

**Before the
DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY OF TRANSPORTATION
Washington, D.C. 20590**

In the Matter of)	
)	
Use of Mobile Wireless)	Docket No. DOT-OST-2014-0002
Devices for Voice Calls)	
on Aircraft)	

**COMMENTS OF
THE COMPETITIVE ENTERPRISE INSTITUTE**

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Marc Scribner
Research Fellow
Competitive Enterprise Institute
1899 L Street N.W., Floor 12
Washington, D.C. 20036
(202) 331-1010

Executive Summary

On behalf of the Competitive Enterprise Institute (“CEI”), I respectfully submit these comments in response to the Department of Transportation’s Office of the Secretary of Transportation’s advance notice of proposed rulemaking in the matter of Use of Mobile Wireless Devices for Voice Calls on Aircraft (“ANPRM”).¹ CEI is a nonprofit, nonpartisan public interest organization that focuses on regulatory policy from a market-oriented perspective.²

CEI previously submitted comments to the Federal Communications Commission in its proceeding to consider an update of its 1991 rule prohibiting many in-flight cellular transmissions.³ We agreed with the Commission that technological innovation has rendered this rule obsolete, and supported revising it to reflect the realities of the modern wireless marketplace.

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

The Department of Transportation (“Department”) is at this stage not requesting comments related to the safety and security implications of in-flight cellular transmissions or voice communications. Rather, it seeks comments “to determine whether permitting voice calls on aircraft is an unfair practice to consumers, pursuant to 49 U.S.C. § 41712, or would be so disruptive as to be inconsistent with adequate air transportation, pursuant to 49 U.S.C. § 41702.”⁴

Our comments address the lack of empirical support for the Department’s claim of potential consumer harm resulting from voice communications, as well as the nebulous “aviation consumer protection authority” that purportedly empowers the Department to prohibit in-flight voice communications even in the absence of consumer harm. We urge the Department to discontinue this proceeding, as intervention is unnecessary and will produce harmful results for consumers, air carriers, and wireless telecommunications providers.

¹ Use of Mobile Wireless Devices for Voice Calls on Aircraft, *Advance Notice of Proposed Rulemaking*, DOT-OST-2014-0002, 79 Fed. Reg. 10049 (Feb. 24, 2014) [hereinafter ANPRM].

² See About CEI, <http://cei.org/about-cei> (last visited Mar. 19, 2014).

³ 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); see also Comments of the Competitive Enterprise Institute, Expanding Access to Mobile Wireless Services Onboard Aircraft, *Notice of Proposed Rulemaking*, WT Docket No. 13-301 (rel. Dec. 13, 2013), available at <http://apps.fcc.gov/ecfs/comment/view;jsessionid=LnJ8TFpYn6h5pcg1RcpBjQggtFDhbjFHmyH1FLDv0v1LhGbDV2C4!-1864380355!1357496456?id=6017589113>.

⁴ ANPRM, *supra* note 1, at 10050.

I. The Department's Stated Belief in the Potential Consumer Harm Due to In-Flight Voice Communications Is Not Supported by the Best Available Evidence

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. A 2012 international survey of civil aviation authorities conducted by the FAA concluded that "[n]o 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."⁵

While airline passengers may simply not be as violent as some techno-pessimists assume, there is another explanation: the high cost of voice calls via aircraft network control unit and picocell systems deters consumer use. When these technologies first became available in foreign jurisdictions in 2008, *The Economist* noted that "airlines are salivating at the idea of charging passengers \$2.50 a minute to make calls and 50 cents for a text message."⁶ It was observed then that "around half of passengers switch[ed] on their phones during flights. Text messaging proved most popular, and the average length of voice calls was just 2.5 minutes. Most of these calls were made on daytime flights; the number on night flights was 'minimal'."⁷ As *The Economist* concluded, "[i]n short, fears that in-flight telephony will be a nuisance, rather than a benefit, seem to be wide of the mark."⁸

In opening this ANPRM, the Department is similarly wide of the mark, caving to populist fears based on ignorance rather than conducting an informed evaluation of the best available empirical evidence. As the FAA's 2012 survey noted, in Brazil, where in-flight voice communications are legally permitted, the "average call duration [is] 110 seconds."⁹

Other than expressing a vague fear of poor etiquette, the Department is unable to articulate a justification for prohibiting in-flight voice communications. The ANPRM's discussion of in-flight voice communications betrays a lack of knowledge of how the technology involved actually works and how services will be priced.

For instance, AeroMobile, a leading in-flight mobile network provider, installs a network control unit and picocell (collectively, an "Airborne Access System") onboard equipped aircraft. The Airborne Access System ("AAS") allows qualified mobile telephone users to connect to the in-flight cellular network. The AAS routes the cellular traffic through a satellite, which in turns transmits the data to terrestrial networks.

⁵ 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>.

⁶ *The Dial-high Club: Mobile Phones on Planes May Not Be as Annoying as Some People Think*, *ECONOMIST*, Aug. 7, 2008, available at <http://www.economist.com/node/11893545>.

⁷ *Id.*

⁸ *Id.*

⁹ Walen et al., *supra* note 5, at 7.

International roaming rates apply to voice calls, text messaging, and data services. Even when a customer has purchased an international roaming plan from her cellular provider, rates are typically several dollars per minute for voice calls, \$0.50 per text message, and \$0.25 per megabyte of data.¹⁰ Such high prices will likely deter most passengers from using in-flight mobile services on AAS-equipped aircraft at all, let alone hold hours-long telephone conversations.

II. The Department's Claimed Power to Prohibit Certain In-Flight Voice Calls under Its Aviation Consumer Protection Authority Is Dubious

As the ANPRM notes, the Department is investigating a prohibition on in-flight voice communications under the Aviation Consumer Protection Authority, codified at 49 U.S.C. § 41712, which empowers the Secretary of Transportation to police “unfair or deceptive practice[s] or unfair method[s] of competition.”¹¹ Expanding “unfair” business practices to include passenger cell phone use would be unprecedented, arbitrary, and capricious. In addition, the ANPRM contemplates deeming in-flight voice communications with mobile devices “so disruptive as to be inconsistent with adequate air transportation, pursuant to 49 U.S.C. 41702,”¹² which states that “[a]n air carrier shall provide safe and adequate interstate air transportation.”

While the Department'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.¹³ 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 Department's most recent semiannual regulatory agenda, published in January 2014, contained no mention of a planned future rulemaking or review related to the in-flight use of cellular devices.¹⁴

Similar statutory provisions barring “unfair” business practices exist at 12 U.S.C. § 5531 and 15 U.S.C. § 45. Unfortunately, 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

¹⁰ See, e.g., Verizon Wireless, *Global Plans and Pricing*, <http://www.verizonwireless.com/wcms/global/plans-and-pricing.html> (last visited Mar. 21, 2014).

¹¹ ANPRM, *supra* note 1, at 10051.

¹² *Id.* at 10050.

¹³ 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.

¹⁴ See Introduction to the Unified Agenda of Federal Regulatory and Deregulatory Actions, *Semiannual Regulatory Agenda*, 79 Fed. Reg. 1190 (Jan. 7, 2014).

competition.”¹⁵ This has allowed the Department overbroad authority, which is a troubling statutory flaw that Congress should address as soon as possible.

In recent years, the Department has relied on its Section 41712 authority to impose constitutionally questionable restrictions on airline fare disclosures and advertising (“Total-Price Rule”),¹⁶ require airlines to allow passengers to hold or cancel reservations without penalty for 24 hours provided the ticket was purchased a week or more before the scheduled flight (“24-Hour Hold/Refund Rule”),¹⁷ and require deplaning if a tarmac delay exceeds three hours (“Tarmac Delay Rule”).¹⁸

All of these measures appear well intentioned. However, each suffers from defects that likely and perversely harm air traveler welfare. The Total-Price Rule denies carriers their First Amendment rights while limiting dissemination to consumers of information related to government taxes and fees. The 24-Hour Hold/Refund Rule effectively outlaws true nonrefundable ticketing. Studies conducted by the American Aviation Institute,¹⁹ Government Accountability Office,²⁰ and Econometrica, Inc.²¹ (commissioned by the Department) have found the Tarmac Delay Rule has had an adverse impact on flight cancellations.

Not only have the Department’s latest reinterpretations of its Aviation Consumer Protection Authority generated perverse consequences, they are undermining nearly four decades of economic liberalization in the airline industry. As a number of industry analysts have noted, the recent expansion of Department powers under Section 41712 contradicts the deregulatory mandate Congress established with the Airline Deregulation Act.²² The courts have so far upheld this upsetting power grab. In a recent ruling, the U.S. Court of Appeals for the D.C. Circuit “ma[de] the adoption of new regulations that much easier,” thereby “seriously undermin[ing] the congressional mandate that competition, not regulation, govern airline practices.”²³

¹⁵ 12 U.S.C. §§ 5531(c)(1)(A)–(B).

¹⁶ Enhancing Airline Passenger Protections, *Final Rule*, 76 Fed. Reg. 23166 (Apr. 25, 2011) (codified at 14 C.F.R. § 399.84(a)).

¹⁷ *Id.* at 23165 (codified at 14 C.F.R. § 259.5(b)(4)).

¹⁸ *Id.* at 23164 (codified at 14 C.F.R. § 259.4(b)(1)).

¹⁹ JOSHUA MARKS & DARRYL JENKINS, IMPACT OF THREE-HOUR TARMAC DELAY RULES AND FINES ON PASSENGER TRAVEL TIME AND WELFARE (July 20, 2010), *available at* http://www.tarmaclimits.com/Tarmac/Tarmac_Limits_files/Tarmac_Paper.pdf.

²⁰ U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-11-733, AIRLINE PASSENGER PROTECTIONS: MORE DATA AND ANALYSIS NEEDED TO UNDERSTAND EFFECTS OF FLIGHT DELAYS (2011), *available at* <http://www.gao.gov/assets/330/322962.pdf>.

²¹ ECONOMETRICA, INC., INDEPENDENT REVIEW AND ANALYSIS OF THE IMPACT OF THE THREE-HOUR TARMAC DELAY RULE (Jan. 9, 2014), *available at* http://www.dot.gov/sites/dot.gov/files/docs/-Econometrica_Tarmac_Delay_Report_1_9_2014.pdf (prepared for the Department of Transportation).

²² Airline Deregulation Act of 1978, Pub. L. No. 95–504, 92 Stat. 1705 (codified as amended at 49 U.S.C. § 40101 *et seq.*).

²³ Joanne W. Young & Lyndsey M. Grunewald, *Supreme Court Review of DOT Actions: An Opportunity to Discipline Government Efforts to Re-regulate the Industry*, 25 AIR & SPACE LAW. 1, 12 (2013) (citing *Spirit Airlines, Inc. v. DOT*, 687 F.3d 403, 411 (D.C. Cir. 2012), *cert. denied*, 133 S. Ct. 1723 (2013)).

Prohibiting certain voice communications under Section 41712 would continue this imprudent regulatory path, all the while denying consumers choices, providing no consumer protections, and disadvantaging American air carriers relative to their foreign counterparts. Until Congress addresses the statutory deficiencies that have enabled the Department's overbroad authority under Section 41712, we urge the Department to exercise restraint and recognize its congressional mandate to promote and protect competition.

The ANPRM also cites its Section 41702 authority, which requires than an airline "provide safe and adequate interstate air transportation," to support its quest for an in-flight voice communications ban. Ironically, the "safe and adequate" enforcement example cited by the Department is the Civil Aeronautics Board 1973 rule that mandated nonsmoking sections on airliners,²⁴ which later research conducted by the National Academies of Science and others found was completely ineffective in reducing health and safety risks related to passive smoking.²⁵ Perhaps the Department believes its final rule resulting from this proceeding will be similarly useless and unsupported by science.

Conclusion

We appreciate the Department's willingness to investigate the integration of in-flight wireless services. However, as we explain above, the Department should avoid promulgating a rule prohibiting in-flight voice communications. Decisions related to in-flight mobile wireless services, including voice communications, are best left to the competitive and open marketplace, not regulators.

Respectfully Submitted,

Marc Scribner
Research Fellow
Competitive Enterprise Institute

²⁴ ANPRM, *supra* note 1, at 10051.

²⁵ *See, e.g.*, NATIONAL RESEARCH COUNCIL, THE AIRLINER CABIN ENVIRONMENT: AIR QUALITY AND SAFETY (1986).