

Watch for House Action Banning Most Voice Telephone Service on Passenger Aircraft

March 2014

Few regulatory announcements have received as quick and strong a public outcry as Federal Communications Commission (FCC) Chairman Tom Wheeler's suggestion in November that airline passengers might be allowed to talk on their phones while planes are in flight. Although all the FCC has in mind is lifting the existing prohibition on cell phone usage—not mandating that usage be allowed—editorial cartoonists, late night comedians, and water-cooler habitués have had a field day in responding.

The issue is currently the focus of activity in three policy forums: in administrative proceedings before the FCC and the U.S. Department of Transportation (DOT)—which to date together have attracted over 2,000 mostly negative comments—and on Capitol Hill. The regulators clearly are hoping that Congress will pass legislation on the issue, thus relieving them of this political nightmare. And that seems to be likely.

This issue blew up when the FCC chairman announced the Commission would consider lifting a long-standing prohibition on passenger use of cell phones on aircraft. The FCC's regulatory jurisdiction extends to communications service interference, and addressing the issue reflected the fact that systems currently in use do not present the same concerns as older systems. Approval of the regulatory change would not require carriers to allow voice communications, but it would leave the decision as to what is allowable to them, without the convenient ability to hide behind a regulatory ban. But the proposal was immediately characterized as lifting the ban and opening the door for unlimited, annoying, and inescapable, obnoxious noise pollution.

Authors

David B. Weinberg
Senior Counsel
202.719.7102
dweinberg@wiley.law

Ironically, voice-on-aircraft cell phone technology has been available for several years, and calls have been allowed on a number of foreign carriers. And there have been no complaints or reports of “phone rage.” But the very practical, visceral concern with having to overhear one side of Aunt Minnie’s ludicrous conversations, the inarticulate jabberings of obnoxious adolescents, or the overloud business negotiations that have forced Amtrak to enforce “quiet cars” has so far overwhelmed those facts.

If there is a saving grace, however, it is that even strong opponents of voice usage appear to recognize the benefits of allowing people to use text and other data services in flight. So the attention is not really on the technology (which is moving data whether initially spoken or keyed in), but on potential annoyance.

Within a few days of the FCC’s announcement, bills had been introduced in both the House and Senate that would ban portable cell phone voice usage on planes (but not text and data usage), except in emergency circumstances, on flights between two U.S. airports. And, reportedly at the White House’s direction, the secretary of transportation announced that the agency would consider whether allowing voice service was consistent with its regulations.

The FCC’s formal regulatory action began with the December 13 release of a proposal to reform its existing rules, which later was published in the Federal Register (79 Fed. Reg. 2615 (Jan. 15, 2014)). That proposal attracted almost 400 initial public comments, almost all opposed.

On Capitol Hill, House Transportation and Infrastructure Committee Chairman Bill Shuster (R-PA) produced a stream of releases and blog posts calling for voice service prohibition, as his HR 3676 would direct. He also made it clear to other members of Congress that this was an important issue to him. The unpopularity of the idea of having to listen to a seatmate’s call, combined with Chairman Shuster’s advocacy and his power to control spending on highway and other transportation programs across the nation, discouraged any overt congressional resistance to his proposal, which was unanimously voted out of committee just before the Congress left for its February recess.

In the meantime, a similar bill introduced in the Senate by Sen. Lamar Alexander (R-TN), SB 1811, has received no substantive attention. It appears likely that if the House bill moves over the next few weeks (which seems possible), it will become the vehicle for Senate action.

The importance of that legislation to those who would wish to ban voice service is inadvertently demonstrated by the DOT’s rulemaking proposal, which was released just a few days before. That February 24, 2015 Federal Register notice (79 Fed. Reg. 10049) took the form of an “advance notice of proposed rulemaking”—*i. e.*, an action one step before publication of even a proposed rule. In that notice (on which comment will be allowed until March 26), DOT asked for views on whether it should exercise its authority to control “unfair practices to consumers” or its authority to ensure “safe and adequate” service to impose a voice service ban. A few previous rules have relied on analogous stretches of those authorities, but it also is not hard to see that invoking them here would test their limits. (DOT’s discussion is also disturbing in that it describes adoption of a ban that would apply not only to flights between U.S. airports, but also on any flights over U.S. airspace.)

But the public view is not hard to discern; to date, DOT has received about 1,600 comments, most of them supporting a voice ban. And enactment of Chairman Shuster's bill would eliminate any doubt about the Department's authority. So it seems a safe bet that DOT (as well as the FCC) will be watching carefully for a signal from Congress as to how it would like to see this story play out.