most and best choices."[24] This is exactly what Delta (and American and Hawaiian) aspire to achieve with the requested flexibility to better serve Haneda.

The salient point is this: Delta and other U.S. carriers should have the flexibility to tailor a subset of their U.S.-Haneda flights to actual (and projected) demand rather than historical demand. Doing so would unlock immeasurable pro-consumer and pro-competitive benefits. Not only would it enable U.S.-Haneda slot holders to respond more nimbly to evolving passenger demand trends in the U.S.-Asia and U.S.-Tokyo markets influenced by the COVID-19 pandemic, but it would enhance consumer choice and foster a more competitive air services environment between the U.S. and Japan. Equally importantly, U.S.-Haneda slot holding carriers should be

[23] United Answer, at 8 (emphasis added).
[24] Consolidated Reply of United in Docket DOT-OST-2019-0014 (Mar. 7, 2019), at 20.

able to do so without submitting to cumbersome and lengthy carrier selection proceedings. United's acknowledgment that DOT-administered carrier selection proceedings require the "expending of carrier and Department resources, time lost, uncertainty for both communities and consumers, and winners and losers"[25] is precisely why Delta is asking for gateway flexibility.

III. United's Shots at Delta for Past Haneda Behavior Backfire.

United cautions the Department not to entertain Delta's proposal "given Delta's checkered history at Haneda" – citing Delta's downgauging of aircraft, shifting of slots from one U.S. gateway to another, and difficulty sustaining service on certain U.S.-Haneda routes due to challenging demand conditions.[26] Delta does not hide from its past challenges at Haneda; in fact, they illustrate why Delta's instant request for limited gateway flexibility is squarely in the public interest. Delta's historical struggles to sustain service levels at Haneda on select routes and its corresponding requests for Departmental relief are directly attributable to the gateway-specific framework at Haneda. Had Delta been permitted to use a subset of its U.S.-Haneda slot pairs to serve Haneda from any U.S. gateway of its choosing, as it asks to do here, then Delta would not have been required to submit formal applications to shift U.S. gateways or beg the Department's forbearance for temporarily reducing service levels below the levels it had planned.

As Delta emphasized in its Motion, the U.S.-Japan Agreement does not prohibit the Department from conferring gateway flexibility for U.S.-Haneda services, nor does that Agreement require the Department to impose gateway-specific conditions on such services. It has merely been the Department's policy to do so, and it is a policy that now should be relaxed given the unique, unprecedented circumstances involved with Haneda.

United's airing of grievances about Delta's conduct in past Haneda cases exposes United to a damaging rebuttal. Four years ago – prior to the COVID 19 pandemic – United expressed no substantive opposition to Delta's December 2018 Haneda gateway flexibility motion – a

[25] United Answer, at 13.
[26] *Id.*, at 9-10.

request that was substantially more expansive in scope than its pending Motion. United's contortions in that case illustrate the flimsiness of its position in this one.

First, United filed a notice in the docket on December 28, 2018, indicating that it would be filing a response to Delta's motion the following week (after Delta agreed to an extension affording United and other interested parties additional time to file answers).[27] The following week, on January 7, 2019, United filed yet another notice, this time advising the Department that United "will not be filing a response to Delta's motion" – thereby memorializing its non-objection for the record.[28] That same day, however, American filed an answer supporting Delta's motion in principle, conditioned on a prospective decision by the Department to extend gateway flexibility to limited-entry China frequencies.[29]

American's linkage of Delta's Haneda flexibility request to prospective China flexibility triggered alarms for United because (1) United had the largest portfolio of U.S.-China frequencies of any U.S. carrier; and (2) many of United's U.S.-China frequencies were unrestricted (*i.e.,* not gateway-specific), whereas nearly all the U.S.-China frequencies held by United's competitors, American and Delta, were restricted. Sensing risk to its structurally advantaged U.S.-China franchise, United resurfaced in the docket on January 14, 2019, lodging an objection to American's U.S.-China flexibility request and, by extension, an objection to Delta's Haneda flexibility request.[30]

United's January 14, 2019 objection to Delta's Haneda motion was belated, attenuated and pretextual. United did not attempt to meaningfully confront the substantive merits of Delta's gateway flexibility request or explain why the Department's grant of Delta's request would be contrary to the public interest or prevailing precedent. Instead, United's opposition was aimed

[27] Notice of United dated Dec. 28, 2018 in Docket DOT-OST-2016-0048.
[28] Notice of United dated Jan. 7, 2019 in Docket DOT-OST-2016-0048.
[29] Answer of American in Conditional Support of the Motion of Delta dated Jan. 7, 2019 in Docket DOT-OST-2016-0048.
[30] Consolidated Objection of United dated Jan. 14, 2019 in Dockets DOT-OST-2004-19077, DOT-OST-2007-28567, and DOT-OST-2016-0048.

squarely at protecting its leading position in China. In essence, United did not oppose Delta's 2018 Haneda gateway flexibility motion; it only opposed the collateral damage that the Department's grant of Delta's Haneda motion might have inflicted on United's U.S.-China franchise.

United now flips where it previously flopped. Undeterred by its initial non-opposition to Delta's December 2018 Haneda gateway flexibility request, United now slams Delta's May 2023 request, accusing Delta of "cherry-pick[ing]" its selection of two slot pairs for flexibility and making bald assumptions about the proposed three-year trial period.[31] According to United, Delta's proposal is "without merit and totally arbitrary."[32] What *is* arbitrary is United's decision in January 2019 not to oppose Delta's December 2018 Haneda gateway flexibility request – a more expansive request that would have covered *all* U.S.-Haneda slot holders' current and future slot awards on an *indefinite* basis – but then categorically assail a more surgical proposal that would afford flexibility for only two slot pairs as part of a three-year pilot program with ongoing Departmental oversight.

United's mercurial behavior in the prior Haneda proceeding and its antagonistic rhetoric in the instant proceeding are instructive. They illuminate United's protectionist bent. The Department should see United's objection for what it is: aversion to competition from other U.S. carriers and an attempt to preserve the immunized United/ANA joint venture's leading position at Japan's most important airport, Haneda, a limited entry airport in a nominally Open Skies country.

United's Answer is also loaded with false assumptions. United speculates that Delta proposed the three-year time frame for the gateway flexibility pilot program because Delta's "underperforming Haneda routes will have better prospects of financial returns in three-years' time."[33] United's assumption is cynical and false. Delta proposed the three-year trial period to

[31] United Answer, at 7.
[32] *Id*.
[33] *Id*.

demonstrate its fidelity to the Department's interest in retaining a meaningful degree of oversight over U.S. air carriers' use of scarce regulatory assets.

United's speculation about why Delta has proposed flexibility for two slot pairs (as opposed to some other number) is also wrong. Delta did not "cherry-pick" this number based on current or projected use of its Haneda route authority; rather, Delta is requesting flexibility for two slot pairs (as opposed to all seven slot pairs in Delta's case) because it is a more measured, narrowly tailored solution that will provide sufficient relief without fundamentally undermining the well-reasoned public interest determinations made by the Department in previous proceedings.

IV. United Does Not Refute that the Department Has – and Has in Analogous Circumstances Exercised – Authority to Grant Gateway Flexibility.

Despite ample opportunity to do so, United does not attempt to refute Delta's well-documented position that the gateway flexibility sought in its Motion is fully within the Department's legal authority to implement, advances the statutory objectives that govern the Department's public interest reviews, aligns with Departmental precedent, and would represent a legitimate exercise of Departmental discretion. Instead, United states without substantiation that Delta's request is "unprecedented"[34] and criticizes Delta for citing "an unrelated and inapplicable twenty-year old Brazil precedent" that, according to United, the Department "has already considered and rejected."[35] United, however, fails to explain why the Brazil precedent is "unrelated and inapplicable"; the above-referenced statement from United represents both the beginning and the end of its analysis.

Not only is United's "analysis" of the Brazil precedent conclusory; it is simply wrong: the Department did not reject Delta's analogy to the Brazil precedent. In fact, the Department did not even reference the Brazil decision in the Instituting Order cited by United.

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[34] *Id.*, at 1.
[35] *Id.*, at 12.

Delta takes this opportunity to correct the record. In its 2018 Haneda gateway flexibility motion, Delta had asked the Department to expressly include gateway flexibility in the eventual instituting order to consider certain issues regarding flexibility and to provide an opportunity for interested parties to comment in the public record. The Department ultimately denied Delta's motion. However, the Department's February 2019 decision denying Delta's motion for gateway flexibility did not reject Delta's request on its substantive merits; rather, the Department's denial of the request was attributable to timing concerns. Specifically, the Department denied the request because "the October 2019 deadline to file applications with Japanese authorities for takeoff and landing slot times at Haneda airport" was fast approaching and the Department determined that adjudicating Delta's request "could substantially delay resolution of the case."[36] The Department concluded that the public interest favored a "prompt final decision" to allow sufficient time for the selected carriers to meet the anticipated October 2019 deadline and, on the basis of this narrow timing concern, the Department declined to include consideration of gateway flexibility in the Instituting Order.[37] No such timing concern exists here.

Delta reaffirms its analysis of the 2004 Brazil case. It stands for the proposition that where "the present allocation scheme for U.S. carrier use" of frequencies "is not uniform, with some carriers enjoying greater flexibility than other as to some or all of their frequencies," the Department can exercise its discretion to correct any such imbalance and "afford the same flexibility to all" carriers that serve the subject market.[38] That is precisely what Delta is asking the Department to do here. The 2004 Brazil precedent supports a grant of gateway flexibility at Haneda. Just as the Department in that case sought to correct a competitive imbalance between carriers holding frequencies with U.S. gateway flexibility and carriers without such flexibility, so too should the Department exercise discretion to rectify the imbalance at Haneda – where ATI-

[36] DOT Order 2019-2-5, at 6.
[37] *Id*.
[38] Order 2004-6-25, at 2.

enabled joint ventures, like United/ANA, can use the gateway flexibility available to them due to the Japanese government's less restrictive policies. Like the pre-June 2004 Brazil frequency environment, the current U.S.-Haneda slot environment is effectively a two-tiered licensing regime with some carriers holding gateway flexibility and others not. It bears further emphasis that the Department was willing to grant gateway flexibility in the 2004 Brazil case notwithstanding the fact that Brazil was not Open Skies at the time. Extending (limited) gateway flexibility in a nominally Open Skies market like Japan would be an even more justifiable level-setting measure by the Department.

United's pledge of allegiance to precedent in the Haneda flexibility context – but not in other limited-entry contexts, like Cuba – further betrays United's self-interest in this case. In September 2017, United applied to the Department for operational flexibility to provide Houston-Havana service using either United's B737 aircraft or Mesa's E175 aircraft. In justifying this request – which, at the time, was unprecedented – United stated that it needed the relief to "maximize flexibility . . . to ensure that supply is narrowly tailored to meet fluctuating demand in the nascent, developing Havana market."[39] United described its proposed arrangement with Mesa as a "smart, sensible approach" that would "offer[] the best chance of sustained, long-term success and growth in the market."[40] JetBlue vehemently objected to United's request, noting that it was unprecedented and inconsistent with the U.S.-Cuba bilateral agreement. United's rebuttal of JetBlue in that case demonstrates the hypocrisy of United's position in this case:

> United emphasizes that its request for operational flexibility is simply intended to help United more nimbly and effectively respond to consumer demand fluctuations in the U.S.-Havana and Houston-Havana markets. JetBlue itself has down-gauged to a regional jet between Orlando and Havana. By its application, United is similarly seeking to tailor capacity between Houston and Havana with a mainline or regional aircraft as JetBlue itself has done. No other applicant has raised a concern with United's plan and in fact Delta went as far to say it has no issue with the operational flexibility sought by United. United maintains that flexibility in aircraft fleet utilization is key to maintaining service levels and driving long term success. As other carriers

[39] Joint Application of United and Mesa, Docket DOT-OST-2016-0021 (Sept. 12, 2017), at 10-11.
[40] *Id.*

can attest, the market to Havana is taking some time to develop and is subject to fluctuating demand.[41]

The parallels between United's position in the Houston-Havana example and Delta's position on Haneda gateway flexibility are striking.

DOT ultimately approved United's request for operational flexibility to serve the Houston-Havana market. In justifying its decision, the Department stated that United's operational flexibility proposal was "consistent with the Department's approach of deferring to carrier judgment of how to best develop the market."[42] The Department's decision on United's then-unprecedented request is even more remarkable because the U.S.-Cuba market was not (and still is not) Open Skies. By contrast, the U.S.-Japan air travel environment is nominally Open Skies. Flexibility is even more appropriate here than it was in the Cuba case.

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American and Hawaiian have joined Delta in recognizing that the limited gateway flexibility proposed in Delta's Motion would enable U.S.-Haneda slot holders to respond more nimbly to evolving passenger demand trends in the U.S.-Haneda market; generate substantial consumer benefits; intensify competition; and more closely align the U.S.-Haneda slot environment with longstanding Open Skies principles. United's objection is parochial and its counterarguments are shallow. For the foregoing reasons, Delta urges the Department to swiftly grant the relief sought in its Motion.

Respectfully submitted,

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Steven J. Seiden
For DELTA AIR LINES, INC.

[41] Consolidated Joint Answer of United and Mesa, Docket DOT-2016-0021 (Sept. 19, 2017), at 20-21 (emphasis added; internal citations omitted)
[42] DOT Show Cause Order 2018-3-16, at 8.

CERTIFICATE OF SERVICE

A copy of the foregoing document has been served this 17th day of May, 2023, upon the following persons via e-mail:

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