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## Airline Deregulation and Service to Small Communities

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## AIRLINE DEREGULATION AND SERVICE TO SMALL COMMUNITIES

### I. INTRODUCTION

There are numerous articles commenting on the purported benefits and subsequent ill effects of deregulation in the airline industry.<sup>1</sup> The Airline Deregulation Act of 1978<sup>2</sup> allows greater competition in the airline industry by eliminating governmental controls, both on airline exit and entry in various air routes and on the pricing of air fares.<sup>3</sup> The nation-wide results of removing strict economic regulation from the airline industry have been generally positive.<sup>4</sup> The transformation of airlines into a competitive industry, however, has not been without its difficulties or its victims. In contrast to the many positive results from the lowering of air fares<sup>5</sup> and the availability of more flights than ever before,<sup>6</sup>

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1. For commentary on airline deregulation prior to the enactment of the Airline Deregulation Act of 1978, 49 U.S.C.A. §§ 1301-1552 (West Supp. 1981), see Farris, *The Case Against Deregulation in Transportation, Power and Communications*, 45 ICC PRACTITIONER'S J. 306 (1977); Keyes, *A Comparison of Two Proposals for Regulatory Change*, 41 J. AIR L. & COM. 727 (1975); Miller, *A Perspective on Airline Regulatory Reform*, 41 J. AIR L. & COM. 679 (1975). For commentary on the Airline Deregulation Act of 1978, see Cohen, *New Air Service and Deregulation: A Study in Transition*, 44 J. AIR L. & COM. 695 (1979); Dempsey, *The Rise and Fall of the Civil Aeronautics Board — Opening Wide the Floodgates of Entry*, 11 TRANSP. L.J. 91 (1979); Havens & Heymsfeld, *Small Community Air Service Under the Airline Deregulation Act of 1978*, 46 J. AIR L. & COM. 641 (1981) Sandell, "Deregulation"—Has it Finally Arrived? *The Airline Deregulation Act of 1978*, 44 J. AIR L. & COM. 799 (1979); Thoms, *Deregulation: The Airline Experience*, UPPER GREAT PLAINS TRANSPORTATION INSTITUTE (Jan. 1981); Note, *Competitive Policy in Airline Deregulation*, 28 AM. U. L. REV. 537 (1979).

2. Airline Deregulation Act of 1978, 49 U.S.C.A. §§ 1301-1552 (West Supp. 1981).

3. *Id.* § 1302 (9), (10).

4. *Impact of Airline Deregulation on Service to Small and Medium Sized Communities: Hearings before the Subcommittee on Aviation of the Senate Committee on Commerce, Science and Transportation*, 96th Cong., 1st Sess. v (1979) [hereinafter cited as 1979 *Hearings Aviation*].

5. The prime argument used by supporters of deregulation was that it would bring lower airline fares. Transcontinental routes and fares to popular destinations have been kept relatively low. One-way discount fares are as low as \$129 on prime transcontinental routes. Regular round trip fares, however, between the East Coast and the Midwest are in the \$300 range, up from \$200 in 1979. AV. WEEK & SPACE TECH., Nov. 3, 1980 at 214.

6. The great upsurge in flights has been due in large part to commuter airlines. Commuter

airline deregulation has applied pressures to the nation's air transportation system and the convenience of air travel.<sup>7</sup> One of the most controversial results is that many small communities have experienced drastic reduction or deterioration in air service.<sup>8</sup> Some of the most vocal criticism of airline deregulation is in the area of loss or reduction of small community air service.<sup>9</sup>

Whether a boon or a bane, the term "deregulation" is actually somewhat of a misnomer. Specific provisions of the Airline Deregulation Act of 1978<sup>10</sup> reregulate rather than deregulate air service to small communities.<sup>11</sup> Guarantees in the Airline Deregulation Act aid air service to small communities both directly and indirectly.<sup>12</sup> This Note will focus on the past, present, and future of small community air service. Specifically, four areas will be discussed: 1) the historical perspective of small community air service; 2) the provisions of the Airline Deregulation Act of 1978 that relate to small community air service;<sup>13</sup> 3) the persistent problems of determining "essential air service," selecting subsidy air carriers, and providing a comprehensive and convenient system of scheduled airline service for small communities;<sup>14</sup> and finally, 4) some available solutions to ensure future air service and economic viability for small communities.<sup>15</sup>

## II. AIR SERVICE TO SMALL COMMUNITIES: A HISTORICAL PERSPECTIVE

Small community air service may be defined quantitatively as service to communities that generate small amounts of air traffic.

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airlines carried 11% more people in 1980 than in 1979. Nulty, *Friendly Skies for Little Airlines*, FORTUNE, Feb. 9, 1981, at 46 [hereinafter cited as Nulty, *Little Airlines*]. Service patterns for other carriers, however, are shifting under cost and competitive pressures. One indication is the Official Airline Guide, the North American edition has shrunk in thickness reflecting the reduction in flights. AV. WEEK & SPACE TECH. Nov. 3, 1980, at 23.

7. Deregulation and rising costs have restricted the air service provided. Service is gradually fading as the hallmark of airline excellence. AV. WEEK & SPACE TECH., Nov. 3, 1980 at 23.

8. See Mosher, *Rough Weather Lies Ahead for the Nation's Airways*, NAT'L. J., June 16, 1979 at 1001. Since deregulation was begun over 216 routes have had service ended. Some communities have ended up with better service, but according to Patrick Murphy, Chief of the Civil Aeronautics Board's essential air services division, some, like Columbus, Georgia; Meridian, Mississippi; Bakersfield, California; and Charleston, West Virginia have experienced real hardships in terms of loss or reduction of air service. *Id.*

9. 1979 Hearings Aviation, *supra* note 4, at vii.

10. 49 U.S.C.A. §§ 1301-1552 (West Supp. 1981).

11. See *id.* § 1389. The small community air service provision offers protection from air carriers attempting to terminate service. *Id.*

12. See *id.* § 1389 (direct guarantees for air service to small communities); *Id.* § 1386 (increase of commuter aircraft size).

13. *Id.* § 1386 (classification and exemption of carriers); *id.* § 1389 (small community air service).

14. See AV. WEEK & SPACE TECH., Apr. 21, 1980 at 25; *infra* notes 182-244 and accompanying text.

15. See *infra* notes 247-83 and accompanying text. Only passenger air service is considered in this discussion. Airline Deregulation Act of 1978, 49 U.S.C.A. §§ 1301-1552 (West Supp. 1981). Cargo air traffic and deregulation is not addressed.

Points generating less than twenty-five passengers per day are likely to be considered in the category of small community air service.<sup>16</sup> Generally, such communities are rural in character. In some cases, however, a location with substantial population may generate little traffic because it is convenient to a nearby major airport.<sup>17</sup> Service offered between small communities and other points is primarily to provide for passenger convenience in making connections at major airports and secondarily, to provide local traffic between small communities and larger cities. Service to small communities has historically been affected by the regulation of entry and subsidy payments to air carriers.<sup>18</sup> To understand the issues of small community air service, therefore, air carrier entry and subsidy payments must be explored. First, the origins of airline regulation must be examined.

#### A. EARLY AIRLINE REGULATION

Prior to the enactment of the Airline Deregulation Act of 1978,<sup>19</sup> the Civil Aeronautics Act of 1938<sup>20</sup> as amended,<sup>21</sup> was the controlling federal legislation for regulation of the airline industry. The Civil Aeronautics Act of 1938 created a new agency, the Civil Aeronautics Administration (CAA), with independent economic and safety regulatory authority.<sup>22</sup> This authority granted the CAA the same status as the Interstate Commerce Commission (ICC), which regulates domestic surface transportation modes.<sup>23</sup> The two agencies differed, however, in that the ICC is strictly a regulatory body, whereas the CAA was also given the task of promoting aviation.<sup>24</sup>

16. CAB, REGULATORY REFORM: REPORT OF THE CAB SPECIAL STAFF, 195 II.2 (1975) [hereinafter cited as REGULATORY REFORM]. It is clear, however, that estimates of the volume of traffic needed to sustain commuter service are far too high. Although it appears that virtually all communities enplaning as few as six passengers a day will support commuter service, the precedent set by the CAB of selecting thresholds on the high side is generally followed. Studies by the U.S. Department of Transportation dated March 1976 had the following thresholds: "Any point enplaning fewer than six passengers a day is assumed to be incapable of supporting commuter service; points enplaning between six and ten passengers a day are assumed to be marginal (having a 50 percent chance of retaining air service and a 50 percent chance of losing air service); points enplaning between ten and sixteen passengers a day are assumed to have a 75 percent probability of retaining air service; and points enplaning seventeen or more passengers a day are assumed to be certain of retaining air service." REGULATION OF PASSENGER FARES AND COMPETITION AMONG THE AIRLINES 97 (P. MacAvoy & J. Snow eds. 1977) [hereinafter cited as COMPETITION AMONG THE AIRLINES].

17. See COMPETITION AMONG THE AIRLINES, *supra* note 16, at 25.

18. See Straszheim, *The Scheduling and Route Impacts of Increased Fare Flexibility*, 10 TRANS. L.J. 269, 272 (1978).

19. 49 U.S.C.A. §§ 1301-1552 (West Supp. 1981).

20. Civil Aeronautics Act of 1938, ch. 601, 52 Stat. 973 (current version at 49 U.S.C.A. §§ 1301-1552 (West Supp. 1981)).

21. Federal Aviation Act of 1958, P.L. 85-726, 72 Stat. 731 (current version at 49 U.S.C.A. §§ 1301-1552 (West Supp. 1981)).

22. Civil Aeronautics Act of 1938, ch. 601, 52 Stat. 980.

23. B. SCHWARTZ, ADMINISTRATIVE LAW 12 (1976).

24. Civil Aeronautics Act of 1938, ch. 601, 52 Stat. 985.

The Civil Aeronautics Act of 1938 gave existing carriers "grandfather" rights over routes then being operated.<sup>25</sup> The Act further provided that air carriers were to be awarded a certificate of "public convenience and necessity" by the CAA before they could begin regular commercial service.<sup>26</sup> Under the Act, airlines could not add or abandon any route without CAA approval.<sup>27</sup> Airlines were additionally required to publish and make public the fares to be charged for their services.<sup>28</sup>

In 1940 the CAA was reorganized and the name changed to the Civil Aeronautics Board (CAB).<sup>29</sup> The Federal Aviation Act of 1958<sup>30</sup> reaffirmed the role of the CAB and transferred its safety functions to the new Federal Aviation Administration (FAA).<sup>31</sup> CAB actions largely have determined the characteristics of the aviation industry. CAB regulations control the commercial activities of interstate air carriers in the primary areas of entry into the air industry, rates, fares, and subsidy payments designed to promote civil aviation.<sup>32</sup> As a result of these CAB regulations, three levels of airline service developed — trunk lines, local service, and commuters.<sup>33</sup>

### 1. *Trunk lines*

The trunk lines<sup>34</sup> are those air carriers originally brought under federal regulation by the Civil Aeronautics Act of 1938.<sup>35</sup> These air carriers provide air service between the major cities. Today these airlines include United, TWA, Continental, Braniff, Eastern, and Western.<sup>36</sup>

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25. *Id.* at 987. "Grandfather" rights indicate that existing air carriers were able to continue to operate. *Id.*

26. *Id.*

27. *Id.* at 980. The applicant had the burden of proving that the "public convenience and necessity" required the air service. *Id.*

28. *Id.* at 992.

29. Reorganization Plan No. IV of 1940, 54 Stat. 1235.

30. P.L. 85-726, 72 Stat. 731 (1958).

31. *Id.* at 741 (continuation of existing board); *id.* at 740 (declaration of policy).

32. *Id.* at 740.

33. See Cohen, *New Air Service and Deregulation: A Study in Transition*, 44 J. AIR L. & COM. 695, 696 (1979). The three categories comprise the scheduled passenger airline industry and are complemented by cargo, charter, and intrastate carriers. Note, *Competitive Policy in Airline Deregulation*, 28 AM. U. L. REV. 537, 547 (1979). Today, due to airline deregulation, the categories of trunks and local carriers are less distinct. See *infra* notes 105-15 and accompanying text.

34. CAB defines a trunk air carrier as "[a] class of certificated route air carrier . . . receiving original certification under the 'grandfather clause' of the Civil Aeronautics Act . . . and whose primary operations are in domestic scheduled passenger service between relatively medium and large air traffic hubs. . . ." CAB, GLOSSARY OF AIR TRANSPORTATION TERMS 30 (1977) [hereinafter cited as CAB GLOSSARY].

35. Ch. 601, 52 Stat. 973.

36. See Thoms, *Deregulation: The Airline Experience*, UPPER GREAT PLAINS TRANSPORTATION INSTITUTE 6 (Jan. 1981).

In the late 1930s and early 1940s, small communities received scheduled air transportation only as a result of trunk airline service between the major cities.<sup>37</sup> The air fleet of these trunk carriers included the twenty-one passenger DC-3 aircraft having a range of 800 miles.<sup>38</sup> Intermediate stops, primarily scheduled for operational or mail rather than passenger traffic reasons, provided small communities with air service between the larger cities.<sup>39</sup> As newer aircraft were acquired,<sup>40</sup> the number of points served by trunk carriers declined. Trunk carriers withdrew service from approximately one-half of the points they once served.<sup>41</sup> Marginal or unprofitable routes, as well as smaller points, were either transferred to local service carriers or abandoned.<sup>42</sup>

## 2. Local Service

Small communities traditionally have received air service from two classes of air carriers. One of these is the local service carrier; the other is the commuter air carrier.<sup>43</sup> Consider first the local service carrier. In the mid-1940s the CAB created the local service or regional carriers.<sup>44</sup> These carriers were designed to assume the burden of serving small communities and to provide "feeder" service between small points and major or intermediate hubs.<sup>45</sup> They served the purpose of meeting the growing demand for air transportation following World War II and utilized the large number of aircraft and pilots then available.<sup>46</sup> Using small aircraft,<sup>47</sup> the local service carriers served the low density air routes

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37. CAB, SERVICE TO SMALL COMMUNITIES, PART II: SMALL AIRCRAFT AND SMALL COMMUNITIES, A HISTORY AND ECONOMIC ANALYSIS 9 (1972) [hereinafter cited as SERVICE TO SMALL COMMUNITIES].

38. *Id.*

39. *Id.* For example, in 1937 the original transcontinental carriers in providing New York-Los Angeles service scheduled up to ten stops, many for refueling purposes. In doing so, they incidentally benefited many small towns. *Id.*

40. See U.S. DEPT. OF TRANS., NATIONAL TRANSPORTATION TRENDS & CHOICES (TO THE YEAR 2000), 215-17 (1977) [hereinafter cited as NATIONAL TRANSPORTATION TRENDS]. The advances of technology have driven the advance of aviation. Since the introduction of multi-engine reliability, the progression of civil aircraft has been one of constantly improving range, speed, payload and comfort, culminating in the introduction in the 1970s of the wide-bodied jets (Boeing 747, DC-10, Lockheed L-1011). *Id.*

41. *Id.* at 229.

42. *Id.*

43. *Id.* at 228.

44. The CAB describes the local service carriers as "[a] group of air carriers originally established in the late 1940's to foster and provide air service to small and medium communities on relatively low density routes to larger air traffic hubs . . . these carriers have since evolved from their 'feeder' airlines origination into 'regional' carriers. . . ." CAB GLOSSARY, *supra* note 34, at 29.

45. SERVICE TO SMALL COMMUNITIES, *supra* note 37, at 9.

46. *Id.* at 11.

47. See SERVICE TO SMALL COMMUNITIES, *supra* note 37, at 11. Although a few local service carriers commenced service with very small equipment, ranging from three passenger, single-engine Beechcraft Bonanzas to eight passenger, twin-engine Lockheed Electras, the industry quickly standardized on the 21 passenger DC-3. *Id.*

between small communities and the cities served by trunk lines.<sup>48</sup>

As local service operations expanded, the local service carriers acquired fleets of larger aircraft.<sup>49</sup> By the mid-1960s, local service carriers began to acquire jet aircraft and to move into larger air markets.<sup>50</sup> The nonjet equipment in the local service fleet was phased out and replaced by jet aircraft.<sup>51</sup> With a jet aircraft fleet, it became economically impossible for carriers to justify high frequency service to points enplaning only a small number of passengers per day.<sup>52</sup> As a result, service was lost by many small communities,<sup>53</sup> or the quality of service to those communities still served by local service carriers was reduced.<sup>54</sup> This decline in service showed no sign of reversing and was predicted to occur at an increased rate.<sup>55</sup> The local service carriers, due to their air traffic increase in both volume and size, began to resemble regional trunk lines.<sup>56</sup> The local service carrier's responsibility of providing small community air service, therefore, fell upon a third class of air carriers, the commuter.

### 3. Commuters

#### The second type of air carrier traditionally serving small

48. See COMPETITION AMONG THE AIRLINES, *supra* note 16, at 18. An example is Air New England, which provides connecting service from smaller communities in the Northeast to the major cities of Boston and New York. *Id.*

49. See, SERVICE TO SMALL COMMUNITIES, *supra* note 37, at 12-13. Local service carriers began acquiring aircraft larger than the DC-3 in 1952. These aircraft included the 40 passenger Martin 202 aircraft. *Id.* CAB opposition to these acquisitions was demonstrated when the higher costs associated with Pioneer Airline's purchase of 40 seat Martin 202 aircraft and the simultaneous sale of its DC-3's was disallowed in computing Pioneer's subsidy payment. Only the rate applicable to DC-3 operations was paid. Mail Rates Pioneer Airlines, 17 C.A.B. 499 (1953).

50. See generally Cohen, *New Air Service and Deregulation: A Study in Transition*, 44 J. AIR L. & COM. 695, 696 (1979). See also Part 298 Weight Limitation Investigation, 60 C.A.B. 142, 150 (1972) (locals' acquisition of jet aircraft).

51. See SERVICE TO SMALL COMMUNITIES, *supra* note 37, at 15. Later, over CAB objection, jet aircraft were again acquired. Passenger capacity ranged from 65 to 135 seats. *Id.* In 1977 jets comprised 69.5% of the local service fleet, whereas in 1971 jets comprised only 39.3% of the fleet. 1979 *Hearings Aviation*, *supra* note 4, at 163 (statement of Duane H. Ekedahl, Executive Director, Commuter Airline Association of America).

52. Because of high fuel consumption during take-off and landing, jet aircraft are not as economical on short flights as other aircraft. Jet aircraft are most efficient when operated in air segment lengths over 1200 miles non-stop. When segment lengths are reduced, there is a proportionate reduction in efficiency. Measured in seat miles per gallon, the reduction in efficiency caused by an 800 mile air segment length is 10%; a 500 mile segment, 20%; and a 300 mile segment, 30%. AV. WEEK & SPACE TECH., May 19, 1980 at 55.

53. See CONGRESSIONAL RESEARCH SERVICE, AIRLINE DEREGULATION: AN ASSESSMENT 20 (Aug. 5, 1980) [hereinafter cited as AIRLINE DEREGULATION]. Jet aircraft usage was a primary cause for the abandonment or reduction of service in smaller, short haul markets by the larger carriers. *Id.*

54. *Id.* The level of service at many points decreased to the minimum level of adequate service, two flights per day. For example, at a number of small communities such as Glendive, Montana and Devils Lake, North Dakota, only one daily flight was provided. NATIONAL TRANSPORTATION TRENDS, *supra* note 40, at 231.

55. *Id.*

56. Examples of such local service airlines are Ozark and Republic. Since deregulation, this trend has increased. Local service airline activity in the regional markets has nearly doubled since deregulation. AV. WEEK & SPACE TECH., Oct. 20, 1980 at 34.

communities is the commuter.<sup>57</sup> Generally, as local service carriers left small towns for larger air markets, the commuter carrier began to serve the community.<sup>58</sup> Under the CAB's economic regulations, the small irregular air carriers were designated as "air taxis."<sup>59</sup> Commuter airlines were later established as a subclass of the air taxis.<sup>60</sup> Neither air taxis nor commuters were regulated or subsidized by the CAB. The specific exemption from regulation<sup>61</sup> resulted because these carriers were required to operate small aircraft with a take-off weight of less than 12,500 pounds.<sup>62</sup>

In 1972 the CAB increased the allowable size of air taxis.<sup>63</sup> Important in the 1972 size increase was the shift from a 12,500 pound payload operating standard to a capacity standard allowing both a maximum passenger capacity of thirty passengers and a maximum payload of 7,500 pounds.<sup>64</sup> Most commuter fleets, however, continued to utilize small aircraft in the fifteen to nineteen seat range.<sup>65</sup> Following a trend toward liberalization, the CAB in 1978 announced proposed rules to further raise the capacity limit to sixty seats for commuter carriers.<sup>66</sup>

Commuters serve routes that are regarded by the trunk and local carriers as economically undesirable.<sup>67</sup> As a result, the number of small communities served by commuter carriers has increased substantially.<sup>68</sup> Commuter carriers have been able to

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57. Commuter carrier is defined as follows:

[A]n air taxi operator which (1) performs at least five round trips per week between two or more points and publishes flight schedules which specify the times, days of the week and places between which they are performed, or (2) transports mail by air under a contract or contracts with the United States Postal Service. . . .

14 C.F.R. § 298.2(f) (1981).

58. See Cohen, *New Air Service and Deregulation: A Study in Transition*, 44 J. AIR. L. & COM. 695, 696 (1979).

59. 14 C.F.R. § 298 (1981) (Part 298 - Classification and Exemption of Air Taxi Operators).

60. 34 Fed. Reg. 7124 (1969) (codified at 14 C.F.R. § 298.1(f) (1981)).

61. 14 C.F.R. § 298 (1981). See Federal Aviation Act of 1958, P.L. 85-726, 72 Stat. 754 (specific exemption from § 401(a) of the Federal Aviation Act of 1958).

62. See Part 298 Weight Limitation Investigation, 60 C.A.B. 142, 152 (1972) (a plane this size could carry no more than 20 passengers).

63. 60 C.A.B. at 152.

64. *Id.*

65. See Strazheim, *The Scheduling and Route Impacts of Increased Fare Flexibility*, 10 TRANS. L.J. 269, 274 (1978). By the late 1960s, the twin-engine Beech 99 and DeHaviland Twin Otter (both between the 15-19 seat range) began to enter commuter service and were the backbone of the commuter fleet. COMPETITION AMONG THE AIRLINES, *supra* note 16, at 87. See also REGULATORY REFORM, *supra* note 16, at 201 n.1.

66. 43 Fed. Reg. 39,587 (1978) (EDR-361 CAB, Proposed Rulemaking). The Airline Deregulation Act of 1978 made the proposed rules moot, as the Act substantially increased both aircraft passenger and payload capacities. Carriers can fly with less than 56 passengers and a payload capacity of less than 18,000 pounds. 49 U.S.C.A. § 1386(b)(4) (West Supp. 1981).

67. See *supra* note 52 and accompanying text. The trend of trunks and local service carriers is to drop smaller points in order to maintain equipment efficiency with jet aircraft. NATIONAL TRANSPORTATION TRENDS, *supra* note 40, at 231.

68. See 1979 *Hearings Aviation*, *supra* note 4, at 162 (remarks of Duane Ekedahl, Executive Director of the Commuter Airline Association of America). Mr. Ekedahl's remarks were as follows:



serve small markets for a variety of reasons. First, they tend to use small aircraft tailored to the size of the market being served.<sup>69</sup> Second, they have lower costs than the larger air carriers for equipment of the same type.<sup>70</sup> This cost difference is partially due to greater operational efficiency (less overhead and lower labor costs) and partially due to fewer federal requirements.<sup>71</sup> The most costly federal requirements, from which commuters have been exempted are the operations requirements imposed by the FAA.<sup>72</sup>

Commuter carriers provide scheduled service to 230 communities with a population under 100,000.<sup>73</sup> In 150 of these communities, commuters provide the only scheduled air service.<sup>74</sup> Service to these communities exists only because commuters are exempt from economic regulations. If these communities were to depend solely upon either of the other two classes of air carriers, many would not receive any air service.<sup>75</sup> Commuters, therefore, provide significant air service to small communities.

## B. SUBSIDIZED SERVICE

Small community air service has its origins in subsidized service. Subsidized service, however, often resulted in problems for small community air service.<sup>76</sup> Air subsidy programs to facilitate small town air service were initiated by the Civil Aeronautics Act of 1938.<sup>77</sup> The primary purpose of subsidy programs was mail subsidy

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There are more than 200 commuter airlines based in the United States and Puerto Rico. . . . Since 1970, commuter air carriers have experienced an average yearly growth rate of 10.3 percent in passengers carried. . . . For the year ending December, 1978, scheduled passenger traffic increased 18 percent. These carriers fly in and out of more than 800 airports, serving large and small cities. . . . The Federal Aviation Administration forecasts that in the next 10 years commuter growth in passenger miles will be 163 percent, more than double the rate of other air carriers.

*Id.*

69. See COMPETITION AMONG THE AIRLINES, *supra* note 16, at 87. Commuter carriers serve markets which are both short and thin. As surveys indicate, "77 percent of their markets are less than 200 miles and 77 percent enplane fewer than ten passengers per day." *Id.* (emphasis in original). See also NATIONAL TRANSPORTATION TRENDS, *supra* note 40, at 232.

70. NATIONAL TRANSPORTATION TRENDS, *supra* note 40, at 232.

71. *Id.* See also COMPETITION AMONG THE AIRLINES, *supra* note 16, at 88.

72. *Id.* A major cost savings stems from the fact that commuters need not incur costs in the security screening of passengers. *Id.* Smaller but still significant savings arise from exemptions related to requirements imposed by the CAB (*e.g.*, a reduction in legal fees associated with processing route cases). NATIONAL TRANSPORTATION TRENDS, *supra* note 40, at 232.

73. See COMPETITION AMONG THE AIRLINES, *supra* note 16, at 23.

74. *Id.*

75. *Id.* at 87.

76. See COMPETITION AMONG THE AIRLINES, *supra* note 16, at 23. Programs designed to promote service to small communities increased the tendency for local service carriers to acquire larger aircraft and to diminish the amount of service offered to small communities. The subsidy program was intended to guarantee service, but as widespread abandonment attests, it did not serve this purpose. *Id.* at 23-24. See *supra* notes 53-56 and accompanying text.

77. Ch. 601, 52 Stat. 973. Section 406 of the 1938 Act authorized the CAB to subsidize the transportation of mail. *Id.*

rather than passenger service subsidy.<sup>78</sup> In 1954 it became clear that small town support was also a primary function of the subsidy program; thus, the mail and passenger subsidies were separated.<sup>79</sup> The drafters of the Aviation Act of 1958<sup>80</sup> recognized the necessity of service to small communities, and a program of local service carrier subsidization was enacted.<sup>81</sup> Airline subsidies administered by the CAB have consisted largely of payments to the local service carriers.<sup>82</sup>

During the 1950s the CAB experimented with providing subsidized air service to small communities.<sup>83</sup> Small communities were added to the routes of local service carriers.<sup>84</sup> Initially, however, the CAB announced a "use-it-or-lose-it" policy, permitting the air carriers to drop the least profitable stations.<sup>85</sup> This easing of route restrictions resulted in air carriers concentrating on their stronger and more competitive markets.<sup>86</sup>

Programs designed to promote air service to small communities, therefore, actually caused a decrease in the amount of service available to small communities.<sup>87</sup> Two particular developments led to this result. First, it is generally accepted that the structure of the subsidy program encouraged air carriers to procure larger aircraft.<sup>88</sup> The use of larger aircraft made serving small points less attractive and resulted in an increased number of regional airports.<sup>89</sup> As a result, low levels of service were provided to small communities. In 1969 more than one-third of the 259 marginal points on local service carrier routes received fewer than the CAB minimum of two daily round trips.<sup>90</sup>

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78. *Id.* at 994.

79. See Styles, *Commuter Airlines and the Airline Deregulation Acts of 1978*, 45 J. AIR L. & COM. 685, 694 (1979).

80. Federal Aviation Act of 1958, P.L. 85-726, 72 Stat. 731.

81. *Id.* at 763 (section 406 of the Federal Aviation Act of 1958). See also Keyes, *A Comparison of Two Proposals for Regulatory Change*, 41 J. AIR L. & COM. 727, 740 (1975).

82. See REGULATORY REFORM, *supra* note 16, at 76. Trunk lines have received subsidy payments for air mail carriage. "Trunk line subsidies ended in 1959, but were renewed for service in New England from 1964 to 1968." Note, *Competitive Policy in Airline Deregulation*, 28 AM. U.L. REV. 537, 544 n. 41 (1979).

83. See SERVICE TO SMALL COMMUNITIES, *supra* note 37, at 9.

84. *Id.* A series of "area" cases were conducted in which communities which had never before received scheduled air service were added to local air carrier routes. *Id.* See Seven States Area Investigation, 28 C.A.B. 680 (1958) (first in a series in which CAB was reappraising the local air service needs).

85. See Seven States Area Investigation, 28 C.A.B. at 687. See also REGULATORY REFORM, *supra* note 16, at 80-81. The "use-it-or-lose-it" policy enabled carriers to drop cities enplaning fewer than five passengers per day. *Id.*

86. See REGULATORY REFORM, *supra* note 16, at 81.

87. See NATIONAL TRANSPORTATION TRENDS, *supra* note 40, at 231.

88. See *supra* note 76 and accompanying text.

89. See NATIONAL TRANSPORTATION TRENDS, *supra* note 40, at 231.

90. See SERVICE TO SMALL COMMUNITIES, *supra* note 37, at 17. The CAB has recognized the basic minimum standard to be two daily round trips. Seven States Area Investigation, 28 C.A.B. 680, 759-60 (1958); Ozark Certificate Renewal Case, 19 C.A.B. 95, 105 (1954).

Second, the CAB's easing of route restrictions encouraged local service carriers to convert themselves into small trunk lines.<sup>91</sup> The "use-it-or-lose-it" policy accommodated the air carriers' reluctance to provide air service truly adapted to the needs of small communities.<sup>92</sup> A similar result was obtained in the mid-1960s, when the CAB permitted locals to compete with trunk lines in the medium and short haul markets.<sup>93</sup> Beginning in 1964 the CAB approved temporary suspensions of scheduled air service to numerous points where substitute unscheduled air service was available.<sup>94</sup> The system of CAB economic regulation, therefore, allowed the cessation of local carrier air service to many small communities.

Since the mid-1960s over 170 points have lost scheduled air service.<sup>95</sup> Although CAB regulation did not require that air service be provided to those communities, commuter carriers voluntarily served nearly 100 of the towns.<sup>96</sup> In 1970 the CAB allowed further suspension of service by local carriers in favor of commuter carriers.<sup>97</sup> The CAB's rationale was based upon the recognition that commuter carriers with small aircraft could provide better air service to small communities.<sup>98</sup> It was concluded that commuters were the most efficient for this task.<sup>99</sup> This recognition of the commuter carriers' importance to small communities was ultimately incorporated in provisions of the Airline Deregulation Act of 1978.<sup>100</sup>

### III. AIRLINE DEREGULATION ACT OF 1978

The Airline Deregulation Act of 1978<sup>101</sup> was designed to give the airlines gradual freedom from CAB regulation of fares and

91. See REGULATORY REFORM, *supra* note 16, at 81.

92. *Id.* The new "use-it-or-lose-it" policy and legislation which offered guaranteed loans and tax exemptions to help carriers purchase new larger equipment did not help strengthen small community routes. *Id.* at 81.

93. See generally Sandell, "Deregulation"—Has it Finally Arrived? *The Airline Deregulation Act of 1978*, 44 J. AIR L. & COM. 799, 803 (1979).

94. See SERVICE TO SMALL COMMUNITIES, *supra* note 37, at 29.

95. *Hearings on S. 292 and S. 589 Before the Subcomm. on Aviation of the Senate Comm. on Commerce, Science, and Transp.* 95th Cong., 1st Sess. 108 (1977). This number is equal to one-third of the points previously served. *Id.*

96. *Id.*

97. See SERVICE TO SMALL COMMUNITIES, *supra* note 37, at 29. The CAB allowed service suspension for local carriers at 39 points and trunk carriers at 26 points. *Id.*

98. *Id.* Better service could be provided primarily by making additional trips and operating at lower costs than an air carrier with larger equipment. *Id.*

99. See REGULATORY REFORM, *supra* note 16, at 278-79. Small community air service provided by local service carriers is expensive in terms of subsidy cost and often not responsive to market demand for efficient, frequent service. *Id.*

100. 49 U.S.C.A. §§ 1301-1552 (West Supp. 1981).

101. *Id.*

routes.<sup>102</sup> The Act substitutes competitive marketplace forces for the regulatory control of the CAB.<sup>103</sup> Initially, liberalized route and market entry enable the airlines to provide service over one new route per year without CAB approval.<sup>104</sup> The airlines can apply to serve markets where other airlines with route authority are not operating.<sup>105</sup> Airlines are allowed to exit from a route after a period of notice to the CAB.<sup>106</sup> After December 31, 1981, the CAB no longer has control over the issuance of airline route certificates.<sup>107</sup> Any new carrier meeting the safety requirements of the FAA can commence operations with CAB approval.<sup>108</sup> On January 31, 1983, the CAB will lose its control over airline rates and mergers.<sup>109</sup> After this date the CAB will no longer perform its primary functions. Congress has mandated that the CAB report to Congress by January 1, 1984, with recommendations regarding its future role, if any.<sup>110</sup> The CAB will cease to exist on January 1, 1985, unless it convinces Congress to enact legislation staying its demise.<sup>111</sup> After January 1, 1985, the remaining functions of the CAB will be transferred to the Department of Transportation, Department of Justice, and United States Postal Service.<sup>112</sup>

Loss of service to small communities was a major argument against airline deregulation.<sup>113</sup> The Airline Deregulation Act of 1978 specifically addresses small community air service.<sup>114</sup> The Act's policy statement expressly states that "a comprehensive and convenient system of continuous scheduled airline service for small

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102. *Id.* § 1302(a)(9).

103. *See* Note, *Competitive Policy in Airline Deregulation*, 28 AM. U.L. REV. 537, 557 (1979). Six major provisions are found in the Act. First, any certificated interstate carrier is able to acquire without CAB opposition one new nonstop service per year between any one pair of points in interstate or overseas air transportation until 1981. 49 U.S.C.A. § 1371(d)(7)(A) (West Supp. 1981). Second, proper notice must be given for air carriers to exit. At least 90 days shall be given after the application is filed with the CAB. *Id.* § 1371(c)(1). Third, passenger fares and air cargo rates are addressed. *Id.* § 1373. Fourth, protection from loss of air service is provided for small communities. *Id.* § 1389. Fifth, airline nonmanagerial employees are protected by the Act if it results in their positions being terminated. *Id.* § 1552. Finally, the last major provision affects the foregoing provisions and is known as the "sunset" provision of the Act, terminating the CAB. *Id.* § 1551.

104. *Id.* § 1371(d)(7)(A).

105. *Id.* § 1371(d)(7)(A). Air carriers "may apply to the Board for a certificate under this subparagraph to engage in nonstop service between any one pair of points in interstate or overseas air transportation. . . ." *Id.*

106. *Id.* § 1371(j)(1). Air carriers may not terminate or suspend air service "unless such air carrier has first given the Board, any community affected, and the State agency of the State in which such community is located, at least 90 days notice of its intent. . . ." *Id.*

107. *Id.* § 1551(a)(1).

108. *Id.* §§ 1371(d)(1) & 1307.

109. *Id.* § 1551(a)(2).

110. *Id.* § 1551(c).

111. *Id.* § 1551(a)(4).

112. *Id.* § 1551(b)(1).

113. *See* Rakowski & Johnson, *Airline Deregulation: Problems and Prospects*, Q. REV. ECON. & BUS. 76 (Winter 1979).

114. 49 U.S.C.A. §§ 1302(8), 1389 (West Supp. 1981). Small community air service is addressed in both the general policy declaration and in a separate section guaranteeing protection. *Id.*

communities and for isolated areas, with direct federal assistance where appropriate" will be maintained.<sup>115</sup> The Act has two key provisions affecting air carrier service to small communities. These are the commuter exemption provision<sup>116</sup> and the small community air service provision.<sup>117</sup> These provisions encourage small community service by increasing the size of commuter aircraft and forbidding the interruption of air service determined to be essential. Because Congress has left relatively little room for the CAB to develop its own policy, these provisions are generally considered less significant to deregulation than the rest of the Act.<sup>118</sup> Some of the most vehement criticism of the Act, however, has arisen in regard to these provisions.<sup>119</sup> It is, therefore, necessary to closely examine these provisions and some of the criticisms.

#### A. COMMUTER EXEMPTION

The commuter exemption provision<sup>120</sup> of the Airline Deregulation Act of 1978<sup>121</sup> indirectly affects service to small communities. The provision substantially increases the passenger and payload capacity of commuter airlines.<sup>122</sup> By changing weight restrictions, the provision recognizes that the future of air service to small communities depends upon commuter airlines.<sup>123</sup>

Historically, the aircraft used to provide service to small communities has been generally ill-suited for the purpose. Planes have been either too large, as in the case of most of the aircraft operated by the local service carriers,<sup>124</sup> or they have been designed for other purposes, such as low-utilization private or corporation aircraft (*e.g.* the Piper Navaho and the Beech 18).<sup>125</sup> Only recently have 'stretched' versions of private aircraft been offered for sale to commuter carriers. (*e.g.* the Beech 99, and the Swearingen

115. *Id.* § 1302(8).

116. *Id.* § 1386.

117. *Id.* § 1389.

118. See Note, *Competitive Policy in Airline Deregulation*, 28 AMER. U.L. REV. 537, 571 (1979).

119. See 1979 *Hearings Aviation*, *supra* note 4, at vii.

120. 49 U.S.C.A. § 1386 (West Supp. 1981).

121. *Id.* §§ 1301-1552.

122. *Id.* § 1386(4). The Commuter Exemption provision provides the following: "[A]ny air carrier in air transportation which provides (A) passenger service solely with aircraft having a maximum passenger capacity of less than fifty-six passengers, or (B) cargo service in air transportation solely with aircraft having a maximum payload capacity of less than eighteen thousand pounds, shall be exempt. . . ." *Id.*

123. See COMPETITION AMONG THE AIRLINES, *supra* note 16, at 87. Between 1970 and 1978 the fleet of commuter airlines more than doubled, with commuters providing service to 354 more airports and 1171 more markets in 1978 than in 1971. Commuter airlines served over 200 more points than the other air carriers. 1979 *Hearings Aviation*, *supra* note 4, at 163.

124. These are primarily jet aircraft which are ill-suited to short haul needs. AV. WEEK & SPACE TECH., May 19, 1980 at 55. See *supra* note 52 and accompanying text.

125. See SERVICE TO SMALL COMMUNITIES, *supra* note 37, at 20.

Metro).<sup>126</sup> Previously, few aircraft had been designed specifically for use by airlines serving small communities.<sup>127</sup> Furthermore, commuter carriers eager to purchase new small aircraft had been limited in their ability to do so by weight restrictions, which prohibited them from operating any aircraft with a maximum certified takeoff weight in excess of 12,500 pounds.<sup>128</sup> The commuter exemption provision,<sup>129</sup> containing a limitation formula based on greater passenger and weight capacity, should promote development of a whole new generation of aircraft. Such aircraft specifically designed for service to small communities should enable commuters to continue their success.<sup>130</sup>

The exemption provision encourages small community service by increasing the size of aircraft that can be flown by commuter air carriers without subjecting them to regulation. The exemption also encourages commuter lines to compete directly with larger airlines on routes that otherwise would receive inadequate service or would require federal subsidies.<sup>131</sup>

It has been feared that the Airline Deregulation Act of 1978 will enable commuter air carriers to grow to the point that they too will want to abandon small community service.<sup>132</sup> The provision allowing increased equipment size<sup>133</sup> is not likely to precipitate any rush by commuter carriers to acquire the larger fifty-five seat aircraft. Under previous capacity increases, commuters largely continued to use fifteen to nineteen seat aircraft.<sup>134</sup>

## B. SMALL COMMUNITY AIR SERVICE

One of the most extensive provisions of the Airline Deregulation Act of 1978 also reflects the importance of small

126. *Id.* at 1. These aircraft are within the 16 to 18 passenger capacity range. Others, such as the DeHaviland Jet Star and Convair 580, are within the 40 to 60 passenger capacity range. *Id.*

127. *Id.* at 20.

128. See *supra* note 62-66 and accompanying text.

129. 49 U.S.C.A. § 1386 (West Supp. 1981).

130. See Miller, *A Perspective on Airline Regulatory Reforms*, 41 J. AIR L. & COM. 679, 695 (1975). Even if CAB certificated carriers abandoned those markets, one must not overlook the outstanding success of the commuter airlines in providing service to small communities and serving low-density markets. *Id.*

131. See Note, *Competitive Policy in Airline Deregulation*, 28 AM. U.L. REV. 537, 571 (1979).

132. *Id.* at 547. The possibility of commuter air carriers "graduating" to larger cities naturally gives rise to the question of what would take their place. The category itself may remain indefinite with constituent carriers operating as commuters for several years and then aspiring to local service status. At that time they would be replaced at the commuter level by new firms. The question remains as to when the saturation point in the carrier hierarchy, *i.e.*, the point at which a carrier can advance no further without running the risk of bankruptcy in a saturated industry, will be reached. *Id.*

133. 49 U.S.C.A. § 1386(4)(B) (West Supp. 1981).

134. See REGULATORY REFORM, *supra* note 16, at 336. Previously, commuter carriers have just increased flight frequencies, coordinating them with major carrier flights at airports. *Id.*

community air service.<sup>135</sup> The provision directly addresses the issue of how small communities assure themselves of essential services under market competition in the absence of regulation.<sup>136</sup> The new subsidy provision<sup>137</sup> requires a program for "guaranteed essential air transportation."<sup>138</sup> The CAB guarantees for ten years "essential air transportation" to eligible points.<sup>139</sup> Eligible points are those small communities presently receiving service from an air carrier under a certificate issued by the CAB or those communities which have lost such service during the last ten years.<sup>140</sup> The CAB was given the duty to determine essential air transportation for the various eligible points and review the determinations periodically.<sup>141</sup>

For the purposes of implementing this program, essential air transportation is defined broadly. It is the level of transportation necessary to satisfy the transportation needs of the community and to ensure access to the nation's air transportation system.<sup>142</sup> Additionally, the rates charged for essential air transportation must not be unjust, unreasonable, unjustly discriminatory, unduly preferential, or unduly prejudicial.<sup>143</sup> Except in Alaska,<sup>144</sup> essential air transportation consists of at least two daily round trips, five days per week, or the level of service provided by air carriers to a given point in effect for the calendar year 1977, whichever is less.<sup>145</sup>

Air carriers may not terminate, suspend, or reduce air transportation to any eligible point below the level of essential air transportation established by the CAB unless certain requirements are met. These requirements are proper notice<sup>146</sup> and continuation

135. 49 U.S.C.A. § 1389 (West Supp. 1981) (small community air service provision).

136. See Farris, *The Case Against Deregulation in Transportation, Power and Communications*, 45 ICC PRACTITIONER'S J. 306, 318 (1977).

137. 49 U.S.C.A. § 1389 (West Supp. 1981).

138. *Id.*

139. *Id.* § 1389(g). The section provides for a phasing out of the current subsidy program utilized with local service air carriers in favor of a new structure which includes commuter air carriers. This program will guarantee essential air service to eligible points for ten years. *Id.* The new program is self-limiting, as the CAB may not provide a subsidy in excess of what is needed to maintain the essential service. *Id.* § 1389(a)(1).

140. *Id.* § 1389(b)(1)(A). The Board must prescribe objective criteria for designating eligible points in the United States. Among the factors to be considered in establishing such criteria are "the level of traffic generated by the point concerned, the future traffic generating potential, the cost to the federal government of providing essential air transportation to such point, the alternative means of transportation available to the residents for access to the national transportation system and its principal communities of interest of such point, and the degree of isolation of such point from the national air transportation system." *Id.* § 1389(b)(2)(A).

141. *Id.* § 1389(a)(2)(C).

142. *Id.* § 1389(f).

143. *Id.* "The availability of a variety of adequate, economic, efficient and low-price services by air carriers . . . without unjust discriminations, undue preferences or advantages, or unfair or deceptive practices, . . ." is mandated by this provision. *Id.* § 1302(a)(3).

144. *Id.* § 1389(f)(2). "[W]ith respect to air transport to any point in Alaska, essential air transportation shall not be specified at a level of service less than that which existed for such point during calendar year 1976, or two round trips per week, whichever is greater. . . ." *Id.*

145. *Id.* § 1389(f)(1).

146. *Id.* § 1389(a)(3).

of service during the period of the selection of a replacement carrier.<sup>147</sup> If the air carrier is either a certified air carrier or an air carrier receiving compensation for service to an eligible point, ninety-day notice of the change must be provided to the CAB, the State Aviation Agency, and the affected communities.<sup>148</sup> If, however, the air carrier is neither certified nor receiving compensation for air service, then it must provide only thirty days notice prior to termination, suspension, or reduction of air service.<sup>149</sup> Furthermore, when volunteers are not forthcoming, the CAB must require the carrier, including noncertified carriers, to continue service until a replacement is found.<sup>150</sup> Such forced service can be required for an indefinite series of thirty-day periods.<sup>151</sup> During this time, carriers are entitled to subsidy payment.<sup>152</sup>

If the CAB finds that a community will not receive essential air transportation without compensation, it is required to invite applications for the performance of subsidized service.<sup>153</sup> The CAB is empowered to make payments to air carriers but may do so for only the time necessary to maintain essential air transportation to any eligible point.<sup>154</sup> The CAB will establish levels of compensation

147. *Id.* § 1389(a)(6).

148. *Id.* § 1389(a)(3). This section provides the following:

No air carrier shall terminate, suspend, or reduce air transportation to any eligible point below the level of essential air transportation . . . unless such air carrier — (A) if such air carrier — (i) holds a certificate . . . or (ii) does not hold such a certificate, but is receiving compensation . . . has given the Board, the appropriate State agency or agencies, and the communities affected at least ninety days notice prior to such termination, suspension or reduction. . . .

*Id.*

149. *Id.* § 1389(a)(3)(B). This section provides, “[i]f such air carrier does not hold such a certificate and is not receiving compensation . . . [termination is allowed if it] has given the Board, the appropriate State agency or agencies, and the communities affected at least thirty days notice prior to such termination, suspension or reduction.” *Id.*

150. *Id.* § 1389(a)(6). This section provides as follows:

[I]f an air carrier has provided notice to the board . . . and if at the conclusion of the applicable period of notice the Board has not been able to find another air carrier to provide essential air transportation to such point, the Board shall require the carrier which provided such notice to continue such service . . . for an additional 30-day period, or until another air carrier has begun to provide essential air transportation to such point, whichever first occurs.

*Id.*

151. *Id.*

152. *Id.* § 1389(a)(7)(B). This section provides: “If the Board requires an air carrier . . . which is providing air transportation to any eligible point without compensation . . . the Board shall compensate such air carrier for any losses. . . .” *Id.*

153. *Id.* § 1389(a)(4). This section provides: “Whenever the Board determines that essential air transportation will not be provided to any eligible point without compensation — (A) the Board shall provide notice that applications may be submitted by any air carrier which is willing to provide essential air transportation. . . .” *Id.*

154. *Id.* § 1389(a)(5). This section provides: “The Board shall continue to pay compensation to any air carrier to provide essential air transportation to any eligible point only for so long as the Board determines it is necessary in order to maintain essential air transportation to such eligible point.” *Id.*



appropriate to the need for service.<sup>155</sup> Subsidy payment will be based upon factors such as the representative costs of carriers operating aircraft of a type appropriate to the essential air transportation for a particular eligible point.<sup>156</sup>

The federal subsidy<sup>157</sup> is intended primarily to provide service to communities which generate so little traffic that the service is not self-supporting.<sup>158</sup> There is no diminution in service to communities now receiving subsidized service.<sup>159</sup> The CAB is required to report to Congress on the feasibility and appropriateness of devising formulas in which the local communities would contribute to or share in the cost of such subsidy payments.<sup>160</sup>

After January 1, 1983, air carriers subsidized under the old or outgoing program<sup>161</sup> may be replaced by an applicant who can show that it can improve service and reduce the subsidy at a particular point.<sup>162</sup> Also, any subsidized carrier under the program

155. *Id.*

156. *Id.* § 1389(d). This section provides as follows:

The Board shall, by rule, establish guidelines to be used by the Board in computing the fair and reasonable amount of compensation required to insure the continuation of essential air transportation to any eligible point. Such guidelines shall include expense elements based upon representative costs of air carriers providing scheduled air transportation of persons, property and mail, using aircraft of the type determined by the Board to be appropriate for providing essential air transportation to the eligible point.

*Id.*

157. *Id.* § 1389(a)(4)(B). This section provides in part that "the Board shall establish . . . a rate of compensation to be paid for providing such essential air transportation." *Id.*

158. *Id.* § 1302(a)(8). The subsidy is intended for "the maintenance of a comprehensive and convenient system of continuous scheduled . . . airline service for small communities and for isolated areas . . . with direct Federal assistance where appropriate." *Id.*

159. Subsidy payments to local service airlines under section 406 of the Federal Aviation Act of 1958, P.L. 85-726, 72 Stat. 763 will be continued. *See also supra* notes 81 & 82 and accompanying text. The statutory language and legislative history of section 406 leave no doubt that the temporary maintenance of service by locals at subsidized points was the basic policy objective of the congressional amendments to section 406. The language and legislative history of the Airline Deregulation Act make it clear that Congress was not interested in a long-range effort to rehabilitate the section 406 subsidy program; it was interested solely in maintaining the status quo in terms of service. *See Local Service Class Subsidy Rate IX*, C.A.B. Order 79-10-51. (Oct. 1979).

160. 49 U.S.C.A. § 1306 (West Supp. 1981). The CAB and the Secretary of Transportation are directed to submit a report on the feasibility and appropriateness of state and federal government sharing of subsidy costs. *Id.* In the area of subsidy, the sharing of costs is not a proposition strongly supported. The two primary concerns over the division of subsidy costs are 1) discontentment with the possible requirement of additional state tax revenue for state participation in the new subsidy program, and 2) a belief that a great deal of assistance is already provided by the states. *See 1979 Hearings Aviation, supra* note 4, at 89.

161. Federal Aviation Act of 1958, P.L. 85-726, 72 Stat. 763 (section 406 of the Act).

162. *Id.* § 1389(a)(11)(A). This section provides as follows:

The Board shall grant such application . . . if the applicant can show that termination of the compensation being paid under Section 1376, and that the provision of service by such applicant with compensation under this section, will result in a substantial — (i) improvement in the air service being provided . . . (ii) decrease in the amount of compensation. . . .

*Id.*

detailed in this provision<sup>163</sup> may be replaced after two years by an applicant who shows that it can improve service or operate in such a way as to reduce the subsidy.<sup>164</sup> In short, the aim of the subsidy provision is to provide adequate small community air service by obtaining carriers who will offer the best service possible.

Under the Airline Deregulation Act of 1978, commuter services are brought under tighter control by the CAB.<sup>165</sup> A subsidized commuter air carrier providing essential air service must satisfy the requirement that it is "fit, willing and able"<sup>166</sup> and that all aircraft utilized for service will conform to the safety standards established by the FAA.<sup>167</sup> Commuters affected must

163. *Id.* § 1389(a)(11)(B).

164. *Id.*

165. *Id.* § 1389(c)(2). Not only is tighter control exercised over the commuter air carriers, but the Airline Deregulation Act of 1978 also preempts state authority over intrastate carriers. It provides:

[N]o State or political subdivision thereof and no interstate agency or other political agency of two or more States shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes or service of an air carrier. . . .

*Id.* § 1305. This explicit preemption of state regulation of rates and routes is fairly straightforward. Two areas of controversy, however, have arisen. First, the California Public Utilities Commission was fighting to regain control of the state's airlines, claiming that deregulation has forced air fares to skyrocket and has hurt service to small communities. The Commission is appealing a court ruling barring it from regulating air fares by claiming that since the ruling, fares have risen a minimum of 38% and a maximum of 103%. *AV. WEEK & SPACE TECH.*, Jan. 28, 1980, at 37. Additionally, many communities have lost the services of air carriers that use large jet aircraft, bearing out the forebodings the Commission had when the Act was passed. *Id.*

Second, the term "services" is susceptible to interpretation. *See Freeman, State Regulation of Airlines and the Airline Deregulation Act of 1978*, 44 J. AIR L. & COM. 747, 766 (1979). States have considered certain aspects of air carrier selection as inadequate and have considered specific regulatory criteria. According to the Director of the North Dakota State Aeronautics Commission:

The Airline Deregulation Act of 1978 does not require a part 298 exempt air carrier or a section 416 air carrier to show any fitness or any financial capacity, unless the Civil Aeronautics Board shall adopt regulations on this subject. The policy of the Board is void on this subject. . . . [I]t is unlikely that any Board regulations will be adopted in the future.

This is a regulatory vacuum which States may ultimately move into. . . .

1979 *Hearings Aviation*, *supra* note 4, at 94 (remarks of Mr. Harold Vavra).

166. 49 U.S.C.A. § 1389(c)(2) (West Supp. 1981). This section provides:

[T]he Board shall not provide any compensation under this section to any commuter air carrier to provide service to any eligible point, and the Board shall prohibit any commuter air carrier from providing service to any eligible point, unless the Board determines that such commuter air carrier —

(A) is fit, willing and able to perform such service. . . .

*Id.* A "certificate of fitness" is issued to any carrier capable of demonstrating that it is "fit, willing and able to perform the air transportation applied for." To determine the best way to demonstrate this, air carriers and potential air carriers may look to past CAB decisions, as this fitness requirement existed prior to the Act. More importantly, the fitness requirement virtually eliminates CAB discretion to restrict entry and exit for economic reasons in the airline industry. In effect, this certificate of fitness can be equated with an operating license of a business, which must be granted if the applicant can show that it is objectively capable of performing the proposed service. *See Dupre, A Thinking Person's Guide to Entry/Exit Deregulation in the Airline Industry*, 9 *TRANSP. L. J.* 273 (1977).

167. 49 U.S.C.A. § 1389(c)(2)(B) (West Supp. 1981). The 1978 Act requires "that all aircraft which will be used to perform such service and all operations relating to such service will conform to the safety standards established by the Administrator. . . ." *Id.*

comply with all the new FAA standards and satisfy the insurance requirements of the Act.<sup>168</sup>

#### IV. IMPLEMENTATION OF THE AIRLINE DEREGULATION ACT OF 1978

Persistent problems result from the attempt to provide a comprehensive and convenient system of scheduled airline service for small communities under the Airline Deregulation Act of 1978.<sup>169</sup> The major problems include the determination of "essential air service" and its ramifications, and the selection of subsidy air carriers. It is these areas that must be examined to determine the impact of the Act on small communities.

##### A. ESSENTIAL AIR SERVICE

The Airline Deregulation Act of 1978 contains terms which play a new role in transportation regulation.<sup>170</sup> One of the most controversial is the term "essential air service" and its determination.

The type and extent of air transportation provided to a community affects its economic viability.<sup>171</sup> Communities, though considered small by aviation standards,<sup>172</sup> are often major communities in their respective states. Adequate air service is critical to the economic functioning of these communities and to the economic well-being of the states in which they are located.<sup>173</sup> Loss of air service would threaten the economic base and viability of

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168. *Id.* § 1389(c)(3). This section provides the following:

[R]equirements upon such commuter air carriers to assure that the level of safety provided to persons traveling on such commuter air carriers is, to the maximum feasible extent, equivalent to the level of safety provided to persons traveling on air carriers which provide service pursuant to certificates issued under section 1371 of this title (local service and trunk line carriers).

*Id.* Furthermore, regarding insurance, "[n]o air carrier shall receive any compensation under this section unless such air carrier complies with regulations or orders issued by the Board governing filing and approval of policies of insurance or plans for self-insurance in the amount prescribed by the Board. . . ." *Id.* § 1389(e).

169. *Id.* § 1302(a)(8).

170. See Kelleher, *Deregulation and the Practicing Attorney*, 44 J. AIR L. & COM. 261, 264 (1978). The bill that became the Civil Aeronautics Act of 1938 borrowed heavily from the motor carrier sections of the Interstate Commerce Act. *Id.* The question that arises over the competitive nature of the deregulation provisions is whether the lawyers who will deal with the resolution of these deregulation issues are equipped to deal with a regulatory scheme dependent on economic theory rather than traditional concepts of public convenience and necessity. *Id.* at 293.

171. See REGULATORY REFORM, *supra* note 16, at 195.

172. *Id.* at 195 n.2. CAB standards have established points generating less than 25 passengers a day as small communities. *Id.*

173. See 1979 *Hearings Aviation*, *supra* note 4, at 205 (remarks of Mr. Cliff Madison, Western Airlines).

these communities. In its broadest sense, it is the issue of access to the national air transportation system that concerns these communities. Essential reliable air passenger service to these communities is a major component of this desired access.<sup>174</sup> Community concern is heightened by the fact that loss or diminution of service does not provide for the development of a balanced national transportation system.<sup>175</sup> Many states have lost, or are in the process of losing, rail transportation and bus service at a time when airlines are also exiting.<sup>176</sup> Airlines are deserting communities that previously enjoyed the benefits of air service. Essential air service and its determination is, therefore, a critical factor to small communities.

Providing essential services is not a new concept.<sup>177</sup> The CAB has established the essential level of service for each of 555 communities.<sup>178</sup> Under the Act, each designated community is

174. See U.S. DEPT. OF AGRIC. & DEPT. OF TRANSP., SUMMARY OF PUBLIC HEARINGS ON AGRICULTURAL TRANSPORTATION 30 (1979).

175. One lawmaker expressed his concern as follows:

It was my conviction and continues to be my conviction that the Airline Deregulation Act does not provide the needed protection to maintain adequate air service to our small- and medium-sized communities. . . . [I]t does not provide for the development of a balanced national transportation system. This latter concern is heightened by the fact that many States are losing rail transportation and bus service at a time when the airlines under the Deregulation Act are deserting. . . .

1979 *Hearings Aviation*, *supra* note 4, at 118 (remarks of Sen. Randolph, West Virginia).

176. *Id.*

177. See Farris, *The Case Against Deregulation in Transportation, Power and Communications*, 45 ICC PRACTITIONER'S J. 306, 313 (1977). The general guidelines in the Airline Deregulation Act have some historical significance and can be traced to some early cases. Regulation by the state and federal government is the basis for the Act's provision of guaranteed essential service. During the "Granger Movements" in which the agricultural interest of the Midwest struck out at the discriminatory clauses and excessive charges in the transportation system (railroads, elevators, warehouses), the State of Illinois passed a statute in 1871 setting maximum charges and requiring a license for grain elevators. Munn was a proprietor and manager of a grain elevator. He was convicted and fined in the state courts for violating the statute by failing to get a license and charging higher than statutory rates. Munn appealed to the United States Supreme Court on the grounds that the statute violated the newly adopted fourteenth amendment to the Constitution by depriving him of his property without due process of law. The case, which challenged the constitutionality of the various Granger Acts, reached the Supreme Court in 1876 along with several cases concerning railroads. The pivotal case of *Munn v. Illinois*, 94 U.S. 113 (1877), established the right of a state to regulate transportation. The *Munn* Court held that (a) the public may legally regulate certain businesses which are "affected with the public interest" and (b) the two attributes of businesses to be regulated are essential services and potential or actual discrimination. 94 U.S. at 130 and 134. In *Wabash, St. Louis & Pac. Ry. v. Illinois*, 118 U.S. 557 (1886), the legality of federal regulation was established. In conjunction with several congressional committee reports, primarily the Windon Committee (1872) and Cullum Committee (1886), *Wabash* led to passage of the Act to Regulate Commerce in 1887. 45 ICC PRACTITIONER'S J. at 313.

The Act to Regulate Commerce is the basis of all transportation regulation. The goals of the Act and subsequent legislation were to assure an adequate and essential service as well as to assure that the regulated firm did not practice discrimination in rates or service. The level of service provided today is regulated by both "how often" service is to be rendered to satisfy public convenience and necessity and the "conditions of service." *Id.* at 322.

178. These 555 communities are the "eligible points" under the small community air service provision. 49 U.S.C.A. § 1389(a)(1) (West Supp. 1981). The section states as follows:

The Board shall periodically review the determination of what is essential air transportation to each eligible point, and may, based upon such review and

assured for ten years that the essential level of service will be maintained.<sup>179</sup> The maximum level of service set by the CAB in 1979 was 160 round trip seats per day, five days per week, or the service level the community had in 1977, whichever was less.<sup>180</sup> A transitional level of essential service was also created to handle service higher than the maximum level.<sup>181</sup> The CAB standards, however, have not been greeted with much enthusiasm.<sup>182</sup>

In attempting to satisfy the CAB and justify local considerations for essential air service, communities have incurred substantial costs. One such community is the city of Jamestown, North Dakota. Jamestown was the first city in the United States to have essential air service designated to it by the CAB.<sup>183</sup> By all accounts, the city was heralded as a winner in the deregulation sweepstakes. As a result of the CAB designation, Jamestown received more airline service than it had previously enjoyed.<sup>184</sup> It is important to note, however, that in order to support its request for the desired community level of essential air service, the city's petition to the CAB was supplemented with a wealth of economic data.<sup>185</sup> Over twenty thousand dollars was spent to hire consultants and lawyers to prepare the data and to file the petition with the CAB.<sup>186</sup>

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consultations with any interested community and the State in which such community is located, make appropriate adjustments as to what is essential air transportation to such point.

*Id.* § 1389(a)(2)(C). Essential levels of service were established using the guidelines of the small community air service provision which provides the following:

The term "essential air transportation" means scheduled air transportation of persons to a point provided under such criteria as the Board determines satisfies the needs of the community concerned for air transportation to one or more communities of interest and insures access to the Nation's air transportation system. . . . In no case shall essential air transportation be specified as fewer than two daily round trips, 5 days per week, or the level of service provided by air carriers to such point based on the schedules of such air carriers in effect for calendar year 1977, whichever is less. . . .

*Id.* § 1389(f).

179. *Id.* § 1389(g).

180. See AIRLINE DEREGULATION, *supra* note 53, at 22. The CAB assumed a 50% passenger load factor to enable a commuter airline serving a community to realize a profit. See also Essential Service Tennessee Points, C.A.B. Order 80-1-53 (Jan. 1980) (greater factors such as 65% may be imposed if the circumstances warrant).

181. See Essential Service Pocatello Transitional, C.A.B. Order 80-4-69 (Apr. 1980) (transitional level is set and will last six months after a carrier is permitted to reduce or suspend service).

182. Some feel that the CAB should be flexible in making essential service decisions, rather than holding to the same maximum for every community. BUS WEEK, Nov. 5, 1979, at 110.

183. In 1979 service went from two flights provided by Northwest Airlines to Minneapolis, Minnesota per day, to five flights per day by Air Wisconsin, Inc. — three to Minneapolis and two to Bismarck, North Dakota. Air Wisconsin's schedules were more convenient and encouraged people to fly from Jamestown instead of driving to a larger airport. BUS WEEK, Nov. 5, 1979, at 112.

184. *Id.* Air Wisconsin has subsequently withdrawn from Jamestown, North Dakota and has been replaced by Big Sky Airlines.

185. See 1979 *Hearings Aviation*, *supra* note 4, at 88 (remarks of Joseph G. Mason, Executive Vice President of National Association of State Aviation Officials).

186. *Id.*

These efforts were necessary to convince the CAB of the special local conditions and to attract an air carrier to the community.<sup>187</sup> Communities should not have to go to these lengths to convince the CAB of the level of essential service it should establish.<sup>188</sup> Community representations should be carefully and seriously considered by the CAB on a case by case basis. Justifications for levels of essential air service should not require substantial expenditures.<sup>189</sup>

The ramifications of determining essential service levels are also significant. Generally, an essential air service determination affects community air service in two ways. First, the maximum essential service level set by the CAB in 1979<sup>190</sup> does not account for the situation in which a community has lost only a portion of its service. The Airline Deregulation Act of 1978 does not protect communities from partial abandonment. Thus, communities can lose most of their major air carrier service, but still be considered to have their "essential service" level satisfied by other air carriers.<sup>191</sup> Such other air carriers may be unacceptable to the communities, however.<sup>192</sup>

Second, the determination of essential service levels affects the manner in which people from small communities reach their destinations. Two options exist for passenger travel for small communities: the linear route or the hub and spoke

187. *Id.*

188. See 1979 *Hearings Aviation*, *supra* note 4, at xii (remarks of Sen. Schmidt, New Mexico). "Such effort should not entail a substantial cost to communities of consultants, lawyers and economists to convince the Board that they have special local conditions." *Id.*

189. *Id.*

190. See *supra* note 50 and text accompanying note 180.

191. Communities can lose much of their nonstop service to communities of similar size. The Chairman of the Senate Subcommittee on Aviation remarked:

The airline deregulation law guarantees that no community will lose all air service over the next 10 years.

It does not guarantee that service reductions will not be made. The old law guaranteed neither a minimum level of air service nor protections from service changes. The old law did provide a procedural obstacle course for any airline which wished to exit or enter a community.

1979 *Hearings Aviation*, *supra* note 4, at 1 (remarks of Chairman Sen. Cannon, Nevada).

Essential air service is guaranteed only for 555 "eligible" communities. There are other communities, however, that are not aided under the subsidy provision. In contrast to eligible communities that are able to maintain essential air service through subsidy, those not aided must provide other means. Typically, this is accomplished by offering concessions and incentives for airport usage and assistance. As an example, in order for Dickinson, North Dakota, which is not an essential service designated community, to have service from an air carrier and connections to the state capitol, Bismarck, North Dakota, Dickinson and Big Sky Airlines entered into an agreement whereby the air carrier was guaranteed \$15,000 in monthly revenue for the first six months. Grand Forks Herald, July 8, 1980, at \_\_\_, col. 1. Noneligible communities are not guaranteed access to national air transportation and can not take advantage of the small community air service provisions of the Airline Deregulation Act of 1978. 49 U.S.C.A. § 1389 (West Supp. 1981).

192. See *infra* notes 203-27 and accompanying text.

concept.<sup>193</sup> In flying a linear route, stops are made at several small communities and passengers are collected; the last stop is at a major transportation center or hub.<sup>194</sup> Under the hub and spoke concept,<sup>195</sup> the carrier 'feeds' travelers from small communities to a central location, congregates them at the hub, and then takes them to their final destinations.

The hub and spoke system is highly profitable<sup>196</sup> and the more attractive of the two alternatives for air service to small communities. The Airline Deregulation Act utilizes the hub and spoke concept to move passengers, and guarantees community access to a hub airport.<sup>197</sup>

The problem with the hub and spoke concept, however, is two-fold. First, passengers do not like the concept because they have fewer direct flights.<sup>198</sup> The CAB has not allowed more than single hub essential air service.<sup>199</sup> Second, such central locations are often unavailable. Air carriers are unable to establish hubs on their own without financial assistance from the states and regions involved.<sup>200</sup> This makes it difficult to implement adequate commuter air carrier service.

Solutions to these problems are being formulated as groups of airport officials in certain areas discuss the impact of airline deregulation on commuters and small communities.<sup>201</sup> Their discussions have focused on exploring the development of commuter airline hubs and connections with other terminals. The recommendations of these groups have placed emphasis on the need for a broad approach to air transportation.<sup>202</sup> Under such an approach it will be necessary to cut across state lines, as regional air service planning will facilitate the creation of air transportation

193. 1979 *Hearings Aviation*, *supra* note 4, at 206 (remarks of Mr. Cliff Madison, Western Airlines).

194. *Id.*

195. The hub and spoke concept route system was prevalent in the 1950s. Regional airlines developed this system, which is now considered imperative to profitability. *AV. WEEK & SPACE TECH.*, Nov. 3, 1980, at 89.

196. *Id.*

197. *Id.* § 1389(f). This section provides that "'essential air transportation' means scheduled air transportation of persons to a point [a hub] provided under such criteria as the Board determines. . . ." *Id.*

198. *AV. WEEK & SPACE TECH.*, Nov. 3, 1980, at 89.

199. *See* Alternate Essential Service Ozark Airlines, C.A.B. Order 80-4-172 (recognition that more than one hub might be useful); Essential Service Modification Ironwood/Ashland, C.A.B. Order 80-8-177 (Aug. 1980) (Minneapolis is included as an essential service hub along with Chicago, Milwaukee, and Green Bay).

200. *See* 1979 *Hearings Aviation*, *supra* note 4, at 207. Mr. Cliff Madison of Western Airlines remarked: "We believe that the hub concept is a more attractive alternative for our service to the smaller communities. However, alone, we do not have the traffic or the capacity to create the effective hubbing operation. . . ." *Id.* Although it was believed that airline deregulation would result in new hubs, this has not proved to be the case. *See AIRLINE DEREGULATION*, *supra* note 53, at 21.

201. One such group of airport officials are the Southeast Airport Operators Association. *AV. WEEK & SPACE TECH.*, Nov. 3, 1980, at 89.

202. *Id.*

networks. Several areas across the country should formulate this type of plan in order to ensure the development of small community air service.

## B. AIR CARRIER SELECTION

Once essential service levels are established, carrier selection must occur. Selection of an air carrier also creates problems. Two areas of prime concern are involved: 1) community sentiment in the selection process; and 2) objections to commuter carriers.

Carrier selection is made by considering several factors. The key factors are how dependent the selected carrier would be on a federal subsidy, the amount of subsidy, the ability to meet carrier qualifications, and the reactions of the communities served.<sup>203</sup> The CAB air carrier selection process has been the target of much criticism. For example, communities are unwilling to be forced to accept carriers that do not represent good service and experience.<sup>204</sup> The CAB, however, has been reluctant to give greater weight to community sentiment when selecting an air carrier.<sup>205</sup> The CAB feels that the factors of greatest importance include experience,<sup>206</sup> financial history,<sup>207</sup> subsidy amount,<sup>208</sup> equipment used,<sup>209</sup> and proposals to maintain integrated, convenient, and efficient essential service.<sup>210</sup> Of lesser importance, but of possible consideration, are special geographic or commercial

203. Airline Deregulation Act of 1978, 49 U.S.C.A. § 1389 (11) (West Supp. 1981).

204. See 1979 *Hearings Aviation*, *supra* note 4, at 90 (remarks of Mr. Daniels, Chairman North Dakota Aeronautics Commission). The Chairman of the North Dakota Aeronautics Commission stated, "Under current CAB policy when a . . . commuter carrier decides it wants to serve [communities]. . . the CAB must enthusiastically embrace the opportunity to guarantee the approved levels of essential air service and subsidize good, capable carriers. . . ." *Id.*

205. See *Essential Service*, Upstate N.Y. Points, C.A.B. Order 80-2-100 (Feb. 1980) (decisive weight not given to the community's preference). *Essential Service Carrier*, El Dorado/Camden, C.A.B. Order 80-10-121 (Oct. 1980) (community preference outweighed by experience of air carrier).

206. See *Essential Service Carrier*, El Dorado/Camden, C.A.B. Order 80-10-121 (Oct. 1980) (experience is a factor to be weighed particularly to minimize the difficulties an air carrier will encounter in beginning and maintaining service); *Essential Service*, Upstate N.Y. Points, C.A.B. Order 80-2-100 (Feb. 1980) (air carrier with 10 years experience serving community selected to provide essential service).

207. See *Fitness Investigation*, Altair Airlines, C.A.B. Order 80-1-93 (Jan. 1980) (air carrier's 13-year history of operation gives support to its contention that it is financially capable of performing services in the future).

208. See *Essential Service Compensation*, North Dakota Points, C.A.B. Order 80-7-5 (July 1980) (selection of air carrier based, in part, on its lower subsidy need); *Essential Service Carrier*, El Dorado/Camden, C.A.B. Order 80-10-121 (Oct. 1980) (focus is on obtaining best air service from an air carrier that has demonstrated a reasonable subsidy need).

209. See *Essential Service*, Tennessee Points, C.A.B. Order 80-1-53 (Jan. 1980) (equipment utilized must meet minimum aircraft standards of at least two engines and two pilots); *Essential Service*, London-Corbin (Kentucky), C.A.B. Order 80-2-110 (Feb. 1980) (air carrier selected to provide essential service because it has superior aircraft); *Essential Service*, North Dakota Points, C.A.B. Order 80-5-92 (May 1980) (air carrier service plan reflects inefficient use of aircraft).

210. See *Essential Service*, Upstate N.Y. Points, C.A.B. Order 80-2-100 (Feb. 1980) (system as a whole is considered in order to maintain integrated, convenient, and efficient essential service).



characteristics<sup>211</sup> and the use of pressurized equipment.<sup>212</sup> Not considered as selection factors are proposals for exceeding essential service,<sup>213</sup> use of aircraft in market development,<sup>214</sup> or community expenditures to upgrade airports.<sup>215</sup>

Individual communities understandably desire some input into the selection process. The air service provided should be of a type acceptable to the community. If the carrier also receives a subsidy, such subsidy is for the community's benefit not the CAB's.<sup>216</sup>

Second, although scheduled service as measured by weekly departures has increased,<sup>217</sup> and no community has experienced loss of "essential air service,"<sup>218</sup> it is the quality of service that communities object to, not the quantity. Three objections have been made to the quality of commuter service: 1) the lack of amenities; 2) the safety record of commuters; and 3) the inconvenience of travel.

The objection of the lack of amenities is one that may seem unduly harsh but in perspective has some merit. Commuters do not offer the on-board service found on larger airlines because their aircraft typically carry eight to twenty passengers.<sup>219</sup> Ticket service is often poor because many commuters can not afford to employ full-time personnel at all stations.<sup>220</sup> Due to the lack of

211. See Essential Service, Puerto Rican Points, C.A.B. Order 80-8-116 (Aug. 1980) (in determining level of service, special geographic or commercial characteristics are taken into account).

212. See Essential Service, Alamogordo/Silver City, C.A.B. Order 80-8-8 (Aug. 1980) (it is recognized that pressurized service is desirable because of high altitudes).

213. See Essential Service, Upstate N.Y. Points, C.A.B. Order 80-2-100 (Feb. 1980) (no weight is given to carrier's proposal for additional service over the essential level).

214. See Essential Service, Upstate N.Y. Points, C.A.B. Order 800-2-100 (Feb. 1980) (essential service program does not subsidize market development); Hughes Air West, Crescent City Suspension, C.A.B. Order 80-6-176 (June 1980) (service exceeding community's essential level not considered).

215. See Essential Service Marianas Midway/Wake, C.A.B. Order 80-7-201 (July 1980) (community expenditures to upgrade airports not considered in essential service determination).

216. See Essential Service, North Dakota Points, C.A.B. Order 80-5-92 (May 1980). The essential service subsidy program is not a contractual (low-bid) procurement program. The relationship between the CAB and the carrier is purely statutory. Transportation is performed for the benefit of the community, not the government. *Id.*

217. One Committee member made the following remarks:

I agree with you that the CAB does show that there is a percentage increase. However, that is speaking of quantity and perhaps not quality and that is in frequency of flights. . . . There are four flights a day compared to where we have one. But today there are only 40 seats available, where with the one flight we have 105 seats available.

1979 *Hearings Aviation*, *supra* note 4, at 158 (remarks of Mr. Schmitt, Aviation Director Meadows Field, Bakersfield, California. See also, Dempsey, *The Rise and Fall of the Civil Aeronautics Board — Opening Wide the Floodgates of Entry*, 11 *TRANS. L.J.* 91, 178 (1979).

218. See 1979 *Hearings Aviation*, *supra* note 4, at 192 (remarks of Paul R. Ignatius, President and Chief Executive Officer, Air Transport Association of America).

219. See Cohen, *New Air Service and Deregulation: A Study in Transition*, 44 *J. AIR L. & COM.* 695, 699 (1979).

220. See 1979 *Hearings Aviation*, *supra* note 4, at 71 (statement James Lightsey, Director Aeronautics Div., Iowa Dept. of Trans.).

full-time staff, baggage handling is done by the pilots at many stations.<sup>221</sup> Situations such as these fail to satisfy the public's desire for quality service.

Commuter service is also objected to on the basis of the relatively poor commuter safety record. A major concern is that commuter safety should be equal to that of trunk or local carriers.<sup>222</sup> The realities of the industry, however, may prevent this from happening. For example, commuters often would benefit from newer equipment that is not readily available.<sup>223</sup> Older equipment must therefore be utilized. The use of older equipment results in less comfort and, in some cases, decreased reliability and efficiency.<sup>224</sup> Also, the variety of locations from which commuters operate, some without adequate weather service and navigation aids, causes some concern.<sup>225</sup> Overall public sentiment, therefore, is that these factors impede air carrier safety.

Finally, inconvenience of travel impacts on community perception regarding the quality of air service. Smooth connections between commuter traffic and the major carriers are essential. Some carriers have been successful in providing satisfactory connections.<sup>226</sup> Travel to and from some communities, however, has become circuitous due to the termination of flights that previously had provided direct connections.<sup>227</sup> As a result, to catch a flight directly it is often easier to travel some distance by car to

221. *Id.*

222. See AIRLINE DEREGULATION, *supra* note 53, at 47. "The safety record of commuters, by comparison with other carriers is in fact poor, as commuters had an accident rate six times higher than other carriers in 1978." *Id.* (remarks of James B. King, Chairman National Transportation Safety Board Oct. 31, 1979). This has been improving. The commuter airline accident rate in the United States in 1979 was .49 fatal accidents per 100,000 aircraft departures, according to the official figures released by the National Transportation Safety Board. The 1979 fatal accident rate was six percent less than in the year 1978. N.D. AERONAUTICS COMM'N, SAFETY RECORD OF COMMUTER AIRLINES AND LARGE SCHEDULED AIRLINES IN NORTH DAKOTA AND THE UNITED STATES 4 (APR. 29, 1980) [hereinafter cited as SAFETY RECORD].

223. TRAFFIC WORLD, May 12, 1980 at 94. See also SAFETY RECORD, *supra* note 222, at 2 (aircraft manufacturers have recognized this new market and now have turbo powered aircraft on the market with seating capacity in various models, ranging from 19 to 50 seats).

224. See 1979 *Hearings Aviation*, *supra* note 4, at 71.

225. See SAFETY RECORD, *supra* note 222, at 2. Congress has recognized the lack of instrument landing systems at the smaller airports served by commuter airlines. It is estimated that two-thirds of all airports served by commuter airlines do not have proper landing systems. *Id.* at 3. Congress has amended the Airport-Airway Aid Bill to require the FAA to spend 20% of all federal funds authorized for facilities and equipment to be expended for instrument landing systems installation at smaller airports, served by commuter airlines. *Id.*

226. See Nulty, *Little Airlines*, *supra* note 6, at 51. In the mid-1960s US Air (formerly Allegheny Airlines) found a way to steer travelers on to its planes. The company, along with a number of independent companies, established a network of cooperative ticketing and baggage handling. *Id.* "Allegheny Commuter" was painted on all of the planes, including those belonging to the independent companies. *Id.*

The success of Allegheny Commuter bred imitation. To channel traffic from smaller planes to their own, major airlines are beginning in the 1980s to share ticketing operations and departure gates with commuters. *Id.* TWA has started providing this service for Golden West in Los Angeles. *Id.* Eastern has done the same for Mississippi Valley Airlines in Chicago. *Id.*

227. See Av. WEEK & SPACE TECH., Nov. 3, 1980, at 53. The primary cause of circuitous routes are fewer direct flights. *Id.*

reach a hub airport instead of using the service of a local airport. Such inconveniences do not aid in implementing a comprehensive air transportation system.

The specific objections to commuter air service can and must be overcome if small community air service is to be successful. This has already begun to happen. Commuters are gaining experience in air carrier operations.<sup>228</sup> The use of newer equipment will make commuters more efficient and comfortable.<sup>229</sup> Because over seventy percent of the passengers on commuters connect with flights to more distant points,<sup>230</sup> quicker and more efficient service is being offered through the use of cooperative ticketing and baggage handling.<sup>231</sup> Furthermore, the FAA has promulgated safety standards for the commuters. The rules pertaining to equipment and flight personnel have been tightened, bringing them up to standards similar to those of the major carriers.<sup>232</sup> Finally, circuitous traveling may not be eliminated, but frequency and quality of service will compensate for less direct routing.<sup>233</sup>

Community participation is also essential to commuter success. Air carriers should be encouraged to maintain the desired type of community service. Input by passengers regarding commuter service,<sup>234</sup> as well as information from the airlines about the services being provided, will aid in the acceptance and success of commuters in the community.

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228. Nulty, *Little Airlines*, *supra* note 6, at 50.

229. TRAFFIC WORLD, May 12, 1980, at 44. Edwin Colodny, chairman and president of US Air stated the following:

Now more than ever we need the most fuel efficient aircraft possible. We need a new technology aircraft. Our concentration is in markets under 1,000 miles. We are not alone. Our route structure is not unique. In our opinion from the mid to late 1980s there could be a market for several hundred of this type aircraft. This number could exceed 2,000 in the next 15 years.

Manufacturers should expend a greater portion of their development efforts in the direction of air energy efficient derivative, short to medium range transport, but even more attractive would be the design and development of a totally new aircraft. We believe the design and manufacture of such an aircraft is possible — the technology is available.

*Id.*

230. Nulty, *Little Airlines*, *supra* note 6, at 51. *See also* SAFETY RECORD, *supra* note 222, at 3. Commuter airlines serve the short-haul passenger market. Commuters carry 26% of their passengers between 0 and 75 miles, 34% of the passengers between 75 and 150 miles, and 27% of the passengers between 150 to 250 and beyond. *Id.* This compares with the large airlines in which 94% of their passengers travel 250 miles or more. *Id.*

231. Nulty, *Little Airlines*, *supra* note 6, at 51.

232. AIRLINE DEREGULATION, *supra* note 53, at 47.

233. *See* SERVICE TO SMALL COMMUNITIES, *supra* note 37, at 34. The key is sufficient frequencies, adequate capacity, and reasonable reliability. *Id.*

234. According to a travel manager, "Often passengers just do not take the time to complain, any more than they take the time to compliment the airlines when service is good." AV. WEEK & SPACE TECH., Nov. 3, 1980, at 213.

## V. FUTURE OF SMALL COMMUNITY AIR SERVICE

To ensure the future of small community air service it will be necessary to aid the transition to total airline deregulation and to meet the shortfalls in protection of small community air service. In aiding the transition to total airline deregulation, experience in applying the small community air service provision of the Airline Deregulation Act of 1978<sup>235</sup> has resulted in several proposals. A key proposal<sup>236</sup> is to redefine "essential air service" to better serve small community needs. In order to accomplish this, the maximum and minimum levels of air service established by the CAB should be reexamined.<sup>237</sup> Additionally, point to point service of communities as well as single hub airport access should be protected.<sup>238</sup> To ensure successful deregulation and protection of small community air service, these proposals should be implemented by amending the Airline Deregulation Act of 1978.<sup>239</sup>

In some cases the protection of small community air service provided by the Airline Deregulation Act<sup>240</sup> does not appear to be enough. The apparent shortfalls have come to the attention of the federal government.<sup>241</sup> As a result, several federal agencies provide financial assistance to help small communities retain air service. These agencies include the CAB, the FAA, the Small Business Administration (SBA), the Farmer's Home Administration (FmHA), and the Economic Development Administration (EDA).<sup>242</sup> Federal aid<sup>243</sup> to communities that have lost air service by the major trunk and regional airlines, and to the commuter airlines that now want to serve those communities is coordinated by these agencies. This interagency cooperation is part of the "White

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235. 49 U.S.C.A. § 1389 (West Supp. 1981).

236. Several proposals were formulated by the Southeast Airport Operators Association. *AV. WEEK & SPACE TECH.*, Mar. 17, 1980, at 29. In addition to redefining essential air service and point to point service to communities, it was recommended 1) to extend the time in which airlines may exit from airports from 90 days' notice to 18 months' notice for a three-year period, and to 12 months' notice thereafter and 2) to require exiting carriers to provide sufficient fuel to a replacement carrier. *Id.*

237. *Id.*

238. *Id.*

239. Such amendments would strengthen the goal of affording airline service for small communities as found in the Airline Deregulation Act of 1978. 49 U.S.C.A. § 1302(a)(8) (West Supp. 1981).

240. *Id.* § 1389.

241. See CONGRESSIONAL RESEARCH SERVICE, FEDERAL ASSISTANCE AVAILABLE TO AID SMALL COMMUNITIES THAT HAVE LOST AIRLINE SERVICE AFTER AIRLINE DEREGULATION 1 (Nov. 6, 1979) [hereinafter cited as FEDERAL ASSISTANCE].

242. *Id.*

243. In the context of proposed federal budget cuts in the Reagan Administration, such federal assistance may be directly affected.

House Rural Initiatives Program.”<sup>244</sup> A brief description of the programs offered by each agency will indicate the breadth of available assistance. By utilizing one or more of these programs, communities can ensure adequate air service to meet the needs of their citizens.

The programs administered by the CAB are those provided for by the Airline Deregulation Act of 1978.<sup>245</sup> These programs principally aid communities with guaranteed essential air service.<sup>246</sup>

The FAA administers the Aircraft Loan Guarantee Program, which was modified by the Airline Deregulation Act of 1978.<sup>247</sup> This program helps small carriers obtain loans for the purchase of aircraft.<sup>248</sup> Commuter air carriers, local service carriers, and others<sup>249</sup> are eligible to apply for loan guarantees under this program.<sup>250</sup> Priorities as to who is granted a guarantee have been set by the FAA.<sup>251</sup> The highest priority is assigned to eligible carriers that will be providing “essential air service.” The second highest priority is assigned to eligible carriers serving small communities other than those included in the “essential air service” definition.<sup>252</sup> Indications are that these loan guarantees have been favorably received.<sup>253</sup>

The SBA oversees a variety of different programs mandated by the Small Business Act of 1953,<sup>254</sup> as amended by the Small Business Act of 1958<sup>255</sup> and the Small Business Investment Act of 1958.<sup>256</sup> These acts also apply in instances of reduction in airline service. The SBA may be helpful to those individuals interested in starting a commuter air carrier operation to meet the air service needs of a community. Small businesses may also borrow money from the SBA to construct, expand, or convert facilities; to

244. FEDERAL ASSISTANCE, *supra* note 241, at 2.

245. 49 U.S.C.A. §§ 1301-1552 (West Supp. 1981).

246. *Id.* § 1389.

247. *Id.* § 1380. Prior to enactment of the Airline Deregulation Act of 1978, the Aircraft Loan Guarantee Program was available only to trunk and local service carriers. *Id.*

248. FEDERAL ASSISTANCE, *supra* note 241, at 4.

249. *Id.* Commuter air carriers, local service carriers, intrastate carriers, Alaskan carriers, Hawaiian carriers, and charter air carriers are eligible to apply for loans under this program. *Id.*

250. *Id.*

251. *Id.*

252. *Id.*

253. *Id.* The FAA has been receiving applications for loan guarantees under the Aircraft Loan Guarantee Program since the enactment of the Airline Deregulation Act (October 24, 1978) and has been processing applications since August 1979. In October 1978 twenty-five applications were received; by August 1979 three had been granted and five withdrawn. Sixteen applications, however, were in progress, with one under revision. Since August 1979 the pace has picked up. *Id.* at 5.

254. Small Business Act of 1953, ch. 282, 67 Stat. 232 (amended 1958).

255. Small Business Act of 1958, 15 U.S.C.A. §§ 631-648 (West Supp. 1981).

256. 15 U.S.C.A. §§ 661-697 (West Supp. 1981).

purchase buildings, equipment, materials; or to obtain working capital to cover the day-to-day expenses of doing business.<sup>257</sup> A loan seeker, however, must seek private financing before applying to the SBA.<sup>258</sup> Community businesses interested in utilizing this program should contact the Small Business Administration local field office for available loans.

The FmHA as a rural credit agency administers several programs that may be of assistance to small communities that have lost air service. The Consolidated Farmer's Home Administration Act of 1961<sup>259</sup> and the Consolidated Farm and Rural Development Act of 1972,<sup>260</sup> which amended the 1961 Act, provide the basis for the FmHA programs. Two additional FmHA programs provide assistance to small communities. These programs are the Industrial Development Grant Program<sup>261</sup> and the Business and Industrial Loan Guarantee Program.<sup>262</sup>

Under the Industrial Development Grant Program, grants for the development of industrial sites are provided to communities with populations less than 50,000. In communities that have suffered a loss of airline service, the funds could be used to develop an industrial park around a small community airport, thereby drawing air service business to the area. Grants from this program, however, cannot be used directly for the construction or maintenance of airports.<sup>263</sup> The program receives \$10,000,000 in funding per year and offers an alternative for small communities.<sup>264</sup>

The Business and Industrial Loan Guarantee Program<sup>265</sup> makes loans available to businesses and industries engaging in activities that stimulate employment in rural areas. These loans also are available only to communities with populations less than 50,000.<sup>266</sup>

The loss of businesses in a community resulting from a loss in airline service is primarily the concern of the EDA. The Public Works and Economic Development Act of 1965<sup>267</sup> mandates grants, loans, loan guarantees, and development funds for communities. Especially applicable to small communities is assistance for public works and development,<sup>268</sup> and special

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257. See FEDERAL ASSISTANCE, *supra* note 241, at 7-8.

258. *Id.* at 8.

259. P.L. 87-128, 75 Stat. 307 (1961) (amended 1972).

260. 7 U.S.C.A. §§ 1921-1996 (West Supp. 1981).

261. *Id.* § 1932.

262. *Id.*

263. See FEDERAL ASSISTANCE, *supra* note 241, at 9.

264. *Id.*

265. 7 U.S.C.A. § 1932 (West Supp. 1981).

266. See FEDERAL ASSISTANCE, *supra* note 241, at 9.

267. 42 U.S.C.A. §§ 3121-3246 (West Supp. 1981).

268. *Id.* § 3131.

economic development and adjustment.<sup>269</sup> Public works grants can be used for the "acquisition or development of land and improvements for public works, public service, or development facility usage, and the acquisition, construction, rehabilitation, alteration, expansion, or improvement of such facilities, including related machinery and equipment, within a redevelopment area. . . ." <sup>270</sup> Special economic development and adjustment assistance is available to states and local areas so that they may "meet special needs arising from actual or threatened severe unemployment arising from economic dislocation . . . arising from actions of the Federal Government . . . and economic adjustment problems resulting from severe changes in economic conditions . . . and to encourage cooperative intergovernmental action to prevent or solve economic adjustment problems."<sup>271</sup> It appears that EDA funds are available to finance the development of an airport or a commuter airline willing to serve a community.<sup>272</sup> Such development would improve opportunities in the area<sup>273</sup> and help in the successful establishment or expansion of industrial or commercial facilities as required by the Act.<sup>274</sup>

In summary, by utilizing the available federal, state, and local assistance programs, small communities may be able to ensure future air service. Those communities that seek out the available assistance and utilize such programs will unquestionably benefit.

## VI. CONCLUSION

Air service to small communities has developed from its meager and haphazard beginnings, through tumultuous periods of experimentation, to its present form. Today, there is a national commitment to provide guaranteed essential service. All three types of airlines — trunk lines, local service, and commuters — have been involved in providing small community service at one time or another. Continued service to many small communities is provided today by only one type of carrier, the commuter.

Under the Airline Deregulation Act of 1978<sup>275</sup> commuter air service and the means of providing it to small communities has been specifically addressed in the Act's provisions. This Note has

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269. *Id.* § 3241.

270. *Id.* § 3131(a)(1).

271. *Id.* § 3241.

272. *See* FEDERAL ASSISTANCE, *supra* note 241, at 7.

273. 42 U.S.C.A. § 3131(a)(1)(A) (West Supp. 1981).

274. *See* FEDERAL ASSISTANCE, *supra* note 41, at 7.

275. 49 U.S.C.A. §§ 1301-1552 (West Supp. 1981).

explored the problems inherent in these provisions<sup>276</sup> and their impact on small communities.

The Airline Deregulation Act has assured many small communities of continued and perhaps increased service. The basis for achieving long-term success exists, however, if proper planning, emphasis, and concern is demonstrated by individual communities. Airline deregulation and its impact on service to small communities is a major change in air transportation policy. A primary goal must be to provide adequate air service to small communities to ensure a national air transportation network.

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276. *Id.* § 1386 (commuter exemption); *id.* § 1389 (small community air service).



