BEFORE THE
DEPARTMENT OF TRANSPORTATION
WASHINGTON, DC

In the Matter of	)	
	)	**Dockets OST-97-2881**
COMPUTER RESERVATIONS	)	**OST-97-3014**
SYSTEM (CRS) REGULATIONS	)	**OST-98-4775**
	)	**OST-99-5888**
Notice of Proposed Rulemaking	)	

REPLY COMMENTS OF THE COMPETITIVE ENTERPRISE INSTITUTE

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INTRODUCTION

The Competitive Enterprise Institute hereby submits these comments in response to the Departments November 15, 2002 Notice of Proposed Rulemaking (NPRM), 67 Fed. Reg. 69366, and in light of the comments and testimony the Department has received thus far.

While CEI endorses DOT's deregulatory mindset, the NPRM is a mishmash of rules that increases the Department's regulatory role in some areas, eliminates it in others, and expands it to CRSs not owned or controlled by airlines – the latter being a controversial and unwarranted extension of DOT's regulatory function.

DOT's proposed rules express outmoded concepts of monopoly, ignoring competition between vendors and between travel agents – a declaration that remains as true today as it was when CEI first declared such in its comments to the 1992 rulemaking.[1] DOT failed to appreciate the market then; it falls short of understanding it now. Some things never change, or are allowed to change – as reflected by the unremitting sunset extensions to this current 1997 rulemaking process.

With regard to specific issues, CEI believes that the NPRM attempts to unconstitutionally regulate information sharing and impermissibly extend its jurisdiction to CRSs not owned by air carriers beyond its statutory authority. In addition, CEI opposes a transitional rule that would needlessly continue these regulations.

Simply put, it's time to recognize that current market dynamics have outstripped the original and continued purpose for CRS regulation. The NPRM should be withdrawn and the current CRS regulations should be allowed to expire on January 31, 2004.

BACKGROUND OF CEI

CEI is a non-profit public policy organization nationally recognized as a leading voice on a broad range of regulatory issues, antitrust policy, property rights and technology policy. CEI is particularly interested in analyzing alternatives to government regulation in the marketplace and promoting private solutions to consumer information issues. CEI has long been active in the area of government regulation of CRSs. It was first involved in regulation of airline ticket marketing in 1985, submitted comments in DOT's 1992 rulemaking, and has continued its interest to the present day.

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[1] *See* CEI's Comments to the U.S. Department of Transportation on Computer Reservation System Regulations; Notice of Proposed Rulemaking, Docket No. 46494, June 24, 1991.

THE NPRM RESTRICTS FREE SPEECH RIGHTS OF CRSs AND AIRLINES

DOT's proposal affects the free speech rights of both the provider and receiver of information in violation of the First Amendment to the United States Constitution. The U.S. Constitution places strict limits on government attempts to regulate speech. With the onset of the digital age, courts have recognized that speech comes in many forms that can be distributed through multiple mediums.[2]

Despite the increased protection afforded by courts to electronic communications since the explosion of internet usage, the DOT does not even attempt to address the free speech implications of regulating the manner in which CRSs digitally display information. The object of DOT's regulation is, in its purest form, electronic speech. Commercial speech clearly falls under First Amendment protection – the framework for reviewing regulations concerning commercial speech is expressed in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980).[3] Commercial speech may not be as fully protected as other forms of speech, but it is protected nonetheless. As was true when CEI filed its comments in 1991, the NPRM does not contain any recognition by the DOT that it is regulating speech and consequently has made no effort to show that its proposal satisfies constitutional free speech concerns.[4]

DOT must navigate the display bias and service fee issues very carefully. For instance, when a person asks an airline or a travel agent about flight availability, the conveying of this air travel information is constitutionally protected speech. This information is still constitutionally protected even if the speech is from one business to another business, say from CRSs to travel agents. One could read the entirety of DOT's NPRM without realizing that the target of these regulations – electronic speech – is a constitutionally protected activity. The fact that CRSs involve computers rather than more traditional forms of communication does not diminish the first amendment issues involved. In its 1988 court challenge to one portion of DOT's CRS regulations, CEI argued that the agency's approach violated the First Amendment's protection of commercial speech.[5] Because that case was dismissed for lack of standing, the merits of this contention were never addressed by the court. However, CEI believes that the salient issues of 1988 – limitations on content and failure to examine less restrictive means – remain pertinent today.

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[2] Computer code has been determined to be expressive speech. In the case of *Junger v. Daley*, 209 F.3d 481 (6th Cir. 2000), the Court of Appeals held that computer source code is an expressive means for the communication of information and ideas about computer programming and that it is protected by the First Amendment. Likewise, even object code is speech (Universal City Studios, Inc. v. Corley, 273 F.3d 429 (2d Cir. 2001). Furthermore, in *Reno v. ACLU* 521 U.S. 844 (1997), the U.S. Supreme Court recognized that expression sent over the Internet is protected speech.

[3] The holding of this case mandates a four part test when analyzing a regulation that restricts commercial free speech. First, the commercial speech must concern lawful activity and not be misleading. Second, the asserted governmental interest must be substantial. Third, the regulation must directly advance the governmental interest asserted. Lastly, the regulation must not be more extensive than is necessary to serve the governmental interest asserted.

[4] *See* June 24, 1991 CEI comments at 2.

[5] *Competitive Enterprise Institute v. Department of Transportation*, 856 F.2d 1563 (D.C. Cir 1988).

Regulation of Display Content is a Direct Restriction on Free Speech Rights

DOT refers to the communications between CRSs and travel agents by way of the term "display bias" and assumes without any factual studies or empirical data that "bias" is always detrimental to the travel agent, and therefore is harmful for the consumer. However, the issue of display "bias" or, if you will, display "preference," is too often misunderstood by regulators and industry alike.[6]

DOT currently regulates, and is attempting to further regulate, the supermarkets of the travel industry.[7] CRSs have every right to engage in shelf-placement by electronic means. This is the model of display preference – a concept that the NPRM does not sufficiently grasp.

DOT proposes to strengthen its regulations of CRS displays, piggybacking on rules first introduced in 1984.[8] The rationale for the original display rules, evoking the notion of "bias," concerned the ability of airline-owned CRS to display flights of the airline-owner ahead of its competitors. This rationale ignored the sophistication of travel agents to get around such preferential listings if so desired. It also fails to recognize that CRS display screens provide electronic shelf space for available passenger tickets, just as supermarkets commonly stock "national" brands that compete head-on with their "house" brands. The national manufacturer will win such a competition if its product offers the store a higher return per unit of shelf space than the house brand.

In the airline industry, the most obvious way for a carrier to bid for better screen position is to offer a higher fee to the system operator. Rules against display preference insert the government into this process – the increase in listing prominence – that rival airlines, through negotiation, are quite capable of bidding for on their own. Now that CRSs are no longer entirely airline-owned and face competition from the internet, the fears of the negative aspects of display bias are greatly diminished.

The Regulation of Service Fees Violates First Amendment Rights

The NPRM additionally proposes to regulate service fees.[9] The regulations state that service fees charged by airlines, CRSs, or travel agencies must be listed separately from the price of air transportation.[10] When a specific itinerary is listed the full fare must also be displayed. In addition, DOT intends to declare that it is unfair and deceptive – and hence illegal – to display fees (1) that are not prominently near the advertised fare; (2) in

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[6] This commentator will refer to "display preference" instead of "display bias."
[7] *See* Fred L. Smith Jr., "Airline Reservation Systems: Curse of the Mummy's Tomb," *Regulation*, Jan/Feb 1985, p. 9 (analogizing the physical shelf placement by supermarket companies with the virtual placement of flight listings by CRS companies).
[8] 67 FR 69396.
[9] For an extended constitutional analysis of the service fee rule, *see* Supplemental Comments of Expedia Inc. Analyzing the Statutory and Constitutional Issues Raised by the Proposed Agency Service Fee Rule and Motion for Leave to File.
[10] 67 FR 69417

excess of $20.00 or ten percent of the fare; and (3) that are considered to be *ad valorem* in nature. The presentation of fare information, whether it is by print advertisement or over the internet, does not warrant regulatory action. The proposed rules would arbitrarily require the itemized display of fees below a certain dollar amount and a lump sum display over a certain dollar amount. The market should be allowed to sort out the display of ever increasing surcharges and taxes – consumers are in fact aided when they are able to determine how much of their money goes to the government versus the airline, no matter how much percent the service fee is of the total ticket amount. Consumers and travel agents will come to expect a certain convention in the display of fees and will avoid those companies that present their fee information in a confusing or misleading way.

DOT further under appreciates the ability of travel agents to bargain for and adapt to the way air travel information is displayed. The convenience of travel agents, after all, has shaped many aspects of the existing systems. Where CRSs are effectively competing with each other, they may be passing along any profits from preference by charging lower fees to agents or carriers. It is also hard to separate the effects of "bias" from the natural interest of travel agents in gaining quick access to the most popular flights.

The Prohibition against Distributing Software that Affects Displays Unconstitutionally Restricts Content

DOT intends to continue making decisions on behalf of travel agents. Its newest proposal prohibits any airline from providing software to agencies that would bias the display in favor of that airline.[11] As an example of what conduct is made illegal, consider that a travel agent in Atlanta who knows that his customers prefer Delta would be prohibited from installing software from Delta that allows him to easily obtain results on Delta flights. Likewise, an upstart airline like Airtran would not be able to provide a software solution to travel agents that express a preference to book with that discount airline. This is patently absurd in the face of current technology and the sophistication level of consumers.

Displaying results from searches in a preferential manner is the lifeblood of such internet search engines as Yahoo! and Google. In the internet context, these are known as "sponsor links." Consumers are used to this practice – they can and do easily scroll down to their other search results. Travel agents are vastly more sophisticated than the average internet consumer when it comes to navigating airline information search results. Prohibitive rules that micromanage display bias, screen padding and software installation demean the ability of travel agents and unnecessarily restrict CRSs and airlines.

[11] 67 FR 69397, 69421.

DOT's JURISDICTION DOES NOT EXTEND TO NON-AIRLINE OWNED CRSs

CEI also believes that DOT has set a dangerous course regarding the regulation of CRSs that do not have any airline ownership. CEI supports the view that DOT does not have authority to regulate independent CRSs. The essential function of a CRS is to electronically display information. When divested of airline control, a CRS is neither an "air carrier" nor a "ticket agent" for purposes of DOT's jurisdiction. Airlines offer tickets for sale and travel agents sell tickets – CRSs are merely the E-Bay of the airline world. It would be an unthinkable tenet to impose liability on E-Bay or Yahoo as a seller of the goods it lists on its internet auction sites – as would holding the Washington Post liable as an agent of a person listing the time and availability of an estate sale. A regulation that does not take into affect these real world analogies sets a dangerous precedent for those that are in the business of providing access to information.

TRANSITIONAL RULES WILL BE COSTLY AND ARE NOT JUSTIFIABLE

Any transitional rules will just perpetuate themselves into the future. The costs imposed by continuing this regulation exceed any benefits to the consumer. While there are cases where CEI can envision transitional rules being beneficial – privatization or utility deregulation – there is no such need for further manipulation of the marketplace here. As CEI referred to in its testimony at the May 22, 2003 public hearing, Oliver Cromwell, when addressing the Rump Parliament in 1653, stated "you have been sat too long here for any good you have been doing. Depart, I say, and let us have done with you. In the name of God, go!"[12] Similarly, it is time for DOT to relinquish itself from the regulatory role it has perpetuated for almost twenty years.

[12] CEI testimony at 270.

CONCLUSION

For the foregoing reasons, the NPRM should not be enacted into law. Prohibitive rules that micromanage display bias, screen padding and software installation violate free speech rights. The proposed regulations do not adequately consider the ability of travel agents and unnecessarily restrict CRSs and airlines. CEI supports the efforts of many of the commentators in advocating the total deregulation of CRSs. Airline deregulation in 1978 intensified the use of CRSs. CRS deregulation in 2004 will similarly allow for the rapid introduction of innovative business models and thereby strengthen travel agent and consumer access to air travel information. The NPRM should be withdrawn and the current CRS regulations should be allowed to expire, once and for all, on January 31, 2004.

Respectfully submitted,

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