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SECTION 419 OF THE AIRLINE DEREGULATION ACT: WHAT HAS BEEN THE EFFECT ON AIR SERVICE TO SMALL COMMUNITIES?

JAMES S. MEYER

THE AIRLINE DEREGULATION Act of 1978 (the ADA) instituted substantial changes in government regulation of the airline industry. The main thrust of the ADA is to limit severely government regulation and place "maximum reliance on competitive market forces and on actual and potential competition . . . ." The ADA is a product of extensive political debate. One of the most controversial issues was whether there would be an adverse impact on air service to small communities. In order to insure that a comprehensive and convenient system of continuous scheduled air service for small

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4 For analyses predicting the economic impact of deregulation on the airlines, and in turn the air service they would subsequently provide, see generally AMERICAN ENTERPRISE INSTITUTE, REGULATION AND PASSENGER FARES AND COMPETITION AMONG THE AIRLINES (1977) [hereinafter cited as AEI]; Dupre, A Thinking Person's Guide to Entry/Exit Deregulation in the Airline Industry, 9 TRANSPO. L.J. 273 (1977) [hereinafter cited as Dupre]; Thayer, And Now "The Deregulators": When Will They Learn? 43 J. AIR L. & COM. 661 (1977) [hereinafter cited as Thayer]; Brenner, Need for Continued Economic Regulation of Air Transportation, 41 J. AIR L. & COM. 793 (1975) [hereinafter cited as Brenner].
communities and isolated areas would be maintained, Congress in section 419 of the ADA guaranteed “essential air transportation” to all “eligible points” for a period of ten years. To accomplish this goal, Congress, among other things, created a new federal subsidy program to compensate qualifying air carriers.

The small community program established in section 419 has been in effect since October of 1978. All initial, essential air transportation determinations have been made for the communities guaranteed service under section 419, and government subsidization, where necessary, has also been initi-

* Id. § 1389.
* Id. § 1389(f).

"[E]ssential air transportation" means scheduled air transportation of persons to a point provided under such criteria as the Board determines satisfies the needs of the community concerned for air transportation to one or more communities of interest and insures access to the Nation's air transportation system, at rates, fares, and charges which are not unjust, unreasonable, unjustly discriminatory, unduly preferential or unduly prejudicial . . . .

Id.
The guidelines that the CAB adopted for making “essential air transportation” determinations are set out in 14 C.F.R. § 398 (1981).

* For a community to be guaranteed essential air service as an “eligible point” it must fit within the terms of 49 U.S.C.A. § 1389(a)(1) (West Supp. 1981), or qualify as an additional “eligible point” under the guidelines of 14 C.F.R. § 270 (1981) which were established by the Board pursuant to 49 U.S.C.A. § 1389(b)(2)(A) (West Supp. 1981).


10 The section 406 subsidy program which originally was instituted to subsidize the transfer of mail, but later primarily supported small town service, is to be phased out and terminated on January 1, 1986. 49 U.S.C.A. § 1376(c) (West Supp. 1981).


13 For an explanation of the guidelines used in determining essential air transportation see notes 56-70 and accompanying text infra.

14 Although the statutory deadline for the initial essential service determinations by the Board was October 24, 1979, the process was not completed until several months later due purportedly to “the Board’s thoroughness in gathering community views and reviewing policy” and not any lack of effort. Av. Daily, Nov. 5, 1979, at 18.
Furthermore, the forces of the open market have now had an opportunity to take effect.

This comment addresses the questions regarding whether the section 419 small community program is working to satisfy the needs of the communities concerned, and whether those needs will call for future government regulation beyond the ten years stipulated in the ADA. Economic predictions which were advanced by airline economists, executives and other industry analysts prior to deregulation are set forth before an examination of the statutory framework of section 419. There is also an evaluation of the effect deregulation and section 419 have had on air service in many small communities. Finally, a conclusion will be reached as to the future action required to insure that small communities receive essential air service.

I. Opposing Economic Theories on Deregulation

Whether government regulation or a basic reliance on the free market is the proper method for achieving the goals of the air transportation system has been a subject of great dis-

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15 Government subsidies under Section 419 of the ADA are estimated to be $9.4 million for 1980. Av. Week & Space Tech., May 12, 1980, at 22.
16 See note 9 supra.
17 The goals of the United States air transportation system as dictated by public interest are stated in 49 U.S.C.A. § 1302 (West Supp. 1981):

(1) The assignment and maintenance of safety as the highest priority in air commerce . . .

(2) The prevention of any deterioration in established safety procedures . . .

(3) The availability of a variety of adequate economic, efficient and low priced services by air carriers and foreign air carriers without unjust discriminations . . . the need to improve relations among, and coordinate transportation by, air carriers . . .

(4) . . . (A) to provide the needed air transportation system and (B) to encourage efficient and well managed carriers to earn adequate profits and to attract capital.

(5) The development and maintenance of a sound regulatory environment which is responsive to the needs of the public and in which decisions are reached promptly in order to facilitate adoption of the air transportation system to the present and future needs of the domestic and foreign commerce of the United States, the Postal Service and the national defense.
pute. Those opposing deregulation predicted an adverse effect on air service to small communities. The typical scenario set forth by opponents of deregulation was that, in a totally unregulated market, airlines would actively compete for the more profitable routes primarily by reducing air fares. No carrier would allow fares to be undercut for fear of losing passengers to its competitors. Therefore, fares would spiral downward as each airline attempted to gain a competitive advantage. Ultimately, this cutthroat competition would cause all carriers to charge fares below their operating costs, and

(6) The encouragement of air service at major urban areas in the United States through secondary or satellite airports and fostering an environment which reasonably enables such carriers to establish themselves and to develop their secondary or satellite airport services.

(7) . . . the avoidance of . . . conditions, that would tend to allow one or more air carriers unreasonably to increase prices, reduce services, or exclude competition in air transportation.

(8) The maintenance of a comprehensive and convenient system of continuous scheduled airline service for small communities and isolated areas . . .

(9) The encouragement of entry into air transportation markets by new air carriers, . . . existing air carriers, and the continued strengthening of small air carriers so as to assure a more effective, competitive airline industry.

Id.

18 See generally American Enterprise Institute, Air Transportation Regulatory Reform, 15-21 (1978) [hereinafter cited as AEI Analysis].

19 Id. at 20. Competition in a regulated market is limited to improvements in service quality; for example, more frequent flights by the same airline, more comfortable aircraft and better meals. Id. at 15. An increase in the number of airlines serving the more profitable routes in a deregulated market would lead to excess capacity, and the competition to fill that capacity would be in the form of lower fares. See Dupre, supra note 4, at 281.

20 See AEI Analysis, supra note 18, at 20.

21 See Dupre, supra note 4, at 280-81. Direct operating costs consist of expenses that vary according to factors such as the number of passengers aboard each flight, the number of flights and the length of each flight. See G. Douglas & J. Miller, Economic Regulation of Domestic Air Transport: Theory and Policy 13-18 (1974) [hereinafter cited as Douglas & Miller]. These costs include expenses such as fuel costs, crew pay, landing fees, passenger service costs and aircraft maintenance. See Brenner, supra note 4, at 799. Fixed costs on the other hand, are costs that will be incurred no matter how many flights the airline makes. These expenses are costs incurred in purchasing or leasing aircraft and non-flight equipment such as a computerized reservation system, rental expenditures at airports and most general and administrative expenses. Id. at 798. See also Dupre, supra note 4, at 280-81. The theory is that during fierce competition, airlines will reduce fares to their direct operating cost
to suffer financial losses. This chain of events would be detrimental to the entire air transportation network.\footnote{22}

The opponents of deregulation further argued that the above scenario could be the result of an aggressive carrier intentionally instigating such a price war as a predatory tactic.\footnote{23} By causing its competitors to incur losses, the aggressor airline could force the other competing airlines to abandon certain routes or drive them into bankruptcy.\footnote{24} The aggressor airline, with financial reserves to weather such losses, might then be able to establish a monopoly on the more lucrative routes or remain a member of a small group of larger airlines level or below for each flight, leaving no return available on the airline's fixed costs. An inability to provide a return on fixed costs would lead the airlines to lease or sell their aircraft, suspend operations entirely on some routes and lay off employees. Id. at 281.

\footnote{22} See generally AEI Analysis, supra note 18, at 15-21. In reducing costs in order to maintain profitability, some opponents of deregulation argued that the airlines might skimp on aircraft maintenance and safety margins. William Mahoney, counsel to the Air Line Pilots Association, stated that:

But employees know the effects upon safety of carrier employers having to cut corners in order to survive, as for example in the astounding number of train derailments throughout the United States. Every instinct tells us that the rail safety record will be repeated in the air transport industry as air carriers feel compelled to cut corners in order to stay in business. Senate Hearings, supra note 3, at 1286.

\footnote{23} AEI Analysis, supra note 18, at 20. Predatory pricing occurs when one or several of the stronger firms in an industry lower prices in order to drive the weaker firms that cannot withstand losses for a long period of time into bankruptcy, thereby reducing competition. Gerald O'Grady, senior vice president-legal of Western Airlines, stated that:

We object to carriers being given discretion to increase or decrease fares or rates in individual markets subject only to the restriction that such rates or fares shall not fall below "direct costs". . . . This provision in effect authorizes the carriers to engage in rate wars in individual markets, with the one which can best afford to lose money being ultimately successful in driving competitors out of the market. . . . The small carrier under this form of regulation does not stand a chance. Senate Hearings, supra note 3, at 1374, 1382. These pricing tactics are only sensible if a competitor, once driven out of a market cannot reenter it. This assumes that economies of scale exist within the airline industry providing the larger carriers with lower per-passenger costs. See G. EADS, THE LOCAL SERVICE AIRLINE EXPERIMENT 72-74 (1972) [hereinafter cited as EADS]. But see notes 35-38 and accompanying text infra.

\footnote{24} See Dupre, supra note 4, at 280 n.44.
serving such routes.\textsuperscript{25}

The pro-regulators argued that smaller communities would lose air service because the large airlines subsidize their service to small communities with profits from their more profitable routes.\textsuperscript{26} With income reduced on their normally profitable routes due to the increased competition resulting from deregulation, airlines would abandon their service to smaller communities, thus shrinking the national air transportation system.\textsuperscript{27}

Some of the most vocal proponents of continued regulation have been the trunklines which have dominated the airline industry prior to deregulation.\textsuperscript{28} Their analyses showed a large number of routes which were unprofitable but were served without federal subsidy\textsuperscript{29} due to cross-subsidies from other profitable segments.\textsuperscript{30} The trunklines further argued that the airline industry does not conform to the traditional concepts of classical economics.\textsuperscript{31} They contended that a total market

\textsuperscript{25} See AEI Analysis, supra note 18, at 20. After driving the small carriers out of the lucrative markets, the large firms would then establish monopolies or oligopolies on such routes and charge excessive fares. Id. See also Thayer, supra note 4, at 668.

\textsuperscript{26} See AEI, supra note 4, at 82 n.4. The notion is that air carriers voluntarily serve unprofitable markets in recognition of public service objectives. With deregulation, competition would dry up the profits being earned on the denser routes eliminating any cross-subsidies. This would result in the elimination of any large carrier's ability to subsidize a smaller unprofitable market. Id. But see note 39 infra.

\textsuperscript{27} Dupre, supra note 4, at 281.

\textsuperscript{28} Id. at 283-88.

\textsuperscript{29} Any subsidy for service to small communities prior to deregulation would have come from the section 406 subsidy program now codified in 49 U.S.C.A. § 1376 (West Supp. 1979). The section 406 subsidy program based an airline's subsidy on that airline's system-wide operating costs in relation to its revenues. The program was not very effective in the decade prior to the ADA as 128 towns were dropped from certificated service during that time. See Comment, Commuter Airlines and the Airline Deregulation Act of 1978, 45 J. Air L. & Com. 685, 694-95 (1980) [hereinafter cited as Commuter Airlines]. See note 10 supra.

\textsuperscript{30} See Dupre, supra note 4, at 285. Eastern Airlines claimed to have 160 domestic routes that were benefitting from cross-subsidies, all of which could be in jeopardy under deregulation. Id.

\textsuperscript{31} See Brenner, supra note 4, at 794, 800. Under classic economic theories, factors of supply and demand interact in a manner to produce a self-adjusting equilibrium. The airline industry has a built-in tendency towards over-capacity and that tendency would be greatly intensified under deregulation. This capacity behavior cannot be reconciled with classical theories of supply and demand. In any other industry, it
planning approach with the CAB as coordinator, would provide much more stable and efficient service than an unregulated market in which every individual air carrier would be completely free to do its own individual planning regarding routes and fares. The advocates of regulation saw no need to change a system which they felt was already operating in the public's best interest.

The supporters of deregulation, on the other hand, believed that the increased competition of a free market in the airline industry would be in the best interests of the public. They argued that deregulation would not be detrimental to small community service if a lesser amount of remaining regulation were properly structured taking into consideration the legitimate demands and needs of industry, labor, management and consumers. They argued that predatory pricing would be impossible under airline deregulation because such pricing tactics by larger airlines are only sensible if a competitor, once driven out of the market, would not reenter it. Since jet aircraft have been among the most mobile investments in modern industry, proponents of deregulation argued that carriers could always enter new markets at will, thereby preventing

would be unthinkable for a firm that had been selling only one-third of its output to then increase its rate of output by over thirty percent. Id.

See Thayer, supra note 4, at 672.


Id. Donald Baker, former assistant attorney general for the antitrust division testified that:

We believe the key to preventing predatory behavior is not regulatory control of fares, but a policy of liberal entry and pricing. . . . Moreover, the "natural monopoly" argument, which some advance to justify economic regulation finds no support in the facts of air transportation economics. The larger air carriers do not enjoy "economies of scale"; that is, any cost advantages the largest air carriers may enjoy because of their large size are more than offset by the increased costs and inflexibilities of managing a large complex and dynamic airline system. In addition, the most costly air carrier assets are much more highly mobile than the key assets of, for instance, oil pipelines or electrical generating plants.

the predator from subsequently raising its prices.\textsuperscript{36} This view of the deregulators was premised on the belief that no economies of scale\textsuperscript{37} of any importance existed in the airline industry to prevent smaller carriers from effectively competing.\textsuperscript{38}

The notion that service to many communities was cross-subsidized by the airlines’ more profitable routes was criticized as being highly unlikely in light of the main goal of all corporations to maximize profits.\textsuperscript{39} Indeed it was stated by some advocates of deregulation that the cross-subsidy argument used by the larger airlines was nothing more than a “smokescreen” disguising the true effect that regulation had on the airline industry’s profit picture. That effect, it was argued, was to cause minimal losses in the smaller markets while creating windfalls due to the protection of regulation in the more lucrative markets.\textsuperscript{40} Advocates of deregulation further contended that the old certificate\textsuperscript{41} and subsidy pro-


\textsuperscript{37} For a definition of “economies of scale” see note 35 supra.

\textsuperscript{38} See AEI Analysis, supra note 18, at 19-20. See also 124 Cong. Rec. S5856 (daily ed. April 19, 1978) (remarks of Sen. Percy). Examples were given as to how smaller carriers have competed successfully with larger airlines demonstrating that the larger an airline becomes does not necessarily make the airline more cost efficient. Laker Airways has had great success in the New York to London market, in fact undercutting the larger carriers by hundreds of dollars. \textit{Id.}\ North Central, another small carrier, forced United Airlines out of the non-stop Milwaukee-New York market, and Ozark had similar success competing with American Airlines in the Chicago-St. Louis market. \textit{Id.}

\textsuperscript{39} AEI \textit{supra} note 4, at 82 n.4.

Although the management of an airline might like to view the airline as a public service organization, it would face severe pressures not to operate in such a manner. It must withstand comparisons with other airlines, and the airline which is most profitable (rather than the one which serves the most losing routes) will be most favorably judged. Thus, management in the airline industry, as in any other industry, faces great pressure [mainly from investors wanting a better return on their dollar] to cut losses and increase profits. Although an industry composed of very profitable firms may afford the luxury of consciously maintaining losing operations, it seems doubtful that the airline industry is in a condition to do so. These factors lead us to believe that airlines do not generally and gladly subsidize losing service with profits earned elsewhere in their system.

\textit{Id.}

\textsuperscript{40} Dupre, supra note 4, at 284.

gram had not been very successful in protecting air service to small markets, because the certificate did not guarantee service to any particular markets. One study advocating deregulation compiled statistics indicating that the trunk air carriers had already terminated service to most of their marginal points by the mid-1970s. Therefore, deregulation would simply accelerate the trend already begun toward service to small communities by commuter as opposed to local service carriers.

II. Section 419 and Small Community Air Service

Though the opponents and supporters of deregulation differed as to its long range effects, most factions recognized that deregulation initially would have an adverse effect on air service to small communities. Congressmen representing less densely populated regions were particularly concerned that complete deregulation would lead to a substantial abandonment of air service to their constituents. In order to minimize this impact on the smaller markets, Congress amended the ADA to include section 419, which guarantees “essential air transportation” to certain smaller communities for ten years. The regulation of air carrier exit from these communities...
ties and a special subsidy program designed to insure that some service is provided to these smaller communities implements this ten year guarantee.

The essential service determinations for each eligible point under the small community air service program are made pursuant to guidelines adopted by the CAB in accordance with its rulemaking power. The guidelines are intended to be used by the CAB in a flexible manner to insure that each community is analyzed on an individual basis. In determining the essential air service to be provided under the guidelines, the relevant inquiry is what level of service the government should guarantee to insure the community's access to other communities of interest and the national air system. This level of service, however, is not necessarily the level of service that the community wants.

The guidelines for individual determinations of essential air transportation are based on several factors: the number and designation of hubs, the specifications of airports and equipment, the frequency and times of flights, the maximum available capacity to be guaranteed by the CAB, and the number of stops permitted. The essential service determinations are set forth in terms of service to one or two hubs per day in order to insure convenient and reasonable access for an eligible point to its major destinations either with direct service or

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The conference . . . [amendment for Section 419] guarantees continued air transportation for 10 years to all cities which are listed on air carrier certificates on the date of enactment, including cities at which a certified carrier has suspended service. To insure such service the substitute establishes a new subsidy program, with compensation to be based on the needs of the community and the use of appropriate size aircraft.

Id.

51 Id. § 1389(a)(4), (5), (7)-(11).
53 Id.
54 Id. at 52,647.
55 Id.
57 Id. § 398.2(a).
convenient connecting opportunities. The factors the Board looks at in determining which hubs to serve are: the extent to which the hubs are linked to the national air transportation system, the commercial, geographic, and political ties of the hubs to the eligible point, the traffic levels at the hubs, the distance between the hubs and the eligible point, and the size of the hubs. Essential service under the guidelines does not usually require that the essential service be to a particular airport at the hub, but it may require service to a particular airport at the eligible point.

No specific type or size of aircraft is required by the guidelines, but the aircraft must meet the applicable FAA safety standards, must have two engines, be operated by two pilots, and be sufficient to accommodate the passengers and their baggage at the eligible point. The frequency of flights required under the guidelines is “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 less service in 1977 and cannot support such service at a 50 percent average load factor.” This level of service can

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58 44 Fed. Reg. 52,646, 52,649 (1979). The general rule of the CAB is to require service to only one hub, but where there are commercial, geographic, and political ties in two directions and sufficient traffic to support two round trips per day to both hubs, the CAB will consider defining the essential level in terms of service to two hubs from the small community. Id. at 52,648-49. If traffic is not sufficient, the CAB may require one round trip per day to both hubs if the community requests such service. 14 C.F.R. § 398.2(b)(1) (1981).
59 14 C.F.R. § 398.2(c) (1981).
60 Id. § 398.3(a). In the case of eligible points which are hyphenated (two small communities considered jointly), essential air service will be specified as service to more than one airport only if clearly necessary and if multi-airport service is economically feasible and justified on the basis of traffic levels at these airports. Id.
61 Id. § 398.4. For the FAA safety standards see 14 C.F.R. § 121 (1981) which covers aircraft seating over thirty passengers, and see 14 C.F.R. § 135 (1981) which covers planes flown by some commuter carriers that seat less than thirty passengers.
62 14 C.F.R. § 398.4 (1981). The two engine, two pilot requirement may be relaxed by the small community receiving the essential services determination if they so desire. Id. See 44 Fed. Reg. 52,650 (1979). Pressurized and air-conditioned aircraft will be required when absolutely necessary to provide usable air service to the eligible points. 14 C.F.R. § 398.4(e) (1981).
63 14 C.F.R. § 398.5(a) (1981). Average load factor is defined as the ratio of passen-
be increased if historic traffic data indicates a need for more frequent flights or if smaller aircraft are being used, requiring more trips. If traffic levels change with the season, a two-tier level of air service will be instigated to meet the varying needs of the eligible point. The guidelines are very flexible as to the required departure time of flights. Flights merely have to depart at reasonable times, and if travel is primarily local, there needs to be at least one flight in the morning and one in the late afternoon or evening.

Only under unusual circumstances will the maximum available flight capacity that the Board guarantees to any eligible point be in excess of 120 available seats; that is 60 seats in each direction. This capacity can be increased in certain circumstances, such as when the eligible point is virtually isolated or when the number of stops between the eligible point and the hub to which it has been guaranteed service are such that the available aircraft capacity is being shared with those intermediate boarding passengers.

"A maximum of two stops is permitted in providing essential air service between the eligible point and a hub, unless otherwise agreed with the community." Under the Board's discretion, they may require one-stop or non-stop service when it is necessary to make the

gers carried to available seats. DOUGLAS & MILLER, supra note 21, at 13. In Alaska, it is the policy of the Board to require either two round trips each week to each designated hub or focal point or the level of service that existed for the point in 1976, whichever is greater, unless such service is clearly unnecessary and the Alaska Transportation Commission agrees that a different level of service would meet the needs of the community. 14 C.F.R. § 398.5(b) (1981).

44 Fed. Reg. 52,646, 52,653 (1979). "Timing and scheduling requirements that are too specific will hinder rather than assist the development of viable and responsive air transportation. . . . Connecting banks at various hubs are at different times of the day depending upon the specific carriers serving the hub city and their service patterns." Id.

14 C.F.R. § 398.6(a) (1981).

Id. § 398.6(b).

Id. § 398.8(a).
service effective. 70

The procedures adopted by the Board to be used in making these essential air service determinations are very informal to insure maximum public participation. 71 The Board encourages input from local and state government, airport supervisors, and any other interested party to help it in the determination of essential service. 72 These determinations are appealable by any person within 60 days after issuance. An appeal must contain specific objections to the determination, a statement of the extraordinary factors justifying a deviation from the guidelines, and a description of the desired level of essential air service. 73 All appeals are considered by a panel of three CAB employees: one from the Bureau of Domestic Aviation, 74 one from the Office of Community and Congressional Relations, 75 and one from the Office of General Counsel. 76 The essential air service determinations are further subject to change through a petition for modification which can be filed by any person, 77 or through the periodic review of the determinations required by the essential air service procedures. 78

70 Id. § 398.8(c). "When an eligible point normally is an intermediate stop that shares available capacity with another point, it is the policy of the Board to either require additional capacity (more flights or larger aircraft) between the hub and the eligible point or to specify some turnaround operations in that route segment. Id. § 398.8(d).

71 See 44 Fed. Reg. 52,661, 52,664 (1979). Under the regulations, communities and members of the public have numerous opportunities to make their views known to the Board. Any interested person can appeal an essential service determination and either by written comment, informal hearing or oral argument the Board will become aware of such person's views. Id.


73 Id. § 325.7.

74 44 Fed. Reg. 52,661, 52,664 (1979). The Bureau of Domestic Aviation is the branch of the CAB directly in charge of the determination and issuance of essential services to all of the eligible communities. Id.

75 The Office of Community and Congressional Relations is involved in monitoring the essential service at eligible points and serves as a liaison in the field for the CAB. Id.

76 This three-member panel can make a direct recommendation to the Board or call for an informal conference if the appeal raises an issue that cannot be resolved on the basis of written submissions. 14 C.F.R. § 325.8 (1981).

77 Id. § 325.10.

78 Id. § 325.6. "The Board will start a periodic review of essential air service within one year of the date of the previous determination of essential air service for eligible
In the continental United States there are several standards under which communities may be eligible for essential air service determinations. First, any point receiving certificated service on October 24, 1978, automatically qualifies for an essential service determination. Second, the group of communities that were deleted from an air carrier’s certificated service between July 1, 1968, and October 24, 1978, will be eligible if they meet certain criteria set forth by the Board. The group of communities that lost all certificated air service at their airports as a result of hyphenation with another community on a carrier’s certificate between July 1, 1968, and October 24, 1978, may be eligible as well.

The CAB is required by section 419 to weigh specific considerations in compiling criteria for determining communities’ eligibility for essential air service such as historic and potential traffic levels, probability and cost of subsidy, alternative means of transportation and the isolation of the community. The criteria the CAB promulgated for determining eligibility mainly focuses on the isolation and the potential traffic generated by the community. Communities located less than thirty road miles from a hub airport are not eligible. Communities between thirty and sixty road miles from a hub airport will be designated eligible if they have the potential of enplaning twenty passengers each day for five days of the week. Communities over sixty road miles from a hub airport will be designated eligible for essential service if they have the potential of enplaning ten passen-

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points receiving subsidized service . . . and within three years of the date of the previous determination for eligible points without subsidized air service. Id.

81 See note 60 supra for a definition of hyphenated points.
82 14 C.F.R. § 270.2 (1981). Any other communities in Alaska and Hawaii can apply for designation as an eligible point. Id. The criteria for the communities in Alaska and Hawaii is set out in subpart C of the regulations. Id. §§ 270.20-21.
85 14 C.F.R. § 270.10 (1981) “The isolation of a community will be evaluated by measuring the driving distance from its center to the nearby hub’s airport or to an eligible point’s airport.” Id. § 270.4.
86 Id. § 270.11(a).
gers each day for five days of the week. After the CAB completes its determination of eligible points not automatically qualifying for guaranteed service, the Board has until January 1, 1982, to complete the essential service determinations for these communities.

Route exit from these small communities is regulated under section 419 by requiring any certified or subsidized carrier to give ninety days' notice to the Board, the appropriate state agencies, and the affected communities prior to any termination, suspension or reduction of service to such points. Non-certified, non-subsidized carriers such as some commuter airlines, are only required to give thirty days' notice to the appropriate parties. The Board will allow route exit unless the remaining service to the eligible point will drop below the level previously determined to be essential. In such a situation, the carrier seeking to reduce or abandon service will be required by the Board to continue providing essential service to the eligible point for subsequent thirty-day periods, until a substitute carrier is found. When a carrier is required to stay past the notice period and provide essential service, it is compensated by the Board for any losses incurred in compliance during that period while the Board is looking for a replacement carrier.

When the Board requires a carrier to hold over past its notice period for abandonment, "it is to make every effort to se-

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87 Id. § 270.11(b).
89 Id. § 1389(a)(3)(A). Under the prior law a certified carrier could only abandon a route if the Board found it to be in the public interest. 49 U.S.C.A. § 1371(j) (1976).
91 Id. § 1389(a)(6).
92 Id. See Frontier Airlines, Inc., v. C.A.B., 621 F.2d 369 (10th Cir. 1980). Frontier was ordered by the CAB to provide essential service for two communities in New Mexico for several thirty day periods until a replacement carrier, Zia Airlines, took over those routes. After Zia began service, Frontier still had to provide back-up service for an additional period of sixty days. These orders were held to be within the CAB's statutory power under section 419. Id.
93 49 U.S.C.A. § 1389(a)(7) (West Supp. 1981). Any carrier seeking to abandon its service that was receiving a subsidy will continue to receive their subsidy during the holdover period. Id. § 1389(a)(7)(A). Trunk carriers can only be compensated for one year after their initial ninety-day notice period. Id. § 1389(a)(7)(B).
cure an air carrier to provide at least essential air transportation to such eligible point on a continuing basis.\textsuperscript{94} When it is determined that such essential service cannot be provided to an eligible point without compensation, the Board is to provide notice and take applications from carriers willing to provide service under the section 419 subsidy program.\textsuperscript{95} Two factors the Board is to consider in choosing applicants for subsidy are "the desirability of developing an integrated linear system of air transportation whenever such a system most adequately meets the air transportation needs of the communities involved"\textsuperscript{96} and "the experience of the applicant in providing scheduled air service in the vicinity of the communities for which essential air transportation is proposed to be provided."\textsuperscript{97} Subsidy payments are to be based on a reasonable rate of compensation,\textsuperscript{98} but are only to be paid so long as they are necessary to insure the essential service.\textsuperscript{99} After January 1, 1983, any air carrier can file an application with the CAB seeking to take over the subsidized service to any eligible point.\textsuperscript{100} The Board shall terminate the subsidy to the carrier then serving the point and grant a different subsidy to the new applying carrier if, after notice and hearing, the new carrier can prove that its service will result in an improvement in

\textsuperscript{94} Id. § 1389(a)(9).
\textsuperscript{95} Id. § 1389(a)(4)(A).
\textsuperscript{96} Id. § 1389(a)(4)(A)(i). An integrated linear system would tend to connect the small community with major air centers, stopping at some smaller points in between. This is the type of service usually provided by local service carriers. See Commuter Airlines, supra note 29, at 703.
\textsuperscript{97} 49 U.S.C.A. § 1389(a)(4)(A)(ii) (West Supp. 1981). Local service carriers are generally presumed to be more experienced than commuter air carriers. See EADS, supra note 23, at 3-5.
\textsuperscript{98} 49 U.S.C.A. § 1389(d) (West Supp. 1981). The guidelines used to determine a reasonable rate of compensation shall include "expense elements based upon representative costs of air carriers providing scheduled air transportation of persons, property, and mail, using aircraft of the type determined by the Board to be appropriate for providing essential air transportation to the eligible point." Id. For an argument that, in most situations, commuter carriers will provide the most appropriate air service to meet the market demands of the eligible small community see Commuter Airlines, supra note 29, at 703.
\textsuperscript{100} Id. § 1389(a)(11)(A).
the air service being provided such eligible point and a de-
crease in the amount of subsidy required to continue essential
air transportation to the point. In acting on the applica-
tions, the Board is to “solicit and give great weight to the
opinions of the communities affected by the proposed replace-
ment of an air carrier.”

III. The Impact On Small Community Service

The implementation of deregulation has had the immediate
effect of changing the service and route structures of the na-
tion's air transportation system. Regional airlines quickly
moved into competition against the trunk airlines in the more
profitable long-haul markets, abandoning in the process
many small and medium-sized communities. Air-taxi opera-
tors and commuter airlines have attempted to fill this void
through the adoption of a hub and spoke concept, flying
scheduled routes primarily between these small communities
and hubs. Although this approach increases the overall effi-
ciency of the service actually being provided by the smaller
carriers, it cannot totally counteract the detrimental effects
on air service caused by a decrease in the number of seats on
departing flights and the diminished quality of service.

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101 Id.
102 Id. \S 1389(a)(11)(C).
103 See EADS, supra note 23, at 74. “[T]he only way to remove the cost disadvan-
tage of local service carriers is to turn them into trunkline carriers—to drop their
short haul low density routes.” Id.
104 Bus. WEEK, Feb. 19, 1979, at 77. The irony in their abandonment of service to
small cities is that the regionals got their biggest boost 20 years ago when the trunk
airlines found they could no longer afford to fly to numerous medium sized cities with
their then new jet planes. Id.
105 A hub and spoke flight system involves commuter airlines making direct flights
connecting a major air center with the surrounding small communities. See Com-
muter Airlines, supra note 29, at 690.
106 See Bus. WEEK, Feb. 19, 1979, at 78.
107 The CAB argues that a decrease in service between non-hubs is a positive shift
because it shows that passengers have to go from one small airport to another less
frequently before finally reaching their connecting city. Impact of Airline Deregula-
tion: Hearings Before the Subcomm. on Aviation of the Senate Comm. on Com-
merce, Science, and Transportation, 96th Cong., 1st Sess. VI (1979) [hereinafter
cited as Deregulation Hearings].
108 The Airport Operators Council International's statistical information indicates
which has been experienced by many smaller communities.\textsuperscript{109} The CAB contends that many small communities, although upset at first with the loss of larger aircraft, have generally come to prefer the replacement commuter services.\textsuperscript{110} The Board further contends that the smaller aircraft are providing more efficient service to the smaller markets\textsuperscript{111} as evidenced by increases in flight frequency and decreases in fuel consumption.\textsuperscript{112} According to CAB Chairman, Marvin Cohen, the

\begin{quote}
that U.S. airports recorded fewer departures in 1979 than 1978 and that the percentage loss of seats is considerably greater. Av. Week \& Space Tech., April 21, 1980, at 25.
\end{quote}

\textsuperscript{109} See notes 136-147 and accompanying text infra. Factors which subjectively affect whether or not each passenger feels he or she is receiving quality air service include lack of pressurization in some commuter planes, cramped interior head and leg room, more turbulence due to flights at lower altitudes, lack of amenities and flight attendants, less convenient flight times, aircraft dependability problems, and a general feeling that the smaller commuter planes are less safe. Id.

\textsuperscript{110} The response of these communities is rather interesting. At first many of them were quite upset about the loss of larger aircraft—fifty seats or more—service by a certified carrier. Yet these communities soon discovered that a schedule of four to six or more roundtrips a day with a fifteen seat aircraft is far preferable to two roundtrips with a fifty seat plane. I have heard time and time again in my recent travels around the country to study small community service how pleased communities such as Waco, Texas, Fredrick, Maryland, and Salem, Oregon, have been with replacement service. In twenty-five of thirty-seven small communities studied last year by the Board's staff, passenger traffic improved considerably when a commuter with frequent service replaced a local service airline.


\textsuperscript{111} See M. Cohen, Airline Deregulation—It's Working (Oct. 24, 1980) (printed by CAB) at 3 [hereinafter cited as It's Working].

\textsuperscript{112} Address by Marvin Cohen, Aero Club Luncheon, Washington, D.C. (Oct. 28, 1980) (reprinted by CAB) at 4 [hereinafter cited as Address].

For example, in 1978 Hot Springs, Arkansas was served by two local service carriers which provided 26 DC-9 and 14 Convair flights weekly. . . . In April 1980 the city received 96 weekly flights with 19 seat Metros. . . . The average travel time was reduced and there was ample capacity to meet consumer demand. The estimated fuel consumed in serving Hot Springs in 1978 was about 2.5 million gallons. In 1980 it was just under 600,000 gallons. At a dollar a gallon, this higher quality service saved the industry and consumers $1.9 million dollars. We have not attempted to figure out the total savings from the substitution of turbo-prop equipment throughout the system, but it is obviously immense.

Id.
move in smaller community service from jet planes to small turbo prop planes is indicative of the benefits of deregulation. "Certainly a stringent system of regulation could ensure some small cities a continuation of their jet service, but the service provided would probably not be as good and the costs to the taxpayer would be very high."

An objection frequently raised by smaller communities to the CAB's defense of deregulation is that loss of service must be measured qualitatively as well as quantitatively. One commentary critical of the CAB pointed out that "[a]lthough the [CAB] has provided elaborate departure statistics in an attempt to prove that deregulation was a brilliant success, it has provided no statistics with respect to the corresponding qualitative loss that many small communities have experienced." Indeed, some of the CAB's own data now shows that there has been a quantitative loss of service to small communities.

The CAB has drawn much criticism from disgruntled small communities for the way in which it implemented the essential air services determinations. A congressman from Cali-

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113 Id. at 3. For 35 of the 50 cities that went through the transition from jet service to turbo-prop service, there was more frequent service on April 1, 1980, than on April 1, 1978. In all cities the available seats were more than adequate to accommodate the traffic. Id.

114 It's Working, supra note 111, at 3.

115 See Dempsey, Rise and Fall of Civil Aeronautics Board—Opening Wide the Floodgates of Entry, 11 TRANSP. L.J. 91, 178 n.428 (1979) [hereinafter cited as Dempsey]. In many small communities, the replacing commuter airline is willing to replace the service abandoned by a larger carrier. But, even though the community may still have as many departures, the service provided may nevertheless be to less convenient points at less convenient times, at a far less capacity. The service may also be less satisfactory in terms of safety and dependability. Id.

116 Id.

117 See notes 165-176 and accompanying text infra.

118 See Av. DAILY, Oct. 25, 1979, at 294. Commenting on deregulation one year after implementation, one Californian stated that:

Kern County's experience with deregulation reads like a sequel to the last days of Pompeii. Robert Ripley would not believe what has happened here. Since deregulation we have lost our Las Vegas service. Despite Air Pacific's representations, San Francisco enplanements have fallen 40% and we are fighting to retain service to Los Angeles, where United's requested departure would mean a 90% loss in our en-
fornia asserted that the "economics theorists at the Board have arrived at a supposed level of self-sufficiency for air carrier service and have adopted that level as essential air service for each community without regard to community needs. This has given deregulation a negative image in small communities."\footnote{1}

The small communities' assertions that their needs are being ignored are in direct conflict with the purported policy behind the approach\footnote{2} that the CAB took in making the essential service determinations.\footnote{3} In fact, the determinations were not finished for over six months past the statutory deadline,\footnote{4} due to the large amount of local input that the Board requested in conjunction with the guidelines for essential service and the specific determinations that were made for each community.\footnote{5} One of the major problems leading to dissatisfaction according to Chairman Cohen is that every community sees itself as being unique.\footnote{6} The needs of the communities must be met, but Cohen does not want the agency to knuckle

tire air service prior to deregulation. We are reconsidering our local ordinance against hitchhiking. We do not oppose deregulation. Rather, we think CAB erred in its treatment of Bakersfield and take little comfort from the belated admissions to this effect by the CAB staff.

\footnote{1} Id. at 295.
\footnote{2} See notes 48-55 and accompanying text \textit{supra}.
\footnote{3} See \textit{Av. Daily}, June 12, 1980, at 237. CAB member George Dailey sees the success of deregulation as inevitably linked to the Board's explaining its small community program satisfactorily. He stated that a "continuing program of community outreach—including personal appearances by board members when necessary, is crucial to the stability of the essential service program." \textit{Id}.
\footnote{4} 49 U.S.C.A. § 1389(a)(2)(A) (West Supp. 1981). This section states that, "after considering the views of any interested community and the State agency of the State in which such community is located" the Board was to have all essential service determinations completed by October 24, 1979. As of April 21, 1980, 90 percent of the determinations had been made. \textit{Av. Week & Space Tech.}, April 21, 1980, at 25.
\footnote{5} In explaining why the essential service determinations were going to be delayed, Chairman Cohen wrote: "[R]ather than develop our guidelines for essential air service determinations in a vacuum, we elect to hold a series of regional meetings throughout the country to get the greatest possible input from the states and affected communities." Letter from Marvin M. Cohen to Howard W. Cannon (Oct. 23, 1979), \textit{reprinted in Av. Daily}, Nov. 5, 1979, at 18.
\footnote{6} See \textit{Av. Daily}, Dec. 17, 1979, at 237.
under to what he sees as unreasonable community demands: "If we do just whatever the community wants, I think it will destroy the program."125

It is clear however, that many communities feel that their needs are not being met by the essential services program.126 An ad hoc group of United States airport officials is attempting to gather support for some proposed amendments to the ADA aimed at tailoring essential services more toward community needs.127 One suggested amendment would redefine essential air service as the level of service necessary to meet historic passenger demands including service to hub airports.128 Another proposed amendment would attempt to include some protection of point-to-point service of communities in addition to the provision that an airport or community be provided with service to a hub operation.129 The chairman of the ad hoc group believes that amending the law in Congress is the only way to gain some relief for small and medium sized communities.130

The American Association of Airport Executives has endorsed by resolution the proposed amendments because it believes the "CAB’s current guidelines for essential service are unresponsive to the air service needs of small and medium

125 Av. Daily, Nov. 7, 1979, at 33.
126 See Av. Daily, Aug. 4, 1980, at 185. Appeals have been filed by 100 of the 560 communities which received essential service determinations, and over fifteen more appeals are expected. Id.
128 Id. This proposed amendment would replace the current 80 seat per day guarantee adopted by the CAB, termed "inadequate" by the ad hoc group. Id.
129 Id. This proposed amendment was added in an effort to attract interest of medium sized airport operators whose airports have lost point to point service under deregulation. Two other amendments that are also being circulated in draft language by the ad hoc group are: (1) to extend the time in which airlines may exit from airports from 90 days' notice to 18 months' notice for a three-year period, and to twelve months' notice thereafter; and (2) to require exiting carriers to provide sufficient fuel to a replacement carrier at a fair market price. Id.
130 Timothy L. Campbell, Executive Director, Patrick Henry International Airport, Newport News, Va., who is the chairman of the ad hoc group, stated that after a meeting last year between a group of airport operators and the CAB staff, "it was clear that the CAB had no intention to help out." Id.
sized communities." Other factions of the transportation industry are becoming concerned as well. In a resolution expressing concern about the decline of air service to small communities, the American Automobile Association has asked Congress to instigate oversight hearings to determine if airline deregulation is achieving its stated goals.

The most vocal opposition to the essential services determinations has come from several small and medium sized communities in West Virginia that have been hit hard by the effects of deregulation. Although the magnitude of the reduction in services has been much more severe in West Virginia than anywhere else in the country, the types of problems encountered in that state are demonstrative of the problems encountered by many small communities throughout the country. One of the biggest difficulties is selling commuter airline service to passengers who are used to traveling on the major airlines' jets. One commuter airline's President remarked that, "[t]he idea is to persuade travelers that the dark ages of aviation haven't descended just because the

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181 Av. Daily, June 18, 1980, at 271. The resolution was adopted at the AAAE's 52nd annual conference in Dallas. Id.

182 Av. Daily, Oct. 21, 1980, at 277. The resolution which was adopted at the AAA's annual meeting in Atlanta also expressed concern over sharp fare increases and significant employee dislocation. Id.

183 Av. Week & Space Tech., July 21, 1980, at 29. The director of the CAB Office of Community and Congressional Relations said West Virginia may have lost 35% of all small community service. Id.

184 See Av. Week & Space Tech., July 21, 1980, at 30. For example, Parkersburg, West Virginia which as of July, 1980, had 15 roundtrip market flights daily to various markets, was guaranteed 2 in its essential service determination. Morgantown had 17 and was guaranteed 4, Clarksburg had 23 and was guaranteed 4, Bluefield had 12 and was guaranteed 4, and Beckley had 10 daily roundtrips and was guaranteed only 4. Id.

185 The decrease in number of seats and flights available is part of a nationwide trend in small community air service. See notes 165-76 and accompanying text infra. Also, the qualitative loss of service due to a movement from local service to commuter carriers is a general problem in many markets. See notes 136-47 and accompanying text infra.

186 See Harris, Commuter Airlines Dress Up to Attract More Passengers, Wall St. J., Nov. 21, 1980, at 25, col. 4 [hereinafter cited as Harris]. Many passengers assume that the commuter airlines' eight to fifty seat planes are less safe, and flying on them smacks of second-class citizenship. Id.
big, deregulated trunk lines have stopped flying jetliners in many marginal markets." The commuter carriers however, have found this task to be extremely difficult. In West Virginia, the commuter carrier, Aeromech, Inc. for example, has tried to take up the slack left by the large carriers by flying eight commuter planes that are not pressurized and are much smaller than the major airlines' jets it replaced. One passenger commented that, "Aeromech works hard to overcome the commuter airline image and assure its customers the service is as safe and comfortable as a larger airline. But the aircraft and service cannot be as comfortable as that provided by a certificated airline."

The image and service problems of the commuter airlines are complicated by several factors. First, there are frequent problems in finding slots and facilities for commuter airlines in the major cities' terminals. In West Virginia's case, Aeromech's commuter flights from Washington, D.C.'s National Airport are relegated to a cramped commuter terminal, and in Pittsburgh, Pennsylvania, the commuters do not even have a terminal. Second, Aeromech's flights operate at a much lower altitude subjecting passengers to much more turbulence. Even though the passenger is provided with a better view of the landscape, the tradeoff is often discomforting. Third, most commuter airline cabins are too small to stand up

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187 Id. What the 250 commuter airlines have is a public relations problem. According to Skywest President, Jerry C. Atkin, "it's just in the passengers' head, but it is there." Id.


190 See Deregulation Hearings, supra note 107, at VII, 7-8. A number of key airports only have the facilities and capacity to accommodate fewer flights than the demand warrants and are thus slotted or restricted to a maximum number of operations. Id.


192 Id. at 29-30.

193 Id. at 30. But see Harris, supra note 136, at 25, col. 5: "[A]s passengers rediscover the beauties of the landscape, in contrast to the cloud top boredom of high flying jets, the commuter operators believe their service will seem even more attractive."
in and there are no stewardesses, meals, or amenities. Finally, many commuter aircraft are not pressurized, causing further discomfort for some passengers. These factors all lead to feelings of nervousness or displeasure which makes replacement commuter service hard to promote and, in many cases, a poor substitute for the small communities that were guaranteed essential service.

One phenomenon which indicates that essential air service is not meeting the needs of smaller communities is the response of corporations which have increased their investments in aircraft, in order to assure transportation for their executives and key personnel to plants and offices in smaller communities where service has been cut. Skyrocketing fares on the short-haul markets likewise have been a factor in forcing private industry to purchase its own aircraft. The CAB has been of little help in trying to keep fares from rising too rapidly in these smaller markets. In fact, under an interim pol-

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146 AV. WEEK & SPACE TECH., July 21, 1980, at 30. But see Harris, supra note 136, at 25, col. 5. Mississippi Valley Airlines, Inc., has recently purchased some larger foreign made commuter aircraft that are wide enough to allow them to employ on-board attendants to carry out its new wine and cheese service. Id.

146 AV. WEEK & SPACE TECH., July 21, 1980, at 30. For problems that unpressurized commuter aircraft cause to retired citizens in New Mexico and Arizona, see Deregulation Hearings, supra note 107, at 32-36.

147 See AV. WEEK & SPACE TECH., July 21, 1980, at 30. "Virtually every passenger talked to during recent commuter airline flights in West Virginia volunteered that he was uneasy about the service. At least two said they would not have flown if they had known they were booked on commuter aircraft." Id.

146 See WALL ST. J., Nov. 20, 1980, at 1, col. 5. The National Business Aircraft Association expects the nation's business aircraft fleet to increase at an average of at least 5 percent a year for some time to come. They also estimate that 36,000 companies are currently flying 65,000 aircraft. U.S. airlines fly a total of 2,500 planes. Id.

146 AV. WEEK & SPACE TECH., July 21, 1980, at 30. The Charleston, West Virginia, airport manager expressed private industries' position this way:

There are some companies that absolutely forbid their employees to fly on commuter airlines because they think they are being ripped off by the cost of the ticket, ... and mostly because of the safety aspect.

... The businesses have come to the conclusion that they have no choice but to buy their own airplane because they don't have the airline service they need. In some cases four or five small businesses have gone together to buy an airplane and hire a pilot.

Id. at 31.

146 See 49 U.S.C.A. § 1482(e)(1) (West Supp. 1981). This section of the ADA re-
icy issued in May of 1980, the Board allowed total flexibility in fare structuring for markets under 200 miles, while setting ceilings on other markets.\textsuperscript{181} This policy was revised approximately four months later, after the CAB received sharp criticism from several senators for its discrimination against small communities.\textsuperscript{183}

Besides increasing transportation costs for companies already doing business in many small communities, the impact of deregulation is decreasing the attractiveness of locating new businesses in these communities.\textsuperscript{183} West Virginia, in its third year of a $300,000 per year advertising campaign to attract new business, is extremely concerned because "business looks at air service as a factor in locating."\textsuperscript{154} Industries that are not fully established in small communities are left extremely vulnerable\textsuperscript{166} when passenger service is drastically reduced. State and federal funds previously invested to upgrade airport facil-

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\textsuperscript{181} WALL. ST. J., Sept. 25, 1980, at 4, col. 2. Under the interim policy, the CAB had set a fare flexibility limit of 50 percent for routes of 201-400 miles and 30 percent for longer routes. When limits were finally put on the short-distance markets, airlines were allowed to raise those fares $15 plus 30 percent a year above the cost based fare level that the agency regularly sets. Id.

\textsuperscript{182} Two of the leading critics were Senate Commerce Committee Chairman Howard Cannon (D-Nev.), see AV. DAILY, May 15, 1980, at 81, and former Senate majority leader Robert Byrd (D-W.Va.), see AV. DAILY, May 21, 1980, at 114.

\textsuperscript{183} See Dempsey, supra note 115, at 179 n.428. Chambers of Commerce have begun to worry about their ability to attract new industry and tourism with reduced air passenger service. Transportation like communications and energy is a fundamental component of national, regional and local economic development. If any of these vital components is deficient, either from a qualitative or quantitative standpoint, investment in industrial plants is not as likely to be forthcoming, and existing industry may relocate elsewhere. Id.

\textsuperscript{184} BUS. WEEK, June 23, 1980, at 64.

\textsuperscript{166} See Deregulation Hearings, supra note 107, at 67. The mayor of Providence, Rhode Island, pointed out his city's vulnerability. "You can't go into the convention business. You can't keep up the jewelry trade which manufactures 66-\%\textsuperscript{2} percent of the world's costume jewelry or develop a convention service when Air New England is your major carrier to New York." Id.
ities are effectively wasted.166

The subsidy provisions under section 419 were intended by Congress to insure that the eligible small communities under the program actually received the air service determined to be essential for such communities.167 Nevertheless, the Board's emphasis on saving subsidy money whenever possible, instead of seeing that the service needs of the community are met, is weakening the effectiveness of the subsidy.168 Because the Board takes this stance, many small carriers are reluctant to ask for needed subsidies due to their belief that the Board will always give the routes to the carrier that does not request subsidy, regardless of any other factors.169 This practice encourages small carriers to gamble to a greater extent in their financial planning before providing service to the small communities.169 As a result, these small carriers experience a greater percentage of failures, which has the immediate effect of further disrupting service.170 According to one state aviation director, "[i]f the Board in its selection process will listen

166 Id. at 6. "Some airlines are deserting many of our airports into which Congress has poured literally millions of dollars over many years for construction and improvement, often at the urging of these same airlines. And there are many instances in which the local communities themselves have spent money to upgrade and improve their airports." Id. (statement of Senator Robert Byrd). An example given by William Richards, executive director of the West Virginia Aeronautics Commission is that "West Virginia had just completed a project to upgrade most of its major airports to handle two-engine and three-engine jet aircraft just before the major airlines that operate such aircraft began pulling out of the state." AV. WEEK & SPACE TECH., July 21, 1980, at 31.

167 See Commuter Airlines, supra note 29, at 694-95.
168 See AV. DAILY, July 9, 1980, at 44. The State of New Mexico's initial appeal of its essential services determinations cited "an apparent reluctance by the Board to subsidize air service, even where a near term subsidy would contribute to the stability of the carrier and minimize long-term subsidy requirements." Id. In situations where a replacement carrier is needed to serve a community being exited by an unwilling carrier, Chairman Cohen has supported a practice of paying a hold-in subsidy to the unwilling carrier instead of paying an up-front subsidy to an untried commuter. Cohen stated that "the Board, heeding public views, did not wish to corrupt commuters, which have been successful in the unregulated marketplace, by conveying the attitude that subsidy always would be paid." AV. DAILY, Feb. 6, 1980, at 204.

169 See Deregulation Hearings, supra note 107, at 30-31 (impression of Senator Howard Cannon).
170 Id.
171 Id.
responsively to the desires of the community, it will, to a large
degree, insure a satisfied, well-served public. Competing appli-
cations to provide service can then be judged by which pro-
vides the best service rather than which is cheapest." The 
CAB has taken notice of the various communities’ desires 
when selecting subsidized carriers to provide air service under 
section 419, but the small communities’ interests are fre-
quently outweighed by the Board’s concern that the section 
419 program will grow into the multi-million dollar operation 
the old subsidy program has become. 

Recent statistics show that quantitatively a majority of 
smaller communities are receiving worse service under deregul-
ation. Scheduled departures from non-hubs communities 
have decreased steadily since November of 1979 at a much 
 faster rate than any of the other various classifications of hub

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163 Id. at 106 (opinion of Wayne C. Anderson, Director of Aeronautics, Nebraska Aeronautics Commission).

164 Av. Daily, Dec. 17, 1979, at 237; Av. Daily, Feb. 27, 1980, at 333. This concern of the Board was voiced by Chairman Cohen during hearings on whether to grant subsidy to Air North or Empire Airlines for service to three communities to upper New York. Air North had proposed a $345,000 annual subsidy but also the use of larger aircraft than Empire had proposed to provide at the cost of $99,000—$206,000 annually. The communities’ unanimous choice was Air North. Despite a fear of setting an unwise precedent, the Board selected Air North. Id. More recently, the Board sided with Scheduled Skyways over an untested airline, South Central, for subsidized service at two Arkansas communities. Despite substantial financial backing and community support for South Central, the Board picked Scheduled Skyways mainly because of its lower proposed subsidy. Av. Daily, Aug. 25, 1980, at 309-10; Av. Daily, Sept. 15, 1980, at 75.

164 In 1980, government payments to airlines are expected to be $86.8 million under the 406 subsidy program and $9.4 million under the 419 subsidy program. The largest recipient of 419 subsidy for 1980 will be United Airlines, which is expected to receive $2.2 million for continuing air service in six markets by order of the CAB. The rate of return which the carriers are pushing for in 419 subsidies is a 12 percent return on investment. Av. Week & Space Tech., May 12, 1980, at 22. However, the CAB staff has been experimenting with a profit based on the carrier’s operating expenses. A 10 percent profit based on operating expenses was used as a test with Air Kentucky’s proposed subsidy rate in the London/Corbin-Louisville market. Av. Daily, April 2, 1980, at 177. As of September 30, 1980, 23 airlines have received subsidy under 419 since its inception. Almost $8 million has been spent compensating unwilling carriers for losses incurred while slightly over $1 million has been spent establishing essential service. Subsidy Paid to Air Carriers under 419 as of September 30, 1980 (unpublished CAB memo).
cities. Of the 526 non-hub communities in the national air system, 276 experienced fewer departures in July of 1980 than were occurring in July of 1978, as opposed to 200 non-hubs which experienced an increase in departures in July 1980.


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TRENDS IN SCHEDULED AIRCRAFT DEPARTURES,
BY HUB SIZE

February 1979-July 1980

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<td>-5.8</td>
<td>-1.2</td>
<td>-3.7</td>
</tr>
<tr>
<td>May '80</td>
<td>-8.1</td>
<td>-4.5</td>
<td>-5.3</td>
<td>-1.9</td>
<td>-4.1</td>
</tr>
<tr>
<td>June '80</td>
<td>-10.5</td>
<td>-3.6</td>
<td>-5.8</td>
<td>-1.7</td>
<td>-4.5</td>
</tr>
<tr>
<td>July '80</td>
<td>-13.4</td>
<td>-2.7</td>
<td>-6.1</td>
<td>-3.1</td>
<td>-5.7</td>
</tr>
</tbody>
</table>
compared to July 1978.\textsuperscript{166} Comparing July 1, 1979 to July 1, 1980, seventy communities which were receiving some service

\textsuperscript{166} Id. at 51.

Table 5

AIRCRAFT DEPARTURES BY HUB SIZE
(48 States)
July 1, 1980 vs. July 1, 1978

<table>
<thead>
<tr>
<th>Hub Class</th>
<th>No. of Communities</th>
<th>Departures Per Week</th>
<th>Increase or decrease</th>
<th>Percent Change</th>
</tr>
</thead>
<tbody>
<tr>
<td>Large</td>
<td>26</td>
<td>66,875</td>
<td>71,052</td>
<td>4,177</td>
</tr>
<tr>
<td>Medium</td>
<td>33</td>
<td>20,181</td>
<td>20,603</td>
<td>422</td>
</tr>
<tr>
<td>Small</td>
<td>76</td>
<td>15,275</td>
<td>15,841</td>
<td>566</td>
</tr>
<tr>
<td>Nonhub</td>
<td>526</td>
<td>27,539</td>
<td>26,730</td>
<td>-809</td>
</tr>
<tr>
<td>Total</td>
<td>661</td>
<td>129,870</td>
<td>134,226</td>
<td>4,356</td>
</tr>
</tbody>
</table>


DISTRIBUTION OF DEPARTURE CHANGES BY HUB SIZE

<table>
<thead>
<tr>
<th>Change</th>
<th>Number of Hubs</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Large</td>
</tr>
<tr>
<td>Increase</td>
<td>20</td>
</tr>
<tr>
<td>No Change</td>
<td>0</td>
</tr>
<tr>
<td>Decrease</td>
<td>6</td>
</tr>
</tbody>
</table>

| Passenger Enplanements 2/ (million) | 181.4 | 48.2 | 25.8 | 5.9 | 261.3 |

\textsuperscript{1} Including departures to all destinations by all carriers, including foreign flag.

\textsuperscript{2} \textit{Airport Activity Statistics}, year ended December 31, 1978.

Enplanements at certificated points in the 50 states by certificated carriers.

\textit{Id.}
have now lost it," while only sixteen communities have

187 Id. at 73
started to receive service in 1980 after being without any service in 1979.168

When an analysis is done in terms of seats available to a community, it becomes evident that even service to cities that the CAB has used as positive examples of deregulation has decreased quantitatively.169 In Salem, Oregon, departures are up 46.3 percent in July, 1980, as opposed to July, 1978, but the number of seats available has decreased 34.8 percent.170 In Hot Springs, Arkansas, departures have increased 147 percent, but available seats have increased only 1.6 percent.171

These statistics, showing a decrease in the number of departures and seats available from small communities, do not necessarily indicate that the communities are receiving less efficient service. If average load factors172 had increased since deregulation, then the service now provided would be more efficient. The average load factors, however, have decreased on flights serving non-hub markets since the implementation of deregulation,173 which proves that smaller communities are receiving markedly worse air service than existed prior to deregulation. The CAB argues that the recession and rising fuel costs are the causes behind the decline in service.174 This ar-

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168 Id. at 74.

169 Chairman Cohen has used Waco, Texas and Salem, Oregon as examples of communities that have been pleased with their commuter service. See A Study in Transition, supra note 110, at 699. Hot Springs, Arkansas, has also been highlighted by Cohen. See Address, supra note 112, at 4.

170 CAB Report, supra note 165, at 80.

171 Id. at 77.

172 See note 63 supra for a definition of average load factor.

173 See CAB Report, supra note 165, at 103.
PERCENTAGE CHANGE IN TRAFFIC, CAPACITY AND LOAD FACTORS BY HUB CLASSIFICATION
May 1980 vs. May 1978, Domestic 48-State Operations, Certificated Air Carriers

<table>
<thead>
<tr>
<th>Hub Classification</th>
<th>Number Segments</th>
<th>Percent Change</th>
<th>Passenger Per Segment</th>
<th>Pt. Chg.</th>
<th>L.F.</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>May 80</td>
<td>May 78</td>
<td>Dept.</td>
<td>Passengers</td>
<td>Seats</td>
</tr>
<tr>
<td>Non-Hub to Non-Hub</td>
<td>102</td>
<td>237</td>
<td>-54.3</td>
<td>-57.8</td>
<td>-44.7</td>
</tr>
<tr>
<td>Non-Hub to Smal-Hub</td>
<td>102</td>
<td>204</td>
<td>-45.3</td>
<td>-45.8</td>
<td>-39.2</td>
</tr>
<tr>
<td>Non-Hub to Med-Hub</td>
<td>58</td>
<td>108</td>
<td>-56.5</td>
<td>-54.4</td>
<td>-45.1</td>
</tr>
<tr>
<td>Non-Hub to Lge-Hub</td>
<td>161</td>
<td>278</td>
<td>-49.1</td>
<td>-48.9</td>
<td>-40.6</td>
</tr>
<tr>
<td>Smal-Hub to Smal-Hub</td>
<td>84</td>
<td>110</td>
<td>-26.4</td>
<td>-28.6</td>
<td>-15.7</td>
</tr>
<tr>
<td>Smal-Hub to Med-Hub</td>
<td>147</td>
<td>168</td>
<td>-26.8</td>
<td>-26.9</td>
<td>-22.5</td>
</tr>
<tr>
<td>Smal-Hub to Lge-Hub</td>
<td>321</td>
<td>355</td>
<td>-13.8</td>
<td>-13.6</td>
<td>-7.4</td>
</tr>
<tr>
<td>Med-Hub to Med-Hub</td>
<td>83</td>
<td>94</td>
<td>-33.0</td>
<td>-34.9</td>
<td>-27.3</td>
</tr>
<tr>
<td>Med-Hub to Lge-Hub</td>
<td>453</td>
<td>421</td>
<td>1.9</td>
<td>1.7</td>
<td>8.5</td>
</tr>
<tr>
<td>Lge-Hub to Lge-Hub</td>
<td>357</td>
<td>340</td>
<td>5.9</td>
<td>6.2</td>
<td>14.5</td>
</tr>
<tr>
<td>All Segments</td>
<td>1,868</td>
<td>2,315</td>
<td>-11.7</td>
<td>-7.0</td>
<td>0.03</td>
</tr>
</tbody>
</table>
gument, however, would account only for average load factor decreases that are proportionate to those that have occurred in larger markets. In fact, the average load factors on non-hub routes have decreased at a much greater proportion than the other routes in the air transportation system.

IV. Conclusion

It is evident that, due to deregulation, air service to small communities has decreased both qualitatively and quantitatively. In view of this decrease, it is difficult to say that the needs of these smaller communities have been adequately protected by the CAB. Essential service determinations can and should be upgraded when appealed to the Board, if the economic viability of the affected community will otherwise suffer. The section 419 subsidies should be used to insure comfortable, convenient, and consistent air service by smaller airlines that are providing the replacement service to these communities.

After two years of functioning in a deregulated environment, it is apparent that the airline industry will continue to need some form of regulation in order to insure that smaller communities receive a quality of air service necessary to foster their economic growth.

174 See Address, supra note 112, at 1.
175 For the average load factor decreases in larger markets see CAB Reports, supra note 165, at 103. Theoretically, recessionary factors should have an equal effect on all markets.
176 Id.
177 See notes 136-47 and accompanying text supra.
178 See notes 165-76 and accompanying text supra.
179 See Av. Week & Space Tech., July 21, 1980, at 31. A lack of adequate air service stunts community growth creating a vicious circle in which a city does not grow enough to justify adequate air service. The reason the community does not grow is because it does not have adequate air service. Id.
180 See Deregulation Hearings, supra note 107, at 64 (remarks of Vincent Cianci, Mayor of Providence, Rhode Island). "[T]he implementation of the Deregulation Act, without a suitable compensatory modification of the definition of essential air services to ensure comfortable and convenient air service by major carriers, will most certainly destroy the whole commercial and industrial expansion of medium sized cities." Id.
181 See Av. Daily, Oct. 31, 1980, at 342. Economist John Kenneth Galbraith predicts that some form of the CAB will return in the future because regulation of the airline industry cannot be avoided. Id.
182 See Dempsey, supra note 115, at 179, n.428.
Clearly there is more at stake than the sanctity of the marketplace. There is a public interest in assuring that the fundamental ingredients of economic growth are abundant in all regions of our nation, so that the fruits of such growth might be enjoyed by a larger segment of the population.\textsuperscript{183}

Under section 419, the CAB has the authority to make sure that small communities are not harmed by deregulation.\textsuperscript{184} However, if the concerns of many of the small communities continue to be effectively ignored, new legislation will have to be implemented to insure that the air service needs of these communities are met.\textsuperscript{185}

\textsuperscript{183} Id.

\textsuperscript{184} See notes 49-53, 95-102 and accompanying text \textit{supra}.

\textsuperscript{185} See \textit{Deregulation Hearings, supra} note 107, at 117 (Statement of Senator George McGovern).
Perceptive student, sensitive teacher, gracious friend.

LAURA KESSELMAN DEVLIN
Class of 1982
1938-1981

A WIND sways the pines,
And below
Not a breath of wild air;
Still as the mosses that glow
On the flooring and over the lines
Of the roots here and there.
The pine-tree drops its dead;
They are quiet, as under the sea.
Overhead, overhead
Rushes life in a race,
As the clouds the clouds chase;
And we go,
And we drop like the fruits of the tree,
Even we,
Even so.

Dirge in Woods by George Meredith