

107TH CONGRESS
1ST SESSION

S. _____

To amend title 49, United States Code, to require that air carriers meet public convenience and necessity requirements by ensuring competitive access by commercial air carriers to major cities, and for other purposes.

IN THE SENATE OF THE UNITED STATES

FEBRUARY —, 2001

Mr. HOLLINGS (for himself, Mr. MCCAIN, Mr. —, Mr. —, and Mr. —) introduced the following bill; which was read twice and referred to the Committee on —

A BILL

To amend title 49, United States Code, to require that air carriers meet public convenience and necessity requirements by ensuring competitive access by commercial air carriers to major cities, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Aviation Competition
5 Restoration Act”.

6 **SEC. 2. FINDINGS.**

7 The Congress makes the following findings:

1 (1) The airline industry continues to evolve into
2 a system dominated by a few large air carriers and
3 a handful of smaller, niche air carriers. Absent Con-
4 gressional action, access to critical markets is likely
5 to be foreclosed.

6 (2) In testimony before the Commerce Com-
7 mittee in 1978, the then-President of Eastern Air-
8 lines testified that the top 5 air carriers had 68.6
9 percent of the domestic market. If the mergers and
10 acquisitions proposed in 2000 and 2001 are con-
11 summated, the 5 largest network airlines in the
12 United States will account for approximately 83 per-
13 cent of the air transportation business (based on
14 revenue passenger miles flown in 1999).

15 (3) According to Department of Transportation
16 statistics, taking into account the proposed mergers
17 of United Airlines and US Airways, and of American
18 Airlines and TWA, there will be at least 20 large
19 hub airports in the United States where a single air-
20 line and its affiliate air carriers would carry more
21 than 50 percent of the passenger traffic.

22 (4) The continued consolidation of the airline
23 industry may inure to the detriment of public con-
24 venience and need, and the further concentration of

1 market power in the hands of even fewer large com-
2 petitors may lead to unfair methods of competition.

3 (5) A more concentrated airline industry would
4 be likely to result in less competition and higher
5 fares, giving consumers fewer choices and decreased
6 customer service.

7 (6) The Department of Transportation has doc-
8 umented that air fares are relatively higher at those
9 main hub airports where a single airline carries
10 more than 50 percent of the passenger traffic, and
11 studies indicate that unfair methods of competition
12 are more likely to occur at such airports, thus inhib-
13 iting competitive responses from other carriers when
14 fares are raised or capacity reduced.

15 (7) The General Accounting Office has con-
16 ducted a number of studies that document the pres-
17 ence of both high fares and problems with competi-
18 tion in the airline industry at dominated hub air-
19 ports.

20 (8) The National Research Council of the
21 Transportation Research Board has recognized that
22 higher fares exist in short haul markets connected to
23 concentrated hub airports.

24 (9) A Department of Transportation study indi-
25 cates that the entry and existence of low fare airline

1 competitors in the marketplace has resulted in a re-
2 ported \$6.3 billion in annual savings to airline pas-
3 sengers.

4 (10) While the antitrust rules generally govern
5 mergers and acquisitions in the air carrier industry,
6 and will continue to do so, the public concern about
7 the importance of air transportation, the impact of
8 over scheduling, increasing flight delays and can-
9 cellations, poor service, and continued hub domina-
10 tion requires the Department of Transportation to
11 assert its authority in analyzing proposed trans-
12 actions among air carriers that affect consumers.

13 **SEC. 3. PUBLIC INTEREST REVIEW OF AIR CARRIER ACQUI-**
14 **SITIONS AND MERGERS.**

15 (a) IN GENERAL.—Subchapter I of chapter 417 of
16 title 49, United States Code, is amended by adding at the
17 end thereof the following:

18 **“§ 41722. Mergers and acquisitions**

19 **“(a) PROTECTION OF PUBLIC INTEREST; COMPETI-**
20 **TION TEST.—**

21 **“(1) IN GENERAL.—**An air carrier may not ac-
22 quire, directly or indirectly, any voting securities or
23 assets of another air carrier if, after the acquisition,
24 the air carrier resulting from the acquisition would
25 have more than 10 percent of the passenger

1 enplanements in the United States (based on projec-
2 tions from the most recent annual data available to
3 the Secretary of Transportation) if the Secretary de-
4 termines that the effect of the acquisition—

5 “(A) would be substantially to lessen com-
6 petition, or

7 “(B) would result in unreasonable industry
8 concentration, excessive market domination,
9 monopoly powers, or other conditions that
10 would tend to allow at least 1 air carrier unrea-
11 sonably to increase prices, reduce services, or
12 exclude competition in air transportation at any
13 large hub airport (as defined in section
14 47134(d)(2)) or in at least 10 percent of the
15 top 500 markets for passenger air transpor-
16 tation in the United States.

17 “(2) EXCEPTION.—Notwithstanding paragraph
18 (1), such an acquisition may proceed if the Secretary
19 finds that—

20 “(A) the anticompetitive effects of the pro-
21 posed transaction are outweighed in the public
22 interest by the probable effect of the acquisition
23 in meeting significant transportation conven-
24 iences and needs of the public; and

1 “(B) those significant transportation con-
2 veniences and needs of the public may not be
3 satisfied by a reasonably available alternative
4 having materially less anticompetitive effects.

5 “(b) DOMINANT CARRIERS REQUIRED TO RELIN-
6 QUISH SOME GATES, FACILITIES, AND ASSETS AT HUB
7 AIRPORT.—

8 “(1) IN GENERAL.—An air carrier may not ac-
9 quire, directly or indirectly, any voting securities or
10 assets of another air carrier if, after the acquisition,
11 the air carrier resulting from the acquisition would
12 be a dominant air carrier at any large hub airport
13 (as defined in section 47134(d)(2)) unless the Sec-
14 retary of Transportation finds that—

15 “(A) the air carrier resulting from the ac-
16 quisition will provide gates, facilities, and other
17 assets at that hub airport on a fair, reasonable,
18 and nondiscriminatory basis to another air car-
19 rier that—

20 “(i) holds a certificate issued under
21 chapter 411 authorizing it to provide air
22 transportation for passengers;

23 “(ii) has fewer than 15 percent of the
24 average daily passenger enplanements at
25 that airport; and

1 “(iii) is able, or will be able, to utilize
2 the gate, facility, or other asset provided to
3 it at a reasonable level of utilization; or

4 “(B) gates, facilities, and other assets are
5 available, or will be made available in a timely
6 manner, on a fair, reasonable, and nondiscrim-
7 inatory basis to accommodate competitive ac-
8 cess to that airport by other air carriers.

9 “(2) LIMITATION.—Paragraph (1) does not re-
10 quire an air carrier to relinquish control, or other-
11 wise dispose, of more than 10 percent of the gates,
12 facilities, and other assets controlled by that air car-
13 rier at any airport, as determined by the Secretary.

14 “(3) PLAN REQUIRED.—Before the Secretary
15 may make a finding under paragraph (1), the ac-
16 quiring air carrier and the air carrier being acquired
17 shall file a joint plan in writing with the Secretary
18 that states with such specificity as the Secretary
19 may require exactly how the air carrier resulting
20 from the acquisition will comply with the require-
21 ments of paragraph (1).

22 “(4) ENFORCEMENT OF PLAN.—If the Sec-
23 retary determines, more than 90 days after the date
24 on which an acquisition described in paragraph (1)
25 is completed, that the air carrier has failed substan-

1 tially to carry out the plan submitted under para-
2 graph (3), the Secretary may—

3 “(A) withdraw approval of the acquisition;

4 “(B) withdraw authority for the air carrier
5 to serve international markets; or

6 “(C) take such other action as may be nec-
7 essary to compel compliance with the plan.

8 “(c) NOTIFICATION; WAITING PERIOD; FINAL
9 RULE.—

10 “(1) IN GENERAL.—In order for the Secretary
11 to be able to make the determination required by
12 subsection (a)—

13 “(A) each air carrier (or in the case of a
14 tender offer, the acquiring air carrier) shall
15 submit a notification to the Secretary, in such
16 form and containing such information as the
17 Secretary may require; and

18 “(B) wait until the waiting period de-
19 scribed in paragraph (2) has expired before ef-
20 fecting the acquisition.

21 “(2) WAITING PERIOD.—

22 “(A) IN GENERAL.—The waiting period
23 begins on the date of receipt by the Secretary
24 of a completed notification required by para-
25 graph (1)(A) and ends on the thirtieth day

1 after that date, or (in the case of a cash tender
2 offer) the fifteenth day after that date.

3 “(B) WAIVER; MODIFICATION.—The Sec-
4 retary may waive the notification requirement,
5 shorten the waiting period, or extend the wait-
6 ing period (by not more than 180 days), in
7 order to coordinate action under this subsection
8 with the Department of Justice under the anti-
9 trust laws of the United States.

10 “(3) COORDINATION WITH DOJ.—The Sec-
11 retary and the Attorney General may enter into a
12 memorandum of understanding to ensure that the
13 determination required by subsection (a) is made
14 within the same time frame as any Department of
15 Justice review of a proposed acquisition under sec-
16 tion 7A of the Clayton Act (15 U.S.C. 18a).

17 “(4) FINAL ACTION WITHIN 180 DAYS.—The
18 Secretary shall take final action with respect to any
19 acquisition requiring a determination under sub-
20 section (a) within 180 days after the date on which
21 the Secretary receives the notification required by
22 paragraph (1)(A).

23 “(d) AIR 21 COMPETITION PLAN REVIEW.—The
24 Secretary shall examine any hub airport affected by a pro-
25 posed acquisition described in subsection (a) to determine

1 whether that airport has complied with the competition
2 plan requirement of sections 47106(f) or 40117(k) of title
3 49, United States Code, and whether gates and other fa-
4 cilities are being made available at costs that are fair and
5 reasonable to air carriers in accordance with the require-
6 ments of section 41712(c)(3). The sponsor (as defined in
7 section 47102(19)) of any hub airport shall cooperate fully
8 with the Secretary in carrying out an examination under
9 this subsection.

10 “(e) DEFINITIONS.—In this section:

11 “(1) DOMINATED HUB AIRPORT.—The term
12 ‘dominated hub airport’ means an airport—

13 “(A) that each year has at least .25 per-
14 cent of the total annual boardings in the United
15 States; and

16 “(B) at which 1 air carrier accounts for
17 more than 50 percent of the enplaned pas-
18 sengers.

19 “(2) DOMINANT AIR CARRIER.—The term ‘dom-
20 inant air carrier’ means an air carrier that accounts
21 for more than 50 percent of the enplaned passengers
22 at an airport.

23 “(3) CONTROL.—With respect to whether a cor-
24 poration or other entity is considered to be con-
25 trolled by another corporation or other entity, the

1 term ‘control’ means that more than 10 percent of
2 the ownership, voting rights, capital stock, or other
3 pecuniary interest in that corporation or entity is
4 owned, held, or controlled, directly or indirectly, by
5 such other corporation or entity.

6 “(4) ENPLANEMENTS.—The term ‘passenger
7 enplanements’ means the annual number of pas-
8 senger enplanements, as determined by the Sec-
9 retary of Transportation, based on the most recent
10 data available.

11 “(5) ASSET.—The term ‘asset’ includes slots
12 (as defined in section 41714(h)(4)) and slot exemp-
13 tions (within the meaning of section 41714(a)(2)).”.

14 (b) SPECIAL RULE.—For the purpose of applying
15 section 41722 of title 49, United States Code, to an acqui-
16 sition or merger involving major air carriers proposed
17 after January 1, 2000, that has not been consummated
18 before February 15, 2001—

19 (1) subsection (c) of that section shall not
20 apply; but

21 (2) the Secretary of Transportation shall re-
22 quire such information from the acquiring air carrier
23 and the acquired air carrier, or the merging air car-
24 riers, as may be necessary to carry out that section,
25 and shall complete the review required by that sec-

1 tion within a reasonable period that is not to exceed
2 180 days from the date on which the Secretary re-
3 ceives the requested information from all parties.

4 (c) CONFORMING AMENDMENT.—The chapter anal-
5 ysis for chapter 417 of title 49, United States Code, is
6 amended by adding at the end the following;

“41722. Mergers and acquisitions”.

7 **SEC. 4. COMPETITIVE ACCESS TO GATES, FACILITIES, AND**
8 **OTHER ASSETS.**

9 (a) Subchapter I of chapter 417, as amended by sec-
10 tion 3, is further amended by adding at the end thereof
11 the following:

12 **“§ 41723. Competitive access to gates, facilities, and**
13 **other assets**

14 “(a) DOT REVIEW OF GATES, FACILITIES, AND AS-
15 SETS.—Within 90 days after the date of the enactment
16 of Aviation Competition Restoration Act, the Secretary of
17 Transportation shall investigate the assignment and usage
18 of gates, facilities, and other assets by major air carriers
19 at the largest 35 airports in the United States in terms
20 of air passenger traffic. The investigation shall include an
21 assessment of—

22 “(1) whether, and to what extent, gates, facili-
23 ties, and other assets are being fully utilized by
24 major air carriers at those airports;

1 “(2) whether gates, facilities, and other assets
2 are available for competitive access to enhance com-
3 petition; and

4 “(3) whether the reassignment of gates, facili-
5 ties, and other assets to, or other means of increas-
6 ing access to gates, facilities, and other assets for,
7 air carriers (other than dominant air carriers (as de-
8 fined in section 41722(e)(2)) would improve com-
9 petition among air carriers at any such airport or
10 provide other benefits to the flying public without
11 compromising safety or creating scheduling, effi-
12 ciency, or other problems at airports providing serv-
13 ice to or from those airports.

14 “(b) AUTHORITY OF SECRETARY TO MAKE GATES,
15 ETC., AVAILABLE.—The Secretary shall require a major
16 air carrier, upon application by another air carrier or on
17 the Secretary’s own motion to make gates, facilities, and
18 other assets available to other air carriers on terms that
19 are fair, reasonable, and nondiscriminatory to ensure com-
20 petitive access to those airports if the Secretary deter-
21 mines, on the basis of the investigation conducted under
22 subsection (a), that such gates, facilities, and other assets
23 are not available and that competition would be enhanced
24 thereby at those airports.

25 “(c) DEFINITIONS.—

1 “(1) MAJOR AIR CARRIER.—In this section the
2 term ‘major air carrier’ means an air carrier certifi-
3 cated under section 41102 that accounted for at
4 least 1 percent of domestic scheduled-passenger rev-
5 enues in the 12 months ending March 31 of each
6 year, as reported to the Department of Transpor-
7 tation pursuant to part 241 of title 14, Code of Fed-
8 eral Regulations, and identified as a reporting car-
9 rier periodically in accounting and reporting direc-
10 tives issued by the Office of Airline Information.

11 “(2) ASSET.—The term ‘asset’ includes slots
12 (as defined in section 41714(h)(4)) and slot exemp-
13 tions (within the meaning of section 41714(a)(2)).”.

14 (b) CONFORMING AMENDMENT.—The chapter anal-
15 ysis for chapter 417 of title 49, United States Code, is
16 amended by inserting after the item relating to section
17 41722 the following:

 “41723. Competitive access to gates, facilities, and other assets”.

18 **SEC. 5. UNFAIR METHODS OF COMPETITION IN AIR TRANS-**
19 **PORTATION.**

20 (a) UNFAIR COMPETITION THROUGH USE OF GATES,
21 FACILITIES, AND OTHER ASSETS.—Section 41712 of title
22 49, United States Code, is amended by adding at the end
23 the following:

24 “(c) UNDERUTILIZATION OF GATES, FACILITIES, OR
25 OTHER ASSETS.—

1 “(1) IN GENERAL.—It is an unfair method of
2 competition in air transportation under subsection
3 (a) for a dominant air carrier at a dominated hub
4 airport—

5 “(A) to fail to utilize gates, facilities, and
6 other assets fully at that airport; and

7 “(B) to refuse, deny, or fail to provide a
8 gate, facility, or other asset at such an airport
9 that is underutilized by it, or that will not be
10 fully utilized by it within 1 year, to another car-
11 rier on fair, reasonable, and nondiscriminatory
12 terms upon request of the airport, the other air
13 carrier, or the Secretary.

14 “(2) REQUESTING CARRIER MUST FILE WITH
15 DOT.—An air carrier making a request for a gate,
16 facility, or other asset under paragraph (1) shall file
17 a copy of the request with the Secretary when it is
18 submitted to the dominant air carrier.

19 “(3) AVAILABILITY OF GATES AND OTHER ES-
20 SENTIAL SERVICES.—The Secretary shall ensure
21 that gates and other facilities are made available at
22 costs that are fair and reasonable to air carriers at
23 covered airports where a ‘majority-in-interest clause’
24 of a contract or other agreement or arrangement in-
25 hibits the ability of the local airport authority to

1 provide or build new gates or other essential facilities.
2

3 “(4) DEFINITIONS.—In this subsection:

4 “(A) DOMINANT AIR CARRIER.—The term
5 ‘dominant air carrier’ has the meaning given
6 that term by section 41722(e)(2).

7 “(B) DOMINATED HUB AIRPORT.—The
8 term ‘dominated hub airport’ has the meaning
9 given that term by section 41722(e)(1).

10 “(C) COVERED AIRPORT.—The term ‘covered
11 airport’ has the meaning given that term
12 by section 47106(f)(3).

13 “(D) ASSET.—The term ‘asset’ includes
14 slots (as defined in section 41714(h)(4)) and
15 slot exemptions (within the meaning of section
16 41714(a)(2)).”.

17 (b) CONFORMING AMENDMENT.—Section 155 of the
18 Wendell H. Ford Aviation Investment and Reform Act of
19 the 21st Century (49 U.S.C. 47101 nt) is amended by
20 striking subsection (d).

21 **SEC. 6. AIP COMPETITION FUNDING.**

22 (a) IN GENERAL.—Subchapter I of chapter 471 of
23 title 49, United States Code, is amended by adding at the
24 end the following:

1 **“§ 47138. Competition enhancement program**

2 “(a) IN GENERAL.—The Secretary of Transportation
3 shall make project grants under this subchapter from the
4 Airport and Airway Trust Fund for gates, related facili-
5 ties, and other assets to enhance and increase competition
6 among air carriers for passenger air transportation.

7 “(b) SECRETARY MAY INCUR OBLIGATIONS.—The
8 Secretary may incur obligations to make grants under this
9 section.

10 “(c) AUTHORIZATION OF APPROPRIATIONS.—There
11 are authorized to be appropriated from the Airport and
12 Airway Trust Fund \$300,000,000 for fiscal year 2002,
13 such amount to remain available until expended.”.

14 (b) AIP GRANTS.—Section 47107 of title 49, United
15 States Code, is amended by adding at the end the fol-
16 lowing:

17 “(q) GATES, FACILITIES, AND OTHER ASSETS.—

18 “(1) In general.—The Secretary of Transpor-
19 tation may approve an application under this sub-
20 chapter for an airport development project grant at
21 a dominated hub airport only if the Secretary—

22 “(A) receives appropriate assurances that
23 the airport will provide gates, facilities, and
24 other assets on fair, reasonable, and non-
25 discriminatory terms to air carriers, other than

1 a dominant air carrier, to ensure competitive
2 access to essential facilities; or

3 “(B) determines that gates, facilities, and
4 other assets are available at that airport on a
5 fair, reasonable, and nondiscriminatory basis to
6 air carriers other than a dominant air carrier.

7 “(2) DEFINITIONS.—In this subsection:

8 “(A) DOMINANT AIR CARRIER.—The term
9 ‘dominant air carrier’ has the meaning given
10 that term by section 41722(e)(2).

11 “(B) DOMINATED HUB AIRPORT.—The
12 term ‘dominated hub airport’ has the meaning
13 given that term by section 41722(e)(1).

14 “(C) ASSET.—The term ‘asset’ includes
15 slots (as defined in section 41714(h)(4)) and
16 slot exemptions (within the meaning of section
17 41714(a)(2)).”.

18 (c) PFC FUNDS.—Section 40117 of title 49, United
19 States Code, is amended by adding at the end the fol-
20 lowing:

21 “(I) FACILITIES FOR COMPETITIVE ACCESS.—

22 “(1) IN GENERAL.—The Secretary may approve
23 an application under subsection (c) for a project at
24 a dominated hub airport only if the Secretary—

1 “(A) receives appropriate assurances that
2 the airport will provide gates, facilities, and
3 other assets on fair, reasonable, and non-
4 discriminatory terms to air carriers, other than
5 a dominant air carrier, to ensure competitive
6 access to essential facilities; or

7 “(B) determines that gates, facilities, and
8 other assets are available at that airport on a
9 fair, reasonable, and nondiscriminatory basis to
10 air carriers other than a dominant air carrier.

11 “(2) DEFINITIONS.—In this subsection:

12 “(A) DOMINANT AIR CARRIER.—The term
13 ‘dominant air carrier’ has the meaning given
14 that term by section 41722(e)(2).

15 “(B) DOMINATED HUB AIRPORT.—The
16 term ‘dominated hub airport’ has the meaning
17 given that term by section 41722(e)(1).

18 “(C) ASSET.—The term ‘asset’ includes
19 slots (as defined in section 41714(h)(4)) and
20 slot exemptions (within the meaning of section
21 41714(a)(2)).”.

22 (d) CONFORMING AMENDMENT.—The chapter anal-
23 ysis for subchapter I of chapter 471 of such title is amend-

1 ed by inserting after the item relating to section 47137

2 the following:

“47138. Competition enhancement program”.

○