BEFORE THE
DEPARTMENT OF TRANSPORTATION
WASHINGTON, D.C.

Motions and Application of	)	
	)	
AMERICAN AIRLINES, INC.	)	**Docket DOT-OST-2010-0018**
HAWAIIAN AIRLINES, INC.	)	
	)	
In the matter of 2010 U.S.-Haneda Combination Services Allocation Proceeding	)	

OBJECTIONS OF DELTA AIR LINES, INC.
TO ORDER 2015-3-17

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April 6, 2015

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Delta Air Lines Inc. ("Delta") strongly agrees with the Department's decision in Order 2015-3-17 that Delta "should retain the U.S.-Haneda slot pair currently allocated to it for daily scheduled combination services." Order 2015-3-17 at 1 ("Order"). That result is compelled by law and manifestly serves the public interest, for reasons Delta has previously explained.

Delta emphatically objects, however, to the Department's tentative decision to impose draconian "protective measures" on Delta's slot authority—namely, an unprecedented requirement that Delta provide a daily Haneda-Seattle flight "on each and every day of the week (7 days a week, 365 days a year)," on pain of slot forfeiture. Order at 8. That extreme condition is unsupported by the record; it finds no support whatsoever in Department precedent; it conflicts with the longstanding "security of route" principle by placing Delta's slot authority in perpetual jeopardy; and it would impose serious burdens on Delta and the public interest with no countervailing justification. For those reasons and others, the 365-day-a-year service mandate is an impermissible, arbitrary and capricious condition on the use of Haneda slot authority.

Fortunately, the proposed condition is unnecessary to serve the Department's objectives. The Order correctly acknowledges that the Department has a "justifiable basis to believe that Delta [can] be relied upon" to provide year-round service based on Delta's

statements and the concrete steps Delta has taken to grow its Seattle hub. Order at 7-8. To the extent any further assurance is necessary, Delta respectfully submits that the Department is limited to imposing targeted conditions that actually address the concern that prompted reexamination of Delta's slot authority—namely, Delta's cutback in service during the past winter season. For example, as explained further below, conditioning Delta's slot authority on 15 days of nonuse (a significant restriction above and beyond the standard 90-day dormancy condition) would advance the Department's public-interest aims by protecting against any meaningful seasonal service cutback, while at the same time avoiding the deleterious consequences flowing from an inflexible 365-day-a-year service mandate. The Department's failure to adopt such a sensible alternative to the proposed condition—which is patently overbroad and which risks inflicting serious commercial and operational costs on Delta—will invite appellate vacatur of the proposed condition.

Delta makes the following specific objections to the condition:

1. The 365-Day-A-Year Service Mandate Is Substantially Overbroad And Not Rationally Related To Any Public-Interest Objective

Perhaps the most basic problem with the 365-day-a-year service mandate is that it is seriously disproportional to the purported problem that the Department seeks to remedy. It is axiomatic that the Administrative Procedure Act's demand of reasoned decisionmaking requires an agency confronted with a problem to "articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 43 (1983) (internal quotation marks omitted). The Order fails to meet that standard. There is simply no "rational connection" between the identified problem (a single-season cutback that was nonetheless well within the standard dormancy conditions of Delta's authority) and the "choice made" (imposing an absolute 365-day-a-year service mandate).

The Department's initial decision that it was in the public interest to grant Delta Seattle-Haneda slot authority in no way depended on Delta providing service 7 days a week, 365 days a year. *See* Order 2013-2-4 (Feb. 5, 2013) ("Seattle Order"). In fact, slot authority for "daily service" for any international route has *never* been understood to be tantamount to a 365-day-a-year service expectation, much less a requirement. And for good reason: there are countless safety, operational, and commercial reasons that require that airlines have flexibility to deviate from a strict 365-day-a-year service expectation, as discussed further below.

Instead, in granting Delta Haneda slot authority, the Department focused on the compelling public-interest benefits of "providing the first nonstop Haneda service on a significant mainland U.S.-Tokyo route that currently lacks any such service"; of offering "a number of western cities with first one-stop connecting opportunity to Haneda"; and of "promoting the geographic diversity of the U.S.-Haneda gateways." Seattle Order at 4. Making crystal clear that the Department's public-interest analysis did not depend on Delta providing 365-day-a-year service without exception, the Department imposed the standard dormancy condition, under which loss of the slot could result only from *90 days* of nonuse. *See id.* at 5 ("if the slot pair is not utilized for a period of 90 days , it will be deemed dormant and revert to the Department"). The Department's Order requiring 365-day-a-year service conflicts with its decision in prior orders in this proceeding and other slot authority decisions that a 90-day dormancy condition sufficiently advances the public interest. No other Haneda slot recipient has been subject to such conditions – including American, which liberally used this flexibility in connection with its now-abandoned JFK-Haneda service. It would be arbitrary and capricious to subject Seattle-Haneda service to forfeiture conditions never imposed on any other international route.

What is more, in deciding to reexamine Delta's Haneda slot authority, the Department's stated concern was never the absence of service 365 days a year. Instead, the Order here pointed to "Delta's virtual abandonment of the route" for a "traffic season" as the basis for reexamination and the new condition. Order at 7. Likewise, the Order instituting the

reexamination focused only on "Delta's extensive winter-season service cutbacks." Order 2014-12-9 at 5. There is a wide gulf between "virtual abandonment of [a] route" for several months of the year and 365-day-a-year mandated service without exception, and the Department does not explain how the former "problem" justifies the latter "solution." Indeed, the Department cannot seriously contend that 363 – or 343 or 323 – days of Seattle-Haneda service would vitiate the public interest benefits the route so clearly provides. And in allowing American the standard 90-day dormancy period should it take over the route authority, the Order assumes without logic, explanation or empirical support that 275 days or less of American's Los Angeles-Haneda service is preferable to 363 days of Delta's Seattle-Haneda service (See pp. 6-7 below).

Given the Department's past public-interest analysis—which has in no way depended on an inflexible 365-day-a-year-service expectation—the Department's choice of remedy is not remotely tailored to address the stated harm or to advance the public interest.

2. The Department Has Unreasonably Ignored Alternatives To A 365-Day-A-Year Service Mandate

As explained above, the logical solution to a concern with seasonal cutbacks is not to require service 365 days a year without exception. In fact, there are myriad alternatives short of such an extraordinary requirement that would fully advance the Department's interests. For example, conditioning Delta's slot authority on 15 consecutive days of nonuse (a significant restriction above and beyond the standard 90-day dormancy condition) would advance the Department's public-interest objectives by guarding against any meaningful seasonal service cutbacks, while avoiding the deleterious consequences flowing from an inflexible 365-day-a-year service mandate. The Department's failure to identify, consider, or explain why those alternatives are insufficient renders the condition arbitrary and capricious. *See American Gas Ass'n v. FERC*, 593 F.3d 14, 19 (D.C. Cir. 2010) ("[R]easoned decisionmaking requires" agencies to consider "reasonable alternatives" raised by the parties."); *Chamber of Commerce*

of U.S. v. SEC, 412 F.3d 133, 145 (D.C. Cir. 2005) (SEC violated the APA in failing to consider an alternative that was "neither frivolous nor out of bounds"); *Laclede Gas Co. v. FERC*, 873 F.2d 1494, 1498 (D.C. Cir. 1989) ("where a party raises facially reasonable alternatives the agency must either consider those alternatives or give some reason for declining to do so").[1]

3. The 365-Day-A-Year Service Mandate Unreasonably Departs From Department Practice And Precedent

The Department's imposition of an unyielding 365-day-a-year mandate is also arbitrary and capricious because it finds no support in, departs from, and conflicts with past Department practice and precedent. Indeed, the Order does not acknowledge, much less provide, a reasoned explanation for this sharp break from practice and precedent. It is axiomatic that an agency's failure to account for and to explain a departure from practice and precedent violates crucial tenants of reasoned decisionmaking. *See Republic Airline Inc. v. U.S. Dept. of Transp.*, 669 F.3d 296, 300-02 (D.C. Cir. 2012) (vacating DOT slot exemption order for failure to account for relevant Department precedent). The Order violates those principles here.

At the most basic level, the proposed condition deviates from past practice because, as far as Delta is aware, the Department has *never* previously imposed such a strict 365-day-a year service requirement And that is despite the Department facing cutbacks in international service by other airlines far more substantial than Delta's single-season winter cutback. As Delta has now explained several times, starting in at least 2002, American allowed its limited entry Brazil frequencies to go unused for months at a time, frequently for periods of 90 days or more, with no action by the Department to reexamine those frequencies, much less to impose 365-day-a-year service requirements on the airline. *See, e.g.*, Delta Answer at 7-8. In addition, in the Brazil route proceeding, the Department took no action for more than *three and a half*

[1] In asking the Department to adopt a more targeted dormancy condition, Delta expressly reserves all of its legal arguments for why the Department may not unilaterally rewrite the express terms and conditions on which the Department previously granted Delta Haneda slot authority given that Delta violated no express term or condition of those prior orders. *See* Petition of Delta Air Lines, Inc. for Reconsideration of Order 2014-12-9 (Dec. 22, 2014).

years to revoke and reallocate United's unused Brazil frequencies that were dormant and where United had no stated plans to use them. *See* Order 2008-10-20.

Without acknowledging that historical record, the Department subjects Delta's Haneda slot authority to an entirely novel service condition on the basis of a single season of cutbacks. Because the Department has offered no plausible reason—and none is apparent—for treating Delta differently (and substantially so) from other airlines or from departing from its own practice and precedent in proposing a new draconian service mandate, the proposed condition is unlawful. *See Republic Airline*, 669 F.3d at 300-302 (vacating agency action for failure to account for precedent); *see also Green Country Mobilephone, Inc. v. FCC*, 765 F.2d 235, 237 (D.C. Cir. 1985) (vacating agency action that did "not treat[] similar cases similarly").

4. The Order Irrationally Treats Delta And American Airlines Differently

The Order is also legally infirm because it imposes substantially differential burdens on Delta, as the primary slot authority holder, as opposed to American Airlines, as the backup slot authority holder. Such unwarranted disparate treatment violates principles of reasoned decisionmaking. Under the Administrative Procedure Act, "[a] long line of precedent has established that an agency action is arbitrary when the agency offer[s] insufficient reasons for treating similar situations differently." *County of Los Angeles v. Shalala*, 192 F.3d 1005, 1022 (D.C. Cir. 1999). The proposed condition on its face defies that principle.

Under the order, "should the backup award be activated, the Department proposes that the allocation of the slot pair to American would remain in effect indefinitely, subject to the Department's standard 90-day dormancy condition." Order 2015-3-17. In other words, under the proposed condition, American is subject to a standard dormancy condition in the event it is awarded the very same Haneda slot authority that would remain with Delta subject to an inflexible 365-day-a-year service mandate. Remarkably, the Department proposes that disparate treatment despite American's undisputed history of engaging in far more substantial seasonal cutbacks with respect to other international slot authority. *See* p. 5-6, above. The

Department's differential treatment of Delta and American—as well as its failure to explain that treatment—renders the condition unlawful. Even assuming the Department has "broad discretion" to impose conditions on slot authority, that is no "license to treat like cases differently." *Airmark Corp. v. FAA*, 758 F.2d 685, 692 (D.C. Cir. 1985). Principles of "[e]lementary even-handedness require[]" that each slot holder—whether primary or backup—be subject to the same conditions, particularly in light of America's past usage patterns with respect to other international slot authority. *Id*. at 692-695 (vacating FAA slot exemption decision where the "FAA offered no coherent explanation for disparate treatment" of applicants). Whatever condition is imposed in the final order accordingly should be applied even-handedly to Delta and American alike.

5. The 365-Day-A-Year Service Mandate Unreasonably Fails To Account For Operational And Commercial Realities

In addition to the legal defects in the proposed condition discussed above, the 365-day-a-year service mandate is arbitrary and capricious and contrary to the public interest because it fails entirely to account for operational, safety and commercial realities. There are countless reasons that an airline might need to cancel a flight. For example, even for Delta which maintains the industry's leading non-cancellation rate, inclement weather or airplane maintenance occasionally require cancellation or rescheduling on short notice. Sometimes such cancellations can affect more than one day of service in any 7-day period. Presumably that is part of the reason why the Department has never before understood "daily service" to mean an unyielding 365-day-a-year service requirement. The Order does not address these serious concerns at all and thus fails to account for "important aspect[s] of the problem" before it, rendering the proposed condition arbitrary and capricious. *Motor Vehicles Mfrs. Ass'n*, 463 U.S. at 43; *see SecurityPoint Holdings, Inc. v. Transp. Security Admin.*, 769 F.3d 1184, 1187 (D.C. Cir. 2014) ("An agency's action is arbitrary and capricious if it has entirely failed to consider an important aspect of the problem it faces.") (internal quotation marks omitted).

Even worse, the proposed condition creates perverse incentives that run directly contrary to the public interest. Were the condition adopted, Delta's failure to provide service on any single day would violate the condition, and any two days of non-service in a seven-day period would summarily strip Delta of slot authority (unless Delta is able to obtain a waiver well in advance through a cumbersome and unrealistic process that requires that other parties have the opportunity to comment). For example, it would never be possible for Delta to obtain a waiver for a mechanical issue under the Order's unreasonable procedural requirements, and thus any one mechanical cancellation would put Delta in default. Faced with that exacting threat, the condition would create improper incentives to maintain scheduled service at all costs, when flights might otherwise be canceled, delayed, or rescheduled out of safety or other operational concerns. Delta's commitment to safety is paramount, and as such Delta faces the likelihood of losing this authority under the terms of the proposed Order for acting properly to protect its customers. But the public interest is decidedly *disserved* by a mandate that runs directly counter to safety incentives. Delta will always make flight decisions based on the safety of crew and passengers, but the possibility that a decision to cancel or reschedule a flight might cost Delta its slot authority should never even be a factor. The Department should not adopt mandates that risk distorting proper safety incentives.[2]

[2] The "emergency circumstances outside of Delta's control" exception to the advanced waiver requirement does not resolve this concern. Order at 9. The Department does not purport to define what counts as an "emergency situation." Nor does it explain what is meant by "outside of Delta's control." Faced with such vague standards, any real-time decision whether inclement weather or aircraft reliability concerns require cancelling a flight might have to consider the possibility that, with the benefit of hindsight, the Department might later decide there was *no bona* fide emergency that justified the flight cancellation or that the emergency was not outside of Delta's control. The waiver exception thus would provide no assurance that a good-faith decision to cancel a flight would not later become a basis for stripping Delta of its Haneda slot authority.

6. The 365-Day-A-Year Service Mandate Is Fundamentally Inconsistent With The "Security Of Route" Principle

Finally, Delta objects to the 365-day-a-year condition because renders illusory the foundational principle that certificated carriers should enjoy "security of route." *CAB v. Delta Air Lines*, 367 U.S. 316, 324 (1961). This principle "provide[s] assurance to the carrier that its investment in operations [will] be protected insofar as reasonably possible." *Id.* Given the myriad factors that might require Delta to cancel a daily flight, the cumbersome waiver process, and the fact that Delta would have no assurance that the Department would deem its failure to obtain a waiver justified, the proposed mandate would vitiate any reasonable reliance Delta could place on the security of its Seattle-Haneda route. That outcome also disserves the public interest: by placing Delta's slot authority in perpetual jeopardy, the condition would undermine Delta's willingness to invest in the route and thus threaten the public-interest benefits that the Department has repeatedly found would flow from a viable Haneda-Seattle route.

* * *

The Department made the correct legal decision and an eminently sound policy judgment in permitting Delta to retain its Haneda-Seattle slot authority. The unprecedented 365-day-a-year-service mandate, however, stands in stark contrast: that proposed condition is plainly unlawful and it reflects an ill-advised policy judgment, inviting almost certain appellate vacatur. Delta respectfully requests that the Department abandon the condition and consider a narrowly targeted dormancy condition to the extent the Department has any remaining concerns about Delta's commitment to the Haneda-Seattle route. Delta stands ready to work with the Department to craft an appropriate condition.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing document has been served this 6th day of April, 2015, upon the following persons via email:

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