



**Before the
DEPARTMENT OF TRANSPORTATION and DEPARTMENT OF JUSTICE
Washington, D.C. 20554**

**In the Matter of Public Comment on Request for Information on Competition in
Air Transportation (rel. October 24, 2024) (RFI).**

Docket No. ATR 103

Comments of the American Consumer Institute

The American Consumer Institute Center for Citizen Research (ACI) is a nonprofit 501(c)(3) educational and research organization committed to identifying, analyzing, and protecting the interests of consumers in legislative and rulemaking proceedings. ACI submits these comments in response to the Request for Information (RFI) on competition in air transportation issued by the Department of Justice (DOJ) and the Department of Transportation (DOT).

These comments address: 1) the enhanced consumer experience resulting from airline deregulation; 2) recent regulatory missteps in the airline industry; 3) frameworks for evaluating competition; and 4) areas ripe for reform.

Introduction

In the RFI, the DOJ and DOT correctly noted that "robust competition in the air transportation industry promotes lower costs, improves working conditions, and enhances the ability of Americans to travel, whether for business, leisure, or to visit friends and relatives."¹ These benefits are evident in the significant consumer gains realized over recent decades.

¹ Department of Justice and Department of Transportation, Request for Information on Competition in Air Transportation, [Docket \(ATR-2024-0001-0002\)](https://www.regulations.gov/document/ATR-2024-0001-0002), Washington D.C.: 2024, <https://www.regulations.gov/document/ATR-2024-0001-0002> (accessed December 5, 2024).

Therefore, the RFI should be used as an opportunity to protect and build upon these gains rather than justify burdensome regulations that risk undoing the progress achieved by deregulation. Protecting the consumer experience requires careful consideration of policies that foster competition, innovation, and operational efficiency while avoiding undue constraints on the industry's growth and adaptability.

Airline Deregulation and the Improved Consumer Experience

The Airline Deregulation Act (ADA) of 1978 marked a pivotal shift in the industry.² While some critics lament this era as the beginning of a decreased consumer experience, the data tells a different story, as cited in one recent article:³

“Studies show that airline deregulation led to an annual consumer welfare savings of \$20 billion, and competition remains robust today. In the last decade, competition has driven inflation adjusted prices down 34 percent. In other words, a \$500 airline ticket would cost \$173 less today – a real savings for Americans. In fact, the most recent data shows that airfares are actually 25 percent lower relative to overall inflation since pre-pandemic benchmarks.”⁴

Moreover, commercial airline travel, once an exclusive privilege, is now accessible to a vast majority of Americans. In 1971, only 49 percent of Americans had flown commercially; by 2022, this figure had risen to 87 percent, reflecting expanded access and affordability.⁵

Fares have also seen remarkable reductions. While specific savings differ by year and estimate, overall airfares have dropped following deregulation, saving travelers' hard-earned money.⁶ Moreover, air travel is safer than ever, following the era of regulation.⁷ These outcomes

² Alfred E. Kahn, “Airline Deregulation,” *Library of Economics and Liberty*, <https://www.econlib.org/library/Enc1/AirlineDeregulation.html>.

³ Jeff Neal, “Why flying is miserable,” *Harvard Law Today*, November 14, 2023, https://www.chicagomanualofstyle.org/tools_citationguide/citation-guide-1.html#cg-journal.

⁴ Steve Pociask, “In the Interest of Consumers, the Government Should Abandon the Air Travel Probe,” *American Consumer Institute*, December 19, 2024, <https://www.theamericanconsumer.org/2024/12/inside-sources-government-should-abandon-the-air-travel-probe/>.

⁵ Airlines for America, “New Survey: Nearly 90 Percent of Americans Have Flown Commercially,” March 22, 2023, <https://www.airlines.org/new-survey-nearly-90-percent-of-americans-have-flown-commercially/>.

⁶ Fred L. Smith, Jr. and Braden Cox, “Airline Deregulation,” *EconLib*, <https://www.econlib.org/library/Enc/AirlineDeregulation.html>.

⁷ Kahn, “Airline Deregulation.”

underscore the success of deregulation in democratizing air travel and enhancing consumer welfare.

The evolution of competition in air travel has been reshaped by consumer preferences. Critics lamenting the loss of a *Golden Age* of glamorous air travel often fail to acknowledge that airlines have adjusted to meet the demands of the average consumer, emphasizing affordability, differentiated service options, and accessibility.⁸ Economy-priced travel has permeated the industry, making air travel accessible to millions who might not otherwise afford it. These low fares mean that ticket revenues often cover only variable costs for most airlines.⁹ However, fixed costs—which typically constitute about two-thirds of an airline’s expenses— are a reflection of capital intensity, which necessitates operational strategies such as favoring larger and fuller planes on popular routes, as well as hub and spoke routing.¹⁰

At the same time, airlines have catered to less price-sensitive segments, such as first-class and business-class options, by providing a more premium experience, but at higher prices. Far from indicating anti-competitive behavior, service and pricing differentiation often reflect economic necessities for cost recovery, and they represent an important aspect of competition. Effectively, they give passengers more options, which tend to maximize consumer welfare, as noted by Professor Darby’s review of the economic literature:

“The consensus among mainstream economists is that price discrimination is not only compatible with effective competition and economic welfare maximization, but that it may be the only sustainable structure of prices for capital intensive, high sunk cost, low marginal cost undertakings. Banning natural pricing practices will suppress investment and consumer choice.”¹¹

⁸ Scott A. Wolla and Carolyn Backus, “The Economics of Flying: How Competitive Are the Friendly Skies?,” Federal Reserve Bank of St. Louis, November 1, 2018, <https://www.stlouisfed.org/publications/page-one-economics/2018/11/01/the-economics-of-flying-how-competitive-are-the-friendly-skies>.

⁹ Ibid.

¹⁰ The Geography of Transport Systems, “Passenger Airlines Operating Costs, United States, 2019,” <https://transportgeography.org/contents/chapter5/air-transport/airline-operating-costs/#:~:text=Since%20about%20two%2Dthirds%20of,than%20no%20fare%20at%20all>.

¹¹ Larry F. Darby, “FAQs about Price Discrimination and Consumer Welfare,” ConsumerGram, *American Consumer Institute*, May 1, 2008.

Recent Missteps

Despite improvements for the consumer, the DOJ has expressed significant concerns about concentration in the airline industry, as demonstrated by its successful challenge to the proposed acquisition of Spirit Airlines by JetBlue Airways.¹² The DOJ contended that the acquisition would harm competition, primarily by eliminating the *Spirit Effect*, a term describing the lower fares typically observed in markets where Spirit operates.¹³ However, as ACI has previously noted, this perspective oversimplifies the complexities of the airline industry and neglects critical economic realities. Moreover, the move to block the potentially eliminated a large competitor from operating in the market place.¹⁴

The DOJ's presumption that blocking the acquisition would safeguard competition between the two carriers has proven to be flawed. In the wake of the decision, both airlines have experienced financial and operational difficulties. JetBlue has reduced its routes, Spirit has furloughed pilots, and most notably, Spirit has since filed for bankruptcy.¹⁵ While Spirit aims to restructure and recover, its current precarious financial condition underscores the inherent vulnerabilities of the low-cost carrier model in an industry characterized by high fixed costs and narrow profit margins.

For an agency ostensibly committed to preserving competition, these outcomes should not be interpreted as a regulatory failure. Reduced service and the potential collapse of a competitor harms rather than protects consumers.

The airline industry, like other capital-intensive sectors, faces substantial barriers to entry. High fixed costs, regulatory complexities, and the operational scale required to compete mean that even in the absence of anti-competitive behaviors by incumbents, new market entrants often struggle to establish and sustain operations. In such an environment, blocking

¹² Department of Justice, "Justice Department Statements on District Court Decision to Block JetBlue's Acquisition of Spirit Airlines," press release, January 14, 2024, <https://www.justice.gov/opa/pr/justice-department-statements-district-court-decision-block-jetblues-acquisition-spirit>.

¹³ United States Department of Justice, Complaint for Civil Penalty (Case 1:23-cv-10511, Washington, D.C.: 2023).

¹⁴ Tirzah Duren, "Oregon Should Learn From Blocked Spirit Merger Before It's Too Late," *Oregon Catalyst*, September 4, 2024, <https://oregoncatalyst.com/80168-oregon-learn-blocked-spirit-merger-late.html>.

¹⁵ David Koenig, "Spirit Airlines files for bankruptcy as financial losses pile up and debt payments loom," *Associated Press*, November 18, 2024, <https://apnews.com/article/spirit-airlines-bankruptcy-debt-losses-782c7fb892adf1d2f366411bab955668>.

mergers/acquisitions fails to address these structural challenges and may exacerbate them by depriving companies of the resources necessary for viability.

While antitrust enforcement relies on proxy measurements to evaluate competition, not all proxies are equally effective.¹⁶ A singular focus on market concentration risks overlooking broader dynamics, such as the financial health of industry participants and the economic pressures they face. Policymakers must carefully consider the counterfactual scenarios of their actions. Preventing a merger might forestall immediate consolidation, but if it hastens the financial decline of one or both entities, it could ultimately undermine the competition it seeks to protect.

To effectively promote competition in the airline industry, the DOJ must adopt a more nuanced approach. Outmoded and overly generalized metrics, such as market concentration, must be accompanied by an analysis of the market performance of the industry. For instance, if the industry has low profitability compared to other industries, then they are not, by definition, exhibiting market power – regardless of measures of market structure or concentration.

Instead, these outdated metrics must be supplemented with considerations of the industry's unique economic characteristics, including its capital intensity, high fixed costs, and the potential for scale efficiencies achieved through mergers. By accounting for these factors, policymakers can avoid interventions that inadvertently undermine competition and consumer welfare. Ensuring that antitrust actions align with the long-term realities of the airline industry is critical for fostering a competitive, innovative, and consumer-focused market.

A Path Forward: Innovation Suggests Competition

The presence of competition is undeniable in the airline industry. Competition may occur through pricing, route offerings, inflight amenities, ticket restrictions, offers for additional legroom, or membership perks. For example, Spirit has traditionally competed on price, offering consumers lower-cost travel options. Innovation within the industry, however, extends beyond

¹⁶ Tirzah Duren, “Economic Analysis is Key to Improving Proxies and Consumer Outcomes,” *American Consumer Institute*, November 13, 2024, <https://www.theamericanconsumer.org/2024/11/economic-analysis-is-key-to-improving-proxies-and-consumer-outcomes/>.

pricing strategies. It includes new business models, such as the strategic consolidation of two struggling airlines to more effectively compete with the dominant Big Four carriers. As Stanford economist Mordecai Kurz has noted, “When older firms’ market power declines, they can survive only by reinventing themselves: developing new technologies through research, joint ventures, or acquisitions.”¹⁷

The airline industry continues to exemplify innovation. United Airlines, for instance, is working to enhance passenger connectivity by adopting Starlink technology to provide free Wi-Fi¹⁸ and Delta Air Lines recently announced a partnership to serve Shake Shack on flights.¹⁹ Meanwhile, Virgin Airlines is pursuing the revival of supersonic commercial flights, which would dramatically reduce travel times.²⁰ These developments highlight the industry's ongoing efforts to enhance service, retain customers, and maintain competitiveness.

Recognizing heightened rivalry in the form of pricing, product differentiation and innovations is essential for policymakers to make informed decisions that preserve and foster competition. By understanding the multifaceted nature of competition in the airline industry, regulators can ensure that interventions support, rather than inadvertently stifle, the dynamic forces that drive consumer benefits and industry growth.

Areas For Reform

Despite significant progress, areas for improvement remain.²¹ The air traffic control (ATC) system,²² managed by the Federal Aviation Administration, faces staffing shortages exacerbated

¹⁷ Mordecai Kurz, “Market Power Is Permanent, and Technological Competition Does Not Remove It,” *Project Syndicate*, December 1, 2023, <https://www.theamericanconsumer.org/2024/11/economic-analysis-is-key-to-improving-proxies-and-consumer-outcomes/>.

¹⁸ Leslie Josephs and Michael Sheetz, “United Airlines to offer free Wi-Fi using Starlink from Elon Musk’s SpaceX,” *CNBC*, September 13, 2024, <https://www.cnn.com/2024/09/13/united-airlines-spacex-starlink-internet.html>.

¹⁹ Delta, “Now boarding: Delta to serve Shake Shack burgers on flights,” November 19, 2024, <https://news.delta.com/now-boarding-delta-serve-shake-shack-burgers-flights#:~:text=at%2030%2C000%20feet.-,Delta's%20first%2Dof%2Dits%2Dkind%20partnership%20with%20Shake%20Shack,Cheeseburger%20as%20their%20meal%20option>.

²⁰ Channing Reid, “Virgin Galactic’s Options With Boom Supersonic Lapse,” *Simple Flying*, July 10, 2023, <https://simpleflying.com/virgin-galactic-lets-boom-supersonic-options-lapse/>.

²¹ Kahn, “Airline Deregulation.”

²² Chris Edwards. (2022). “Air Traffic Control,” *Cato Handbook for Policy Makers*, Cato Institute.

by the COVID-19 pandemic.²³ Addressing these deficits is critical for maintaining safety and expanding capacity.

Beyond employment tweaks, there is reason to support challenging the ATC structure altogether and moving it towards a private sector system. A 2005 study by the Government Accountability Office looked at five countries that had taken that approach and found that such a step incentivized cost controlling actions, increased efficiency, and maintained safety standards.²⁴

Furthermore, many airport authorities levy fees on ride-sharing companies, but not taxis or other vehicles, which leads to increased fees for airline travelers. A consumer could spend an extra \$22 on their travel because of fees imposed on them to and from both airport destinations.²⁵

Additional approaches could include addressing limited capacity in airports. One study analyzed historic data on airport capacity expansion and found that it could lead to additional destinations and carriers, but that it is largely dependent on slot control regulations.²⁶ Looking at such barriers is a great place to start.

Recommendations

The RFI offers a vital opportunity to advance competition and consumer welfare in the airline industry. By protecting the gains of deregulation, addressing regulatory missteps, and fostering innovation and competition, policymakers can ensure that air travel remains safe, accessible, and affordable for all Americans. A balanced approach, informed by data and economic realities, is essential to achieving these consumer goals.

²³ John Pullen, "Here's Why US Aviation Has Been Experiencing Air Traffic Controller Shortage," *Simple Flying*, November 18, 2024, <https://simpleflying.com/us-atc-shortage-analysis/#:~:text=Scope%20of%20the%20shortage&text=The%20FAA%20estimates%20that%20in,a%20deficit%20of%20800%20controllers>.

²⁴ United States Government Accountability Office, *Preliminary Observations on Commercialized Air Navigation Providers*, Washington DC: 2005, <https://www.gao.gov/assets/gao-05-542t.pdf> (accessed December 9, 2024).

²⁵ Justin Leventhal and Steve Pociask, "Picking Up The Tab: The Impact of Airport Fees on Ridesharing Consumers," *American Consumer Institute*, November, 2023, <https://www.theamericanconsumer.org/2023/11/american-consumer-institute-study-examines-the-impact-of-airport-fees-on-ridesharing-consumers/>.

²⁶ Lynnette Dray, "An empirical analysis of airport capacity expansion," *Journal of Air Transport Management*, Volume 87, 2020, 101850, ISSN 0969-6997, <https://doi.org/10.1016/j.jairtraman.2020.101850>.