

1980

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Recommended Citation

Mark Styles, *Commuter Airlines and the Airline Deregulation Act of 1978*, 45 J. AIR L. & COM. 685 (1980)
<https://scholar.smu.edu/jalc/vol45/iss3/6>

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COMMUTER AIRLINES AND THE AIRLINE DEREGULATION ACT OF 1978

MARK STYLES

AFTER FOUR years of congressional hearings,¹ numerous legislative proposals,² and countless hours of political discussion, lobbying, and compromise, the Airline Deregulation Act of 1978 (the ADA) was signed into law on October 24, 1978.³ The enactment of this legislation marked the first significant revision in the economic regulatory structure governing the airline industry since the establishment of the Civil Aeronautics Board (CAB or the Board) by the Civil Aeronautics Act of 1938 (the 1938 Act).⁴

¹ *Oversight of Civil Aeronautics Board Practices and Procedures: Hearings Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary*, 94th Cong., 1st Sess. (1975) [hereinafter cited as *Senate Hearings 1975*]; *Reform of the Economic Regulation of Air Carriers: Hearings Before the Subcomm. on Aviation of the House Comm. on Public Works and Transportation*, 94th Cong., 2d Sess. (1976) [hereinafter cited as *House Hearings 1976*]; *Regulatory Reform in Air Transportation: Hearings Before the Subcomm. on Aviation of the Senate Comm. on Commerce, Science, and Transportation*, 94th Cong., 2d Sess. (1976) [hereinafter cited as *Senate Hearings 1976*]; *Aviation Economics: Joint Hearings Before the Subcomm. on Investigations and Review and the Subcomm. on Aviation of the House Comm. on Public Works and Transportation*, 94th Cong., 2d Sess. (1976) [hereinafter cited as *Economics Hearings*]; *Aviation Regulatory Reform Hearings Before the Subcomm. on Aviation of the House Comm. on Public Works and Transportation*, 95th Cong., 1st Sess. (1977) [hereinafter cited as *House Hearings 1977*]; *Regulatory Reform in Air Transportation: Hearings Before the Subcomm. on Aviation of the Senate Comm. on Commerce, Science, and Transportation*, 95th Cong., 1st Sess. (1977) [hereinafter cited as *Senate Hearings 1977*]; *Airline Deregulation and Aviation Safety: Hearings Before a Subcomm. of the House Comm. on Government Operations*, 95th Cong., 1st Sess. (1977) [hereinafter cited as *Safety Hearings*]; *Aviation Regulatory Reform: Hearings Before the Subcomm. on Aviation of the House Comm. on Public Works and Transportation*, 95th Cong., 2d Sess. (1978) [hereinafter cited as *House Hearings 1978*].

² S. 292, 95th Cong., 1st Sess. (1978); S. 689, 95th Cong., 1st Sess. (1978); H.R. 8813, 95th Cong., 1st Sess. (1978); H.R. 9297, 95th Cong., 1st Sess. (1978); H.R. 9588, 95th Cong., 1st Sess. (1978).

³ Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 (1978) (amending 49 U.S.C. §§ 1301-1504 (1976)).

⁴ ch. 601, 52 Stat. 973 (1938) (current version at 49 U.S.C.A. §§ 1301-1552 (Supp. 1979)). This was the first comprehensive law regulating civil aviation in the United States. Though amended in 1958, the revisions did not significantly alter the thrust, impact or operation of the law. Federal Aviation Act of 1958, 72 Stat. 731, as amended, 49 U.S.C.A. §§ 1301-1552 (Supp. 1979).

In recent years the commuter airline industry⁵ has grown to play an increasingly important role in the intercity transportation network of the United States. The purpose of this comment is to illuminate the impact of the ADA upon the domestic passenger segment of the commuter airline industry.⁶ The roots of the commuter airline industry, the ADA provisions relevant to commuter carriers, and the effect of the ADA upon the commuter airline industry will be discussed.

I. ROOTS OF THE COMMUTER AIRLINE INDUSTRY

The development of the industry has occurred over a forty-year period. The 1938 Act required that all carriers obtain certificates of public convenience and necessity from the Board.⁷ Only in instances where the Board determined that certification would impose an "undue burden" upon the airline could it exempt carriers from the certification requirements.⁸ Pursuant to this authority, the Civil Aeronautics Board adopted regulations which exempted carriers engaged solely in nonscheduled operations.⁹ Following an investigation,¹⁰ the CAB issued modified regulations which required the nonscheduled airlines to file with the Board information pertaining to the identity and services offered or to be offered by the carrier.¹¹

⁵ Commuter airlines are commonly known as "scheduled air taxis" or "third level carriers." Certificated carriers, comprised of trunk carriers and local service carriers respectively, are the first two levels of the industry. Trunk carriers (such as TWA or United) are the airlines originally certificated by the 1938 Act to provide nationwide air transportation. Local service carriers (such as Allegheny or Ozark), created after World War II to provide service to smaller and more isolated parts of the country, offer service on a regional scale. *See generally* EADS, *THE LOCAL SERVICE AIRLINE EXPERIMENT* (1972).

⁶ This investigation will be limited to passenger service and not cover the impact of the ADA on all-cargo commuter airlines, the cargo aspects of commuter carriers who provide both cargo and passenger service, or commuter transportation of mail.

⁷ *See* Civil Aeronautics Act of 1938, ch. 601, 52 Stat. 973, 987 (1938) (current version at 49 U.S.C. § 1371 (Supp. 1977)). These certificates specify on which routes scheduled service can be provided.

⁸ 52 Stat. 1005. *See* note 5 *supra*.

⁹ *See* CAB Regulation 400-1 (Oct. 18, 1938), cited in 60 C.A.B. 142, 173, 173 n.3 (1972).

¹⁰ CAB Order of July 26, 1944, cited at 6 C.A.B. 1049 (1946).

¹¹ CAB ER-292.1, effective June 15, 1946, reprinted with Board opinion at 6 C.A.B. 1049, 1057 (1946).

In 1947, the Board created "irregular air carriers" as a new class of nonscheduled airlines.¹² These carriers were defined as carriers not holding a certificate which engaged in interstate air transportation of persons or property to varying destinations in a nonscheduled manner.¹³ A distinction was subsequently drawn between large and small irregular air carriers.¹⁴ Small irregular air carriers were originally limited to the operation of aircraft with a gross takeoff weight of not more than 10,000 pounds or three or more aircraft whose aggregate takeoff weight did not exceed 25,000 pounds.¹⁵ "Generally, the air transportation services of the small irregular carriers constitute[d] only a portion of their total business, and they engage[d] in such other activities as flight instruction, aircraft sales and services, and airport operation."¹⁶ In an effort to parallel Federal Aviation Administration classifications distinguishing large from small planes,¹⁷ the CAB in 1949 raised the takeoff weight limit to 12,500 pounds for small irregular carriers.¹⁸

With the advent of new economic regulations in 1952, the small irregular air carriers were redesignated as "air taxis" under Part 298 (Part 298 carriers).¹⁹ Air taxis, unlike their predecessors, were allowed to perform scheduled air services.²⁰ It was the function of air taxis "to provide connecting air services to off-route points or

¹² Part 292—Exemptions and Classifications, CAB Docket No. 1501, 2742, Regs. Serial No. 388, 12 Fed. Reg. 3076 (1947) (effective June 10, 1947).

¹³ 12 Fed. Reg. at 3077. See 10 C.A.B. 486, 490 (1949).

¹⁴ CAB ER-125 (effective June 15, 1948), cited at 11 C.A.B. 609, 613 n.13 (1950).

¹⁵ CAB ER-292.1(c)(2), 12 Fed. Reg. 3076 (1947) (effective June 10, 1947). At the time this regulation was adopted, noncertificated air carriers operating aircraft with a gross takeoff weight over 10,000 pounds constituted less than 20% of the total noncertificated carriers but accounted for approximately 90% of the total revenue passenger miles flown by these carriers. *Id.* at 3076-77.

¹⁶ 11 C.A.B. 609, 614 (1950).

¹⁷ See 60 C.A.B. 142, 152 n.9 (1972).

¹⁸ Part 291—Classification and Exemption of Irregular Air Carriers: Change in Weight Limitations of Small Irregular Carriers, CAB ER-151, 14 Fed. Reg. 6193 (1949).

¹⁹ Part 298—Classification and Exemption of Air Taxi Operators, CAB ER-167, 17 Fed. Reg. 635 (1952). See Part 291—Classification and Continued Exemption of Large Irregular Air Carriers; Elimination of Classification of Small Irregular Air Carriers, CAB ER-168, 17 Fed. Reg. 635 (1952).

²⁰ Part 298—Classification and Exemption of Air Taxi Operators, CAB ER-167, 17 Fed. Reg. 635 (1952).

'jitney' services of a kind not offered by other air carriers. . . ."²¹ The air taxis remained exempt from the requirements and burdens of certification.²² Indeed, the CAB in 1965 summarized its regulatory policy as follows:

A basic principle underlying the statutory scheme of the Federal Aviation Act is that the grant of a monopoly in the form of route protection necessarily subjects the recipient of the award to Government regulation. In the area of air taxi operations we have determined not to employ the usual common carrier regulatory scheme. Rather, we have adhered to a policy of permitting the forces of competition to operate in lieu of regulation. This policy is based upon the Board's determination that the benefits which could be expected from a system of public utility type regulation would not justify the heavy burdens which would inevitably be placed upon the same air taxi operators and the Board.

The Board's present policy with respect to air taxi operators consists of unlimited freedom of entry into the field and a minimum of Government regulation. Thus, air taxi operators are not subjected to the detailed regulation of rates, fares, charges, and services which is applicable to air carrier operators of larger aircraft. And our experience over the years has been that reliance upon competition and unlimited entry have permitted the development of a viable air taxi industry which has provided transportation services with relatively few complaints from the public and other carriers.²³

While continuing to operate under a 12,500 pound limit on takeoff weight,²⁴ the air taxi industry experienced significant growth upon the development of small, more efficient turbine engine aircraft in the mid-1960's.²⁵ The CAB fostered this growth by allowing air taxis to serve as the sole providers of air transportation in

²¹ 27 C.A.B. 763, 784 (1958) (citations omitted). "Jitney services, by dictionary definition refers to common carriage of passengers in a small vehicle for a small fare, and commonly over a regular route." 60 C.A.B. 142, 158 n.25 (1972) (citations omitted).

²² Part 298—Classification and Exemption of Air Taxi Operators, CAB ER-167, 17 Fed. Reg. 635, 637 (1952). Prior to deregulation, however, Air Aspen had estimated that it cost \$60,000 initially to obtain a certificate and would cost \$450,000 per year to maintain the authority. *House Hearings 1976*, *supra* note 1, at 1163.

²³ CAB EDR-82 (1965), *reprinted at* 60 C.A.B. 142, 179 (1972).

²⁴ Part 298—Classification and Exemption of Air Taxi Operators, CAB ER-167, 17 Fed. Reg. 635, 637 (1952).

²⁵ *House Hearings 1976*, *supra* note 1, at 260. Even so, the air taxi industry was small with just over a dozen airlines operating in 1963. *Id.* at 261, 261 n.8.

a few markets previously served by certificated airlines.²⁶

Commuter airlines were established as a subclass of air taxis in 1969,²⁷ and like other air taxis, the commuter airlines were exempt from the normal regulations for scheduled air carriers.²⁸ Commuter carriers were defined by the Board as Part 298 operators who performed at least five round trips per week between two or more towns and published flight schedules specifying the times, days of the week, and points where these flights were performed.²⁹ In addition, the Part 298 regulations required the commuter airlines to: (1) register with the CAB;³⁰ (2) carry passenger liability and personal property insurance as prescribed by the Board;³¹ (3) provide the Board with copies of their scheduled fares, rates, and charges;³² and (4) file quarterly reports covering their operations.³³ The CAB continued to limit gross takeoff weight to 12,500 pounds.³⁴

A shift from an operating weight standard to a capacity standard occurred in 1972.³⁵ Instead of the previous operating standard which imposed a 12,500 pound takeoff weight limit, the commuter carriers, under relaxed craft size restrictions, were allowed to operate planes seating no more than thirty passengers.³⁶ This change resulted from the CAB determination that the old rule had "deprived a substantial segment of the public of basic comforts

²⁶ This replacement occurred on a very limited scale as the air taxis were not eligible for federal subsidy assistance. See *Air Line Pilots Ass'n Int'l v. CAB*, 515 F.2d 1010 (D.C. Cir. 1975); 60 C.A.B. 142, 177 (1972). The first instance of replacement was in 1964 at Douglas, Arizona, where service by American Airlines was suspended in favor of Apache Airlines. CAB Order E-21301 (Sept. 21, 1964); CAB Order No. 70-8-113 (Aug. 28, 1970).

²⁷ Part 298—Classification and Exemption of Air Taxi Operators, CAB ER-574, 34 Fed. Reg. 7124 (1969) (effective July 1, 1969).

²⁸ *Id.*

²⁹ 14 C.F.R. § 298.1(f) (1978).

³⁰ *Id.* § 298.21.

³¹ *Id.* § 298.41.

³² *Id.* § 298.60.

³³ *Id.* § 298.63.

³⁴ A plane this size holds no more than 20 passengers. 60 C.A.B. 142, 152 (1972).

³⁵ 60 C.A.B. 142 (1972).

³⁶ Part 298—Classification and Exemption of Air Taxi Operators Maximum Payload Capacity: Opinion and Order on Reconsideration, CAB Docket No. 21761, CAB Order No. 72-7-61, ER-748, 37 Fed. Reg. 19,609 (1972) (effective Sept. 17, 1972). See 60 C.A.B. 142 (1972).

normally to be expected in modern air transportation."³⁷ Following this trend toward liberalization, on August 30, 1978, the CAB announced proposed rulemaking to raise the capacity limit for commuter carriers to sixty seats.³⁸

Throughout the years the CAB has employed a free market policy, in lieu of close regulation, toward the commuter airlines.³⁹ In contrast with other interstate air carriers,⁴⁰ commuter airlines have not been subject to CAB certification, regulation of market entry or exit, specification of routes, or determination of fares. Thus, it has been competitive market forces which have guided the commuter airline industry.⁴¹

Commuter airlines primarily have served small communities.⁴² Employing hub or spoke type routes out of large air centers,⁴³ commuter airlines have provided direct links to smaller cities. This service has often been at a lower cost to the passengers.⁴⁴ Through the use of frequent, short haul⁴⁵ flights, commuter carriers have been able to tailor service levels to the needs of each town.

Commuter airlines have made money on routes that would have

³⁷ 60 C.A.B. 142, 151 (1972). The amenities often absent on commuter aircraft included pressurization, air conditioning, adequate seat pitch, adequate head room, lavatory facilities, and galley facilities. *Id.* at 152.

³⁸ Proposed Rulemaking, CAB Docket No. 33314, EDR-361, 43 Fed. Reg. 39,587 (1978). No final action has yet been taken.

³⁹ See text accompanying note 23 *supra*.

⁴⁰ See note 5 *supra*.

⁴¹ The ability to adapt to changes in the market without prior regulatory agency approval has been an important asset for commuter carriers. See text accompanying notes 39-40 *supra*.

⁴² See *House Hearings 1976*, *supra* note 1, at 992-93. There were 1234 city pairs which enplaned ten or less passengers a day in 1978. CAB, *COMMUTER AIR TRAFFIC STATISTICS, 12 MONTHS ENDING DECEMBER 31, 1978*, at 2-3 (1979) [hereinafter cited as *COMMUTER STATS.*]. In 1977, commuters averaged only six enplanements per flight. *COMMUTER AIRLINE A. AMERICA TIMES*, Feb. 1979, at 4 [hereinafter cited as *TIMES-Feb. 1979*].

⁴³ 60 C.A.B. 142, 161 (1972). This hub or spoke type service differs from the linear flight routes flown by local service and trunk carriers. Linear routes connect major air centers with stops at smaller airports along the way. As a result, service provided by the certificated carriers tends to be less frequent and not as quick or direct.

⁴⁴ *COMMUTER AIRLINE A. AMERICA TIMES*, Jan. 1979, at 15 [hereinafter cited as *TIMES-Jan. 1979*]. Commuters have lower fares in 62% of the markets served by both certificated carriers and commuter airlines. *Id.*

⁴⁵ *COMMUTER STATS.*, *supra* note 42, at 1. Average trip distance in 1977 and 1978 was 111 miles. This compares to 584 miles for trunk carriers and 188 miles for local service carriers in 1976. *House Hearings 1977*, *supra* note 1, at 2091.

generated losses to other types of carriers. The use of small aircraft on hub routes, coupled with the relaxed regulatory climate, has provided commuter carriers a degree of flexibility unmatched by other carriers.⁴⁶ As a result, load factors have been relatively high for commuter carriers, especially when compared to the load factors that would have resulted if the same number of passengers⁴⁷ were placed on the large aircraft operated by local service carriers.⁴⁸ In the airline industry, flying full planes has been a key to profitable operation.⁴⁹

Considering the level of demand for air transportation in the relatively small communities served, commuter airlines provide fuel-efficient transportation.⁵⁰ By operating small planes full of passengers, as opposed to partially filled larger craft, fuel is conserved.⁵¹ Furthermore, commuter airlines offer a viable alternative

⁴⁶ Under the Civil Aeronautics Act of 1938, ch. 601, 52 Stat. 973 (1938) (current version at 49 U.S.C.A. §§ 1301-1552 (Supp. 1979)), the CAB was granted the authority to control the routes and fares of certificated airlines.

⁴⁷ See note 42 *supra*.

⁴⁸ See *House Hearings 1977*, *supra* note 1, at 1199. The smallest jets in the local service fleet carry about 75 passengers while the largest turboprop holds 50-60 people.

In 1965 99 per cent of the aircraft in the local service fleet were turboprop or piston-powered, ranging in size from 26 to 56 seats. By 1976 only 35 per cent were of that type, the rest being larger jet aircraft. These jets accounted for 90 per cent of local service carrier investment in aircraft at the end of 1976 and were used to fly 89 per cent of the revenue passenger miles logged by them.

House Hearings 1978, *supra* note 1, at 672. See *House Hearings 1978*, *supra* note 1, at 693-97; NEW HORIZONS, Commuter Airline Industry 1978 Annual Report, Commuter Airline Association of America, 48, 50-51 (Nov. 1978) [hereinafter cited as HORIZONS].

⁴⁹ This correlation is obvious since airlines experience relatively high fixed costs and relatively low marginal costs for each flight. In other words, it costs nearly as much to fly one person on a 100 seat plane as it does to fly 100 people on the same craft. See *House Hearings 1976*, *supra* note 1, at 358, 1100, 1103.

⁵⁰ "The least efficient commuter airliner is still considerably more effective in saving energy than its most effective jet counterpart." COMMUTER AIRLINE A. AMERICA TIMES, May, 1979, at 5 [hereinafter cited as TIMES-May 1979].

⁵¹ A 15 seat Beech 99 consumes about 49 gallons of jet fuel on a 100 mile flight. The 50 seat Convair 580, among the smaller airplanes operated by certificated carriers, consumes 155 gallons for the same flight. Although fuel consumption per seat is slightly less for the Convair, most commuter markets do not need its 50 seat capacity. On a per passenger basis the smaller aircraft is far more efficient. Given 10 passengers, a 66.6 percent load factor on the 15 seat airplane, the commuter consumes 4.9 gallons per passenger

to those intercity travelers driving automobiles. By flying, a passenger's travel time is reduced and fuel is saved.⁵²

In the years prior to deregulation, commuter airlines prospered⁵³ while other carriers languished.⁵⁴ Though only a handful of commuter type airlines existed originally,⁵⁵ a total of 208 carriers offered passenger service in 1978.⁵⁶ Between 1970 and 1978 the number of passengers served increased at an annual rate of 11.3%,⁵⁷ with over ten million passengers carried in 1978 alone.⁵⁸

II. ADA PROVISIONS RELEVANT TO COMMUTER CARRIERS

A. Regulatory Framework

As evidenced by the title, the purpose of the Airline Deregulation Act of 1978 was regulatory reform. Under its provisions, the certificated carriers were granted freedom from CAB oversight and control.⁵⁹ These certificated airlines, following a transition period, will operate in the same regulatory climate that the commuter airlines have enjoyed for years.

In keeping with the spirit of the ADA, commuter airlines have remained exempt from CAB control over routes and fares.⁶⁰ The

over a 100 mile stage length. The Convair consumes 15.5 gallons per passenger.

House Hearings 1976, supra note 1, at 1045. See TIMES-May 1979, supra note 50, at 6.

⁵² Ransome Airlines, a commuter carrier, has found that their service frequently yields up to 40 passenger miles per gallon of fuel. This compares to a passenger car, with its average load of 1.2 occupants, which yields roughly 16 passenger miles per gallon. *House Hearings 1977, supra note 1, at 2102. See TIMES-May 1979, supra note 50, at 2-7.* In 1978, of the fuel used in intercity transportation, commuter airlines used .06% while automobiles consumed 55.15%. *Id.* at 4.

⁵³ *HORIZONS, supra note 48, at 11.*

⁵⁴ *See House Hearings 1976, supra note 1, at 114.*

⁵⁵ *See note 25 supra.*

⁵⁶ *COMMUTER STATS., supra note 42, at 40.*

⁵⁷ *Id.* at 2-3.

⁵⁸ *Id.* In that same year, commuter airlines served 682 airports, linking 1676 city pairs. *Id.* As of 1978, commuter airlines offered service in every state except South Dakota. *HORIZONS, supra note 48, at 79-87.*

⁵⁹ A goal of the ADA is to place "maximum reliance on competitive market forces and on actual and potential competition." 49 U.S.C.A. § 1302(a)(4) (Supp. 1979).

⁶⁰ 49 U.S.C.A. § 1386(b)(4) (Supp. 1979). However, commuter carriers must still conform to liability requirements and other reasonable regulations

ADA has not imposed the requirement of certification upon the commuter carriers.⁶¹ No new constraints in the area of economic regulation have been placed upon the commuter airlines by the ADA.

Commuter airlines, under the new law, now have the authority to fly aircraft with a capacity of no more than fifty-five passenger seats.⁶² This increase, from the previous thirty passenger limit,⁶³ may be raised by the Board when "public interest so requires."⁶⁴

B. *Service to Small Communities*

A major goal of the ADA was "the maintenance of a comprehensive and convenient system of continuous scheduled air service for small communities, and for isolated areas with direct federal assistance where appropriate."⁶⁵ Throughout the hearings for the ADA, concern for the air transport needs of small towns was expressed.⁶⁶ Professing a view that Congress subsequently adopted, Dr. Alfred Kahn, then chairman of the CAB, testified that "the key to high quality small community air service is the commuter airline industry."⁶⁷

The subsidy program employed prior to the ADA to facilitate small town air service originated in the 1938 Act.⁶⁸ Section 406 of that Act authorized the CAB to subsidize the transportation of mail.⁶⁹ The purpose of this program was to encourage and protect the growth of an infant industry so as to aid the development of

that the Board may adopt in the public interest. Also, the exemption from certification (49 U.S.C. § 1371 (Supp. 1977)) shall not apply to Alaskan carriers unless the airline is authorized to provide service by the state of Alaska. 49 U.S.C.A. § 1386(b)(5) (Supp. 1979). For the CAB views on certification of commuter carriers see *House Hearings 1977*, *supra* note 1, at 1115.

⁶¹ See note 60 *supra*.

⁶² 49 U.S.C.A. § 1386(b)(4) (Supp. 1979).

⁶³ See note 36 *supra* and accompanying text.

⁶⁴ 49 U.S.C.A. § 1386(b)(4) (Supp. 1979). Deliberations on proposed rule-making to increase the passenger limit to sixty have not yet been completed. See note 38 *supra*.

⁶⁵ 49 U.S.C.A. § 1302(8) (Supp. 1979).

⁶⁶ See note 1 *supra*.

⁶⁷ *House Hearings 1978*, *supra* note 1, at 668.

⁶⁸ Civil Aeronautics Act of 1938, ch. 601, 52 Stat. 973 (1938) (current version at 49 U.S.C.A. §§ 1301-1552 (Supp. 1979)).

⁶⁹ 49 U.S.C.A. § 1376 (Supp. 1979).

a national airline industry.⁷⁰ Through the years, local service carriers received the bulk of the over one billion dollars in direct subsidy payments made.⁷¹ By 1954 it was clear that small town service support was the primary function of the program; thus mail pay was separated.⁷² Except for Northeast Airlines, none of the trunk carriers, who were original recipients of the funds under the 1938 Act, required subsidy support after 1959.⁷³ Though the purpose of the section 406 subsidy program was to provide service to small cities, the program was less effective in later years as a total of 128 towns were dropped from the certificated air transportation network between 1968 and 1978.⁷⁴

For the first time, under section 419 of the ADA, commuter airlines can receive direct federal operating assistance.⁷⁵ Prior to this enactment, attempts by the CAB to provide subsidies to non-certificated airlines were blocked by the courts.⁷⁶ The creation of the section 419 subsidy program by Congress is perhaps, from the perspective of commuter carriers, the most important provision in the ADA.⁷⁷

The section 419 program was designed to replace the previous section 406 program and serve as the primary form of assistance

⁷⁰ See *House Hearings 1978*, *supra* note 1, at 667. While the subsidy program remained the same, the industry matured and grew 435 times larger than it had been. *Economics Hearings*, *supra* note 1, at 201.

⁷¹ *House Hearings 1977*, *supra* note 1, at 2124.

⁷² EADS, *supra* note 5, at 142.

⁷³ *House Hearings 1977*, *supra* note 1, at 348.

⁷⁴ AV. DAILY, Apr. 26, 1979, at 321.

⁷⁵ Section 419 is codified at 49 U.S.C.A. § 1389 (Supp. 1979). Commuters, like all other aircraft owners, have enjoyed indirect subsidies in the past through the federally assisted development of airports.

⁷⁶ See *Air Line Pilots Ass'n Int'l v. CAB*, 515 F.2d 1010 (D.C. Cir. 1975). The court held:

[T]he Board has no power to subsidize Air Midwest nor any other non-certificated carrier. Even though the Board may have been correct in finding Air Midwest more efficient at serving the three Kansas cities than Frontier would be, and even if, therefore, it is desirable to keep Air Midwest in that service, Congress has not given the Board power to pursue that end by giving public money to Air Midwest.

Id. at 1013. Though since certificated, Air Midwest was a commuter airline at the time. Frontier was, and remains, a local service operator.

⁷⁷ See text accompanying notes 133-153 *infra*.

to carriers operating in small towns.⁷⁸ Unlike the old program which assessed a carrier's system-wide operating costs against revenues when determining the amount of subsidy, payments will only be made on a route-by-route basis.⁷⁹ Thus, subsidy rates will be individually set at an amount commensurate with the level of air service deemed appropriate for that community.

In order to be eligible to participate in the section 419 subsidy program, a commuter must prove that it is "fit, willing, and able to provide such service."⁸⁰ The ADA additionally requires that all aircraft and operating procedures used by commuter airlines providing subsidized service conform to safety standards established by the Federal Aviation Administration (FAA).⁸¹ Part 135 of the FAA regulations currently control operating standards for commuter airlines flying planes seating thirty passengers or less,⁸² while Part 121 applies to airlines operating larger craft.⁸³ With regard to the actual aircraft employed by commuters, multiple classifications exist.⁸⁴ Thus, depending upon the composition of its fleet, a commuter airline may be subject to a wide spectrum of FAA regulations. The ADA mandates that safety standards for commuter carriers on subsidized routes must, "to the maximum feasible extent," be equivalent to the level of safety to persons traveling on certificated carriers.⁸⁵ It is the goal of the ADA to place "the assignment and maintenance of safety

⁷⁸ The old section 406 subsidy is to be phased out and eventually terminated on January 1, 1986. 49 U.S.C.A. § 1376(c) (Supp. 1979).

⁷⁹ CAB, SUMMARY OF THE AIRLINE DEREGULATION ACT OF 1978, at 15 (1978). However, CAB Chairman Marvin Cohen has testified that the new subsidy program will not be a pure low bid system. *Av. DAILY*, Apr. 26, 1979, at 321.

⁸⁰ 49 U.S.C.A. § 1389(c)(2)(A) (Supp. 1979).

⁸¹ *Id.* § 1389(c)(2)(B) (Supp. 1979). The ADA also imposes minimum insurance requirements on subsidized commuter airlines. *Id.* § 1389(e) (Supp. 1979). See note 151 *infra*.

⁸² 14 C.F.R. § 135 (1979). See *House Hearings 1976*, *supra* note 1, at 1092.

⁸³ 14 C.F.R. § 121 (1979).

⁸⁴ See note 151 *infra*.

⁸⁵ 49 U.S.C.A. § 1389(c)(3)(B) (Supp. 1979). These standards are to become effective within 18 months of enactment of the ADA. Part 135 of the safety regulations is more liberal than the Part 121 regulations. Compare 14 C.F.R. § 135 (1979) with 14 C.F.R. § 121 (1979). Since certificated carriers employ larger craft, they are subject to the Part 121 operating standards and the corresponding aircraft regulations. See note 48 *supra*.

as the highest priority in air commerce.⁸⁶

In conjunction with the new subsidy program, the ADA guarantees service, for ten years, to all communities listed on air carrier certificates on the date of enactment.⁸⁷ For each of these cities the CAB is directed to establish the level of "essential air transportation" which is defined, at a minimum, as the lesser of either two daily round trips five days a week or the level of service actually received during 1977.⁸⁸ When the Board finds that essential air

⁸⁶ 49 U.S.C.A. § 1302(a)(1) (Supp. 1979).

⁸⁷ *Id.* § 1389(a) (Supp. 1979).

⁸⁸ *Id.* § 1389(f)(1) (Supp. 1979). This determination was made within one year of enactment (*i.e.*, by October 24, 1979) after consultation with the towns and appropriate state agencies. *Id.* § 1389(a)(2) (Supp. 1979). In Alaska, the level of "essential air transportation" must be the greater of either two round trips per week or the 1976 service level, unless the state agency of Alaska, after consultation with the community affected, agrees to less service. *Id.* § 1389(f)(2) (Supp. 1979).

The CAB has adopted guidelines delineating factors to be considered in determining air transportation levels for the 555 communities involved:

(1) Initially, the maximum available capacity guaranteed by the Board will be 120 seats each day in a market; *i.e.*, 60 seats between the eligible point and the hub in each direction.

(2) A 60-65% load factor will be required in determining the requisite frequencies.

(3) Except in Alaska, the Board will require at least two round trips per Monday through Friday from the eligible points to the hub. Two round trips each weekend will also be required.

(4) Flights must be flown at reasonable times during the day, taking into consideration the needs of the passengers.

(5) In markets affected by seasonal traffic, a two-tier approach may be established.

(6) In most cases, services to only one hub, usually the closest, will be guaranteed. Service to two hubs will be considered if a community has removed commercial, geographical, or political ties to both hubs and if there is sufficient traffic from the eligible point to support two round trips per day to both hubs.

(7) In multiple airport cities, the situation will be reviewed on an individual basis with preference probably being given to the airport preferred by the community.

(8) No more than two-stop operations will be allowed.

(9) Any person may ask the CAB to modify the essential service level at a given town. The petition for adjustment must state why the designated level is inadequate and what level of service is requested.

See 14 C.F.R. § 398, Guidelines for Individual Determinations of Essential Air Transportation, CAB Docket No. 34650, PS-87, 44 Fed. Reg. 52,646 (1979) (adopted Aug. 31, 1979; effective Sept. 7, 1979); 14 C.F.R. § 325, Essential Air Service Procedures, CAB Docket No. 35464, PR-213, 44 Fed. Reg. 52,661 (1979) (adopted Aug. 31, 1979; effective Sept. 7, 1979). See also *AV. DAILY*, May 4, 1979, at 25; *COMMUTER AIRLINE A. AMERICA TIMES*, Oct. 1979, at 16 [here-

transportation will not be provided without federal assistance to a community guaranteed service the Board is to initiate service with an appropriate carrier on a subsidized basis.⁸⁹

Carriers serving cities which are guaranteed service are required to give notice to the CAB, appropriate state agencies, and the communities involved before reducing service below the essential air transportation threshold.⁹⁰ Upon receipt of notice it is the duty of the CAB to make "every effort to secure an air carrier to provide at least essential air transportation to such eligible point, on a continuing basis."⁹¹ If another carrier cannot be obtained, the Board is empowered to require the current airline to continue providing essential service to the town.⁹² Thus, communities guaranteed air transportation are protected from even temporary disruptions in service.

In addition to the cities guaranteed service by the ADA, a limited number of other towns are also eligible to receive subsidized air service.⁹³ The Board is instructed by the law to review, before January 1, 1982, the status of all communities deleted from air carrier certificates since July 1, 1968, and determine if any should be included in the subsidy program.⁹⁴ When making this determination, the CAB is to consider various factors, including traffic generation, subsidy cost, alternate modes of transportation avail-

inafter cited as *TIMES*-Oct. 1979]; Address by Elizabeth Bailey (CAB Member), ITT Key Issues Lecture, New York University (Dec. 5, 1979) (*reprinted by the CAB*).

⁸⁹ 49 U.S.C.A. § 1389(a)(4) (Supp. 1979). If the Board subsequently determines that service at the appropriate level can be provided without subsidy, the payments are terminated. 49 U.S.C.A. § 1389(a)(5) (Supp. 1979).

⁹⁰ Certificated and subsidized carriers must give 90 days notice while other carriers are required to give 30 days notice. 49 U.S.C.A. § 1389(a)(7)(B), (C) (Supp. 1979).

⁹¹ *Id.* § 1389(a)(9) (Supp. 1979).

⁹² In instances such as these, subsidized carriers will continue to receive the subsidy at the same rate, while unsubsidized carriers who are forced to maintain air service are to be compensated for their losses. So long as the CAB is attempting to find a replacement carrier, the duration the Board may bind a carrier against its will is an open question. *Id.* § 1389(a)(6) (Supp. 1979).

⁹³ *Id.* § 1389(b) (Supp. 1979).

⁹⁴ *Id.* Following this determination, the Board, at its discretion, may add additional points in Alaska and Hawaii to the list of eligible communities after January 1, 1982. However, these additional points are limited to a number that does not raise the total number of subsidized towns above the 1968 level. *Id.* § 1389(b)(2) (Supp. 1979).

able, and degree of isolation.⁹⁵ When a town becomes eligible, the CAB is to set the essential air transportation level within six months.⁹⁶ Unlike towns guaranteed air transportation, these cities are vulnerable as the CAB cannot prevent subsidized carriers from terminating service to these communities.⁹⁷

Commuter carriers will have an additional opportunity to provide subsidized service to small towns as "replacement" carriers.⁹⁸ The ADA states that after January 1, 1983, any carrier can replace a recipient of a section 406 subsidy by demonstrating that it can improve service *and* reduce the required subsidy.⁹⁹ Also, after the same date, any carrier can replace an airline receiving a section 419 subsidy by showing that it can improve service *or* reduce the required subsidy.¹⁰⁰ Thus the most efficient carrier will be providing service to the small communities.

C. Aircraft Loan Guarantees

Initiated in 1957, the federal government has operated a loan guarantee program for over twenty years.¹⁰¹ This program, under the auspices of the Department of Transportation and administered by the Federal Aviation Administration,¹⁰² has facilitated aircraft acquisition by a select group of certificated airlines.¹⁰³ Through the years, a total of 47 loans for \$307 million, going toward the purchase of 158 aircraft, have been made to 19 different airlines.¹⁰⁴

Under the ADA, commuter carriers are eligible to participate

⁹⁵ CAB, SUMMARY OF THE AIRLINE DEREGULATION ACT OF 1978, at 17 (1978).

⁹⁶ 49 U.S.C.A. § 1389(b)(4)(A) (Supp. 1979).

⁹⁷ 49 U.S.C.A. § 1389(b)(7) (Supp. 1979) only requires that the carrier provide advance notice before terminating service.

⁹⁸ "Replacement" carriers are carriers who bump another carrier from subsidized service on a given route pursuant to 49 U.S.C.A. § 1389(a)(11) (Supp. 1979).

⁹⁹ *Id.* § 1389(a)(11)(A) (Supp. 1979).

¹⁰⁰ *Id.* § 1389(a)(11)(B) (Supp. 1979).

¹⁰¹ Act of Sept. 7, 1957, Pub. L. No. 85-307, 71 Stat. 629 (1957) (current version appears at 49 U.S.C.A. § 1324 note (Supp. 1979)).

¹⁰² Authority for the administration of the loan guarantee program has been delegated by the Department of Transportation to the FAA. Young, *The Aircraft Loan Guarantee Program*, TIMES-Jan. 1979, *supra* note 44, at 10.

¹⁰³ *Id.* at 9.

¹⁰⁴ *Id.*

in the loan guarantee program for the first time.¹⁰⁵ The federal government can now guarantee up to \$100,000,000¹⁰⁶ in loans per carrier for the purchase of new and used airplanes, including spare parts and engines.¹⁰⁷ The Act enables a lender to be protected against loss of ninety percent of the face value and all of the unpaid interest on an aircraft purchase loan.¹⁰⁸ Loans guaranteed by the government may have a duration of up to fifteen years,¹⁰⁹ a period which encompasses the useful life of most aircraft.¹¹⁰

Statutorily, for a loan to be guaranteed for any carrier, it must be determined: (1) that absent the guarantee the carrier would be unable to obtain financing "on reasonable terms";¹¹¹ (2) that the aircraft is essential to "the service and efficiency" of the airline's operations;¹¹² and (3) that "reasonable assurances" to repay are made by the airline,¹¹³ so as to ensure "reasonable protection to the United States."¹¹⁴ In addition to the requirements that must be met by any applicant, a commuter carrier must also promise "to continue its operations"¹¹⁵ and, to the extent necessary, agree not to alter the route network flown at the time of the loan.¹¹⁶

¹⁰⁵ Pub. L. No. 95-504, § 42, 92 Stat. 1748 (1978) (codified at 49 U.S.C.A. § 1324 note (Supp. 1979)).

¹⁰⁶ 92 Stat. at 1749.

¹⁰⁷ It is interesting to note that the legislation does not require that the planes purchased be manufactured in the United States. Commuters can thus get loan guarantees to buy all popular craft, including the Shorts 330 (Irish), Nord 262 (French), DeHavilland Dash 7 (Canadian), Embraer EMB 110 (Brazilian), and Britton Norman Islander (English) even though the loan will support foreign manufacturers who are in competition with the American aircraft industry. See *TIMES*-Jan. 1979, *supra* note 44, at 10.

¹⁰⁸ 92 Stat. 1748 (1978) (codified at 49 U.S.C.A. § 1324 note (Supp. 1979)).

¹⁰⁹ The fifteen year period is for new jets. Guaranteed financing for new turboprop planes may be for up to twelve years. All other new and used aircraft can qualify for guarantees lasting up to ten years. *COMMUTER AIRLINE A. AMERICA TIMES*, Aug. 1979, at 4 [hereinafter cited as *TIMES*-Aug. 1979].

¹¹⁰ Over the years the aircraft industry has experienced rapid technological advancement, thus prompting the frequent development of new planes. See note 157 *infra*, and accompanying text.

¹¹¹ 92 Stat. 1748, 1749 (1978) (codified at 49 U.S.C.A. § 1324 note (Supp. 1979)).

¹¹² 92 Stat. at 1749.

¹¹³ 92 Stat. at 1749-50.

¹¹⁴ *Id.*

¹¹⁵ 92 Stat. at 1750.

¹¹⁶ *Id.*

D. Federal Regulatory Preemption

To insure the continued existence of the relaxed regulatory climate created by the ADA, the law provides for federal preemption of state aviation regulation.¹¹⁷ Section 105 of the Act specifically prohibits any state, political subdivision, interstate agency, or political agency from enacting or enforcing "any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier" with authority to provide interstate service.¹¹⁸ "Plainly Congress did not want its decision to deregulate federal carriers to be undermined by increased or continued state regulations."¹¹⁹

E. Joint Fares

A joint fare is a charge for a trip taken on two or more airlines that is less than the sum of the normal segment fares. Under the fare revision resulting from the Domestic Passenger Fare Investigation,¹²⁰ a uniform joint fares program was adopted for certificated carriers.¹²¹ However, the CAB rejected a subsequent request by the commuter airlines to integrate them into the program.¹²² As a result, commuter airlines have had to negotiate individual agreements, if possible, with those certificated airlines who desired a joint fare relationship with commuter carriers.¹²³

The ADA mandates that commuter carriers be allowed to participate in any joint fare program implemented by the CAB.¹²⁴ The law also requires that any formula employed under the joint fare

¹¹⁷ See Freeman, *State Regulation of Airlines and the Airline Deregulation Act of 1978*, 44 J. AIR L. & COM. 747 (1979).

¹¹⁸ 49 U.S.C.A. § 1305(a)(1) (Supp. 1979).

¹¹⁹ Freeman, *supra* note 117, at 755.

¹²⁰ CAB Order No. 70-1-147 (Jan. 29, 1970).

¹²¹ CAB Order No. 74-3-80 (Mar. 18, 1974), *upon reconsideration*, CAB Order No. 74-12-108 (Dec. 27, 1974).

¹²² CAB Order No. 77-9-100 (Sept. 23, 1977). See *House Hearings 1977*, *supra* note 1, at 1099.

¹²³ See *House Hearings 1978*, *supra* note 1, at 217; *Senate Hearings 1977*, *supra* note 1, at 1041-47; *Economics Hearings*, *supra* note 1, at 427; *Impact on Airline Deregulation: Hearings Before the Subcomm. on Aviation of the Senate Comm. on Commerce, Science, and Transportation*, 96th Cong., 1st Sess. 162, 164 (1979) (prepared statement of Duane H. Ekedahl, Executive Director, Commuter Airline Association of America) [hereinafter cited as *Testimony*].

¹²⁴ 49 U.S.C.A. § 1374 (Supp. 1979).

program be applied uniformly to all carriers.¹²⁵ Notice of anticipated termination of service is the only area in which commuter airlines differ from other carriers under the program. In order to insure predictability and stability¹²⁶ for passengers purchasing joint fare tickets, commuter carriers are required to provide ninety days notice prior to terminating service on a joint fare route.¹²⁷

III. OUTLOOK FOR THE COMMUTER AIRLINE INDUSTRY

The key to the commuter airline industry is service to small communities. Since the passage of the ADA, a shift away from small towns by local service carriers has created a void.¹²⁸ It is the responsibility of the commuter carriers, under the ADA, to fill this gap.

A. Regulatory Framework

The ADA's extension of regulatory freedom allows the commuter airlines to provide the same kind of service that has been successful in the past.¹²⁹ Through the use of small, fuel-efficient aircraft on hub type routes the commuter carriers can continue to tailor service levels to each individual town.¹³⁰ The commuter airlines retain the requisite flexibility in routes and fares, without the burden of certification, to respond quickly, efficiently, and effectively to the air transportation needs of small communities.

The relaxation in aircraft size constraints to the new fifty-five passenger limit¹³¹ allows the use of larger planes by commuter airlines in those markets which require greater capacity. Thus the commuter airlines can employ an optimally sized plane on each route. Though the vast majority of points currently served by commuters will never generate sufficient traffic,¹³² the commuters can

¹²⁵ *Id.* "Any commuter which enters the program must have joint fares with all certificated carriers over all routes." COMMUTER AIRLINE A. AMERICA TIMES, Mar. 1979, at 11 [hereinafter cited as TIMES-Mar. 1979].

¹²⁶ H.R. REP. NO. 1211, 95th Cong., 2d Sess. 11 (1978), reprinted in [1978] U.S. CODE CONG. & AD. NEWS 3737.

¹²⁷ TIMES-Mar. 1979, *supra* note 125, at 11.

¹²⁸ See note 74 *supra*, and accompanying text.

¹²⁹ See notes 39-58 *supra*, and accompanying text.

¹³⁰ *Id.*

¹³¹ 49 U.S.C.A. § 1386(b)(4) (Supp. 1979).

¹³² See note 42 *supra*.

now offer service with large planes which, prior to the ADA, required a special exemption. As a result of the greater latitude, the commuter airlines can both accommodate growth in present markets and expand into new markets.

B. *Service to Small Communities*

Experience has shown that the quality of service often improves when commuter airlines, instead of local service carriers, serve a small town.¹³³ Frequent flights directly into larger air centers have tended to stimulate demand for air transportation.¹³⁴ Commuter carrier service has facilitated the integration of small cities into the national air transportation scheme. As a result, both the communities and the airlines have benefited from their relationship.

After the determination of "essential air transportation" has been made by the CAB for a small community, it is very likely that a commuter airline will be able to provide the service without federal assistance. Since commuters fly smaller, more efficient aircraft, they are better suited for communities which enplane only a few people each day. Obviously, a subsidy is less likely to be required by a commuter airline flying a plane nearly full of passengers than a local service carrier operating a large aircraft with many empty seats.¹³⁵

Indeed, during the first ten months under the ADA, individual certificated carriers filed notice with the CAB that they were terminating service to 130 towns.¹³⁶ Of the 79 towns that were losing all certificated airline service, 50 had already obtained commuter air service to fill the void.¹³⁷ Preliminary data indicated that in all instances where the CAB had established the level of essential air transportation commuter airlines were able to pro-

¹³³ See *House Hearings 1978*, *supra* note 1, at 680-85, for a full discussion and examples. See also *Economics Hearings*, *supra* note 1, at 324.

¹³⁴ *Id.* Increasing the number of flights through the use of small planes makes air travel more convenient for passengers. Thus consumer demand for air transportation rises.

¹³⁵ Indeed, it has been argued that the old subsidy program provided an incentive for local service airlines to purchase and fly excessively large planes, thereby perpetuating inefficiency. EADS, *supra* note 5, at 134-35.

¹³⁶ *TIMES*-Aug. 1979, *supra* note 109, at 6.

¹³⁷ *Id.*

vide service at these points without subsidy.¹³⁸ For the reasons noted, this trend will continue.

Even if the CAB should determine, however, that essential air transportation cannot be obtained for a town without subsidy under the section 419 program, commuter airlines will in many instances be selected to provide the subsidized service.¹³⁹ Though the ADA specifically requires the Board to consider the desirability of developing an integrated linear system¹⁴⁰ and the experience of the applicant,¹⁴¹ these factors are not conclusive and thus must be weighed against the advantages of commuter air service. Generally, commuter airlines are able to offer more frequent service¹⁴² and require less subsidy support, due to the type of equipment utilized.¹⁴³ Furthermore, the CAB is directed by the ADA to base carrier compensation rates on the use of aircraft determined by the Board to be appropriate for providing essential air transportation to that particular community.¹⁴⁴ Thus, commuter carriers, flying planes deemed appropriate by the CAB, will often be selected to provide subsidized service to small communities under the section 419 program.

After January 1, 1983, commuter airlines can be expected to provide service as replacement carriers to small towns.¹⁴⁵ The ability of commuter carriers to offer service improvements and subsidy savings will stimulate the shift in small communities from

¹³⁸ *Id.* In most cases where the CAB has determined "essential transportation" levels for points losing certificated service, commuter carriers are providing the requisite service without subsidy. *Id.*

¹³⁹ It is conceivable that by setting essential air transportation at too high a level, the CAB could convert a normally profitable route into one which would only be served by a commuter airline on a subsidized basis. See AV. WEEK & SPACE TECH., Nov. 5, 1979, at 29.

¹⁴⁰ 49 U.S.C.A. § 1389(a)(4)(A)(i) (Supp. 1979); *id.* § 1389(b)(5)(A)(i) (Supp. 1979). Local service carriers typically provide linear service while commuters usually provide hub or spoke type service. See note 43 *supra*.

¹⁴¹ 49 U.S.C.A. § 1389(a)(4)(A)(ii) (Supp. 1979); *id.* § 1389(b)(5)(A)(ii) (Supp. 1979). Local service carriers are older, therefore presumed to be more experienced than commuters. See EADS, *supra* note 5, at 1.

¹⁴² See note 134 *supra*, and accompanying text.

¹⁴³ See note 48 *supra*.

¹⁴⁴ A carrier with excessively large planes relative to the Board's determination will not attempt to provide subsidized service to that town. It should also be noted that the CAB is currently partial toward having commuter airlines provide small town service. See House Hearings 1978, *supra* note 1, at 668.

¹⁴⁵ See note 98 *supra*.

carriers receiving section 406 subsidies to commuter airlines. Furthermore, the replacement of carriers subsidized under section 419, by commuter carriers providing service improvements or subsidy savings will promote efficient air transportation to small cities.¹⁴⁶

It is estimated that after a transition period, the annual subsidy expense will be \$21 million instead of the \$73 million paid in 1977 under the old subsidy program.¹⁴⁷ The majority of this saving is expected to come from the replacement of subsidized local service carriers by commuter airlines needing no or lesser amounts of federal assistance.¹⁴⁸ Thus, the burden on taxpayers will be reduced as the more efficient, less expensive subsidy program is employed.

The ADA, especially regarding subsidized carriers, places substantial emphasis on safety.¹⁴⁹ The commuter airlines, considering the short haul service provided, which takes people out of cars, have had a reasonably good safety record in the past.¹⁵⁰

Operating under new safety regulations, the commuter airlines should experience fewer accidents.¹⁵¹ This will tend to counter-

¹⁴⁶ See notes 134 and 135 *supra*.

¹⁴⁷ *House Hearings 1978, supra* note 1, at 686. See also *House Hearings 1977, supra* note 1, at 355.

¹⁴⁸ See note 138 *supra*, and accompanying text.

¹⁴⁹ 49 U.S.C.A. § 1302(a)(1) (Supp. 1979).

¹⁵⁰ Address by Marvin S. Cohen (Chairman, CAB), American Bar Association President's "Showcase Program" (Dallas, Texas) (August 15, 1979) (*reprinted by the CAB*) at 6. A total of 56 people died in commuter airline accidents in 1979. *Wall St. J.*, Jan. 17, 1980, at 40. In 1978, commuter passenger operations had 36 fatalities with a fatality rate per 100 million passenger miles of 2.79. *TIMES*-Feb. 1979, *supra* note 42, at 5. Due to the short flight lengths of commuter flights compared to other carriers, the commonly cited statistics of passenger fatalities per 100 million miles flown is misleading. Most accidents occur during takeoff and landing (more than 60% of commuter accidents occur at landing, *Safety Hearings, supra* note 1, at 385) and this statistic fails to compensate for the fact that commuters have many more of these critical periods than other types of carriers per 100 million passenger miles. Even so, the number of accidents is six times (fatal accidents 7.5 times) higher for commuter airlines than for certificated carriers per 100,000 departures. *Av. WEEK & SPACE TECH.*, Nov. 5, 1979, at 28-29. See also *Safety Hearings, supra* note 1, at 360-535; *House Hearings 1977, supra* note 1, at 1932-35, 1939-40.

¹⁵¹ On December 1, 1978, a stricter set of FAA safety regulations applicable to the operating procedures of airlines flying planes which seat 30 passengers or less became effective. 14 C.F.R. § 135 (1979). See notes 81-82 *supra*, and accompanying text. Commuter planes with a capacity larger than 30 seats are now governed by the same regulations, which impose the highest safety standards, as certificated carriers. 14 C.F.R. § 121 (1979). The higher standards for large craft will certainly discourage commuter airlines from employing planes with over 30 passenger seats when not absolutely necessary.

act the inherent fear some people have of relatively small planes. Should the Federal Aviation Administration, however, continue to elevate safety standards, the commuter airline industry's growth could be hindered.¹⁵² Overly restrictive regulations, needlessly raising costs, would reduce the ability of commuter airlines to serve marginal points.¹⁵³ Only through experience, under the new safety regulations, can the proper balance among these competing tensions be discovered.

C. Aircraft Loan Guarantees

The federal loan guarantee provisions are an integral part of the ADA. If the commuter airlines are to provide the requisite service in small communities they must have the necessary equipment. As commuter airlines expand and replace other carriers,¹⁵⁴ the demand for both new and used aircraft, of the proper size, will increase. Only if sufficient financing is available, facilitated by loan guarantees, will the commuter airlines be able to purchase the needed equipment.¹⁵⁵

The new Part 135 regulations, with an implementation deadline of August 1, 1979, made major changes including:

- (1) The requirement for the pilot in command of commuter aircraft to hold an airline transport pilot certificate with appropriate rating;
- (2) The imposition of Part 121 maintenance programs for all commuter aircraft with ten or more passenger seats;
- (3) The implementation of flight crew training programs; and
- (4) The establishment of a minimum number of supervisory positions, depending on the scope of operations, for these airlines.

AV. WEEK & SPACE TECH., Aug. 13, 1979, at 32. The FAA is also revising airworthiness standards for planes seating less than 30 passengers in three categories depending on the size of the craft. See FAA Docket No. 18315, 44 Fed. Reg. 53,723 (1979), which describes the actions taken.

¹⁵² The implementation of standards at a level comparable to those in Part 121 is very costly. See *Economics Hearings*, *supra* note 1, at 438. From a practical standpoint, there is a physical limit to the amount of safety equipment that can be placed into a small plane. *Safety Hearings*, *supra* note 1, at 168.

¹⁵³ *Safety Hearings*, *supra* note 1, at 168. It should be noted that subsidy payments, when made to maintain air services at a small community, should be provided at a level to insure safe service.

¹⁵⁴ See *House Hearings 1978*, *supra* note 1, at 215; *House Hearings 1976*, *supra* note 1, at 1019-21.

¹⁵⁵ Should Congress, in the national budget, reduce the amount of loan guarantees that could be made, the commuter airlines would suffer. *Testimony*, *supra* note 123, at 163-64. Responding to a proposal by the Commuter Airline Association of America to give a preference to commuter airlines over other carriers the FAA has decided to set aside a portion of the available guarantee

Since the enactment of the ADA, demand for aircraft by commuter carriers has been high. Commuter airlines have already ordered new aircraft costing \$85 million for delivery in 1979 and \$136 million worth of planes for delivery in 1980.¹⁵⁶ This demand reflects current needs as well as the commuter carrier's optimism for the future.

As expected, the ADA has stimulated the design and development of new planes for the commuter carriers. Since enactment, several aircraft manufacturers have announced plans to produce new planes.¹⁵⁷ The new craft will range in size from thirteen to sixty passenger seats.¹⁵⁸

D. Federal Regulatory Preemption

The threshold question, concerning federal regulatory preemption of route, rate, and service¹⁵⁹ control, is what constitutes interstate air service. Since sixty-five percent of the routes flown by commuter airlines are entirely within a single state,¹⁶⁰ this definition is crucial. The recent case of *California v. CAB*,¹⁶¹ though, illustrates the rule that the origin and destination of the passengers carried, not the route flown, determines the nature of the flight.¹⁶² A commu-

assistance for the exclusive use of commuter airlines. TIMES-Aug. 1979, *supra* note 109, at 4.

¹⁵⁶ *Testimony*, *supra* note 123, at 163. Orders since May, 1979, and purchases of used equipment are not included in these figures. *Id.* Thus total demand for additional aircraft is even higher.

¹⁵⁷ AV. WEEK & SPACE TECH., May 14, 1979, at 22; AV. WEEK & SPACE TECH., July 30, 1979, at 28; AV. WEEK & SPACE TECH., Nov. 5, 1979, at 29.

¹⁵⁸ AV. WEEK & SPACE TECH., May 14, 1979, at 22; AV. WEEK & SPACE TECH., July 30, 1979, at 28; AV. WEEK & SPACE TECH., Nov. 5, 1979, at 29.

¹⁵⁹ 49 U.S.C.A. § 1305 (Supp. 1979). Services have been broadly defined. See Freeman, *supra* note 117, at 766-69.

It should also be noted that the federal government, through the Federal Aviation Administration, has power to control all operations which may affect safety in air commerce, 49 U.S.C. § 1421 (Supp. 1977). Air commerce is defined at 49 U.S.C. § 1301(4) (Supp. 1977) to include interstate air service.

¹⁶⁰ COMMUTER STATS., *supra* note 42, at 1.

¹⁶¹ 581 F.2d 954 (D.C. Cir. 1978), *cert. denied*, 439 U.S. 1068 (1979).

¹⁶² This concept, based on the commerce clause, U.S. CONST. art I, § 8, cl. 3, is well established in American law. See *Houston, E. & W. Ry. v. United States*, 234 U.S. 342 (1914); *The Daniel Ball*, 77 U.S. 557 (1871).

"As every airline may at some time carry an interstate passenger, the CAB has in the past tempered this broad definition by asserting jurisdiction only over carriers with more than a de minimus amount of interstate traffic." Freeman, *supra* note 117, at 751.

ter airline which carries passengers who initially begin their journey in another state thus engages in interstate air service and is subject to federal, not state, regulation.¹⁶³

Though highly unlikely, should a commuter airline serve only intrastate passengers, the carrier would still probably be subject to federal regulation. The plain meaning and the legislative history¹⁶⁴ of the ADA's preemption section support the view that the federal exemption to commuter airlines¹⁶⁵ is an exercise of federal authority in regulating interstate air service.¹⁶⁶ Thus, the federal preemption provision covers these airlines. Under the ADA, all commuter carriers apparently are subject only to federal regulation of routes, rates, and services.¹⁶⁷

Without federal preemption of state regulation, the entire national air transportation scheme would be in a very precarious situation. The ADA is based on a philosophy of competition and reduced regulation. Yet, without federal preemption, the states would be able to nullify the thrust of the law through the enactment of burdensome laws and regulations. Chaos would occur if each state had a separate set of regulatory requirements. Certainly, the ability of the commuter airline industry to grow, and serve small communities, would be hampered had the federal preemption provision not been included in the ADA.

E. Joint Fares

Seventy percent of all commuter passengers connect with other flights.¹⁶⁸ As a result, joint fares represent a savings for a large segment of commuter airline passengers. The Commuter Airline Association of America estimates that commuter participation in the joint fare program will save the traveling public between \$5

¹⁶³ Freeman, *supra* note 117, at 751.

¹⁶⁴ *Id.* at 761.

¹⁶⁵ 49 U.S.C.A. § 1386 (Supp. 1979).

¹⁶⁶ See Freeman, *supra* note 117, at 761-63.

¹⁶⁷ Freeman, *supra* note 117, at 765.

¹⁶⁸ The Reuben H. Donnelley Corp., FTC Docket No. 9079, March 7, 1979; discussed at [1976-1977 Transfer Binder] TRADE REG. REP. (CCH) ¶ 21,544.

The percentage for individual carriers differs as 94% of Golden West Airlines' passengers connect with certificated airlines. *Economics Hearings*, *supra* note 1, at 436.

and \$34 million a year in air fares.¹⁶⁹

It is generally recognized that demand for air transportation is price-elastic.¹⁷⁰ Thus, joint fares will encourage people in small towns to fly. The continuation of a joint fares program is clearly advantageous to both the cities involved and the commuter carriers.¹⁷¹

G. Other Industry Concerns

Though not addressed by the ADA, a number of other issues concern the commuter carriers. It is the goal of the commuter airlines to become integrated into the national air network. Yet, for this to occur, a number of potentially discriminatory impediments need to be removed.

Presently, the schedules of commuter airlines are listed separately from the certificated carriers in the Official Airline Guide.¹⁷² This is potentially discriminatory to the commuter carriers as travelers often select their flights by going down the list only until a convenient flight time is found, thereby precluding the possibility of choosing a commuter flight. As a result, uniform, non-discriminatory, flight listings in the Official Airline Guide are important to commuter airlines.¹⁷³ Though an administrative law judge recently ruled in favor of the commuter airlines,¹⁷⁴ final implementation of the decision could be postponed for years if the judgment is appealed in court.¹⁷⁵

Airport facilities remain a problem for commuter airlines. Com-muter carriers are often relegated to remote or inconvenient ticket-

¹⁶⁹ H.R. REP. NO. 1211, 95th Cong., 2d Sess. 11 (1978), reprinted in [1978] U.S. CODE CONG. & AD. NEWS 3737.

¹⁷⁰ EADS, *supra* note 5, at 16; see also *House Hearings 1976*, *supra* note 1, at 298.

¹⁷¹ Since division of joint fares between the connecting carriers is based on costs, the carrier who flies the shorter segment, such as a commuter carrier, gets a relatively large percentage of the total fare charged. It is fixed costs, that do not vary with trip distance, that account for this differential. See *House Hearings 1977*, *supra* note 1, at 1099. See note 49 *supra*, and accompanying text.

¹⁷² Donnelley, *Official Airline Guide*, No. 20 (July 15, 1979).

¹⁷³ See *House Hearings 1976*, *supra* note 1, at 1006.

¹⁷⁴ The Reuben H. Donnelley Corp., FTC Docket No. 9079, March 7, 1979; discussed at [1976-1977 Transfer Binder] TRADE REG. REP. (CCH) ¶ 21,544. Donnelley's jurisdictional battle to prevent the rendering of this decision is reported at *Reuben H. Donnelley Corp. v. FTC*, 580 F.2d 264 (7th Cir. 1978).

¹⁷⁵ *Testimony*, *supra* note 123, at 166.

ing, gate, and baggage areas, thus causing difficulties for passengers and carriers alike.¹⁷⁶ The prospect of increased security requirements is creating alarm within the industry.¹⁷⁷ Finally, airport air traffic and congestion, only to worsen with an increased number of commuter flights from small towns, is an obstacle to be overcome.¹⁷⁸

IV. CONCLUSION

The future for the commuter airline industry is extremely bright. By providing service primarily to small communities, commuter airlines should experience significant growth. Indeed, forecasts for the industry project a 163% growth in passenger miles between 1978 and 1989.¹⁷⁹

This boom will be facilitated by the ADA. Continued regulatory freedom coupled with the advent of subsidy eligibility and loan guarantees will have a positive impact upon the commuter airline industry. While some obstacles still remain, they are not insurmountable. Operating under the ADA, the commuter airlines will develop into full partners in the national air transportation system.

¹⁷⁶ *Id.* at 7.

¹⁷⁷ AV. WEEK & SPACE TECH., Nov. 5, 1979, at 29.

¹⁷⁸ *Testimony*, *supra* note 123, at 165.

¹⁷⁹ HORIZONS, *supra* note 48, at 17. *See also* Wall St. J., Oct. 18, 1979, at 1.

