April 5, 2022

The Honorable Jonathan Kanter
Assistant Attorney General, Antitrust Division
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

Re: Antitrust Review of the Spirit Airlines-Frontier Airlines Merger

Dear Assistant Attorney General Kanter:

The American Antitrust Institute (AAI) has long advocated for antitrust enforcement and competition policy that promotes competition and protects consumers in the transportation sector.[1] AAI writes to the U.S. Department of Justice (DOJ) Antitrust Division to present analysis supporting our concern that the proposed merger of Spirit Airlines and Frontier Airlines eliminates important competition at the national level and in numerous airport-pair markets for scheduled air passenger service. The threatened loss of competition would likely be felt by consumers in the form of higher airfares, higher ancillary fees, and lower quality service. Moreover, analysis based on publicly available information casts serious doubt on Spirit-Frontier's efficiency claims, and remedial slot and gate divestitures used in past airline mergers are unlikely to be effective in this case.

The proposed merger is the first merger of two major U.S. ultra-low-cost (ULC) airlines. ULC carriers operate different airline networks and employ different revenue models than the legacy airlines that have featured in previous major mergers. Spirit and Frontier have a demonstrated track record of inconsistent exit and entry in airport-pair markets and poor service quality. Moreover, the two carriers serve price-sensitive consumers that are often traveling to and from destinations where there is no choice of airport and little choice of alternative carriers. These unique features pose novel challenges for the Antitrust Division's review of the merger. AAI urges the DOJ to carefully consider moving to block the merger.

I. Summary of Major Conclusions

- **The proposed merger of Spirit and Frontier is the 7th major U.S airline merger in the last 17 years, a period of time that has been marked by the sequential elimination of competing airlines, mounting antitrust concerns in scheduled passenger air service markets, and no meaningful greenfield entry. Merging to bulk up to compete against dominant firms and oligopolies is never a valid justification for allowing a merger**

[1] The American Antitrust Institute (AAI) is an independent non-profit education, research, and advocacy organization. Its mission is to promote competition that protects consumers, businesses, and society. For more information, please visit www.antitrustinstitute.org and https://www.antitrustinstitute.org/issues/airlines/.

and **puts passenger air service markets on the slippery slope of rising concentration. The likely anticompetitive effects of the proposed merger, which will not be ameliorated by dubious efficiencies, would harm consumers and the stability and reliability of the U.S. passenger air transportation system.**

- **AAI's analysis casts doubt on Spirit-Frontier's claims that their proposed merger will deliver consumer benefits. Past airline mergers have struggled to produce claimed efficiencies and Spirit-Frontier is unlikely to be different, and could even be worse. Projected cost savings do not appear merger-specific, some network benefits will be limited for technical reasons, and the carriers' inconsistent history of exiting and entering markets undercuts claims of any enhanced, longer-term connectivity. The fact that Spirit-Frontier do not commit to lower post-merger fares (i.e., only more "ultra-low fares") eliminates a major source of consumer benefits from any efficiencies that are realized. And it puts more pressure on promises of enhanced quality and new service, which are unlikely to materialize.**

- **Skepticism over Spirit-Frontier's efficiency claims is important because the proposed merger will eliminate head-to-head competition between the only two domestic ULCs, at the national level and in airport-pair markets. Numerous such markets could see significant increases in concentration, raising competitive concerns around both unilateral and coordinated effects. Moreover, Spirit's and Frontier's unbundled "fare+fee" model and records of consistently poor service raise additional concerns about higher post-merger ancillary fees and further decreases in service quality. These effects will be felt largely by price-sensitive consumers.**

- **Because of the unique features of ULCs, and Spirit and Frontier in particular, DOJ's historical approach to remedying problematic airline mergers with slot and gate divestitures may be ineffective. The fact that adversely affected airport-pairs involve uncongested airports, and ULCs have limited operations at those airports, severely constrains these remedies. Moreover, "out-of-market" efficiencies of unprecedented size, which are unlikely to exist, would be required for the DOJ to leave competitive concerns unaddressed.**

II. Introduction

On February 7, 2022, Spirit and Frontier announced their plan to merge.[2] The airlines characterize their merger as creating "…America's Most Competitive Ultra-Low Fare Airline."[3] They emphasize big numbers and big benefits that sound decidedly pro-consumer. For example, Spirit and Frontier estimate that they will serve over 145 destinations in the U.S., Latin America, and the Caribbean with over 650 nonstop routes.[4] However, new routes and destinations appear to be only a small

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[2] *Frontier Airlines and Spirit Airlines to Combine, Creating America's Most Competitive Ultra-Low Fare Airline*, FlyFrontier.com (Feb. 7, 2022), https://ir.flyfrontier.com/node/7416/pdf ["Press Release"].
[3] Press Release, *supra* note 2.
[4] *Creating America's Most Competitive Ultra-Low Fare Airline*, Presentation at the JP Morgan Industrial Conference (Mar. 15, 2022), at 7, https://s24.q4cdn.com/507316502/files/doc_presentations/2022/JP-Morgan-2022-Industrials-Conference-Presentation.pdf ["JP Morgan Presentation"].

increase over the two carriers' current offerings.[5] Presumably, all of this will be accomplished through $500 million in claimed annual run-rate operating synergies through 2026, which will allegedly generate $1 billion in annual consumer savings, mostly around more "ultra-low fares to more people in more places."[6]

Spirit-Frontier go on to assert that the merged airline will "drive competition and expand service to underserved small and mid-sized cities across the U.S."[7] Moreover, after accounting for the 350 aircraft they have on order—but not all of which appear to be financed—the two carriers claim the combined fleet will be the youngest, most fuel-efficient and greenest in the U.S.[8] The effect of the merger, according to Spirit and Frontier, would be to create positive competitive dynamics, including a "disruptive airline," and to accelerate investment in innovation and growth to compete even more aggressively, especially against the dominant Big 4 carriers (American, Delta, United, and Southwest).[9]

Spirit and Frontier currently occupy the 7th and 9th slots, based on market share, in the national market. If merged, the airline would leapfrog both JetBlue and Alaska to move into the 5th slot, with about a 9% national market share, or four points behind United.[10] The merger would be the next in a string of mergers of major U.S. airlines that have eliminated seven major airlines in the U.S. over the last 17 years, or roughly one airline every two and a half years.[11] During that period, both at the national level and in airport-pair markets, consumers have witnessed the loss of competing carriers and no meaningful greenfield entry of new carriers.

The trend toward concentration in the domestic airline markets has not gone unnoticed. For example, the DOJ filed suit against United and Delta in 2015, alleging the illegal acquisition of takeoff and landing slots at Newark Liberty International Airport.[12] DOJ also filed suit against American and JetBlue in 2021, alleging an illegal agreement based on the airlines' Northeast Alliance codeshare agreement.[13] And a private consumer class action case alleged anticompetitive collusion on baggage fees between then low-cost-carriers Southwest and AirTran.[14] These alleged (and, in some cases, proven) antitrust violations address fundamental concentration problems: namely, the emergence of dominant firms and tight oligopolies of carriers that have strong incentives to protect their dominant positions and to coordinate to keep capacity tight and airfares high.

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[5] Chris Sloan, *Frontier and Spirit Race Toward Merger With Massive Expansion*, FlightGlobal.com (Mar. 17, 2022), https://www.flightglobal.com/strategy/frontier-and-spirit-race-toward-merger-with-massive-expansion/147969.article
[6] Press Release, *supra* note 2.
[7] *Id.*
[8] *Id.*
[9] *Id.*
[10] Transtats, U.S. Dep't. of Transportation, Bureau of Transportation Statistics, https://www.transtats.bts.gov/.
[11] *See, e.g., Data and Statistics: U.S. Airline Mergers and Acquisitions*, Airlines.org (Feb. 7, 2022), https://www.airlines.org/dataset/u-s-airline-mergers-and-acquisitions/.
[12] U.S. v. United Continental Holdings, Inc. and Delta Air Lines, Inc., Verified Compliant, Case No. 2:33-av-00002 (D.N.J., filed Nov. 10, 2015).
[13] U.S., et al., v. American Airlines Group Inc. and JetBlue Airways Corporation, Complaint (D. Mass., filed Sept. 21, 2021).
[14] In Re Delta/AirTran Baggage Fee Antitrust Litigation, Case No. 1:09-cv-01391-TCB, (N.D. Ga., filed Aug. 2, 2010).

III. Spirit and Frontier Efficiencies Claims are Dubious and Should be Discounted

One of the major features of the Spirit-Frontier merger proposal is a flawed "defense" based on claimed efficiencies that are unlikely to be merger-specific, or that evidence shows probably will not to materialize in any significant way. A survey of Spirit-Frontier's public disclosures highlights that the carriers promise only more "ultra-low fares to more people in more places," not lower fares post-merger. This eliminates lower fares as a major consumer benefit from merger-related efficiencies, should they actually materialize. Any efficiencies that do result from the Spirit-Frontier merger will, therefore, have to be related to "improved quality, enhanced service, or new products."[15] However, our analysis shows that the combined airline will likely deliver even lower quality service than they already do, and Spirit-Frontier's inconsistent track records of connectivity cast doubt on promises of new or enhanced service. Efficiencies claims should thus be discounted accordingly.

A. Past Airline Mergers Reveal Difficulty in Delivering on Promised Efficiencies

The Horizontal Merger Guidelines require that merger efficiencies be both "merger specific" and "cognizable."[16] If efficiencies claims could be achieved through means other than the proposed merger, or if they are speculative, vague, and unverifiable, then they are not credited. There are two categories of efficiencies that are typically estimated in airline mergers—cost savings and benefits from combining networks. Cost savings are the projected savings that result, for example, from integrating information systems, better utilization of gate space and other facilities such as hangars and leaseholds, and increased operational efficiency.

The Guidelines are inherently skeptical of cost efficiencies. More weight is given to easily verified marginal cost reductions that are less likely to result from anticompetitive reductions in output.[17] This contrasts with reductions in fixed costs that directly increase profits and take time to benefit consumers, if they do so at all. Many of the types of cost savings claimed in airline mergers involve fixed cost reductions (e.g., reductions in overhead, management, etc.) and are less likely to be merger-specific, substantial, and cognizable.[18]

Network benefits are those efficiencies projected to accrue from post-merger capacity management and enhanced connectivity for consumers.[19] They can arise from a number of sources, several of which are more specific to hub-and-spoke airline systems. These include, for example: adding destinations to the network, offering more round-trip options on existing routes, converting interline service into single line service, optimizing the combined fleet of aircraft across a larger network, and scheduling improvements. Airlines have also asserted that network benefits can accrue from reducing service in marginally profitable and unprofitable markets.

Airline merger efficiencies have been the focus of considerable analysis and skepticism. The 2013 AAI study, *Delivering the Benefits? Efficiencies and Airline Mergers*, analyzed efficiencies claims in past

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[15] U.S. Department of Justice/Federal Trade Commission, Horizontal Merger Guidelines (2010), at §10.
[16] *Id.*
[17] *Id.*
[18] *Id.*
[19] Network efficiencies are typically estimated by comparing predicted demand for the merged carriers' services under post-merger schedules with demand for services assuming the carriers remained standalone.

airline mergers.[20] The study noted significant public backlash in the wake of previous airline mergers, including criticism of protracted and costly system integrations, service cutbacks, and the deteriorating quality of commercial passenger service.[21] The AAI study also found that promises of network benefits from increased connectivity after the Delta-Northwest, United-Continental, and Southwest-AirTran mergers did not fully materialize. The airlines cut airport-pairs from their systems post-merger and ULCs cut a substantially higher percentage than did legacy airlines.[22]

Problems in achieving post-merger cost savings and network benefits (i.e., more connectivity) highlight that airline mergers have had difficulty in realizing claimed benefits. This undoubtedly caused inefficiencies through expensive system integrations and loss of connectivity. As one expert recently summed up: "It is pretty difficult looking at the U.S. airline industry [to believe] that mergers are actually going to lower costs. There is no evidence that they deliver more cost-efficiency."[23] Moreover, airlines are non-committal when it comes to network benefits around connectivity. The following exchange between Southwest Airline's CEO GaryKelly and Senator Kohl at the 2011 Senate Judiciary Committee hearing on the Southwest-AirTran merger illustrates the reluctance of carriers to make commitments to deliver on longer-term, less certain network benefits:

> ***Chairman Kohl:*** *Would you at this time commit to maintaining AirTran's service and its growth plans at Mitchell Airport after this merger takes place?*
>
> ***Mr. Kelly:*** *Mr. Chairman, we are very enthused about Milwaukee. We are very enthused about continuing to grow Southwest Airlines...I just cannot guarantee that we will have the fiscal ability to do that.*[24]

B. Some Efficiencies Claimed by Spirit-Frontier are Not Merger-Specific or Are Limited for Technical Reasons

Spirit and Frontier claim that expansive efficiencies will result from their proposed merger. This includes $500 million in run-rate operating synergies annually through 2026.[25] Operating synergies cover four major areas: (1) "distribution," or improved load factors ($220 million); (2) "schedule efficiencies," or freeing up spare aircraft and increasing schedule efficiencies ($145 million); (3) "cost synergies," including procurement savings and overhead ($100 million); and (4) "new connecting opportunities" resulting from the organic creation of new connections ($35 million).[26] Such synergies, net of one-time $400 million "costs to achieve," will allegedly generate $1 billion in annual

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[20] Diana L. Moss, *Delivering the Benefits? Efficiencies and Airline Mergers*, American Antitrust Inst. (Nov. 21, 2013), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2547673 ["AAI Study"].
[21] *Id.*, at 7-9.
[22] *Id.,* at 13.
[23] Kristen Leigh Painter, *United Airlines is one big company, but not yet one happy family*, DenverPost.com (Sept. 8, 2013), http://www.denverpost.com/business/ci_24036565/united-airlines- is-one-big-company-but-not.
[24] *The Southwest/AirTran Merger and its Impact On M-7 Businesses, Consumers, and the Local Economy*,Hearing Before the Subcommittee On Antitrust, Competition Policy And Consumer Rights of the Committee on the Judiciary, United States Senate, 112th Congress (Feb. 25, 2011).
[25] JP Morgan Presentation, *supra* note 4, at 5-6. Similar to previous mergers, the cost efficiencies claimed by Spirit-Frontier account for about 20% of operating synergies and the remaining 80% are related to network benefits. For example, in the US Airways-America West, Delta-Northwest, United-Continental, Southwest-AirTran, and US Airways-American mergers, network efficiencies averaged about 70% of claimed efficiencies. *See*, AAI Study, *supra* note 20, at 4.
[26] JP Morgan Presentation*, Id.*

consumer savings or benefits.[27]

The $1 million in consumer savings that Spirit-Frontier claim will flow from their merger are, the carriers state, derived from "consumer price savings" resulting from new route entry enabled by the proposed transaction.[28] New route entry, in turn, will be enabled by: (1) schedule efficiencies, improved fleet utilization, block time optimization, and freeing up spare aircraft; and (2) "but for" new routes, or routes that would not otherwise be available to the carriers on a standalone basis. Spirit and Frontier also claim, as a benefit of the merger, the "brand strength of a more national ULC" that would facilitate entry into 32 legacy-dominated markets.[29]

As noted above, the Guidelines take a skeptical view of claims that cost savings will result from a proposed merger. As relevant to Spirit-Frontier, cost savings from optimized procurement or reductions in overhead are not typically considered merger-specific. For example, cost savings relating to procurement could be accomplished without the merger, i.e., through improved contracting. And overhead expenses are typically considered fixed costs, not the type of marginal cost reductions that the agencies look for.

Some of the network benefits claimed by Spirit-Frontier are also suspect because of technical limitations. These include the claimed increased schedule efficiencies relating to freeing up aircraft, improved fleet utilization, or even some sources of increased load factors. These benefits are all related in some way to the optimization of combined, post-merger fleet operations. But both Spirit and Frontier both fly essentially the same aircraft, the Airbus series A320 and A321. This is also a feature of the 350 aircraft the carriers have on order, a significant percentage of which will replace existing aircraft that will be retired by 2026.[30] Spirit also flies the smaller Airbus A319 but it is a small percentage of their total fleet.[31] The two carriers thus fly similar aircraft with relatively little variation in size or configuration. This is a very different scenario than the diverse fleets operated by legacy airlines, with potentially greater opportunities to gain from post-merger combined fleet optimization. Spirit-Frontier's opportunities to squeeze benefits out of post-merger fleet optimization will be more limited.

C. Analysis of Spirit's and Frontier's Entry and Exit Shows Uncertain Network Benefits Associated with Post-Merger Connectivity

The benefits of greater connectivity resulting from combining the Spirit and Frontier networks sound impressive. But claims of enhanced connectivity reflect fundamentally longer-range network benefits that are contingent on a number of dynamic factors and, therefore, necessarily less certain. For example, as noted earlier, AAI's retrospective analysis of past mergers shows that carriers actually cut airport-pairs post-merger and that ULCs cut a much higher percentage than did legacy airlines. This is likely due to a number of factors that creates a fluid landscape against which to evaluate efficiencies claims: (1) different economics of hub-and-spoke networks operated by the legacy network carriers and the point-to-point networks operated by ULCs; (2) ongoing changes in demand for air travel; and (3) strategic pricing by other carriers in the wake of exit and entry.

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[27] *Id.*
[28] *Jd.*
[29] *Id.,* footnote 1.
[30] *Id.*, at 12.
[31] *Aircraft Configuration*, FlyFrontier.com, https://www.flyfrontier.com/about-us/aircraft-configuration?mobile=true and *What Types of Aircraft Does Spirit Fly?* https://customersupport.spirit.com/en-us/category/article/KA-01304.

We analyzed exit and entry by Spirit and Frontier to assess the viability of carriers' claims around enhanced post-merger connectivity. The analysis identified the presence of the two carriers' on airport pairs in 2015, 2018, and 2021—a period that is long enough, and at regular enough intervals—to observe discrete exit and entry.[32] We identified four types of entry: (1) "short-term" entry (i.e., presence on an airport pair in 2015, but not in 2018, or in 2018 but not in 2021); (2) "intermediate-term" entry (i.e., presence on an airport pair from 2015-2018 but not 2018-2021); (3) "long-term" entry (i.e., presence on an airport pair from 2015-2021); and (4) "intermittent" entry (i.e., presence on an airport pair in 2015, not in 2018, but again in 2021).

The results of the analysis are revealing. For example, over 55% of all airport pairs identified between 2015 and 2021 involved short- and intermediate-term exits by Spirit and Frontier. About 35-40% of all airport pairs involved short-, intermediate-, and long-term entry by the two carriers. The largest source of entry for both carriers was in 2021, but Frontier entered more airport-pairs than Spirit. Higher levels of entry in 2021 are not surprising, given the wind-down of the COVID-19 pandemic and a return to travel by many consumers. Finally, the analysis reveals that Spirit and Frontier exhibited intermittent entry on between about 4-8% of total airport pairs.

The analysis thus shows that both Spirit and Frontier have engaged in a good deal of exit and entry between 2015 and 2021. But the very mixed short-, intermediate-, and long-term nature of that activity—which is heavy on exits—indicates inconsistency in connectivity in their networks. This casts significant doubt on the claim that enhanced connectivity will be realized for any length of time, or even realized at all.

IV. The Proposed Merger Will Eliminate Competition, with Likely Adverse Effects on Fares, Ancillary Fees, and Service Quality

Merging to bulk up to compete better in markets against dominant firms and oligopolies is never a good reason to allow a merger and puts markets on the slippery slope of rising concentration. The weakness of Spirit-Frontier's efficiency claims discussed in the previous section is magnified in light of the potential adverse effects of the merger. These effects are more numerous than in previous airline mergers, falling into three major categories: higher airfares, higher ancillary fees, and lower quality service. Taken together, these effects could have a substantial adverse effect on consumers, particularly price sensitive consumers travelling to locations with only one choice of airport and little competition.

A. The Loss of Head-to-Head Competition and Risk of Anticompetitive Post-Merger Coordination Could Lead to Higher Airfares and Ancillary Fees

Analysis shows that the Spirit-Frontier merger will eliminate competition on a few hundred airport-pairs, dozens of which could see problematic increases in concentration. Relevant markets in airline mergers are defined on the basis of scheduled passenger air service offered between city-pairs.[33] The

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[32] *T-100 Domestic Market (U.S. Carriers)* database, Transtats, U.S. Dep't. of Transportation, Bureau of Transportation Statistics,
https://www.transtats.bts.gov/Tables.asp?QO_VQ=EED&QO_anzr=Nv4%FDPn44vr4%FDf6n6v56vp5%FD%FLS14z%FDHE%FDg4nssvp%FM-%FD%FDh.f.%FDPn44vr45&QO_fu146_anzr=Nv4%FDPn44vr45.
[33] *See, e.g.,* U.S., et al, v. US Airways Group, Inc., and AMR Corporation, Complaint, Case No. 1:13-cv-01236 (D.D.C, filed Aug. 13, 2013), at § 4.

proposed merger of Spirit and Frontier will affect airport-pairs involving cities where there are no secondary airports that provide consumers with alternatives. Airport-pairs where merger-induced increases in, and post-merger, concentration are in excess of the Guidelines' thresholds trigger significant competitive concerns at a number of airports. These include, at a minimum: Cleveland (CLE), Las Vegas (LAS), Myrtle Beach (MYR), Orlando (MCO), Philadelphia (PHL), Ft. Myer (RSW), Puerto Rico (SJU), and Tampa (TPA).[34]

A closer look reveals that the merger would fundamentally change market structures and competitive incentives at some of these airports, with implications for some the routes they serve. For example, at LAS, MCO, and PHL, a combined Spirit-Frontier and the next largest carrier (e.g., Southwest at LAS and MCO, and American at PHL) would have more than a 50% market share. At SJU, the merged airline, together with American and JetBlue, would control almost 70% of the market. At these airports, the merger of Spirit and Frontier would eliminate a significant close ULC rival, putting upward pressure on airfares. And with only two to three rivals remaining post-merger, there would be stronger incentives to coordinate to keep airfares high. These increases in concentration will have outsized impacts on price sensitive consumers.

The elimination of head-to-head competition between Spirit and Frontier as national ULCs will also lessen pressure on the merging parties to compete on ancillary fees, which are set largely independent of route-level pricing. Spirit and Frontier are the domestic leaders in unbundling, or splitting out non-ticket or non-fare airline fees from fares as part of their "fare+fee"model. Ancillary fees are charged for, among other items, checked and carry-on baggage, early boarding, and seat selection. They are encountered largely at the end of consumers' online travel search experience or even after the itinerary has been purchased.[35]

Revenues from ancillary fees constitute a major part of Spirit's and Frontier's total revenue. Frontier touts their status the leader in ancillary revenue, which was 60% of total revenue in the second half of 2021, up from 50% in 2018.[36] Spirit also highlights "robust" non-ticket or ancillary revenue with a "proven" ancillary revenue model.[37] This includes the use of dynamic pricing, which relies on data analytics to optimize the model, to increase ancillary revenues.[38] Because ancillary fees are a major component of Spirit's and Frontier's total revenues, and because they use a fare+fee model to price ancillary fees independent of route-level fares, the carriers have strong incentives to exercise their enhanced post-merger market power to raise those fees.

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[34] T-100 Domestic Market (U.S. Carriers), *supra* note 32.

[35] This is a well-known form of "drip" pricing that has been the subject of significant competition and consumer protection concern over the years. See, e.g., Federal Trade Comm'n., Conference on The Economics of Drip Pricing (May 21, 2012), https://www.ftc.gov/news-events/events/2012/05/economics-drip-pricing.

[36] *Company Presentation*, FlyFrontier.com (Feb. 2022), https://ir.flyfrontier.com/static-files/73d2e31b-20f4-433f-904b-a99e75eaee39, at 7.

[37] Investor Presentation, Spirit Airlines (Dec. 15, 2021), https://s24.q4cdn.com/507316502/files/doc_presentations/2021/12/Investor-Deck-December-2021-12.15.2021-FINAL.pdf, at 15.

[38] *Id.*

B. Spirit's and Frontier's Track Records of Poor Service Quality Will Be Exacerbated by the Proposed Merger

Much like ancillary fees, the elimination of head-to-head competition between Spirit and Frontier as national ULCs will lessen pressure on the merging parties to compete on quality. Indeed, the stepwise elimination of competition in the domestic air travel industry over the last 17 years has raised issues around the quality of air travel service. Spirit and Frontier already have records of poor service quality and the effects of the merger on further degrading incentives to compete could be significant.

We assessed two major performance variables at regular intervals over the last several years (2015, 2018, and 2021), a long enough period over which to observe changes and trends. One metric of airline service quality is on-time arrivals.[39] Data across all U.S. airports show that in 2015, Spirit ranked 12 of 13 total airlines for on-time arrivals while Frontier ranked at the very bottom of the field.[40] In 2018, Spirit ranked eight of 17 total airlines for on-time arrivals, while Frontier was 16 of 17 airlines.[41] In 2021, Spirit ranked 17 of 17 total airlines for on-time arrivals, and Frontier ranked 15 of 17.[42]

Another quality variable is measured by consumer complaints across various metrics, including: flight problems, oversales, boarding, refunds, baggage, customer service, and advertising.[43] A review of data on complaints also reveals poor quality performance by Spirit and Frontier. For example, in 2015 Spirit ranked 3rd highest and Frontier ranked 5th highest in total complaints for 21 carriers.[44] In 2018, Spirit ranked 3rd highest of 15 carriers, while Frontier ranked 6th highest for total complaints.[45] In 2021, Spirit ranked 4th highest of 16 carriers, while Frontier ranked 7th highest for total complaints.[46]

In sum, even a cursory review of the quality indicators for Spirit and Frontier reveals a history of poor performance. For example, across the period 2015 to 2021 Spirit ranked, on average, in the bottom twentieth percentile for on-time arrivals while Frontier ranked in the bottom sixth percentile. Spirit ranked, on average, in the top twentieth percentile for the most customer complaints while Frontier ranked in the top thirty-fifth percentile. Both carriers' positions in the rankings over the period 2015 to 2021 have not materially improved and, in fact, with the exception of only one of twelve observations, the two carriers' rankings remain consistently low.[47] The elimination of competition between Spirit and Frontier could well exacerbate this marked history of poor service quality performance, to the detriment of consumers.

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[39] Air Travel Consumer Reports, U.S. Dep't. of Transportation, Office of Aviation Consumer Protection, June 2015, June 2018, and June 2021 reports, https://www.transportation.gov/individuals/aviation-consumer-protection/air-travel-consumer-reports.
[40] *Id.,* 2015 Report, Table 1, at 4.
[41] *Id.,* 2018 Report, Table 1A, at 7.
[42] *Id.,* 2021 Report, Table 1A, at 7.
[43] Air Travel Consumer Reports, *supra* note 40.
[44] Id., June 2015 Report, at 36.
[45] Id., June 2018 Report, at 42.
[46] Id., June 2021 Report, at 46 .
[47] AAI research shows that ULCs have historically exhibited the poorest performance on delays. For example, over the period 2004-2013, regional carriers saw a slight decline in delays, hub-and-spoke carriers showed an 11% increase in delays, but low-cost carriers showed a 47% increase in delays. *See,* AAI Report, *supra* note 20, at 15-16.

V. DOJ's Approach to Remedying Problematic Airline Mergers is Unlikely to Work in the Case of Spirit and Frontier

DOJ faces a dilemma in addressing the anticompetitive effects of combining the two largest ULCs. The proposed merger of Spirit and Frontier will eliminate competition on dozens of airport-pairs, likely leading to higher airfares. And for the reasons discussed above, the loss of competition between the two largest ULCs will reduce incentives to compete on already high ancillary fees and already low service quality, both on individual routes and system wide. These possible anticompetitive effects of the merger should be assessed in light of Spirit-Frontier's extraordinarily weak efficiencies defense. Fundamental problems with claimed cost-savings and network benefits mean that any efficiencies, whether on airport-pair markets or system-wide, are commensurately limited and highly unlikely to overwhelm any significant loss of competition.

A decision to challenge the merger and settle it with remedies, as the Antitrust Division has done in all past airline mergers, poses novel problems. As a preliminary matter, the Antitrust Division is limited in that may not consider out-of-market benefits in crafting a remedy.[48] Unlike the exercise of prosecutorial discretion not to challenge the merger if the Antitrust Division were to somehow find that the threatened competitive harm in the affected markets is insubstantial and the merger creates large, inextricably linked, out-of-market efficiencies, the Guidelines set forth that a merger remedy requires a plausible Section 7 complaint and an accompanying consent decree, both of which must be filed in federal court.[49] The Antitrust Division, therefore, cannot properly exercise discretion to settle, and the court cannot validly enter a decree if the settlement is premised on tolerating substantial competitive harm in one market for the sake of perceived benefits in a different market.

Moreover, the "go-to" remedy in past mergers has been to increase access to concentrated markets through slot and gate divestitures by the merging parties. These structural fixes were designed to stimulate entry of competing carriers, restoring lost competition and even creating opportunities for new routes and connectivity. This scenario is decidedly absent in the matter of Spirit-Frontier. Airports that are the origin or destination for routes that will see a problematic loss of competition post-merger are not congested and not subject to the Federal Aviation Administration's slot allocation programs.[50] Slot divestitures are thus not available here as a possible remedy. Gate divestitures are unlikely to prove an effective divestiture remedy. Low-cost carriers do not maintain the same magnitude of airport operations facilities (e.g., gates, ticket counters, etc.), as do legacy airlines, which generally command entire terminals to cluster their gates and other facilities together.

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[48] *See* 15 U.S. Code § 18 (Clayton Act Section 7) (merger is illegal if it may substantially lessen competition "in any line of commerce"); 2020 Merger Remedies Manual, U.S. Dep't. of Justice, Antitrust Division (Sept. 202), at 6 (remedy must "maintain the level of premerger competition in the market of concern"); and *id.* at 4 ("[T]he goal is to preserve competition—rather than to pick winners and losers.").

[49] Guidelines, *supra* note 15, at 30, n.14.

[50] *Slot Administration – Schedule Facilitation*, U.S. Dep't. of Transportation, Federal Aviation Administration, https://www.faa.gov/about/office_org/headquarters_offices/ato/service_units/systemops/perf_analysis/slot_administration/slot_administration_schedule_facilitation.

Sincerely,

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