

THE NATIONAL LAW REVIEW

Published May 5, 2022 | NatLawReview.com

Spirit's Merger with Frontier May Face Turbulence

Lawmakers, special interests, others oppose further concentration of ultra-low-cost-carrier market.

By Timothy LaComb & Jonathan Rubin



In early February, Frontier Airlines and Spirit Airlines announced a \$6.6 billion merger that gives Frontier a 51.5% controlling interest in a combined airline that will become the fifth largest carrier in the country and the largest ultra-low-cost carrier (ULCC). Spirit shareholders will receive 1.9126 shares of Frontier plus \$2.13 in cash for each Spirit share, which has an implied value of \$22.54 as of May 4.

The deal does not sit well with lawmakers, special interest groups, or antitrust commentators, several of whom have written to the Department of Justice opposing the merger. Nor does it sit well with JetBlue, which offered to purchase Spirit for \$33 per share in cash in early April – a roughly 50% premium over Frontier’s offer. JetBlue will be leapfrogged in size by the combined Spirit-Frontier.

Nonetheless, despite providing a significantly higher payout to shareholders, the Spirit Board of Directors on May 2 rejected JetBlue’s offer and reaffirmed its commitment to Spirit-Frontier. The question now is whether DOJ’s Antitrust Division, which has sent the merging parties a second request for information, will challenge the transaction in its current form.

The Spirit-Frontier Merger Raises Several Competition Concerns

Spirit and Frontier are the seventh and ninth largest airlines. The combined entity would be the fifth largest airline with a 9% market share nationwide. Although the resulting share of a national market would not be problematic using traditional concentration metrics (e.g., an increase in the Herfindahl-Hirschman Index, or HHI, a commonly accepted measure of market concentration), the deal nonetheless raises several competition concerns.

For one, airlines do not compete in a unified national market and the deal threatens excessive concentration for several dozen city-pairs. [A letter sent by the American Antitrust Institute](#) to the DOJ cites Cleveland, Las Vegas, Myrtle Beach, Orlando, Philadelphia, Ft. Myer, Puerto Rico, and Tampa as destinations that could be significantly affected.

Moreover, a Spirit-Frontier combination would eliminate competition between the two largest ULCCs, a segment that serves price-sensitive consumers who are often traveling to and from single-airport destinations. This sort of competition is particularly important because studies indicate it drives price competition among full-price carriers, as customers begin to defect if prices are too far above those of the ULCCs.

The merger would also reduce competition for ancillary services, e.g., baggage handling, early boarding positions, etc. Both airlines employ an “unbundled” business model, under which they charge fees for virtually every service offered, generating roughly half of their revenue from such fees. Spirit and Frontier were among the first to implement such fees, and now compete vigorously over these charges. The DOJ is likely to pay special attention to the merger’s impact on ancillary fees (President Biden specifically mentions competition for ancillary fees in his [2021 antitrust executive order](#)).

The JetBlue Proposal May Raise Greater Antitrust Concerns

Companies do not typically reject all-cash offers that are 50% higher than the accepted bid. But Spirit’s board did just that, claiming the JetBlue proposal raised greater antitrust hurdles. Although it is difficult to second-guess the Board’s rejection of JetBlue’s \$33/share cash offer, it does appear that the JetBlue proposal would have been more likely to draw a challenge by the DOJ.

First, there is greater route overlap between JetBlue and Spirit. While Frontier is based primarily in the West, both JetBlue and Spirit fly primarily in the East. As a result, the JetBlue and Spirit merger would result in even greater concentration at the city-pair level. In one case, Fort Lauderdale-Hollywood International Airport, the combined company would be responsible for roughly half of all departures.

Second, JetBlue’s acquisition would remove a ULCC carrier from the market as opposed to creating a ULCC behemoth, as the Spirit-Frontier promises to do. JetBlue employs a full-price business model, offering significantly more services and amenities at higher prices. According to reports, JetBlue would fold Spirit’s fleet into its existing business rather than operate Spirit as a separate ULCC.

Third, JetBlue is already in the DOJ’s crosshairs over an alleged anticompetitive combination. The DOJ is currently litigating JetBlue’s Northeast Alliance (“NEA”) with American Airlines in federal court, with trial scheduled to begin this September. The NEA covers operations at four major northeast airports — Logan in Boston, John F. Kennedy and LaGuardia in New York, and Newark Liberty in New Jersey. According to the suit, the agreement is effectively a merger that eliminates competition between JetBlue and American at those airports where both JetBlue and American have a substantial presence. While the fate of a proposed Spirit-JetBlue merger is not necessarily tied to the NEA litigation, it is unlikely the DOJ will ignore the competition issues raised by the NEA in evaluating the lawfulness of a proposed acquisition of Spirit.

Will the DOJ Challenge a Spirit-Frontier Merger?

Although less problematic than a combination with JetBlue, the Spirit-Frontier merger still faces headwinds at the DOJ. As highlighted above, the merger raises significant concentration issues for many city-pairs and has been subject to public opposition by high-profile lawmakers, interest groups, and antitrust commentators. The merger is occurring in an industry that experienced several anticompetitive mergers during the past two decades and is currently under investigation by the DOJ, which has already issued a second request for information to Spirit and Frontier. Finally, the agencies under the Biden administration appear more willing to challenge mergers than under previous administrations. On balance, therefore, it seems that the Spirit-Frontier merger is likely to require material concessions by the merging parties for the deal to avoid a legal challenge. Based on the effects of recent airline mergers, this is likely to be a good thing for airline passengers.



The Authors



Timothy Z. LaComb | Associate

Mr. LaComb focuses on antitrust, unfair competition, and complex business litigation, particularly as they relate to mergers and acquisitions. His experience includes helping secure several multi-million-dollar recoveries for shareholders in merger-related class action litigation. Through his extensive experience in complex litigation, Mr. LaComb has also developed proficiency in electronic and other discovery-related issues.

Education:

University of Wisconsin School of Law: J.D.

University of San Diego: B.A: Economics

Phone: +1 619 687 6611

Email: tlacomb@moginrubin.com



Jonathan Rubin | Partner

Co-founder of MoginRubin LLP, Mr. Rubin focuses his legal practice exclusively on antitrust and competition law and policy. As a litigator, Mr. Rubin has led trial teams in major antitrust cases in courts throughout the country. As a thought-leader in competition law, he has published in influential academic journals and has spoken to numerous professional groups, including the Directorate General for Competition of the European Commission, the Antitrust Section of the American Bar Association, the University of Wisconsin, and the American Antitrust Institute. Mr. Rubin has also made several appearances before Congressional committees.

Education:

University of Copenhagen, PhD: Economics

Florida Atlantic University, MA: Economics

University of Florida, Levin College of Law, J.D.

University of Wisconsin at Madison, BS: Biological Sciences

Phone: +1 202.630.0616

Email: jrubin@moginrubin.com

MoginRubin LLP is a leading antitrust and competition law boutique skilled at litigation, strategic counseling, and policy advocacy, with additional expertise in privacy law and mergers and acquisitions. Read more articles from MoginRubin attorneys published by *The National Law Review* at NatLawReview.com. Article edited by Tom Hagy.

San Diego: +1 619.687.6611
Washington, DC: +1 202.630.0616
Website: MoginRubin.com
Blog: MoginRubin.com/category/blog
© Copyright 2022

