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ROUTE EXIT REGULATION UNDER THE AIRLINE DEREGULATION ACT: THE IMPACT OF FUEL COST AND AVAILABILITY

LUCY JOHNSON

From its infancy in the 1920's, the airline industry of the United States was fundamentally influenced by regulatory activities of the federal government. Although such governmental regulation was not unique to the airline industry, the emergence of extensive deregulation of the industry is unparalleled. On October 24, 1978, the Airline Deregulation Act of 1978 (the Deregulation Act or Act) became law and marked the first deregulation of an entire previously regulated United States industry in recent history. The Deregulation Act brought profound changes affecting airline regulation in five principal areas: policy of the Civil Aeronautics Board (the CAB or Board); entry of existing air carriers into new routes; certification of new carriers; flexibility...
of air fare determination; and reduction and termination of air carrier services.4

In passing the Deregulation Act, Congress clearly intended to allow the air transportation industry to function primarily according to market forces rather than governmental regulation.5 Although the thrust of the Act is deregulation, the provisions of the Act concerning reduction, suspension and termination of air service in conjunction with the provisions guaranteeing small community air service subvert the spirit of the Act by allowing the CAB to maintain vast regulatory control.6 Under the Act, essential air transportation is guaranteed for ten years to all points considered “eligible” with federal subsidy provided where necessary.7 The Board adopted guidelines,8 effective September 7, 1979, to be used flexibly as “a framework for individual determinations”9 of essential air transportation for these points. The Act also allows additional points to qualify for guaranteed essential air transportation if they meet the criteria established by the Board10 as of January 1, 1980.

The liberal guidelines for determining essential service levels and the unsparing criteria for designating eligible points reflect the CAB’s concern that some small communities cannot rely on market forces to ensure their air transportation needs.11 Supporters

4 AMERICAN ENTERPRISE INSTITUTE FOR PUBLIC POLICY RESEARCH, AIR TRANSPORTATION REGULATORY REFORM (1978) [hereinafter cited as REGULATORY REFORM].


6 See Comment, supra note 1, at 814-15, 821.


9 Id. at 52,646.


11 Part 398, 44 Fed. Reg. 52,645, 52,647 (1979). In the preface of the guidelines, the CAB noted that the congressional intent in establishing the small community air service program “was to ensure service at the small points that potentially may not be able to support service economically in a totally deregulated environment.” Id.
of the CAB’s generous approach argue that the cost of subsidized routes is justified by the importance of preventing hardship, inconvenience and economic loss to citizens of small communities and in the preservation of the extensive air transportation network in the United States.\(^\text{13}\) Although valid concerns support these arguments,\(^\text{13}\) the relentlessly escalating cost of fuel and its current shortage challenge the viability of guaranteeing liberal amounts of subsidized air service for ten years. This comment provides a


Advocates of continued regulatory control over airline route exits contend that less regulation would eliminate or substantially reduce air service to small communities. Senator George McGovern, one of the primary proponents of this view, has stated:

I cannot speak for other States—but I can tell you that in South Dakota neither our State nor the individual communities involved have the resources to pay an airline to stop. . . . Our principal carrier—North Central Airlines—has put us on notice that they will provide service only so long as the operating subsidy is continued. If that is terminated or substantially reduced, they will withdraw their equipment. The scenario is clear. The CAB will permit the withdrawal only if a smaller commuter type carrier, judged to be “fit, willing and able” can pick up service. That will destroy the hub-spoke regional airport concept that we have slowly built in our State basically since the end of World War II. As boardings fall off—the CAB will then make a new determination that “essential air service” is not required—and all service, subsidized or not, will be suspended. South Dakota and other rural states will then be left in the backwaters of commercial aviation—denied access to the supposedly national airways transportation system.


\(^\text{13}\) But see Dupre, *supra* note 12, at 283 n.57:

The argument used to justify [service to small communities] as a valid goal starts from the premise that these communities provide net benefits to society as a whole which in turn warrants a return of this value to the communities in the form of a subsidy. In economic terms, society as a whole (here personified as air travelers in other markets) receives a benefit from the small community for which it should pay. Similarly, the direct benefit that these communities receive in the form of air service is worth less than the direct cost of providing that service. Thus, the direct cost of that service is equal to some lower dollar figure plus the intangible value that the community bestows upon society.

The benefit that such communities bestow upon society generally consists of providing a convenient home for a particular economic enterprise which is seeking cost advantages not available elsewhere in order to survive economically. . . . Thus, justification of the goal of service to small communities is questionable.
framework for objective analysis of the Deregulation Act's provisions which continue to regulate reduction, suspension and termination of air carrier service. The guidelines for individual determinations of essential air service to small communities are examined, along with the criteria for designating points eligible for such service. The impact of fuel cost and availability is considered, with a critical review of the arguments for and against continued regulatory control, as well as possible ramifications of both preservation of the existing regulatory scheme and suggested legislative reform.

I. THE EVOLUTION OF CAB REGULATION OF ROUTE EXITS

Since its creation in 1938, the CAB has shaped the air transportation industry of the United States through its vast regulatory powers.\(^{14}\) Established by Congress to protect the growing aviation industry from private industry market forces considered to be hazardous,\(^{15}\) the Board possessed power for forty years to control entry into the airline business, the fares which airlines charged, and the routes which airlines were permitted to fly.\(^{16}\) In the performance of its powers and duties, the CAB is required by congressional mandate to consider factors of public interest, convenience, and necessity.\(^{17}\) Consistent with these factors, the CAB traditionally has encouraged expansion of air service to maintain a comprehensive system of scheduled service for small communities and isolated areas as well as major urban and regional areas.\(^{18}\) In order to insure comprehensive service, particularly to small communities

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\(^{18}\) See 49 U.S.C.A. § 1302(a)(8) (Supp. 1979). One of the general factors for consideration of public interest and public convenience and necessity is 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.
and isolated areas where providing service was often unprofitable, the Board has exercised regulatory authority over reduction, suspension, and termination of certified air carrier service.¹⁹

The statute governing abandonment of air service routes prior to enactment of the Deregulation Act stated that no air carrier "shall abandon any route, or part thereof, for which a certificate has been issued by the Board, unless, upon the application of such air carrier, after notice and hearing, the Board shall find such abandonment to be in the public interest."²⁰ Total abandonment of an unprofitable or undesirable route rarely occurred because, although such abandonment might clearly have been in the carrier's best interest, the carrier could not easily show that the route abandonment was in the public's best interest.²¹ The CAB relieved the burden which these routes placed on trunk carriers by allowing transfers of such routes to local service carriers which were subsidized where necessary by the federal government.²² Such transfers of route authority were conditioned upon a CAB finding that the transfer was consistent with the public interest.²³

Because questions concerning the propriety and efficiency of the CAB's regulatory powers are as old as the Board itself,²⁴ the topic of deregulation of the airline industry has been debated

²¹ REGULATORY REFORM, supra note 4, at 13. The regulatory power of the Board caused virtually all carriers to provide service for certain routes which were unprofitable or only marginally profitable. Cohen, supra note 16, at 696. Although certificated air carriers deleted or suspended service to approximately 200 points during the years prior to enactment of the Deregulation Act, the regulatory provisions of the CAB prevented carriers from developing route systems based exclusively on economic considerations. Id.
²² Several methods for subsidy determination have been adopted and subsequently discontinued. See generally Local-Service Class Subsidy Rate Investigation, 34 C.A.B. 416 (1961); G. EADS, THE LOCAL SERVICE AIRLINE EXPERIMENT (1972). Prior to enactment of the Deregulation Act, subsidy awards to these eligible carriers were based upon the system-wide operating costs and revenues of each. See REGULATORY REFORM, supra note 4, at 13.
²⁴ See Heymsfeld, Deregulation of Air Transportation under the Aviation Act of 1975, 9 Akron L. Rev. 643 (1976) [hereinafter cited as Heymsfeld].
exhaustively.\textsuperscript{25} Prior to enactment of the Deregulation Act, proponents of deregulation contended that CAB control over entry into the airline industry, fares, and route structure depressed competition and stifled industry initiative.\textsuperscript{26} They believed that deregulation would produce lower fares and would not jeopardize either the quality of air service or the stability of the airline industry.\textsuperscript{27} Proponents on the other side of the debate argued that a balanced system of air transportation in all geographic areas, the health and well-being of the country, and national security necessitated continued regulatory control of the industry.\textsuperscript{28}

In late 1974 and early 1975, the Senate Subcommittee on Administrative Practice and Procedure of the Committee on the Judiciary, chaired by Senator Edward M. Kennedy, conducted hearings concerning the role of the CAB in the regulation of commercial air transportation.\textsuperscript{29} The Subcommittee unanimously recommended that federal regulation of the domestic airlines industry must be “drastically reduced” in order to serve the public interest to the greatest possible degree.\textsuperscript{30} Legislative efforts to deregulate the industry reflect a variety of provisions and transition periods.\textsuperscript{31} In October of 1975 the Ford Administration submitted the Avia-


\textsuperscript{26} DeSaussure, The Impact of Governmental Regulation on Air Transportation, 9 Akron L. Rev. 629 (1976) [hereinafter cited as DeSaussure]. Proponents of deregulation cited, for example, the fact that between 1938 and 1978 the Board failed to authorize a new major carrier. This failure was not due to a lack of applications, since seventy-nine had been submitted since 1950. Kennedy, The American Airlines Industry and the Necessity of Deregulation, 9 Akron L. Rev. 631, 631-32 (1976). The network of national trunk or major routes was served by ten airlines, with five of these, United, Trans World, American, Eastern, and Delta, sharing 70% of the total domestic market. DeSaussure, supra, at 629.

\textsuperscript{27} See Heymsfield, supra note 24.

\textsuperscript{28} DeSaussure, supra note 26, at 629-30. “If the public wants assurance of the full range of needed air services, at lowest cost, it must accept the fact that [the airlines’] underlying economics are more those of a public utility than of the corner grocery store. And it must accept the consequent need for regulation of normal marketplace forces.” Brenner, Need for Continued Economic Regulation of Air Transport, 41 J. Air L. & Com. 793, 813 (1975).

\textsuperscript{29} Hearing on the Oversight of the Civil Aeronautics Board Practices and Procedures Before the Subcomm. on Administrative Practice of the Judiciary, 94th Cong., 1st Sess. (1975).

\textsuperscript{30} Kennedy, supra note 26, at 633.

\textsuperscript{31} See generally Keyes, A Comparison of Two Proposals for Regulatory Change, 41 J. Air L. & Com. 727 (1975).
tion Act of 1975 to Congress. The Act called for a substantial reduction of CAB control over air carrier fare levels and route entry and exits over a five-year period. Senator Kennedy subsequently introduced the Air Transportation Act of 1976, which provided for a four-year transition into fundamental deregulation of the industry. Gradual deregulation over a ten-year period was proposed in yet another bill introduced by Senators Pearson and Baker.

Without waiting for legislative mandate, the CAB in 1975 terminated the requirement of group or club membership as a condition for receipt of cheaper fares for charter flight passengers. This signaled not only liberalization of its own regulatory policies but also a significant step toward deregulation. When Alfred E. Kahn became Chairman of the CAB in June of 1977, he set out "to remove the meddling, protective and obstructionist hand of government, and to restore this industry, in so far as the law permits, to the rule of the market." As Kahn's efforts to relax CAB regulatory policies began, congressional debate over deregulation continued.

II. CAB REGULATION OF ROUTE EXITS UNDER THE DEREGULATION ACT

The Airline Deregulation Act of 1978, a compromise of the Air Transportation Regulatory Reform Act of 1978 and the Air Service Improvement Act of 1978, was passed and signed by
President Carter on October 24, 1978. The Act significantly alters the regulatory structure of the airline industry and calls for gradual deregulation over a ten-year period. Although the purpose and thrust of the Act logically appears to be deregulation, the provisions concerning reduction, suspension, and termination of service in conjunction with the provisions guaranteeing small community air service allow continued regulation of route exits until October 24, 1988. Under the terms of the Act, no certified air carrier shall:

terminate or suspend all air transportation which it is providing to a point under such certificate; or reduce any such air transportation below that which the Board has determined to be essential air transportation for such point; 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 to so terminate, suspend, or reduce such air transportation.

The Act also provides that if a certified carrier seeks to abandon or reduce nonstop or single-plane service between two points and is the only certified carrier providing such service, it must notify the CAB and each directly affected community no less than sixty days prior to abandonment or reduction of service. Uncertified and unsubsidized carriers must provide the CAB with at least thirty days notice. If the Board has not found a replacement carrier by the end of the appropriate notice period, it is authorized to require the carrier to provide subsidized essential air transportation level service to the eligible point for subsequent thirty-day periods until a substitute carrier is found. If it appears that an eligible point

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46 Id. § 1371(j).
47 Id. § 1389. See Comment, supra note 1, at 812.
49 Id. § 1371(j)(1).
50 Id. § 1371(j)(2).
51 Id. § 1389(a)(3)(B).
52 Id. § 1389(a)(6). After the date on which the carrier seeks to suspend or abandon service, the Board will subsidize the continued service so that the minimum essential service level may be maintained. Id. § 1389(a)(7).
will not receive the minimum essential service level without subsidy after January 1, 1983, the CAB must give notice of its intention to take applications from carriers willing to provide continued subsidized service to such point. If a carrier shows the Board that it can provide substantially improved air service and reduce the amount of required subsidy to continue essential service, the CAB must grant its application. If a replacement carrier cannot be found, the CAB will continue to subsidize the incumbent carrier and provide limited compensation for its losses.

Simply stated, under the prior law an airline could not abandon any route for which a certificate had been issued by the Board unless the Board found abandonment to be in the public interest. Under the Deregulation Act, an airline may abandon a certificated route if it provides the CAB with requisite advance notice and if abandonment is consistent with the CAB's determination of the minimum service level to guarantee "essential air transportation." Thus, while much of the Board's authority over reduction and suspension of air service under the prior law was based on the elusive standard of "public interest," its authority under the Deregulation Act is focused in its power to determine what constitutes "essential air transportation."

Under the small community air service provisions of the Deregulation Act, the CAB is empowered to guarantee essential air transportation to communities which qualify as "eligible points."

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53 Id. § 1389(a)(11).
54 Id. When reviewing carrier applications, the CAB must consider the desirability of developing an integrated linear air transportation system and the applicants' experience in providing scheduled air service in the vicinity of the affected communities. The Board must also solicit and "give great weight" to the opinions of the community affected by the proposed carrier replacement. Id. § 1389(a)(11)(C).
55 Id. § 1389(a)(7)(B) & (C). Whether or not the Board can contract with a subsidized carrier to provide service for a specified period, thus avoiding the need to search for a replacement carrier, remains an open question. CIVIL AERONAUTICS BOARD, SUMMARY OF THE AIRLINE DEREGULATION ACT OF 1978, at 17 (1978).
58 Id. § 1389(f).
59 Id. § 1389.
60 Id. § 1389(a)(1), (b)(1).
with federal assistance provided where necessary." These provisions are intended to ensure a continued level of essential air service to meet small community needs as CAB control over route structures decreases. The Act defines "essential air transportation" as "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 at rates, fares, and charges which are not unjust." Provisions of the Act require the CAB to determine the level of air service which is essential to each point deemed "eligible." Any point in the United States automatically qualifies as an "eligible point" if on October 24, 1978, it was served by a certificated carrier or if such service was authorized but had been suspended. With respect to those eligible points served by more than one certified air carrier on October 24, 1978, which subsequently receive service by not more than one such carrier, the CAB must determine what constitutes essential air transportation within six months after notification of the reduction in service. The Act further required the CAB to determine by October 24, 1979, what constitutes essential air transportation for those eligible points served by not more than one certified air carrier on October 24, 1978. In both cases the CAB was required to consider the views of any interested community and appropriate state agencies.

A. Guidelines for Individual Determinations of Essential Air Transportation

The CAB adopted guidelines, effective September 7, 1979, to be used in determining essential air service for points eligible under

61 Id. § 1389(d).
64 Id. § 1389(a)(2)(A).
65 Id. § 1389(a)(1). Route suspension may occur for a variety of reasons. Unprofitable operation does not in itself mandate suspension because many unprofitable routes act as "feeders" for other more lucrative ones. Dupre, supra note 12, at 283 n.60.
67 Id. § 1389(a)(2)(A).
68 Id.
the small community air service provisions of the Deregulation Act.\textsuperscript{69} The Act guarantees this level of service for each eligible community and provides for federal subsidy where needed.\textsuperscript{70} Prior to adoption of the guidelines, a controversy arose over whether the Board should establish guidelines to be used as policy statements or whether it should establish criteria, against which the relevant data and circumstances of individual communities could be measured.\textsuperscript{71} Determining that specific criteria would be impractical and might constitute rigid "national standards," the CAB developed guidelines to be used flexibly as "a framework for individual determinations, not as an ironclad formula."\textsuperscript{72}

The guidelines established by the CAB to be used in the determination of essential air transportation for eligible points focus on the number and designation of hubs, specification of airports and equipment, frequency and time of flights, maximum capacity guarantee, and the number of stops permitted.\textsuperscript{73} In the CAB's guidelines, the essential unit of measurement is the "hub," defined by the Board as "any point enplaning more than 0.05 percent of the total enplanements in the United States."\textsuperscript{74} The Board generally requires service to only one hub for an eligible point, but only if that hub satisfies the needs of that point for convenient and sufficient access to the national air system.\textsuperscript{75} In determining whether a hub affords acceptable access, the Board considers such factors as the number of carriers which service the hub, the total operational level of the hub, and historic traffic patterns.\textsuperscript{76} If an eligible

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\begin{enumerate}
\item Part 398, 44 Fed. Reg. 52,646 (1979). The CAB argued that a specific set of criteria setting forth the precise service level "would not lend itself to a careful examination of the individual needs and unique circumstances of a community." \textit{Id.}
\item \textit{Id.} The CAB policy that each point will be analyzed separately is exemplified in the essential air service level determination for Jamestown, North Dakota, where the Board specified service requirements to Minneapolis/St. Paul rather than Fargo, a closer hub, because of the availability of more favorable connecting service. \textit{Id.}
\item \textit{Id.} at 52,659-60 (to be codified in 14 C.F.R. § 398).
\item \textit{Id.} at 52,659.
\item Part 398, 44 Fed. Reg. 52,646, 52,659 (1979) (to be codified in 14 C.F.R.\end{enumerate}
\end{footnotesize}
point has close commercial, geographical, and political ties to two hubs and there is sufficient traffic to support service to both, essential air transportation might be defined as including both hubs. In deciding whether a second hub is required, the CAB's primary considerations are traffic flows and the location of primary destinations of the eligible point's traffic. If passenger demand is insufficient, one round trip per day to both hubs might be required by the Board if there is adequate community interest. Essential air service does not generally mandate service to a particular hub airport, but it may require service to a particular airport at an eligible point.

A specific type or size of aircraft is not generally required by the guidelines, except that all aircraft must adequately accommodate passenger baggage, meet applicable standards of the Federal Aviation Act, and be conveniently accessible to passengers. Concerning the frequency of service, the Deregulation Act requires that for eligible points in all states except Alaska, the minimum level of service which will comply with the guaranteed essential air transportation standards is two daily round trips five days per week, or the 1977 service level, whichever is less.

§ 398.2). For Alaskan service, the CAB may require only that service from an eligible point be to a focal traffic point in the area of the eligible point. Id. Prior to adoption of the guidelines, the CAB received some comments advocating service to two hubs where traffic flows in two directions, with only a single connecting hub. It was determined that the use of two hubs would split the eligible point's traffic, decreasing the benefit of the guaranteed service. Id. at 52,649.

Id. at 52,649. The Board will examine alternate hubs if a large portion of a hub's traffic cannot be conveniently served by connecting service. Id.

Id. at 52,659 (to be codified in 14 C.F.R. § 398.2).

Id. (to be codified in 14 C.F.R. § 398.3). The Board will consider requests for individual airport service on a case by case basis. In circumstances where a community prefers service to a particular airport, the CAB will give special consideration to carriers proposing service to that airport when selecting from among carrier applicants. Id. at 52,649-50.

Id. at 52,659-60 (to be codified in 14 C.F.R. § 398.4). A pilot and copilot and an aircraft with two engines are necessary in servicing all routes in Alaska and in communities which have agreed to alternate arrangements. Pressurized and air conditioned aircraft are required when "absolutely necessary." Id. The Department of Transportation rejected a contention that two-engine aircraft and two pilots are necessary for safety reasons under all circumstances. Id. at 52,650.

§ 1389(f) (Supp. 1979). In Alaska, the "essential air transportation" standard is set at the 1976 service level or two round trips per week to each designated hub, whichever is greater. The level is, however, subject to adjustment agreements after consultation with the affected community. Id.
The Board subsequently determined that weekend service, particularly Sundays, is necessary to provide essential air service. These guidelines therefore require "at least two round-trip flights on each weekday and two round trips over the weekend from the eligible point to the designated hub," unless the point was receiving service below that level in 1977 and could not support such service at fifty percent average load factors. If historic traffic data indicates that a greater level of service is required or if more flights become necessary, the essential service level will be increased. If traffic levels vary with the season, a two-tiered service level is to be established. Flexibility in the timing and scheduling of flights is reflected by the Board's general qualification that flights must depart at "reasonable" times. The Board does, however, require that if traffic is primarily local to and from a hub there should be at least one flight in the morning and one during the late afternoon or evening.

The maximum available flight capacity which may be guaranteed by the Board is 160 available seats each day for an eligible point, 80 seats in each direction; however, more than 160 seats may be guaranteed if the eligible point is extremely isolated, if large aircraft are necessary for effective service, or if other special circumstances exist. Only two stops are allowed in the provision of

84 Id. at 52,660 (to be codified in 14 C.F.R. § 398.5). In the original guidelines, the minimum average load factor was set at 60%-65%. The CAB amended the guidelines, effective November 14, 1979, setting the minimum average load factor at 50%. The effect of the amendment is to increase the maximum capacity of guaranteed service to an eligible point from 60 to 80 seats in each direction. See Amendment to Part 398, 44 Fed. Reg. 65,584 (1979).
86 Id.
87 Id. (to be codified in 14 C.F.R. § 398.7).
88 Id. The Board created the guideline provisions on the premise that "[t]iming and scheduling requirements that are too specific will hinder rather than assist the development of viable and responsive air transportation." A comment to the CAB by a carrier, however, stating that the morning and late afternoon/evening flight requirement was too burdensome was dismissed by the Board. Id. at 52,653.
89 Amendment to Part 398, 44 Fed. Reg. 65,584, 65,585 (1979) (to be codified in 14 C.F.R. § 398.6). As originally adopted, the guidelines provided that a maximum of 120 available seats each day would be guaranteed to an eligible point (60 each way). Part 398, 44 Fed. Reg. 52,646, 52,660 (1979) (to be codified in 14 C.F.R. § 398.6). In conjunction with its decision to decrease the load factor from 65% to 50%, the Board increased the maximum available
essential air service between an eligible point and a hub, unless an alternative agreement is made with the community. One-stop or nonstop service may be required where necessary, particularly in short-haul markets. A turnaround service is required by the CAB if necessary to provide an adequate capacity to ensure the specified level of essential service.

B. Criteria for Designating Eligible Points

In addition to those points which were automatically eligible for guaranteed essential air transportation due to their certification for service on October 24, 1978, the Act provides guaranteed essential air transportation for certain other communities. Communities that were deleted from certified carrier service between July 1, 1968, and October 24, 1978, communities that lost certificated service as a result of being hyphenated or shared with another community, and certain points in Alaska and Hawaii may become eligible for guaranteed essential air transportation. The Deregulation Act required the CAB to establish by January 1, 1980, the criteria for determining which of the deleted communities and points in Alaska and Hawaii should qualify as eligible points. By January 1, 1982, the Board must complete its review of the deleted communities and designate those which qualify for guaranteed essential service. After January 1, 1982, the Board may designate eligible points from applicants in Alaska and Hawaii. Communities designated as eligible points through these

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Part 398, 44 Fed. Reg. 52,646, 52,660 (1979) (to be codified in 14 C.F.R. § 398.8). For eligible points in Alaska, more than two stops may be allowed if required due to low traffic levels or a long distance between the eligible point and the hub. Id.

Id. The Board disagreed with the contention of Piedmont Airlines that the maximum number of stops should be relaxed when carriers operate larger aircraft. Id. at 52,653.

Id. at 52,660 (to be codified in 14 C.F.R. § 398.8).


Id. § 1389(b)(1) (deleted points and Alaska/Hawaii points); 44 Fed. Reg. 59,243 (1979) (to be codified in 14 C.F.R. § 270.2) (hyphenated points).


Id. § 1389(b)(2)(B).

Id. § 1389(b)(2)(C).
criteria established by the CAB will be guaranteed a specified level of essential air transportation to the same extent as communities which were certificated for air service on October 24, 1978.49

The Deregulation Act required the CAB to consider specific factors in establishing the criteria used for designating deleted communities and points in Alaska and Hawaii as points eligible for guaranteed essential air transportation.49 These considerations, which may be modified by subsequent rules, include such factors as the actual and potential level of traffic generated by a particular point, the cost of subsidized essential air transportation to that point, alternative available means of transportation for residents of that point, and the degree of isolation of that point from the national air transportation system.100 The criteria proposed by the CAB on October 9, 1979,101 for communities in the forty-eight contiguous states focus primarily on considerations of isolation and traffic102 and specify that a community will not be designated as an eligible point if it is less than thirty miles from a hub airport.103 Communities which are at least thirty but not less than sixty road miles from a hub airport will be deemed eligible if the community enplanes or possesses the potential for enplaning twenty passengers each day during five days of the week.104 A community sixty or more road miles from a hub airport will be deemed an eligible point if it currently or potentially enplanes ten passengers each day during five days of the week.105 If a community is less than twenty road miles from the airport of a point

100 Id.
102 Id. at 59,243.
103 Id. at 59,245 (proposed 14 C.F.R. § 270.10). The Board has acknowledged the difficulty in determining a specific distance at which access to the national air transportation system is no longer "reasonably" convenient, but proposed thirty road miles as an objective criterion. Id. at 59,243.
104 Id. at 59,245 (proposed 14 C.F.R. § 270.11). This CAB proposal is based on the premise that competition from alternative transportation methods is more acute in short-haul markets, so that higher traffic levels would be necessary for commuter services to become self-supporting. Id. at 59,244.
105 Id. at 59,245 (proposed 14 C.F.R. § 270.11). The Board considered and has tentatively rejected the use of a separate criterion for communities isolated by 100 or 150 road miles from a hub, because few deleted communities would be in this category. Id. at 59,244.
which automatically qualified as eligible for guaranteed essential air transportation due to its certification for service on October 24, 1978, it will not be designated as an eligible point.\textsuperscript{106}

No communities in Hawaii were deleted from service between July 1, 1968, and October 24, 1978.\textsuperscript{107} Under the proposed criteria, Hawaiian communities may be designated as eligible points if they meet the criteria for the forty-eight contiguous states.\textsuperscript{108}

The criteria proposed for determining points eligible for guaranteed essential air service in Alaska are not based on the degree of isolation, since all Alaskan communities are relatively isolated.\textsuperscript{109} The unique circumstances of air travel in Alaska prompted the Board's use of the actual or potential traffic levels of a community as "the only relevant criterion in Alaska."\textsuperscript{110}

III. THE IMPACT OF FUEL COST AND AVAILABILITY ON CAB REGULATIONS

Prior to enactment of the Deregulation Act, the CAB provided subsidies to certificated carriers under section 406 of the Federal Aviation Act,\textsuperscript{111} which authorized compensation for the carriage of mail. Recognizing that the subsidies often bore no relation to mail transportation,\textsuperscript{112} the Deregulation Act amended section 406 to phase out its subsidy provisions by January 1, 1986.\textsuperscript{113} The Act added a new subsidy program in section 419 which was designed to emphasize the ten-year guarantee of essential air transportation to qualifying small communities rather than the sustenance of local carriers.\textsuperscript{114} Under the new program provisions, when the

\textsuperscript{106} Id. at 59,245 (proposed 14 C.F.R. § 270.12).
\textsuperscript{107} See id. at 59,243-44.
\textsuperscript{108} Id. at 59,245 (proposed 14 C.F.R. § 270.12).
\textsuperscript{109} Id. at 59,244.
\textsuperscript{110} Id.
\textsuperscript{112} It has been suggested that the relation of the section 406 subsidy program to the transportation of mail was simply a "polite fiction." Civil Aeronautics Board, Summary of the Airline Deregulation Act of 1978, at 15 (1978).
\textsuperscript{113} 49 U.S.C.A. § 1376(c) (Supp. 1979).
\textsuperscript{114} Civil Aeronautics Board, Summary of the Airline Deregulation Act of 1978, at 15 (1978). Before the enactment of section 419, the Board was required to consider a certificated carrier's overall system needs when determining a subsidy, and the Board generally was precluded from adjusting the equipment...
Board finds that an eligible point will not receive essential air service without compensation, it is to invite applications to provide subsidized service in a manner resembling the typical government procurement process. While the Board is expected to keep the subsidy cost at a reasonable level, Congress has not called for the Board to establish a low bid system since the lowest bidder may not be the most reliable carrier, and since the Board is seeking to encourage efficiency with incentives rather than force cost-cutting measures which could be counterproductive.

The provisions of the Act and its legislative history leave no doubt that the subsidy program is to emphasize insuring essential services rather than minimizing the cost of the program. Section 419(d) contains the guidelines for compensation and refers to "the fair and reasonable amount of compensation required to insure the continuation of essential air transportation . . . ." Language emphasizing the cost of the subsidy program is avoided. The Act requires the Board to establish guidelines for computing compensation to any eligible point based on "representative costs" of carriers operating aircraft of a type appropriate to provide essential air transportation to the point in question. Sharply escaler or schedules of certificated carriers, which prevented it from helping small communities. Of special significance is the fact that the section 406 subsidy program was limited to certificated carriers, thus preventing the direct subsidization of many operators using aircraft more appropriately suited to the needs of small communities.

116 Civil Aeronautics Board, Section 419 Subsidy Program, Discussion Paper 6 (1979). The Board's avoidance of a low bid system is also based on the notion that the transition of each carrier causes difficulties including loss of confidence in the system, decreased demand or less growth in demand, initial performance problems, and long-term development problems. Id.
119 Under the Deregulation Act, the cost to the federal government of providing essential air transportation is only one of the factors to be considered by the Board in designating eligible points. 49 U.S.C.A. § 1389(b)(2)(A) (Supp. 1979).
120 Id. § 1389(d). A variety of methods are available for determining "representative costs," including industry averages and cost breakdowns by geographic areas and carrier capacities. Representative costs are inherently difficult to determine because costs for a particular aircraft may vary greatly in different geographic areas due to climate, hub congestion, and fuel prices. A further problem lies in the determination of the proper amount of emphasis to be
lating fuel prices have had a dramatic impact on these "representative costs." The spiraling cost of fuel has particularly affected small carriers which generally purchase fuel at spot or retail prices typically higher than prevailing contract prices. In order to provide for fuel costs in the subsidy program, an automatic fuel cost adjustment has been proposed so that the CAB would cover 85% of fuel price increases with each subsidized carrier absorbing 15% of the cost.

In addition to the cost of fuel, the availability of fuel has become an increasingly important concern in meeting essential air service levels. As a means of guaranteeing service, the CAB has joined forces with the Department of Energy (DOE) to insure sufficient fuel supplies for carriers providing essential services.

placed on how an essential service carrier's costs compare to a specified average. The question remains open as to whether the Board can require an existing carrier to continue service to a particular point solely because a prospective replacement carrier's cost is above the "representative cost." CIVIL AERONAUTICS BOARD, SECTION 419 SUBSIDY PROGRAM, DISCUSSION PAPER 22 (1979).

Aviation fuel costs rose 100% in 1979, from an average of 40 cents per gallon of jet fuel in 1978 to an average of 80 cents per gallon. Dallas Morning News, Jan. 27, 1980, § H, at 2, col. 3.

In May 1979, commuter airlines using jet fuel paid an average of 61 cents per gallon while certificated carriers with long-term contracts paid from 37.5 cents to 45 cents per gallon for the same fuel. COMMUTER AIRLINE A. AMERICA TIMES, May 1979, at 4. Whether the spot market can continue to provide adequate fuel for commuters remains uncertain. At least twenty carriers have cut back or anticipate cutting back existing service due to a lack of adequate fuel supplies. COMMUTER AIRLINE A. AMERICA TIMES, Aug. 1979, at 6-7. Even if spot market fuel is available, its cost also poses a threat to commuter service. Ransome Airlines' Allegheny Commuter is only one commuter which has been caught in the bind of excessive retail costs. Ransome sought unsuccessfully to obtain a guaranteed fuel allocation, but encountered difficulties because of the practice of oil company suppliers in giving priority to fulfilling prior commitments to major airlines which are traditional customers. AV. WEEK & SPACE TECH., Oct. 1, 1979, at 27.

Because the Board acknowledges that most small carriers must purchase fuel on the spot market, this 15% payment by carriers of fuel price increases is designed to provide incentives for the carriers to keep fuel costs as low as possible. Id.

The unavailability of fuel for commuters could undermine the overall deregulation program if commuters cannot get sufficient fuel to grow and become self-sufficient. COMMUTER AIRLINE A. AMERICA TIMES, Aug. 1979, at 6-7.

The agreement resulted from the growing problem of commuters in obtaining adequate fuel supplies and the necessity of guaranteeing essential air transportation to eligible points under the Deregulation Act. Since the Act became law in October of 1978, more than 130 cities received
Under the joint agreement, the Board will monitor supplies of carriers providing essential service, advising the DOE if a carrier has difficulty obtaining adequate supplies.\textsuperscript{126} The DOE will then contact the carrier, the fixed base operator, and the fuel supplier in an effort to obtain more fuel.\textsuperscript{127} If the DOE finds that fuel cannot be obtained for a potential replacement carrier, the Board will notify the incumbent carrier that it may not leave the route until its replacement makes satisfactory supply arrangements, thus providing an incentive for the incumbent to assist the potential replacement carrier in obtaining fuel.\textsuperscript{128} The mandatory transfer of fuel supplies from an incumbent carrier to a replacement carrier has been reviewed by the CAB but is not presently considered to be feasible because of different fuel requirements for different types of aircraft and the inherently complex logistical and legal considerations.\textsuperscript{129}

A. Justification for Continued Regulation

In passing the Deregulation Act, Congress clearly intended to allow the air transportation industry to function essentially according to market forces rather than to rely on governmental regulation.\textsuperscript{130} Yet the ten-year transition period provided by the Deregulation Act,\textsuperscript{131} guaranteeing essential air transportation to eligible small or isolated communities, reflects a concern that these points often require federal subsidy and cannot rely on forces of the marketplace to ensure their air transportation needs.\textsuperscript{132} Proponents of the CAB's generous provisions for guaranteed essential air

\begin{itemize}
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id. at 52,647; see also S. REP. No. 631, 95th Cong., 2d Sess. 1-4 (1978); S. REP. No. 1374, 94th Cong., 1st Sess. 13 (1976).}
\item 49 U.S.C.A. § 1389(g) (Supp. 1979).
\end{itemize}
transportation and liberal criteria for determination of points eligible for such service contend that the CAB has properly followed the specific congressional mandate to insure essential air service designed to meet the individual needs of small communities. Proponents of the small community service program maintain that special consideration should be given to the carriers providing essential service, often the only air transportation link to many of the small communities in the nation. The fuel needs of small carriers are arguably negligible in comparison with other modes of transportation such as automobiles, buses, and railroads which provide a similar level of service to consumers. In regard to fuel availability, the CAB has concluded that the small community air service program will not have a significant impact on the nation's energy problems.

The subsidized fuel cost is arguably justified in the CAB's cost-sharing subsidy proposals under which carriers have incentives to keep fuel costs as low as possible. This system will be far superior to the previously considered fuel adjustment plan, based on individual carrier requests, which would have served as a signal to fuel suppliers to escalate their prices to section 419 carriers, knowing that carriers could simply pass the cost to the government.

The fuel cost has also been justified on the premise that the subsidy program is flexible and can easily adapt to changing traffic patterns. Within one year after a point receives subsidized service, the CAB will begin a review of the essential service level for

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123 See generally Part 398, 44 Fed. Reg. 52,646, 52,647 (1979); S. REP. NO. 631, 95th Cong., 2d Sess. 5 (1978). The Board has justified its generous subsidy program by reference to congressional silence on the issue of a statutory ceiling for subsidy costs. Id.


125 Id. In 1978 commuter airlines carried over 10 million passengers and consumed 0.7% of all aviation fuel. Compared to other modes of travel including automobiles, buses, and railroads, commuters used 0.06% of all fuel used in passenger transportation. In terms of fuel conservation, the average commuter aircraft is 61% more energy efficient than larger aircraft. COMMUTER AIRLINE A. AMERICA TIMES, May 1979, at 5.


127 See note 123 supra, and accompanying text.

128 CIVIL AERONAUTICS BOARD, SECTION 419 SUBSIDY PROGRAM, DISCUSSION PAPER 26 (1979).

that point.\textsuperscript{140} After the essential service level for a point is determined, any person can petition to have the level changed.\textsuperscript{141} A petition for modification can be filed at any time, and if it demonstrates a need for reexamination, the determination process begins again.\textsuperscript{142}

The Act provides for a ten-year transition period because many legislators at the time of enactment felt that at least ten years would be necessary for a smooth transition into a deregulated environment, so that the newly unshackled airlines would not be immediately free to drop unprofitable service to small cities.\textsuperscript{143} A few proponents of the ten-year restraint on exit freedom even favored further legislation to make route exit more difficult, to extend the time period for guaranteed service, and to prevent anticipated air service cutbacks.\textsuperscript{144} While some initial observers feared that service to many small communities would be virtually eliminated under the Act,\textsuperscript{145} proponents of the Act argued that the provisions guaranteeing essential air service to eligible points encourage growth of more efficient commuter air service and may enable commuters to become self-sufficient.\textsuperscript{146} According to CAB member Elizabeth E. Bailey, "the joint effect of our rule-making and the new legislation should be to encourage commuter services and also to encourage the smaller trunk and local-surface carriers to develop new connecting hubs at terminals that now receive only limited service."

Although all communities have not benefited since the Act was passed, more communities are receiving more service than

\begin{itemize}
\item\textsuperscript{140} Id. at 52,665 (to be codified in 14 C.F.R. § 325.6).
\item\textsuperscript{141} Id. at 52,664 (to be codified in 14 C.F.R. § 325.7).
\item\textsuperscript{142} Id. at 52,666 (to be codified in 14 C.F.R. § 325.10).
\item\textsuperscript{143} 124 CONG. REC. S5863 (daily ed. Apr. 19, 1978) (statement of Senator McGovern).
\item\textsuperscript{144} Av. Week & Space Tech., Apr. 2, 1979, at 21. Senator McGovern in particular advocated legislation to limit market exits. Id. See generally Brenner, supra note 28.
\item\textsuperscript{145} Fears of air service cutbacks brought critical responses concerning deregulation from Senators Jennings Randolph and Robert Byrd of West Virginia, George McGovern of South Dakota, and John Stennis of Mississippi. Av. Week & Space Tech., Apr. 2, 1979, at 21.
\item\textsuperscript{146} See Bus. Week, Oct. 30, 1978, at 57.
\item\textsuperscript{147} Id.
\end{itemize}
A CAB study reveals that 34 hubs and 281 nonhub airports received less service on February 1, 1979, than on that date in 1978. Despite this cutback in service, the CAB and other supporters of the Act contend that overall service has improved since enactment of the Act, as evidenced by an increase in service from nonhubs to hubs. These supporters note that even with subsidized regulation prior to the Act, certified carriers had withdrawn from 173 points between 1960 and 1976, so that over 30% of the communities which received certified air service in 1960 had lost it by 1976. Additionally, prior to deregulation, small community service was not always guaranteed and timely notice of service reduction or termination was not always provided to affected communities. Proponents of the Act maintain that in a newly deregulated environment, adjustments must be anticipated and viewed in a proper perspective. The adjustment which is currently of chief concern is the soaring cost and generally unpredictable availability of fuel. Proponents of the liberal guidelines for guaranteed essential air service and the generous criteria for designating points eligible for such service cite the joint CAB-DOE agreement as evidence that proper adjustments can be made to deal with the problem of cost and availability of fuel. These proponents contend that the Act’s provisions concerning termination, reduction, and suspension of air service, in conjunc-

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148 Address by Elizabeth Bailey (CAB member), ITT Key Issues Lecture, New York University (Dec. 5, 1979) (reprinted by the CAB) at 25. California communities are an example of points which have generally not benefited from deregulation. In California previous state regulation and the desire of certificated carriers to take advantage of new route opportunities elsewhere caused particularly difficult transition problems for many communities. Id. at 26.

149 Av. Week & Space Tech., Apr. 2, 1979, at 21. Service at small, nonhub airports increased 5.2%, while service from nonhubs to small hubs grew by 3.7%, growth to medium hubs increased by 13.1% and to large hubs by 9.2%, during 1978. Id.

150 Id.

151 122 Cong. Rec. 12123 (1976) (remarks of Senator Edward Kennedy). “[A]lthough service to small communities has actually increased, it has done so as a result of the services provided by commuter air carriers exempted from CAB regulation.” Id.

152 See Kennedy, supra note 26.

153 See Dupre, supra note 12.

154 See note 122 and accompanying text supra.

tion with the provisions guaranteeing small community service, create the proper conditions for gradual deregulation of route exits.156

B. Criticism of Continued Regulation

The CAB traditionally has encouraged the development of a comprehensive air transportation network under the congressional mandate that such a network is "in the public interest, and in accordance with the public convenience and necessity."157 This policy is reflected in the provisions of the Deregulation Act which guarantee essential air transportation to eligible points over a ten-year transition period.158 Although the Board's goal of promoting public interest through the "public convenience and necessity"159 standard is meritorious, a close examination reveals the substantive dichotomy which it represents.160

In determining whether these regulatory provisions of the Act serve the public interest, the dual problem arises of defining who comprises the "public" and identifying what is in their best "interest."161 Obviously what may be in the interest of one public segment may contravene the interests of another public segment.162 Likewise, the "public convenience and necessity" standard is per se undefinable because it could be reasonably interpreted to mean almost anything.163 The dichotomy of this standard is patently evident in that public convenience may bear no relation to public necessity. Indeed, economic turbulence may prove that public convenience and public necessity are inherently inconsistent.

The dilemma of determining what constitutes "public convenience and necessity" has been intensified by the increasingly

156 See note 11 and accompanying text supra.
158 See notes 7-11 and accompanying text supra.
160 See Dupre, supra note 12, at 278.
161 Jordan, If We're Going to Regulate the Airlines, Let's Do It Right, in PERSPECTIVES ON FEDERAL TRANSPORTATION POLICY 58 (J. Miller III ed. 1975).
162 Dupre, supra note 12, at 303.
163 Id. at 302.
critical shortage of fuel and its soaring cost. Although the De-
regulation Act arguably might have been adequate to deal with
route exit conditions existing at the time of its enactment, its pro-
visions increasingly appear to be short-sighted. In the months
since the Act became law, the staggering increase in the price of
fuel and the uncertainty of its availability have profoundly affected
the air transportation industry. Fuel costs for the airlines rose
100% in 1979 with the fuel bill totaling $6.5 billion, up $2.5
billion over 1978. The shortage of fuel forced several airlines
to dip into the costly spot fuel market to insure an adequate supply
through 1979. Although the fuel shortage has caused relatively
few flight cancellations the general outlook for both cost and
availability of fuel for the foreseeable future provides little hope
for improvement. The intense worldwide demand for oil will

164 See note 121 and accompanying text supra.

165 The deterioration of relations between the United States and Iran has
cased American airlines to face the prospect of continued high fuel prices and
uncertainty over fuel availability. The specific effects of President Carter's cutoff
of Iranian oil to the United States, ordered in November of 1979, are not im-
m ediately apparent. A DOE spokesperson has predicted that "the market will be
tighter than it has been. More fuel will likely end up on the spot market, and the

166 An example of this effect is found in the Southwest Airlines decision to
cancel 180 flights between December 10, 1979, and March 1, 1980, in an effort
to save 1,503,975 gallons of jet fuel. Southwest also instituted a slower en route
cruise speed to conserve an estimated 350,000 gallons each month. Dallas Morn-
ing News, Dec. 8, 1979, § B, at 14, col. 4. Higher fuel prices have forced Trans
World Airlines to further reduce its already scaled-down operating plan for the
spring of 1980. Possible reductions include further lay-offs of employees and


168 Av. Week & Space Tech., Nov. 19, 1979, at 30. An alternative to the
spot market fuel purchase arrangement is an airline fuel consortium used to
purchase, store, and transport fuel for the airlines, possibly bypassing the oil
industry. Although the CAB has approved formation of a consortium, sig-
nificant antitrust problems and competitive forces among the airlines may render
this alternative unsuccessful. Av. Week & Space Tech., Oct. 1, 1979, at 27.

169 But see note 166 and accompanying text supra.

170 President Jimmy Carter has stated, "No matter what I do, no matter what
Congress does, no matter what anybody does in the years ahead, the price of
energy is going to go up." President's Address on Energy, 15 Weekly Comp.

171 Barton House, aviation fuel specialist for the DOE, has stated "there will
never again be a glut of crude oil. No one will have all he wants . . .

172 See Av. Week & Space Tech., Dec. 10, 1979, at 34.
undoubtedly continue, while both supply and price will remain subject to the discretion of oil exporting countries. The ultimate adequacy of domestic sources remains uncertain. Thus the spiraling cost of fuel and the uncertainty of its availability mandates a critical reexamination of the CAB’s goal of providing for “public convenience and necessity” and the provisions of the Deregulation Act designed to reach that goal.

Because the air transportation industry is important to the overall economy of the United States, the individuals and the legislation governing the industry must be responsive to economic turbulence. The CAB has acknowledged that it is aware of the energy problems which confront the nation, yet it maintains that the guaranteed subsidized service to eligible points will not have a “significant impact” on these problems. This premise is based upon the fact that much of the guaranteed service is provided by small commuter aircraft operating on short haul runs using only a “negligible” amount of fuel. The Board has stated simply that energy concerns will “probably” receive greater importance when the Board is selecting carriers to provide essential air service.

A primary example of the CAB’s extravagant attitude concerning use of available fuel is found in its agreement with the DOE to insure available fuel supplies for commuter carriers providing essential air transportation. Rather than reevaluating the proper use of fuel and the cost of continued subsidies, the CAB has created new regulatory measures, with a proposal that the CAB should fully cover 85% of fuel price increases while subsidized carriers absorb only 15% of the cost. Continued subsidies may create perverse incentives for small community air service by encouraging carriers to pad cost reports, insuring continued subsidy payments,

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172 Id.
173 Id. at 43.
174 Id. at 37.
177 Commuters Able to Meet Needs of Communities, COMMITTER AIRLINES A. AMERICA TIMES, Aug. 1979, at 7.
179 See notes 121-124 and accompanying text supra.
180 See note 119 and accompanying text supra.
and to maintain a normal return through subsidy, rather than to develop the market and encounter the risk of attracting competition from other carriers. If the demands for local air service become insufficient to cover the cost, the utility of such service may be difficult to justify.

The possible diversion of oil to other uses is of special significance in anticipating future aviation fuel supplies. Heating oil for homes and industry, diesel fuel and motor gasoline must share available petroleum supplies with aviation gasoline and jet fuel. Aviation fuel production is currently estimated to comprise six percent of each available crude oil barrel, but its future position in the hierarchy of petroleum priority remains uncertain. Although new fuel-efficient and wide-body aircraft may improve fuel conservation, the use of alternative fossil fuels including synthetic liquid fuels produced from coal and oil shale ultimately may be the most critical factor in fuel availability.

The United States has an abundance of these resources, but the financial investment in research and development, inherent systems problems, and environmental considerations pose significant restrictions to practical foreseeable use of these alternative fuels. Alternative energy sources eventually may provide a viable solution to the current shortage and high cost of fuel, but the practical use of such alternatives is presently premature, reinforcing the critical need for immediate remedial action.

185 CIVIL AERONAUTICS BOARD, SECTION 419 SUBSIDY PROGRAM, DISCUSSION PAPER 7 (1979).

186 It has been suggested that the United States government may be happier keeping people warm than keeping them traveling. Bus. Week, May 28, 1979, at 44.

187 When aviation gasoline supplies became tight during the summer of 1979, considerable blame was placed on governmental steps taken to increase the motor gasoline supply in order to decrease the automobile gasoline lines. Av. Week & Space Tech., Sept. 24, 1979, at 52.


189 The issue of priority positioning has raised significant questions concerning the political clout of a variety of energy consumers. See Av. Week & Space Tech., Sept. 24, 1979, at 52. See also Av. Week & Space Tech., Dec. 10, 1979, at 37.

190 Id. at 43.
IV. CONCLUSION

While the airline industry in its early years arguably may have required regulatory legislation to ensure proper growth, the continuance of extensive regulation at the present time is unjustified. Advocates of free enterprise challenge the propriety of continued governmental interference in the airline industry until 1988 through the regulatory provisions of the Deregulation Act. The provisions of the Act concerning termination, reduction and suspension of air service, the liberal guidelines for determining essential service levels, and the generous criteria for designating points eligible for guaranteed service controvert the purpose and thrust of the Act.

Preservation of the extensive air transportation network in the United States has been set forth as a justification for the cost of subsidized air service, as well as the premise that citizens of small communities should not experience hardship, inconvenience and economic loss due to isolation from major urban areas. Although these justifications are commendable, the increasingly critical shortage of fuel and the staggering increase in its cost warrant reformation of the Act. If the ten-year duration of guaranteed subsidized service were reduced and the terms “eligible point” and “essential air transportation” were narrowly redefined, the steadily increasing subsidy cost would be reduced substantially, and available fuel could be used in other ways. Airlines could concentrate their resources on routes which provide the greatest opportunity for profitable operation. By substantial reduction in subsidies and route exit restraints, local service carriers and commuter airlines would be forced to develop independently profitable operations. These carriers would maintain schedules responsive to individual community transportation needs, not to the CAB's determination of what constitutes “essential air transportation.”

A reduction of the ten-year transition period and a narrow redefinition of the statutory terms “eligible point” and “essential air transportation” will require congressional action. Because of the inherently lengthy legislative process and the congressional mandate that the Board is to maintain an environment “responsive to the needs of the public and in which decisions are reached promptly,” the Board must initiate steps to deregulate route exit

deregulation. Just as the Board did not wait for congressional mandate to begin deregulation of the industry, it must not wait for congressional mandate to complete deregulation.

The Act defines essential air transportation as the level of service which the Board determines to be sufficient to satisfy the needs of a particular eligible point. Thus, the CAB clearly may alter its broad guidelines for determining essential air transportation and its criteria for designing eligible points. A specific initial step could be a redefinition of the measuring unit of these provisions, the hub. Although it is not practical to remove numerical considerations from the definition of "hub," it is feasible to enlarge the current criterion of .05% of total enplanements in the United States. Such an increase, for instance a doubling to .1%, would reduce the level of required service to a community and would allow a wider margin for the forces of the market to act. Additionally, both the requisite frequency of flights and the minimum available equipment capacity to be guaranteed by the Board could be reduced. These steps would create lower subsidy costs, conserve fuel, and still ensure the provision of adequate air service. Perhaps a fresh understanding of the term "essential" will provide the key to living with not only a newly deregulated airline industry, but also the complexities of the new decade. "Essential" service should not include a level of service above that which is "adequate" to meet community needs. Adequacy should be determined by market forces rather than governmental fiat.

The CAB has been empowered to develop and maintain "a sound regulatory environment which is responsive to the needs of the public and in which decisions are reached promptly in order to facilitate adaptation of the air transportation system to the present and future needs of the domestic and foreign commerce of the United States." The route exit provisions of the De-regulation Act, the CAB's criteria for designating eligible points, and the guidelines for determining essential air transportation cannot provide this sound environment and are not responsive to the

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193 See text accompanying notes 36 and 37 supra.
193 See text accompanying note 63 supra.
134 See notes 73-74 and accompanying text supra.
present and future needs of the United States. Expeditious reformation of the Act will allow the air transportation industry to survive current economic turbulence and adapt to future conditions. Such reformation ultimately may prove to be the essence of "public convenience and necessity."