

Order 2015-6-14



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

Issued by the Department of Transportation  
on the 15<sup>th</sup> day of June, 2015

Served: June 15, 2015

Applications of

AMERICAN AIRLINES, INC.

DELTA AIR LINES, INC.

HAWAIIAN AIRLINES, INC.

in the matter of 2010 U.S.-Haneda Combination  
Services Allocation Proceeding

Docket DOT-OST-2010-0018

**FINAL ORDER**

**SUMMARY**

By this Order, the Department makes final its tentative findings and conclusions set forth in Order 2015-3-17, and permits Delta Air Lines, Inc. (Delta) to retain the U.S.-Haneda slot pair currently allocated to it for daily scheduled combination services between Seattle, Washington, and Tokyo's Haneda Airport, subject to certain strengthened conditions and protective measures that were set forth in the show-cause order which are designed to ensure that Delta maintains a year-round daily service in the market. The Department also makes final its tentative selection of American Airlines, Inc. (American) for backup authority for its proposed Los Angeles-Haneda services should Delta not meet the conditions and requirements attached to this slot pair authority.

**BACKGROUND**

Under the Memorandum of Understanding between the United States and Japan signed on October 25, 2010, four daily slot pairs are available to carriers from each country to provide scheduled combination services between the United States and Tokyo's Haneda Airport.<sup>1</sup> As a result of three prior proceedings, by Orders 2010-7-2, 2013-2-4, and 2014-4-6, the Department

<sup>1</sup> These scheduled operations are subject to the following conditions: 1) U.S. operations at Haneda are permitted between 2200 and 0700 hours local time; 2) departures from Haneda to a point in the 48 contiguous U.S. states are not permitted prior to midnight; and 3) extra sections are not permitted.

has now allocated the four slot pairs as follows: 1) one slot pair to Hawaiian Airlines, Inc. (Hawaiian) for Honolulu-Haneda service; 2) two slot pairs to Delta, one for Los Angeles-Haneda and one for Seattle-Haneda services; and 3) one slot pair to United Airlines, Inc. (United) for San Francisco-Haneda service.<sup>2</sup>

On October 2, 2014, American filed a motion stating that Delta published schedules showing that Delta would be operating Seattle-Haneda nonstop service for approximately only one week every 90 days during the then-current Winter season. American asserted that this reduction was just enough to prevent the slot pair from automatically reverting to the Department based on the dormancy condition imposed by the Department on the slot pair.<sup>3</sup> Based upon those circumstances, American requested that the Department (1) withdraw Delta's daily U.S.-Haneda slot pair that was awarded for Seattle-Haneda services; and (2) reallocate that slot pair to American for Los Angeles-Haneda services.

On October 9, 2014, Hawaiian filed a motion to reopen Order 2013-2-4, and an answer to the motion and application of American. Hawaiian specifically requested that the Department (1) reopen the case in which Delta was awarded Seattle-Haneda authority and modify the dormancy condition to require meaningful year-round service; (2) grant American's motion to withdraw the Seattle-Haneda slot pair from Delta; and (3) institute a new proceeding to develop a factual record before reallocating the slot pair.

On October 17, 2014, Delta filed an answer in opposition to the motions of American and Hawaiian. Delta argued, among other things, that it was in full compliance with the applicable "dormancy condition," which provides that the slot pair will become dormant and will revert automatically to the Department if not used for a period of 90 days.

By Order 2014-12-9, issued December 15, 2014, the Department instituted this proceeding to determine the disposition of the Seattle-Haneda slot pair currently allocated to Delta. In light of Delta's extensive Winter season Seattle-Haneda service cutbacks, the submissions of American and Hawaiian, and the responses thereto, the Department found that the public interest required a fresh examination of whether the best use of the Seattle-Haneda opportunity was to allow Delta to retain the slot pair for Seattle-Haneda service, or whether the public interest would be better served by reallocating the slot pair for service from another U.S. city by another U.S. carrier or by Delta. The Department concluded that it did not need to decide whether Delta was in compliance with the dormancy condition, because "[w]here frequency allocations are not being operated effectively, the Department has the authority to reallocate them to ensure that they are

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<sup>2</sup> Following a carrier route selection proceeding, the Department initially allocated the four U.S.-Haneda slot pairs as follows: Delta at Detroit, Delta at Los Angeles, Hawaiian at Honolulu, and American at New York (JFK). *See* Order 2010-7-2. In 2012, Delta applied to relocate its Detroit-Haneda service to the Seattle-Haneda market. Following a second carrier selection proceeding, in which competing proposals were submitted by American, Hawaiian, and United, the Department awarded Delta authority to provide service between Seattle and Haneda. *See* Order 2013-2-4. Subsequently, in 2013, American ended its New York-Haneda service, and returned the slot pair to the Department for reallocation. Following a carrier selection proceeding involving United and Hawaiian, the Department selected United for Haneda service from San Francisco. *See* Order 2014-4-6.

<sup>3</sup> The allocation of the U.S.-Haneda slot pair to Delta was subject to the Department's standard condition pertaining to dormancy, whereby the slot pair would be deemed dormant and would revert automatically to the Department if not used for a period of 90 days. *See* Order 2013-2-4, at 5.

used effectively and in a manner that promotes competition and otherwise best serves the public interest.”<sup>4</sup>

The Order set forth a procedural schedule and evidentiary requirements for the establishment of a record for the Department to make a decision in this case. Pursuant to the procedural schedule, Applications/Supplements/Amendments were due January 5, 2015; Answers were due January 12, 2015; and Replies were due January 20, 2015.<sup>5</sup>

On December 22, 2014, Delta submitted a petition for reconsideration of Order 2014-12-9, arguing that the Department’s decision to institute this proceeding was arbitrary and capricious, and unsupported by Department precedent. In the petition, Delta contended that the Seattle-Haneda slot pair was awarded indefinitely, subject to two conditions: (i) that Delta retain the necessary underlying authority to serve the markets, and (ii) that the slot pair will become dormant and will revert automatically to the Department if it is not used for a period of 90 days. Delta argued that it was in full compliance with those conditions, and that Order 2013-2-4, where Delta was allocated the slot pair, contained no other notice or language by the Department reserving the discretion to amend, modify, or revoke the authority. Delta further argued that the Department ignored proposed alternatives to holding the proceeding by not considering a proposal to amend the dormancy condition applicable to the Seattle-Haneda slot pair. Delta also argued, specifically citing two Brazil precedents, that the Department had permitted other similarly situated carriers to retain limited-entry authority that had remained unused for much longer periods than the single-season cutbacks involved here. Delta’s petition was opposed by American and Hawaiian.

By Order 2015-1-14, issued January 15, 2015, the Department granted Delta’s petition for reconsideration, and on reconsideration, denied the relief requested. In its decision, the Department stated that it was following a longstanding precedent by instituting this proceeding under the Department’s general powers to review the public interest bases of current awards.<sup>6</sup> The Department stated that the procedures established in the instituting order would provide Delta, as well as other interested carriers, ample opportunity to argue its position and present any

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<sup>4</sup> See Order 2014-12-9, at 5 & n.18. The Department cited to Order 95-2-30, which stated that because frequencies “represent valuable operating rights obtained in exchange for valuable rights granted to [foreign] carriers,” the Department “must ensure that the operations conducted are those that best serve the needs of the public,” and noted that “[s]hould frequency allocations not be used, [the Department] ha[s] the power to reallocate them to ensure that they are used effectively and in a manner that best promotes competition and otherwise serves the public interest.” The Department also cited to Order 94-12-7, which stated that the Department has the “right to reallocate . . . frequencies should [it] conclude that the flights are not being operated effectively.”

<sup>5</sup> The procedural schedule set forth in Order 2014-12-9 also established due dates for petitions for reconsideration and answers to petitions.

<sup>6</sup> The Department specifically cited Order 97-11-35, instituting the *1997 U.S.-Argentina All-Cargo Frequency Proceeding* to consider, among other things, whether to reallocate frequencies then held by Challenge Air Cargo, Inc. (Challenge). In that case, Challenge argued that it had “used [its] frequencies within the 90-day dormancy period, which is the only established requirement, and that the Department cannot now impose additional standards to establish whether the frequencies are dormant.” Order 97-11-35, at 5. The Department rejected Challenge’s position and maintained the proceeding, saying it need not make a determination regarding the dormancy condition because “we are instituting this proceeding under our general powers to review the public interest bases of the current awards.” *Id.* at 6, n. 12. Challenge petitioned for reconsideration, seeking rescission of the instituting order or modification of the proceeding. On reconsideration, the Department granted Challenge’s petition and denied the requested relief. Order 97-12-19.

evidence it may wish to present. The Department specifically noted, as it did in the instituting order, that parties would also be free to raise on the record of this proceeding, the issue of modifying the standard dormancy condition.<sup>7</sup> Finally, with regard to the matter of Brazil frequencies, the Department said that Delta “has not brought to our attention any Brazil cases where the Department took no action in the face of a challenge to such frequencies by a carrier with firm plans to use them.”<sup>8</sup>

## **TENTATIVE DECISION**

After examining the complete record of applications and responsive pleadings, the Department, by Order 2015-3-17, issued March 27, 2015, tentatively decided to continue allocation of this slot pair to Delta for daily scheduled combination services between Seattle and Tokyo’s Haneda Airport, subject to the strengthened conditions and protective measures described below which are designed to ensure that Delta maintains a year-round daily service in the market.

The Department also tentatively decided that the public interest warranted the selection of a backup carrier, and tentatively selected American as the backup carrier for its proposed Los Angeles-Haneda service should Delta not meet the additional conditions and requirements tentatively attached to this slot pair authority. The Department proposed that American’s backup award should be granted for two years (meaning that if the backup award is not activated in two years it lapses), and attached a 60-day startup condition to the backup award should it be activated.

In reaching its tentative decision, the Department tentatively found that further protective measures are needed to ensure that the public benefits that were central to the Department’s original award of the Seattle-Haneda slot opportunity to Delta and to its tentative decision to continue that award with Delta, are forthcoming, and to promote maximum use of the limited Haneda rights. The Department therefore tentatively proposed to attach an additional condition on the slot pair allocation requiring that Delta, unless granted a waiver, provide service in the Seattle-Haneda market on each and every day of every week. The proposed condition went on to state that any failure, without a Department-granted waiver, to perform flights on two days of any seven-day period would result in automatic expiration of the authority.

The Department also tentatively imposed a reporting requirement on Delta’s allocation of the Seattle-Haneda slot pair. Specifically, the Department proposed to require that Delta file quarterly reports regarding its utilization of the limited Haneda slot pair in the Seattle-Haneda market.

The Department allowed 10 calendar days for the filing of objections to its tentative decision and seven calendar days for answers to objections.

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<sup>7</sup> See Order 2015-1-14, at 4, n. 10; and Order 2014-12-9, at 6, n. 20.

<sup>8</sup> Order 2015-1-14, at 4, n. 9.

## PLEADINGS FOLLOWING THE TENTATIVE DECISION

American, Delta, and Hawaiian each filed in response to the Department's tentative decision, and each filed answers to those pleadings.

**Delta** agrees with the tentative decision to retain the allocation with Delta for Seattle-Haneda service, but emphatically objects to the proposed condition. Delta asserts that authority for daily service in any international market has never been understood to be tantamount to a 365-day-a-year service, and that the Department has never imposed such a strict requirement. Delta further asserts that the "365-day-a-year service mandate" is arbitrary and capricious because, among other factors, it is overbroad and disproportional to the problem of a single-season service cutback; it departs from Department practice and precedent; and it treats Delta's primary award differently from American's backup award.<sup>9</sup>

Delta further argues that the condition fails to account for operational, safety, and commercial realities. For example, Delta states that inclement weather or airplane maintenance occasionally require cancellation or rescheduling of flights on short notice, and sometimes results in cancellations for more than one day of service in a seven-day period. Delta also argues that the condition runs counter to safety incentives, and that the possibility that Delta might lose its Haneda slot authority should never be a factor in determining whether to cancel or reschedule a flight.<sup>10</sup>

Delta also contends that the Department has unreasonably ignored alternatives to its proposed condition, such as conditioning Delta's authority on 15 consecutive days of nonuse. Delta asserts that such an alternative condition would be a significant restriction above and beyond the Department's standard 90-day dormancy condition and would avoid the deleterious consequences of an "inflexible" 365-day-a-year mandate.<sup>11</sup>

Delta states that it remains firmly committed to the Haneda route, and that it stands ready to work with the Department to create "lawful, reasonable" conditions.<sup>12</sup>

**American** states that, while it would have preferred to begin Haneda service, it accepts the Department's tentative decision, provided that the conditions and requirements proposed by the Department to be placed on Delta's slot pair are not diminished in any way.<sup>13</sup> American also states that it supports the Department's tentative decision to award it backup authority for two years, and that American stands ready to implement Los Angeles-Haneda service within 60 days of its backup award being activated.

American argues that the Department's proposed condition merely holds Delta to the promise it made to operate the Seattle-Haneda route on a daily year-round basis. American states that the conditions are consistent with the Department's authority and are tailored to best serve the public

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<sup>9</sup> Objections of Delta, at 2-7.

<sup>10</sup> Objections of Delta, at 7-8.

<sup>11</sup> Objections of Delta, at 4.

<sup>12</sup> Answer of Delta, at 2.

<sup>13</sup> Answer of American, at 1.

interest. American argues that Delta's proposed alternative condition is not a true safeguard, and could result in Delta operating only a single flight every 15 days, or fewer than the 34-flight-per-year pace on which Delta was proceeding before the Department initiated this proceeding.<sup>14</sup>

American further argues that the Department's proposed condition does not impose an unyielding mandate, as Delta argues. Rather, the Department expressly contemplates waiver provisions that permit Delta all necessary latitude to cancel flights for legitimate non-commercial reasons. American also asserts that there is nothing to suggest that legitimate non-commercial cancellations would be rejected.<sup>15</sup>

**Hawaiian** objects to the Department's tentative decision not to select its Kona-Haneda proposal. Hawaiian asserts that in tentatively selecting American for backup authority, the Department expressed a preference for U.S. business travelers, over the increased international tourism and economic activity that would result from Hawaiian's proposal. Hawaiian argues that the Department does not have a statutory basis to favor U.S. business travelers and that the Department has not explained or quantified the benefits to be realized from the Delta and American service proposals.<sup>16</sup> Hawaiian further argues that the Department failed to properly evaluate the evidence that it submitted on the record, which Hawaiian claims is supportive of its proposal and shows that there is inadequate demand for the competing proposals. Hawaiian maintains that the American and Delta proposals would result in service cutbacks and service failures.<sup>17</sup>

Hawaiian also argues that the Department's show-cause order reflects a misunderstanding of the State of Hawaii and its geography. Hawaiian states that the Department appears to conflate Kona with Honolulu, when in fact those cities are separated by 170 miles and are on different islands.<sup>18</sup>

Hawaiian also disagrees with Delta's assertion that the Department lacks the authority to impose protective measures to ensure Delta's use of the Seattle-Haneda authority. Hawaiian argues that Delta has a four-year record of broken promises to the Department, which is beyond the "single season cutback" that Delta claims.<sup>19</sup> Hawaiian argues that the Department's decision to hold Delta accountable to its Haneda service commitment is reasonable.

## **DECISION**

The Department has decided to make final its tentative decision to continue allocation of this slot pair to Delta for daily scheduled combination services between Seattle and Tokyo's Haneda Airport, subject to the strengthened conditions and protective measures proposed in Order 2015-3-17, and described below, which are designed to ensure that Delta maintains year-round daily service in the market. The Department has also decided to make final its selection of American

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<sup>14</sup> Reply of American, at 6-7.

<sup>15</sup> Reply of American, at 4.

<sup>16</sup> Objection of Hawaiian, at 2-3.

<sup>17</sup> Objection of Hawaiian, at 6.

<sup>18</sup> Objection of Hawaiian, at 7.

<sup>19</sup> Answer of Hawaiian, at 2-4.

as the backup carrier for its proposed Los Angeles-Haneda service should Delta not meet the additional conditions and requirements now attached to this slot pair authority.

## **VALIDITY OF THIS PROCEEDING**

As an initial matter, the Department notes that Delta's objections to the tentative decision argue that its retention of the slot pair is "compelled by law," and that "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."<sup>20</sup> The Department understands these arguments to repeat those made in Delta's petition for reconsideration of Order 2014-12-9, which argued that the Department lacked the authority to commence this proceeding.

In initiating this proceeding, and in denying the relief sought by Delta's petition for reconsideration, the Department fully considered Delta's arguments that the Department lacked the authority to revoke or amend the award of the slot pair to Delta. As the Department explained when initiating this proceeding, "[w]here frequency allocations are not being operated effectively, the Department has the authority to reallocate them to ensure that they are used effectively and in a manner that promotes competition and otherwise best serves the public interest."<sup>21</sup> And as the Department noted in denying the relief sought by Delta on reconsideration, the Department has previously rejected the argument that it cannot reexamine the allocation of underused slot pairs if the dormancy condition has not been triggered, and the Brazil orders relied on by Delta are distinguishable.<sup>22</sup> Delta has pointed to no authority suggesting that the Department lacks the ability to reexamine its awards of slot pairs, and to modify or revoke those awards if it determines that circumstances so require.

The Department reiterates that nothing in the order awarding the slot pair to Delta precludes the Department from reexamining its award. The 90-day dormancy condition relied on by Delta merely specifies the amount of non-use that will cause the slots to revert to the Department *automatically*, without notice or hearing. The condition says nothing that calls into question the Department's ability to institute a proceeding – in which the affected carriers are given notice and an opportunity to be heard – to reexamine whether the public interest requires modification or revocation of an award.

The Department's reexamination authority is not constrained by the fact that Delta was awarded the slot pair "indefinitely." An "indefinite" award is simply one "lasting for an unknown or unstated length of time."<sup>23</sup> While it is true that the Department did not award the slot pair for a specific amount of time, that does not mean that the Department is forever barred from reexamining the award to ensure that it continues to serve the public interest.

Delta notes that in other awards, the Department has expressly stated that it may amend, modify, or revoke the allocation at any time and without hearing, at its discretion. Delta argues that

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<sup>20</sup> Objections of Delta, at 1 and 5, n.1; *see also* Reply of Delta, at 2, n.2.

<sup>21</sup> Order 2014-12-9, at 5.

<sup>22</sup> Order 2015-1-14, at 3-4 & n.9.

<sup>23</sup> *See* Oxford Dictionary of English (3d ed. 2010).

because the Department “knows how to” include such language in awards, its failure to do so here indicates an intent to waive its reexamination authority.<sup>24</sup> The Department disagrees. The Department has the authority to reexamine its awards, regardless of whether or not it makes express note of such authority in making the award. In any event, prior awards reserving the Department’s right to revoke an award *without* hearing are irrelevant to the question of whether the Department can reexamine an award *with* notice and an opportunity to be heard.

Delta also argues that even if the Department has the authority to reexamine its awards, it cannot use Delta’s underuse of the slot pair as a basis for reexamination, because the Department imposed a dormancy condition “to address the very question of how often Delta must use the frequencies.”<sup>25</sup> As noted above, however, the dormancy condition merely specifies the amount of non-use that will trigger automatic reversion. The condition is not intended to address any other question. *Nat’l Mining Ass’n v. U.S. Dept. of Interior*, relied on by Delta, addresses whether an agency can rely on its “general authority” to trump a “specific statutory directive.”<sup>26</sup> The case does not suggest that an agency waives its authority to reexamine an award by providing that the award will automatically be revoked upon the occurrence of certain conditions.

Delta contends that under the Department’s precedent, “where a carrier holding unused frequencies has ‘firm plans’ to use them, those frequencies will remain with the holder and they will not be reallocated.”<sup>27</sup> The Department has considered that argument, and has concluded that Delta does not accurately describe the Department’s precedent.<sup>28</sup> In any event, the Department has determined to continue the allocation of the slot pair to Delta, taking into account Delta’s firm plans to operate daily service between Seattle and Haneda.

Finally, the Department notes that Delta, in its petition for reconsideration, proposed an “alternative” approach: amending the dormancy condition, and giving Delta “notice of the new condition and the opportunity to conform to the amended condition.”<sup>29</sup> That is exactly what the Department has concluded is the most appropriate course of action. Delta’s insistence that the Department lacks the ability to modify the condition is inconsistent with its own prior statements.

## **CONTINUATION OF DELTA AT SEATTLE**

As noted in the Department’s tentative decision, the Department originally awarded Delta Seattle-Haneda authority because it found that Delta’s proposed service would address a variety of public interest goals and would best maximize public benefits.<sup>30</sup> The Department specifically noted at that time that the Seattle-Haneda service would establish a new gateway to Haneda by providing the first nonstop Haneda service on a significant mainland U.S.-Tokyo route that then lacked any such service. The Department also found that Delta’s proposed service would further

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<sup>24</sup> Delta Petition for Reconsideration, at 2.

<sup>25</sup> Delta Petition for Reconsideration, at 4.

<sup>26</sup> 105 F.3d 691, 694 (D.C. Cir. 1997).

<sup>27</sup> Delta Petition for Reconsideration, at 5-6.

<sup>28</sup> See, e.g., Order 2008-5-27 (reallocating frequencies that American had firm plans to use).

<sup>29</sup> Delta Petition for Reconsideration, at 7.

<sup>30</sup> See Orders 2013-2-4 and 2012-11-12.



serve the public interest by providing a number of western cities with their first one-stop connecting opportunity to Haneda, and that other cities would gain the option of service over a less circuitous northwest gateway.

Beyond that, the Department determined that an outcome that would bring first-time Haneda service and first U.S.-flag Haneda service to the sixth-largest Origin and Destination (O&D) market, while also promoting the geographic diversity of the U.S.-Haneda gateways, would be consistent with the Department's established approach for the award of the limited Haneda slot opportunities and would best serve the public interest.

In Order 2015-3-17, the Department tentatively determined that no party to this proceeding had persuasively demonstrated that the Seattle-related attributes and public benefits that were central to the Department's selection of a carrier to provide Seattle-Haneda service were unsupported on the record or that the route should be reallocated. On the contrary, the Department stated that each public interest element cited in justification of its previous decision to favor a Seattle-Haneda selection remained valid. Furthermore, the Los Angeles and Kona gateways that are before the Department now were also before the Department in the previous proceeding, and considering the competing proposals of American and Hawaiian, the Department tentatively found that the relative attributes of those competing gateway/carrier proposals were not sufficiently compelling to outweigh the public benefits of daily Seattle-Haneda service.

The Department has reviewed the objections and answers filed in response to its tentative decision, and determined that no party has presented any new argument that would lead the Department to reach a different conclusion.

Only Hawaiian contested the Department's decision to retain Delta at the Seattle gateway, arguing that the Department should have withdrawn Delta's authority and awarded it to Hawaiian for Kona-Haneda service. Contrary to what Hawaiian asserts, the Department fully considered the evidence and arguments made by Hawaiian regarding its Kona-Haneda service proposal and the competing proposals of Delta and American. The Department noted that Kona-Haneda service would provide certain economic and competitive benefits, and that Hawaiian has fully delivered on its promises in the Honolulu-Haneda market. The Department further noted that Hawaiian, as a non-alliance member, could enhance competition in the U.S.-Japan market. The Department also took note of Hawaiian's assertions in this proceeding that the Seattle-Haneda market is too small.

However, the Department tentatively determined that, for a number of reasons, retaining Seattle-Haneda service would better serve the public interest.

The Department pointed out that the State of Hawaii now enjoys three of the eight total U.S.-Haneda route opportunities available to U.S. and Japanese carriers. Adding a fourth Hawaii-Haneda service would not serve the goal of attaining geographically diverse Haneda gateways.<sup>31</sup> Beyond that, the Department noted that Kona-Haneda service would primarily benefit Japanese-originating leisure traffic, which, while important for promoting increased international tourism

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<sup>31</sup> At no time did the Department conflate Kona with Honolulu, as Hawaiian asserts. Indeed, the Department noted in the show-cause order that selection of Kona would establish a new U.S. gateway to Haneda.

and economic activity in Hawaii, would minimize Haneda's advantages to U.S. travelers in general, and U.S. business travelers in particular.<sup>32</sup>

Against that background, the Department tentatively found in this proceeding, as it found in the previous proceeding, that the benefits of a Pacific Northwest gateway to Haneda outweigh those of the other proposals.<sup>33</sup> Consistent with the Department's ongoing goal of using the limited Haneda rights to address a variety of public interest objectives, including the objective of geographically diverse gateways, the Department therefore makes final its tentative finding that maintaining the Seattle gateway continues to make a better use of the limited Haneda opportunity and better maximizes the public benefits, than would allocating a fourth Haneda route to Hawaii.

Therefore, having carefully considered the record in this proceeding, the Department has decided to make final its tentative decision to continue allocation of this slot pair to Delta for daily scheduled combination services between Seattle and Tokyo's Haneda Airport. For the reasons stated, the Department finds that year-round daily Seattle-Haneda service will offer significant public benefits that outweigh the benefits of the Kona-Haneda and Los Angeles-Haneda proposals.

## **TERMS, CONDITIONS, AND LIMITATIONS**

The Department recognized in the show-cause order that the positive attributes of Seattle-Haneda service would remain meaningful only if Seattle-Haneda service is actually being provided.<sup>34</sup> While the Department noted certain statements and evidence from Delta submitted in this proceeding supporting a decision to continue Delta on the route, notably including Delta's clear commitment to provide year-round daily service,<sup>35</sup> the Department tentatively found that further protective measures were needed to ensure that the public benefits central to the Department's tentative decision were forthcoming, and to promote maximum use of the limited Haneda rights. The Department therefore tentatively proposed to attach certain additional conditions and requirements on Delta's Seattle-Haneda slot pair allocation. The Department also tentatively proposed to award backup authority to ensure that a carrier is ready to step into the market, should Delta again fail to follow through on its Seattle-Haneda commitments. The Department has decided to make final these tentative findings and the tentative decision to impose the conditions proposed in Order 2015-3-17.

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<sup>32</sup> Hawaiian argues that the Department's show-cause order favored, without a statutory basis, U.S. business travelers, rather than the present and future needs of U.S. commerce overall. The Department is not, however, favoring business travelers. Instead, the Department is recognizing one of the many advantages derived from access to Tokyo's close-in Haneda airport, namely Haneda's proximity to the business center of downtown Tokyo. Tokyo's Narita airport, on the other hand, has no bilateral limitations on U.S.-carrier access, meaning that Hawaiian would be free to launch a Tokyo-Kona route from Narita and thereby accommodate the leisure Tokyo-Kona traffic that Hawaiian forecasts. Thus, the selection of Seattle-Haneda over Kona-Haneda represents no more than the Department's effort to maximize public benefits by achieving a result that would serve a broader cross-section of the travelling public.

<sup>33</sup> Order 2015-3-17, at 6, n. 21.

<sup>34</sup> Order 2015-3-17, at 7.

<sup>35</sup> *Id.*, at 8.

Therefore, the Department is attaching the following additional condition on the slot pair allocation:

Any failure, without a Department-granted waiver, to perform a Seattle-Haneda flight, and any failure, without a Department-granted waiver, to perform a Haneda-Seattle flight, on each and every day of every week (7 days a week, 365 days a year), will constitute a violation of Delta's Seattle-Haneda authority subject to enforcement. Any failure, without a Department-granted waiver, to perform Seattle-Haneda flights, and any failure, without a Department-granted waiver, to perform Haneda-Seattle flights, on two days of any seven-day period (365 days a year) will constitute a default of Delta's Seattle-Haneda authority and that authority will automatically expire.<sup>36</sup>

The Department has considered all of Delta's arguments against the condition and found none of them persuasive. Nor does the Department find that Delta's proposed alternative condition, or any modification to the proposed condition, would adequately serve the public interest.

Delta contends that the proposed conditions are overbroad and disproportional to the problem of a "single-season cutback."<sup>37</sup> The Department disagrees. While Delta's virtual abandonment of the route for a full traffic season and the resulting loss of the positive attributes of Seattle-Haneda service led the Department to institute this proceeding to determine the best public interest use of the limited Haneda opportunity, this was by no means the only reason the Department has chosen to impose additional conditions in this case. That decision is also supported by Delta's persistent failure to deliver on its promises for serving this Haneda slot.

It is clear on the record that Delta has a history of underperforming in relation to its Haneda service proposals. For instance, Delta proposed year-round daily Detroit-Haneda service,<sup>38</sup> and the Department selected its Detroit-Haneda proposal over the proposals of other carriers proposing daily Haneda service from other U.S. gateways. However, over the nearly two-year period that Delta held authority for the Detroit-Haneda route, it operated less than half of the number of flights it proposed.<sup>39</sup> Delta then sought to move its Detroit-Haneda slot pair to the Seattle-Haneda market, and it again proposed year-round daily service.<sup>40</sup> Again it was awarded authority over other carriers proposing year-round daily service from other U.S. gateways. Those competing carriers openly questioned Delta's ability to provide the service it was proposing,<sup>41</sup> and Delta rebutted those allegations in its efforts to secure the route.<sup>42</sup> The Department cited Delta's rebuttal arguments in its decision to award Delta the Seattle-Haneda slot.<sup>43</sup> Delta began Seattle-Haneda service in June 2013. Over the next 14 months, through

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<sup>36</sup> The Department is also attaching a quarterly reporting requirement on the slot pair allocation. Additional details concerning the strengthened conditions and protective measures the Department is imposing are set forth in the appendix to this order.

<sup>37</sup> Objections of Delta, at 2-3.

<sup>38</sup> Application of Delta, dated February 16, 2010.

<sup>39</sup> American Application, at Exhibit AA-301.

<sup>40</sup> Application Supplement of Delta, dated August 27, 2012.

<sup>41</sup> See e.g., Answer of American, dated September 6, 2012, at 2-4; Answer of Hawaiian, dated September 6, 2012, at 29-31; and Answer of United, dated September 6, 2012, at 5-8.

<sup>42</sup> Delta Reply, dated September 13, 2012.

<sup>43</sup> Order 2012-11-12, at 5-7; and Order 2013-2-4, at 4-5.

September 2014, in only 4 months did it provide service every day.<sup>44</sup> Then it provided no service for the entire month of October 2014, only one week of service in November 2014, no service at all in December 2014, no service at all in January 2015, only one week of service in February 2015, and three days of service in March 2015.<sup>45</sup>

In this proceeding, Delta presented statements and evidence that its Seattle-Haneda proposal continues to make the best public interest use of the slot pair authority, and that Delta has taken steps to strengthen its commitment to Seattle. Moreover, Delta expressly committed to resume a full pattern of daily Seattle-Haneda service beginning on March 29, 2015, and to continue that daily service not only through the Summer season but also through the following Winter season and the Summer 2016 season.<sup>46</sup> Importantly, nowhere in the record of this proceeding did Delta suggest that the market could not support its proposed year-round daily service, or that Delta would provide anything less than year-round daily service to the Seattle community. But, as stated above, Delta has made previous commitments to provide daily service, and has maintained and defended those commitments in the face of openly expressed skepticism from opponents that Delta could deliver on those commitments. Furthermore, the Department, in reliance on Delta's proposals, has selected Delta as the carrier whose proposal would best serve the public interest, and has done so over the objections of other applicants proposing daily service in other markets.

Against that background, the Department finds that the condition, as proposed, is reasonable and necessary to ensure that the public benefits of Seattle-Haneda service, benefits that were central to the Department's original decision to select Delta at Seattle, and to its tentative decision to continue Delta at Seattle, can be realized. The Department finds no convincing basis to conclude, in light of the above-described history of Delta's experience with this Haneda slot and the Department's firm determination that use of this slot should best serve the public interest, that a condition calling upon Delta to do precisely what Delta itself committed on the record to do – provide year-round daily Seattle-Haneda service – would somehow qualify as “draconian,”<sup>47</sup> “extreme,”<sup>48</sup> “patently overbroad,”<sup>49</sup> “arbitrary,”<sup>50</sup> “capricious,”<sup>51</sup> and “plainly unlawful.”<sup>52</sup>

Delta proposes that the Department should take an alternative approach by, for example, conditioning the slot pair on “15 consecutive days of nonuse.”<sup>53</sup> However, Delta's 15-day proposal could actually produce a situation in which Delta might provide only six days of service in a 90-day period, or roughly 25 flights annually, yet still retain the route. This would in no way satisfy the Department's public interest objectives, and indeed could put the Department in a similar situation as when it began this proceeding.

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<sup>44</sup> American Application, at Exhibit AA-313.

<sup>45</sup> American Application, at Exhibit AA-311.

<sup>46</sup> Delta Response to Evidence Request, at 2; and Delta Answer, at 10.

<sup>47</sup> Objections of Delta, at 1 and 6.

<sup>48</sup> *Id.*, at 1.

<sup>49</sup> *Id.*, at 2.

<sup>50</sup> *Id.*, at 1, 3-5, and 7.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*, at 10.

<sup>53</sup> Objections of Delta, at 4.

Delta also asserts that the Department's condition requiring daily service conflicts with past Department practice and precedent. In support, Delta claims that the Department took no action to reexamine certain U.S.-Brazil frequencies held by American, and certain other U.S.-Brazil frequencies held by United, where those carriers left the frequencies unused and dormant.<sup>54</sup> Both of Delta's examples, however, involved circumstances far different than those presented here.

In the case of American, Delta again asserts, as it did in its October 17, 2014 Answer, that "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."<sup>55</sup> Delta claims that this occurred even though "Delta and other carriers were anxious to obtain more U.S.-Brazil frequencies."<sup>56</sup>

While it is indeed true that American at times left Brazil frequencies unused, no other U.S. carrier stepped forward with firm plans on the record to use the Brazil rights in question, and Delta has cited no specific instance to the contrary.

Regarding United, in the case cited by Delta,<sup>57</sup> United had held long-dormant frequencies in the absence of any demonstrated firm plans by other U.S. carriers to use them. However, once such plans were presented, and United did not counter them with firm plans of its own, the Department acted.<sup>58</sup> It said, in the very order cited by Delta: "American and Delta have provided firm plans for U.S.-Brazil combination services that would make use of United's unused frequencies. United has not provided firm plans to use the subject frequencies. Against this background, we have decided that the public interest is best served by awarding one or both of these unused frequencies in the proceeding instituted by this order."<sup>59</sup>

The Department also finds no merit in Delta's arguments that imposing these strengthened conditions conflicts with the "security of route" principle and precedent. The only thing Delta need do to enjoy "security of route" is to provide precisely the daily year-round Seattle-Haneda service that Delta itself, unequivocally and on the record, committed to provide.<sup>60</sup>

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<sup>54</sup> Objections of Delta, at 5-6.

<sup>55</sup> Objections of Delta, at 5. *See also* Delta Petition for Reconsideration, dated December 22, 2014, at 5.

<sup>56</sup> Delta Answer, dated October 17, 2014, at 7.

<sup>57</sup> Order 2008-10-20.

<sup>58</sup> United had been allocated 23 weekly frequencies for combination service on any authorized U.S.-Brazil route. Two of those frequencies had been unused by United for many years. In August 2008, American applied for allocation of one of the two unused frequencies, and Delta applied for both unused frequencies. United did not file an answer opposing the American and Delta requests, nor did it challenge the allegations regarding its use of the subject frequencies. The Department accordingly instituted a proceeding for the purpose of awarding the unused frequencies.

<sup>59</sup> *See* Order 2008-10-20, at 3.

<sup>60</sup> In its objection, Delta cited a judicial precedent in support of its "security of route" argument. The case cited, *CAB v. Delta Air Lines*, 367 U.S. 316 (1961), specifically held that certificate authority could be amended after notice and hearing. Even though this proceeding involves a mere slot allocation, rather than certificate authority, the Department has nevertheless given Delta both notice and hearing.

With respect to Delta's claim that the Department "irrationally treats Delta and American differently,"<sup>61</sup> by applying strengthened conditions on Delta's primary award and applying the standard 90-day dormancy condition on American's backup award, the Department again disagrees. The strengthened conditions imposed on Delta are specifically designed to address the specific concerns that have been raised regarding Delta's service with the Seattle-Haneda slot pair in light of its past failures to deliver on its service proposals for Haneda slot pair authority. No such concerns have been raised with respect to American's use, or proposed use, of Haneda slot pair authority. Quite the contrary. American did have an allocation to Haneda from New York (JFK), but returned the authority to the Department once it determined that it was not a commercially-viable market, unlike the situation we are faced with here. Therefore the Department does not find the need to apply to American's back-up award the additional protective measures that it is applying to Delta's Seattle-Haneda authority.<sup>62</sup>

The Department has also taken note of Delta's criticisms claiming that the conditions fail to account for the "operational, safety and commercial realities" that might lead an airline to cancel a flight.<sup>63</sup> The Department finds these criticisms to be unfounded.

Safety is the Department's top priority, and nothing in this order will penalize any decision Delta makes regarding safety, or otherwise incentivize any unsafe act. Should Delta have a legitimate reason to cancel a flight or flights in the Seattle-Haneda market, the Department has expressly contemplated waivers from the above condition.<sup>64</sup> Indeed, the Department made explicit that every aspect of its condition concerning Delta's performance was subject to exceptions for Department-granted waivers. Moreover, the Department is well aware that certain unforeseeable operational factors might not allow for Delta to follow full procedures in the face of an emergency need to cancel a flight (*e.g.*, safety, mechanical issues, weather, or other emergency circumstances outside of Delta's control). The Department has long-established rules in place specifically designed to address emergency situations, specifically *14 CFR §302.311, Emergency exemptions*. Delta has provided no persuasive reason why the Department's emergency rules would be ineffective here, or would lead to results contrary to the public interest or the Department's safety mandate.

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<sup>61</sup> Objections of Delta, at 6-7.

<sup>62</sup> Should comparable circumstances arise regarding the service experience of another carrier, the Department would of course be prepared to address them with such protective conditions as might be appropriate. And while we do not agree that the imposition of a condition is necessary to support our ability to revisit the award of this authority to Delta or American, to avoid any misunderstanding we will expressly reserve the right to amend, modify or revoke these allocations at any time and without hearing, at our discretion.

<sup>63</sup> *See e.g.*, Objections of Delta, at 7.

<sup>64</sup> As noted in the show-cause order, the responsibility for seeking a timely waiver from the condition above will rest with Delta. This means that, except when emergency circumstances outside of Delta's control make it impossible, Delta must seek a waiver with sufficient lead time to allow for service of the request on interested parties, an opportunity for interested parties to respond, and an opportunity for a reasoned decision on the part of the Department. Furthermore, in the event of any repeated pattern of non-performance without a waiver, or of waiver requests that fail to justify non-performance, the Department expressly reserves the right, on its own initiative and without hearing, to activate the backup award, or, in the event that the backup carrier fails to inaugurate service, or its authority has lapsed, to reallocate the slot opportunity.

Delta also cites the possibility of needing to cancel flights in light of commercial realities.<sup>65</sup> The Department does not believe that any “commercial realities” should allow Delta to escape its commitment to provide daily service. As noted above, the strengthened conditions the Department is imposing on Delta are designed to ensure that the public benefits of the Department’s Seattle-Haneda award are fully realized. Delta has committed to provide year-round daily Seattle-Haneda service, and the Department has decided to permit Delta to retain this authority on the basis that this time Delta will provide the year-round daily service it proposed. If Delta determines – as it apparently has in the past – that it is not economically feasible to provide the promised daily service, then the public interest will be better served by reallocation of the slot pair to a carrier that will provide such daily service.<sup>66</sup>

In conclusion, the Department has determined for the reasons discussed that the strengthened conditions and protective measures are in the public interest, and it is the Department’s expectation that Delta will honor the conditions now attached to the Seattle-Haneda slot pair authority. Given that these conditions become effective immediately, it is the Department’s view that Delta’s continued operation in the Seattle-Haneda market following the imposition of these strengthened conditions will constitute Delta’s effective agreement to abide by the conditions, pending any judicial review that Delta may wish to pursue.

## **BACKUP AWARD**

Lastly, the Department makes final its tentative decision to select American at Los Angeles as a backup to Delta’s primary award, and to award that backup authority to American for a period of two years.<sup>67</sup> American has stated that it supports the Department’s backup selection, and stands ready to meet the Department’s accelerated 60-day startup condition.

In Order 2015-3-17, the Department tentatively found that American’s Los Angeles-Haneda proposal offers a number of benefits that warrant its selection over Hawaiian’s Kona-Haneda proposal, and nothing in Hawaiian’s objections leads the Department to reach a different conclusion. The Department fully recognizes that Hawaiian’s proposed Kona-Haneda service would promote increased international tourism and economic activity in Hawaii that would in turn promote U.S. export initiatives. These important benefits, however, would be derived through allocating the limited Haneda slot pair to a route that would primarily benefit Japanese-originating leisure travelers, and thereby minimize the advantages of U.S.-traveler access to the close-in Haneda Airport.

American, on the other hand, proposes to provide service in the largest U.S.-Tokyo O&D market in this proceeding, and would enhance competition in the Los Angeles-Haneda market. American also states that it would be prepared to implement daily Los-Angeles Haneda service promptly, within 60 days of its backup award being activated, a factor that takes on additional weight in the context of awarding backup authority.

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<sup>65</sup> Objections of Delta, at 7.

<sup>66</sup> In a case where Delta in fact determined to cease serving the route (and where Delta had no Department waiver to do so), the backup carrier’s authority, if still in effect, would activate automatically.

<sup>67</sup> If the backup award is not activated within two years of the issue date of this Order, the backup authority would lapse. In such circumstances, a Delta default and expiration of its authority will result in the reversion of the slot pair to the Department for reallocation.

Therefore, the Department makes final its selection of American as a backup to ensure that, should Delta not meet the terms of its Seattle-Haneda authority as revised in this proceeding or determines that it is not economically feasible to provide the promised daily service, a carrier will already be authorized to enter the market quickly without the need for further regulatory proceedings.

The Department has decided to make final its tentative decisions to impose a startup condition and dormancy condition on the backup award. The Department will, therefore, require American to institute its proposed service within 60 days of the activation of its backup award. Should the backup award be activated, the allocation of the slot pair to American would remain in effect indefinitely, subject to the Department's standard 90-day dormancy condition.<sup>68</sup>

**ACCORDINGLY,**

1. The Department allocates to Delta Air Lines, Inc. one slot pair for its proposed Seattle-Haneda service, subject to the express conditions as described in the text and appendix of this order;

2. The slot pair allocation to Delta Air Lines, Inc. will remain in effect indefinitely, provided that the holder continues to hold the necessary underlying authority to serve the markets authorized; and is subject to our standard condition that the Department may amend, modify or revoke the allocation at any time and without hearing, at our discretion; and is subject to the following condition:

Any failure, without a Department-granted waiver, to perform a Seattle-Haneda flight, and any failure, without a Department-granted waiver, to perform a Haneda-Seattle flight, on each and every day of every week (7 days a week, 365 days a year), will constitute a violation of Delta's Seattle-Haneda authority subject to enforcement. Any failure, without a Department-granted waiver, to perform Seattle-Haneda flights, and any failure, without a Department-granted waiver, to perform Haneda-Seattle flights, on two days of any seven-day period (365 days a year) will constitute a default of Delta's Seattle-Haneda authority and that authority will automatically expire;<sup>69</sup>

3. The Department requires Delta Air Lines, Inc. to file quarterly written reports addressed to the Director, Office of International Aviation, as described in the text and appendix of this order, regarding Delta's performance of daily Seattle-Haneda service;

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<sup>68</sup> As noted above, the strengthened conditions imposed on Delta are designed to address the specific concerns that have been raised regarding Delta's service experience with the Seattle-Haneda slot pair. No such concerns have been raised with respect to American's use, or proposed use, of Haneda slot pair authority. The Department, therefore, finds no basis to deviate from its standard policy of imposing a 90-day dormancy condition on American's Los Angeles-Haneda authority, should it become activated.

<sup>69</sup> Were Delta's Seattle-Haneda authority to expire, the Department would expect Delta to reaccommodate, either on its own or another carrier's services, any passenger who might hold tickets for Delta's Seattle-Haneda nonstop service.



4. The Department selects American Airlines, Inc. as a backup to Delta's primary award and provisionally allocates it one slot pair for its proposed Los Angeles-Haneda service on a backup basis, subject to the conditions described in the text of this order;
5. The backup authority in ordering paragraph 4 above, will remain in effect for a period of two years, as discussed in the text of this order;
6. Should the backup authority in ordering paragraph 4 become activated, the authority will remain in effect indefinitely, provided that the holder continues to hold the necessary underlying authority to serve the markets authorized; and is subject to our standard condition that the Department may amend, modify or revoke the allocation at any time and without hearing, at our discretion; and provided further that the slot pair will become dormant and will revert automatically to the Department if it is not used for a period of 90 days (once inaugurated);
7. To the extent not granted, the Department denies the remaining applications and requests in this proceeding;
8. The Department will not entertain petitions for reconsideration of this order; and
9. The Department will serve this order on the parties to the captioned docket of the order, the Japanese Ambassador to the United States in Washington, DC, the Federal Aviation Administration, and the U.S. Department of State (Office of Aviation Negotiations).

By:

**SUSAN L. KURLAND**  
**Assistant Secretary for Aviation**  
**and International Affairs**

(SEAL)

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**TERMS AND CONDITIONS ON DELTA'S SEATTLE-HANEDA SLOT ALLOCATION**

Any failure by Delta, without a Department-granted waiver, to perform a Seattle-Haneda flight, and any failure by Delta, without a Department-granted waiver, to perform a Haneda-Seattle flight, on each and every day of every week (7 days a week, 365 days a year), will constitute a violation of Delta's Seattle-Haneda authority subject to enforcement. Any failure by Delta, without a Department-granted waiver, to perform Seattle-Haneda flights, and any failure by Delta, without a Department-granted waiver, to perform Haneda-Seattle flights, on two days of any seven-day period (365 days a year) will constitute a default of Delta's Seattle-Haneda authority and that authority will automatically expire.<sup>70 71</sup>

An expiration of Delta's authority will automatically activate the backup award if it is still in effect. If the backup carrier fails to inaugurate service, or its authority has lapsed, the slot pair will automatically revert to the Department for reallocation.

Responsibility for seeking a timely waiver from the above condition will rest with Delta. This means that, except when emergency circumstances outside of Delta's control make it impossible, Delta must seek a waiver with sufficient lead time to allow for service of the request on interested parties, an opportunity for interested parties to respond, and an opportunity for a reasoned decision on the part of the Department. In emergency circumstances, Delta may rely on the procedures set forth in 14 CFR § 302.311.

Furthermore, in the event of any repeated pattern of non-performance without a waiver, or of waiver requests that fail to justify non-performance, the Department expressly reserves the right, on its own initiative and without hearing, to activate the backup award, or, in the event that the backup carrier fails to inaugurate service, or its authority has lapsed, to reallocate the slot opportunity.

The Department requires Delta to file quarterly reports regarding Delta's utilization of the limited Haneda slot pair in the Seattle-Haneda market.

These reports should be addressed to the Director, Office of International Aviation, filed in Docket DOT-OST-2010-0018 and served on the parties to the docket no later than the 15th day of each fourth month (*i.e.*, January 15, April 15, July 15, and October 15). The Department expects that such reports will contain the number of failures to perform daily Seattle-Haneda service over the past quarter, the date on which each such failure occurred, an explanation as to each such failure, any planned failures to provide daily Seattle-Haneda service for the current or upcoming quarter, and the reasons for such a planned failure. Delta should also identify any other issues that might affect the sustainability of its Seattle-Haneda service. These reports, along with any potential responsive materials, will provide a basis for the Department to make timely determinations as to whether maintaining the allocation with Delta for Seattle-Haneda service remains in the public interest. The Department expressly reserves the right to amend, modify or revoke the allocation of this slot opportunity at any time and without hearing, at our discretion.

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<sup>70</sup> To the extent necessary, the Department delegates to the Director, Office of International Aviation, the power to grant or deny any requests for waivers from this condition.

<sup>71</sup> Were Delta's Seattle-Haneda authority to expire, the Department would expect Delta to reaccommodate, either on its own or another carrier's services, any passenger who might hold tickets for Delta's Seattle-Haneda nonstop service.