Before the

FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C. 20554

In the Matter of	)	
	)	
Expanding Access to	)	
Mobile Wireless Services	)	WT Docket No. 13-301
Onboard Aircraft	)	

COMMENTS OF

THE COMPETITIVE ENTERPRISE INSTITUTE

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Executive Summary

On behalf of the Competitive Enterprise Institute ("CEI"), we respectfully submit these comments in response to the Federal Communications Commission's notice of proposed rulemaking in the matter of Expanding Access to Mobile Wireless Services Onboard Aircraft ("NPRM").[1] CEI is a nonprofit, nonpartisan public interest organization that focuses on regulatory policy from a market-oriented perspective.[2]

We applaud the Commission's efforts to update its 1991 rule prohibiting many in-flight cellular transmissions.[3] We agree with the Commission that technological innovation has rendered this rule obsolete, and support revising it to reflect the realities of the modern wireless marketplace.

Our comments address the proposed licensing framework and how it might affect existing licensees that operate terrestrial wireless networks. We also address the public safety and national security implications of the proposed rule.

I. Airlines Should Be Allowed to Use Licensed Spectrum without Provider Authorization only for Noise Floor Lifting and Device Authentication

The proposed rule would allow airlines under certain conditions to use spectrum otherwise licensed to terrestrial mobile service providers for the limited purpose of delivering in-flight connectivity.[4] However, not every airline that wishes to offer in-flight mobile service will necessarily secure agreements with every terrestrial mobile licensee operating in the U.S. Some wireless providers may forego entirely the provision of in-flight mobile service, while others may offer such service only subject to terms that are not agreeable to all participating airlines. Nevertheless, the proposed rule would permit an airline to transmit on "all domestic commercial mobile spectrum bands" within an aircraft, regardless of whether all licensees have so authorized.[5] Commissioner Pai has expressed concern that the proposed rule would thus

[1] Expanding Access to Mobile Wireless Services Onboard Aircraft, *Notice of Proposed Rulemaking*, FCC 13-157, 79 Fed. Reg. 2615 (Jan. 15, 2014) [hereinafter NPRM].

[2] *See* About CEI, http://cei.org/about-cei (last visited Feb. 12, 2014).

[3] NPRM, *supra* note 1, ¶ 3 (citing 47 C.F.R. § 22.925); *see also* Amendment of Sections of Part 22 of the Commission's Rules in the Matter of Airborne Use of Cellular Telephones and the Use of Cell Enhancers in the Domestic Public Cellular Radio Service, *Report and Order*, FCC 91-399, 7 FCC Rcd. 23 (1991).

[4] *See* NPRM, *supra* note 1, ¶ 54 ("To facilitate the widespread use of airborne mobile data services, we propose to authorize aircraft station licensees to operate Airborne Access Systems that encompass *all domestic commercial mobile spectrum bands*.") (emphasis added).

[5] *Id.*

"infringe upon carriers' exclusive use licenses" by enabling airlines to freely "use the same frequencies that are currently licensed to carriers."[6]

We sympathize with these concerns. CEI has long worked to advance private property rights in many areas as an effective approach to governing the use and allocation of valuable assets, from land to fisheries to original expressive works.[7] But we also recognize that limited, carefully designed exceptions to these exclusive rights in certain assets may, in some situations, best facilitate the use of these assets—without unreasonably undermining property owners' freedom to exploit and enjoy their assets as they see fit.[8] The excessive fragmentation of property among private owners prevents its "coherent assembly for projects that are desired by all but achievable by none," resulting in gridlock that is sometimes known as the "tragedy of the anticommons."[9]

An example of this problem arose early in the twentieth century, when courts struggled with a question similar to the one posed by this proceeding: is a person who flies a plane over land owned by another liable for trespass at common law?[10] After years of litigation, the Supreme Court ultimately held that an unauthorized flight over privately owned land is not a trespass so long as it does not interfere with the property owner's reasonable use and occupation of her land.[11] Flying so low over

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[6] Dissenting Statement of Comm'r Ajit Pai at 1, Expanding Access to Mobile Wireless Services Onboard Aircraft, *Notice of Proposed Rulemaking*, FCC 13-157, WT Docket No. 13-301 (rel. Dec. 13, 2013).

[7] *See generally* THE PROPERTY RIGHTS READER (Jonathan H. Adler ed., Competitive Enter. Inst. 1995), *available at* http://cei.org/sites/default/files/The%20Property%20Rights%20Reader.pdf; Marc Scribner, *This Land Ain't Your Land; This Land Is My Land: A Primer on Eminent Domain, Redevelopment, and Entrepreneurship*, COMPETITIVE ENTER. INST. ONPOINT, no. 164, 2010, *available at* http://cei.org/sites/default/files/Marc%20Scribner%20-%20This%20Land%20Ain't%20your%20Land.pdf; Ryan Radia, *A Balanced Approach to Copyright*, CATO UNBOUND (Jan. 11, 2013), http://www.cato-unbound.org/2013/01/11/ryan-radia/balanced-approach-copyright.

[8] *See generally* RICHARD PIPES, PROPERTY AND FREEDOM (1999); *see also* D. Benjamin Barros, *Property and Freedom*, 4 NYU J.L. & LIBERTY 36, 47 (2009) ("[T]he four classic incidents of property ownership [are] the rights to exclude, use, possess, and alienate . . . .").

[9] *See* MICHAEL HELLER, THE GRIDLOCK ECONOMY: HOW TOO MUCH OWNERSHIP WRECKS MARKETS, STOPS INNOVATION, AND COSTS LIVES *passim* (2008) (arguing that the fragmentation of property among private owners prevents its "coherent assembly for projects that are desired by all but achievable by none"); *see also* Richard A. Epstein, *Heller's Gridlock Economy in Perspective: Why There Is Too Little, Not Too Much Private Property*, 53 ARIZ. L. REV. 51, 52 (2011) ("[T]he losses that come from excessive fragmentation of productive assets, or tragedies of the anticommons, are equal to those which come from the excessive use of common resources over which there are no clear property rights, or tragedies of the commons.").

[10] *See* Eric R. Claeys, *On the Use and Abuse of Overflight Column Doctrine* (Geo. Mason L. & Econ., Working Paper No. 13-43, July 29, 2013), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2302900 (chronicling the overflight cases of the early twentieth century).

[11] United States v. Causby, 328 U.S. 256, 264 (1946) (holding that while "the airspace is a public highway . . . . [a] landowner owns at least as much of the space above the ground as the can occupy or use in connection with the land").

a person's land as to "barely miss[] the tops of trees" is a trespass,[12] therefore, while a typical transcontinental flight that travels thousands of feet above ground is not.[13]

These lessons offer a helpful framework for deciding which rules should govern in-flight mobile wireless services. Consider a commercial airliner that flies from Washington, D.C., to San Francisco, California. Traveling at approximately 500 miles per hour at 35,000 feet above sea level, this airliner will traverse no fewer than eleven U.S. states.[14] Along this route, the plane will overfly geographic areas encompassing innumerable terrestrial mobile licenses.[15] Within this aircraft, the operation of a low-power picocell and network control unit that transmits and receives on each of these licensed bands is highly unlikely to interfere with terrestrial networks, as international experience has demonstrated.[16] But if an airline were required to secure a sublicense[17] from every licensee of spectrum on which its aircraft transmit, the resulting transaction costs might prevent in-flight mobile services from ever getting off the ground, so to speak.[18] We therefore support the Commission's proposal to allow airlines to install and operate Airborne Access Systems[19] without authorization from all terrestrial licensees.

This exception to terrestrial licensees' exclusive rights, however, should extend only to in-flight transmissions that are necessary to 1) authenticate passenger devices so as to determine whether they are subscribed to a mobile provider with which the airline has an agreement regarding in-flight mobile service, or 2) prevent passenger devices from interfering with Airborne Access Systems or other onboard devices. Thus, if an airline secures a partnership with *only* two major mobile providers to offer their data service in-flight, it should be allowed to transmit on frequencies and/or in areas not licensed to its two provider-partners only for the purposes of interference reduction and device authentication. This regime would ensure that the exclusive spectrum licenses for which many terrestrial mobile providers have paid considerable sums are not misappropriated by rival carriers. At the same time, it would prevent the

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[12] *Id.* at 258.

[13] *Id.* at 261.

[14] *See* Great Circle Mapper, IAD-SFO, http://www.gcmap.com/mapui?P=iad-sfo (last visited Feb. 12, 2014).

[15] For instance, in Auction 73, which the Commission conducted in 2008, 101 bidders won 1,090 licenses, many of which encompass a single cellular market area. Auction of 700 MHz Band Licenses Closes: Winning Bidders Announced for Auction 73, *Public Notice*, DA 08-595, 23 FCC Rcd. 4572, ¶ 2 (2008).

[16] NPRM, *supra* note 1, ¶ 3; *see also* Report from CEPT to the European Commission in response to the EC Mandate on Mobile Communication Services on board aircraft (MCA), CEPT Report 016 (Mar. 30, 2007), *available at* http://www.erodocdb.dk/Docs/doc98/official/pdf/-CEPTREP016.PDF.

[17] *See* NPRM, *supra* note 1, ¶ 50 (discussing alternative option of requiring airlines to secure agreements via secondary markets for use of licensed spectrum).

[18] *Cf.* HELLER, *supra* note 9; Epstein, *supra* note 9, at 52.

[19] *See* NPRM, *supra* note 1, ¶ 24.

costly gridlock that might ensue were airlines effectively required to clear all spectrum rights in order to use any of them. And it would minimize the problem of "residual claimants" who might arise if the Commission were to adopt a generous unlicensed use regime onboard aircraft.[20]

In suggesting these rules, we do not take a position on whether current mobile licensees' spectrum holdings extend to the altitudes at which modern commercial aircraft typically cruise. We are not aware of any terrestrial mobile network that currently offers, or plans to offer, long-range service at very high altitudes using its domestic commercial spectrum licenses. But this state of affairs is unlikely to persist in perpetuity. As technology evolves, the Commission may one day need to revisit the metes and bounds of these licenses, considering among other things whether the auctioning of "sky licenses" might better facilitate the use of spectrum at high altitudes.[21] Meanwhile, the Commission need not resolve the perplexing question of where a spectrum licensee's reasonable expectation of exclusive use ends. Instead, the rules established in this proceeding need only address the immediate issue of in-flight mobile communications linked to the ground using frequencies distinct from those licensed to terrestrial mobile providers.

II. Airlines that Offer In-Flight Mobile Voice Communications only to Subscribers of Terrestrial Providers Should Not Be Treated as CMRS

Under the proposed rule, any airline that wished to offer in-flight mobile communications services would be required to install an Airborne Access System that "incorporates hardware and software to enable the provision of service and to manage services onboard the aircraft."[22] Given the potential for in-flight mobile wireless services to interfere with ground-based networks,[23] we appreciate the Commission's rationale for proposing to require that these systems be installed on aircraft that offer onboard mobile communications. And we support the Commission's conclusion that "mobile units would be deemed to be authorized and operated under the aircraft station license."[24]

We are concerned, however, that the proposed rule might impose unnecessary regulation on airlines that offer in-flight voice connectivity by treating them as com-

[20] *See* Sarah Oh, *Exclusion Principles and Receiver Boundaries on Spectrum Resources* 22 (Telecomm. Pol'y Res. Conf. 2011), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1985775 (discussing the pitfalls of residual claimants to spectrum imposing costs on new licensees).

[21] *Cf.* NPRM, *supra* note 1, ¶ 51 (suggesting the auctioning of nationwide "sky licenses").

[22] NPRM, *supra* note 1, ¶ 24.

[23] *See id.* ¶ 34.

[24] *Id.* ¶ 62.

mercial mobile radio service ("CMRS") carriers.[25] Like Commissioner Pai, we "do not see how it would be possible for an airline to allow passengers to make telephone calls unless it chose to become a [CMRS] carrier."[26] Imposing on these airlines the "full panoply of obligations and regulations that apply"[27] to CMRS carriers would likely deter airlines from deploying onboard mobile services—to the detriment of the traveling public.[28]

Under Part 87 of the Commission's rules,[29] airlines are licensed as "aircraft radio stations," [30] which are considered to be "private mobile radio services" ("PMRS").[31] But if an airline were to provide wireless service onboard its aircraft, enabling passengers to make normal voice calls using their mobile devices, this service would presumably fall within the Commission's definition of CMRS, given that the service would be "interconnected with the public switched network."[32] If, on the other hand, an airline were to offer only data and text messaging connectivity—perhaps using spectrum in the 700 MHz band on which most handsets do not transmit voice calls[33]—the airline would not likely face CMRS regulation, assuming its service did not connect to the public switched network.[34]

Although several major airlines have said they do not intend to enable mobile voice service onboard their aircraft, but will instead offer only text messaging and

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[25] *See* 47 U.S.C. § 332(c)(1) ("A person engaged in the provision of . . . a commercial mobile service shall . . . be treated as a common carrier . . . ."); *cf.* 47 C.F.R. § 20.9 (CMRS are regulated as "common carriage services").

[26] Dissenting Statement of Comm'r Ajit Pai at 1, Expanding Access to Mobile Wireless Services Onboard Aircraft, *Notice of Proposed Rulemaking*, FCC 13-157, WT Docket No. 13-301 (rel. Dec. 13, 2013).

[27] *Id.*

[28] *Cf.* 47 U.S.C. § 303(g) (the Commission shall "generally encourage the larger and more effective use of radio in the public interest").

[29] *See* 47 C.F.R. § 87.18 (generally requiring stations in the aviation services to be licensed).

[30] This licensing requirement applies to any aircraft fleet owner whose planes carry radio equipment other than a VHF aircraft radio or an emergency locator transmitter. *See* Amendment of Parts 80 & 87 of the Comm'n's Rules to Permit Operation of Certain Domestic Ship & Aircraft Radio Stations Without Individual Licenses, *Report and Order*, FCC 96-421, 11 FCC Rcd. 14,849, ¶ 4 (1996).

[31] PMRS carriers, unlike CMRS carriers, are not regulated as common carriers. *See* 47 C.F.R. § 20.3 ("Private mobile radio service includes . . . Aviation Service Stations . . . .").

[32] 47 U.S.C. § 332(d)(2) (defining "interconnected service"); *see also* Implementation of Sections 3(n) & 332 of the Commc'ns Act, *Second Report and Order*, FCC 94-31, 9 FCC Rcd. 1411, ¶ 50 (1994) ("In order for a mobile service to be defined as a commercial mobile radio service, it must make interconnected service available.").

[33] Verizon plans to begin offering voice calls on its 4G LTE network in late 2014. Roger Cheng, *Verizon says first LTE-only phones to arrive in late 2014*, CNET, June 27, 2013, http://news.cnet.com/8301-1035_3-57591213-94/verizon-says-first-lte-only-phones-to-arrive-in-late-2014/.

[34] *Cf.* 47 C.F.R. § 20.3 (defining "commercial mobile radio service").

data connectivity,[35] the Commission's rules should not subject airlines that offer in-flight voice service to significantly greater burdens than airlines that only offer data and text messaging. An airline pondering a gamble on in-flight voice communication already faces the uphill battle of winning over a skeptical traveling public. Under common carrier regulation, however, airlines might shy away from in-flight voice entirely.

An airline that offers interconnected, in-flight voice service should not be required to comply with the Commission's rules governing CMRS licensees,[36] assuming the airline provides such service in the manner contemplated by the NPRM—*i.e.*, pursuant to commercial agreements with terrestrial mobile licensees.[37] Insofar as terrestrial mobile licensees provide interconnected voice service, they are already regulated as CMRS carriers.[38] As such, these carriers are subject to the "full panoply" of rules pertaining to interconnection, roaming, resale, non-discrimination, and so forth.[39]

Aside from the specific rules the Commission proposes to impose on Airborne Access Systems to minimize interference with terrestrial networks,[40] we see no compelling reason to treat airlines as CMRS carriers. These Airborne Access Systems merely enable passengers to connect their mobile handsets to their terrestrial wireless provider's network.[41] The in-flight mobile service envisioned by the NPRM would function as an extension of terrestrial networks; it is not a distinct service in any meaningful sense. Although certain services typically provided by CMRS carriers may prove infeasible in-flight—for instance, offering emergency 911 service onboard an aircraft traveling five miles above sea level is unlikely to help passengers, notwithstanding the humorous possibility of "sky police" pulling over airliners[42]—airlines

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[35] *See*, *e.g.*, Comments of Delta Air Lines, Inc. at 2, Expanding Access to Mobile Wireless Services Onboard Aircraft, *Notice of Proposed Rulemaking*, FCC 13-157, WT Docket No. 13-301 (rel. Dec. 13, 2013), *available at* http://apps.fcc.gov/ecfs/document/view;jsessionid=KZGfS71prcj88-CFhxGzGNLdgn1zff3pSCfZJQmLPDzHk8mJ0Zlpx!1357496456!-1864380355?id=7521071571.

[36] *Cf.* NPRM, *supra* note 1, ¶ 57 ("[S]hould an aircraft station licensee that elects a common carrier regulatory status be required to comply with all rules applicable to CMRS licensees under Part 20 of the Commission's rules given the limited scope of the in-cabin service offering?").

[37] *Id.* ¶ 30 ("Under the rules proposed below, terrestrial service providers and aircraft station licensees would be permitted to negotiate commercial agreements to facilitate access to terrestrial networks.").

[38] *See*, *e.g.*, W.T.B. Seeks Comment on CMRS Mkt. Competition, *Public Notice*, W.T. 07-71, 22 FCC Rcd. 6810, 6815 (2007) (discussing implications of AWS and 700 MHz spectrum on CMRS market conditions).

[39] *See* 47 C.F.R. §§ 20.6-20.20.

[40] *See* NPRM, *supra* note 1, ¶¶ 42-47.

[41] *Id.*

[42] *See* LOUIS C.K., *When I Thought I Was Going to Die*, *on* WORD: LIVE AT CARNEGIE HALL (Pig Newton 2012), *available at* http://youtu.be/3mLCv7v07uo?t=1m8s; *cf.* 47 C.F.R. § 20.18 (imposing 911 service requirements on CMRS providers).

and terrestrial networks are better equipped than the Commission to determine which in-flight services to offer passengers and how much to charge for them.

Of course, an airline may face separate obligations under the Commission's rules insofar as it provides connectivity between its aircraft and the ground. Within an aircraft, for instance, an onboard picocell would presumably connect to passenger devices using the licensed frequencies over which the devices are capable of transmitting.[43] The same picocell might also transmit and receive data from these devices *outside the aircraft* on a different frequency, perhaps over the 800 MHz Air-Ground Radiotelephone Service or the Mobile Satellite Service.[44] Many airlines that offer in-flight mobile service, however, will likely contract with third party firms that own and operate these air to ground links. Currently, Gogo Inc., a major provider of in-flight broadband connectivity—using unlicensed Wi-Fi inside aircraft and licensed spectrum for air-to-ground links[45]—generally maintains legal title to the equipment the company installs on aircraft.[46] The popularity of this business model suggests many airlines that wish to offer in-flight mobile service would prefer to leave the licensing rigmarole to others—perhaps by forging agreements with companies such as OnAir and AeroMobile that equip aircraft with the ability to connect to terrestrial networks.[47] The Commission's rules should anticipate these arrangements by ensuring that airlines are not subject to duplicitous burdens if they rely on third parties to provide mobile in-flight connectivity onboard their aircraft.

III. The Proposed Rule Is Consistent with the Commission's Responsibilities Regarding Public Safety and National Security

In his dissent, Commissioner Pai stated, "the NPRM does not adequately address public safety and national security concerns."[48] Although we recognize that the deployment and operation of Airborne Access Systems raises potential public safety and national security questions, we agree with the Commission that, as a general matter, "issues of onboard security and safety of flight are matters primarily reserved for the [Federal Aviation Administration], [Department of Transportation], and the

[43] NPRM, *supra* note 1, ¶ 36 ("The aircraft picocell communicates with the individual mobile devices onboard the aircraft and with its air-to-ground or satellite backhaul link.").

[44] *Id.* ¶ 30 (explaining how a signal travels from a handset to an onboard picocell to a terrestrial mobile network).

[45] *Id.* ¶ 16, n.55 ("Gogo has installed Wi-Fi service on approximately 2,000 commercial aircraft.").

[46] Gogo Inc., Registration Statement (Form S-1), at F-11 (Dec. 22, 2011), *available at* http://www.sec.gov/Archives/edgar/data/1537054/000119312511351260/d267959ds1.htm.

[47] NPRM, *supra* note 1, ¶ 24, n.73 (discussing OnAir and AeroMobile's agreements with non-U.S. carriers).

[48] Dissenting Statement of Comm'r Ajit Pai, *supra* note 26, at 1.

airlines."[49] The NPRM's treatment of safety and security matters is consistent with those of international telecommunications authorities.[50]

The Association of Flight Attendants-CWA, reacting to this proceeding, has claimed that in-flight voice communications will result in "air rage" and other alleged cabin safety hazards.[51] Some members of Congress, including Rep. Bill Shuster, Chairman of the U.S. House Committee on Transportation and Infrastructure, have expressed similar sentiments.[52] Even if these concerns were supported by the available evidence, such matters plainly fall within the purview of the airline industry and the Department of Transportation ("DOT"), not the Commission.

According to the Federal Aviation Administration's ("FAA") own research, safety risks related to in-flight use of voice communications range from infinitesimal to nonexistent. The 2012 international survey of civil aviation authorities conducted by the FAA, which was cited in the NPRM, concluded, "No non-US civil aviation authority reported any cases of air rage or flight attendant interference related to passengers using cell phones on aircraft equipped with on-board cellular telephone base stations."[53]

Regarding national security, a review of international experience provides no evidence that potential marginal security risks (*e.g.*, a terrorist uses a mobile device to detonate an explosive) outweigh the potential marginal security benefits (*e.g.*, an aircraft passenger being able to alert with her mobile device law enforcement authorities that a hijacking has occurred). Bolstering this view are public statements from DOT officials, which appear to suggest their inability to find sufficient safety or security justifications for a prohibition on in-flight voice communications.

Secretary of Transportation Anthony Foxx recently indicated his department would likely pursue banning in-flight voice communications. He suggested that ra-

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[49] *Id.* ¶ 77.

[50] *See*, *e.g.*, U.K. Office of Communications, *Mobile Communications on board Aircraft (MCA), Ofcom statement on authorising MCA services* at 5 (Mar. 26, 2008), *available at* http://stakeholders.ofcom.org.uk/binaries/consultations/mca/statement/mca.pdf ("Aircraft safety issues fall outside Ofcom's remit and will need to be addressed by the relevant authorities - the Civil Aviation Authority (CAA) in the UK, the European Aviation Safety Agency (EASA) and the International Civil Aviation Organisation (ICAO).)."

[51] Association of Flight Attendants-CWA, *Flight Attendant Union Vows To Fight FCC Plan That Would Allow Cell Phone Calls In-Flight*, Press Release, Dec. 12, 2013, http://www.afacwa.org/flight_attendant_union_vows_to_fight_fcc_plan_that_would_allow_cell_phone_calls_in_flight; *see also* Kevin Rollibard, *Anthony Foxx: DOT will consider banning cell phone calls on planes*, POLITICO, Dec. 12, 2013, *available at* http://www.politico.com/story/2013/12/cellphones-on-airplanes-anthony-foxx-101086.html.

[52] *See*, *e.g.*, Rep. Bill Shuster, *Cellphones on Planes? Tap, Don't Talk*, THE HILL, Feb. 10, 2014, *available at* http://thehill.com/opinion/op-ed/197962-cellphones-on-planes-tap-dont-talk.

[53] D. B. Walen et al., *Study on the Use of Cell Phones on Passenger Aircraft* at 10 (FAA Aviation Safety Technical Report No. DOT/FAA/AR-12/30, July 2012), *available at* http://www.tc.faa.gov/its/worldpac/techrpt/ar12-30.pdf.

ther than promulgating such a regulation under the DOT's safety and security statutory authority, it would instead seek to use the Department's consumer protection powers.[55]

While the DOT's consumer protection authority is generally concerned with matters such as deceptive advertising and unfair methods of competition, this authority is far more nebulous than the Department's safety and security powers, which face high science- and data-based burdens of proof.[56] Secretary Foxx's appeal to his Department's consumer protection authority appears to be an implicit acknowledgement that there is insufficient evidence to suggest that in-flight cellular communications present new, unique, or undue safety and security risks. The DOT's most recent semiannual regulatory agenda was published in January 2014 and contained no mention of a planned future rulemaking or review related to the in-flight use of cellular devices.[57]

Respectfully Submitted,

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[55] Office of the Secretary of Transportation, *Statement of U.S. Transportation Secretary Anthony Foxx* (Dec. 12, 2013), *available at* http://www.dot.gov/briefing-room/statement-us-transportation-secretary-anthony-foxx ("Over the past few weeks, we have heard of concerns raised by airlines, travelers, flight attendants, members of Congress and others who are all troubled over the idea of passengers talking on cell phones in flight – and I am concerned about this possibility as well. As the FCC has said before, their sole role on this issue is to examine the technical feasibility of the use of mobile devices in flight. *We believe USDOT's role, as part of our Aviation Consumer Protection Authority, is to determine if allowing these calls is fair to consumers.* USDOT will now begin a process that will look at the possibility of banning these in-flight calls. As part of that process, USDOT will give stakeholders and the public significant opportunity to comment.") (emphasis added).

[56] The FAA prohibits passengers from, among other things, interfering with flight crewmember duties. 14 C.F.R. § 125.328 (citing 49 U.S.C. § 44701 *et seq.*). The FAA's security authority is derived from 49 U.S.C. § 44901 *et seq.* Both safety and security regulatory authorities are limited by evidentiary standards, *i.e.*, data which support preventative regulatory intervention. Public statements from Department of Transportation officials indicate they may pursue an in-flight voice communications ban not under the Department's safety or security regulatory authorities, but under the Aviation Consumer Protection Authority, see 49 U.S.C. § 41712, which empowers the Secretary to police "unfair or deceptive practice[s] or unfair method[s] of competition." Expanding "unfair" business practices to include passenger cell phone use would be unprecedented, arbitrary, and capricious. Similar statutory provisions barring "unfair" business practices exist at 12 U.S.C. § 5531 and 15 U.S.C. § 45. Unlike the Title 49 definition of unfair business practices, the latter two statutes expressly exempt conduct that is "reasonably avoidable by consumers" or is "outweighed by countervailing benefits to consumers or to competition." *See* 12 U.S.C. §§ 5531(c)(1)(A)-(B).

[57] *See* Introduction to the Unified Agenda of Federal Regulatory and Deregulatory Actions, 79 Fed. Reg. 1190 (Jan. 7, 2014).