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DEPARTMENT OF TRANSPORTATION

Office of Aviation Analysis

49 CFR Part 398

Docket No.: OST-2014-0061

Essential Air Service Enforcement Policy

AGENCY: **Office of Aviation Analysis (X50), Department of Transportation (DOT).**

ACTION: **Final Notice of Enforcement Policy**

SUMMARY: This notice of enforcement policy announces how the Department of Transportation (DOT or Department) will enforce compliance with the requirements of the Department of Transportation and Related Agencies Appropriations Act, 2000, which prohibits the Department from subsidizing Essential Air Service (EAS) to communities located within the 48 contiguous States receiving per passenger subsidy amounts exceeding \$200, unless the communities are located more than 210 miles from the nearest large or medium hub airport. All communities receiving subsidized EAS have until September 30, 2015, based on data from October 1, 2014 through September 30, 2015, to ensure compliance with the \$200 subsidy cap or face termination of subsidy eligibility. After September 30, 2015, the Department will enforce the \$200 subsidy cap on an annual basis based on data compiled at the end of every fiscal year. Consistent with established procedures, DOT will issue a show-cause order to each EAS community that has been identified as failing to meet the \$200 per passenger subsidy requirement. Each such community will have a fair and reasonable opportunity to demonstrate compliance with the \$200 subsidy cap prior to a final decision by DOT. In addition, any community that is deemed ineligible under the \$200 subsidy cap provision may petition the

Secretary for a waiver. After receiving a community's petition for a waiver, the Secretary may waive the subsidy cap for a limited period of time, on a case-by-case basis, and subject to the availability of funds. To provide the Department with sufficient time to evaluate the FY 2015 data for potentially affected communities, DOT does not intend to issue any show-cause orders concerning compliance with the \$200 subsidy cap until 2016.

DATES: This enforcement policy is effective [THIRTY DAYS FROM DATE OF PUBLICATION IN FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: For technical questions concerning this action, contact Kevin Schlemmer, Chief, Essential Air Service and Domestic Analysis Division, Office of Aviation Analysis, Department of Transportation, 1200 New Jersey Avenue, SE, Room W86-309, Washington, D.C. 20590; telephone: (202) 366-3176; Kevin.Schlemmer@dot.gov. For legal questions concerning this action, contact Claire McKenna, Attorney, Office of the General Counsel, Department of Transportation, 1200 New Jersey Avenue, SE, Room 96-309; telephone: (202) 366-0365; email: Claire.McKenna@dot.gov.

SUPPLEMENTAL INFORMATION:

Background

The Airline Deregulation Act, passed in 1978, gave airlines significant flexibility to determine which markets to serve domestically and what fares to charge for that service. The United States Congress (Congress) established the EAS program to guarantee that small communities that were served by certificated air carriers before deregulation would maintain at least a minimum level of scheduled air service after airline deregulation. Since its inception, the EAS program has provided a vital link for eligible small communities to the National Airspace

System (NAS). Indeed, this program ensures that small communities across America can tap into the economic and quality of life benefits that scheduled air services offer.

Over the years, Congress has made a number of statutory changes to the program (most recently in 2011 and 2012), but the fundamental purpose of the program remains unchanged. Given the socio-economic importance of this program, DOT remains committed to preserving the EAS program for eligible communities and ensuring the sustainability of the program for the future.

This enforcement policy concerns the statutory mandate that prohibits DOT from providing EAS funds to any carrier to serve any community in the 48 contiguous states that requires a per-passenger-subsidy in excess of \$200 unless the community is located more than 210 miles from the nearest large or medium airport. Congress first imposed a \$200 subsidy per passenger cap for communities in the 48 contiguous States in Fiscal Year 1990 appropriations language. Such language was repeated in several later appropriations acts throughout the 1990s, and was made permanent by the Department of Transportation and Related Agencies Appropriations Act, 2000, Public Law 106-69, 113 Stat. 986 (Oct. 9, 1999). Specifically, the Act provides that:

Hereafter, notwithstanding 49 U.S.C. 41742, no essential air service subsidies shall be provided to communities in the 48 contiguous States that are located fewer than 70 highway miles from the nearest large or medium hub airport, or that require a rate of subsidy per passenger in excess of \$200 unless such point is greater than 210 miles from the nearest large or medium hub airport.

The Department has always expected communities less than 210 miles from a large or medium hub airport¹ to work together with air carriers providing EAS to keep the subsidy per passenger below the \$200 cap or risk termination of eligibility for EAS subsidy. DOT has also routinely provided notice of this statutory mandate to communities that were or appeared to be at risk of exceeding the cap, and a number of EAS communities have lost their eligibility as a result of this requirement.

Although the \$200 subsidy cap is a longstanding statutory provision, in 2012, Congress added a provision that allows the Secretary to grant waivers in limited circumstances. To effectuate that new provision and to ensure the fair and consistent treatment of all EAS communities subject to the \$200 subsidy cap prospectively, DOT published a notice of proposed enforcement policy on May 1, 2014, seeking public comments on a proposed policy to enforce the \$200 subsidy cap. Comments on the proposal were due June 30.

The Department received seven comments on the proposed policy. All of the commenters noted that the \$200 subsidy cap established by the Department of Transportation and Related Agencies Appropriations Act, 2000, Public Law 106-69, 113 Stat. 986 (Oct. 9, 1999), has not kept up with the pace of inflation, and that enforcement of the cap would impose a hardship on EAS communities and be contrary to the EAS program's objectives (to ensure these communities have air service). We recognize these comments; however, the requirements of the statute do not provide us with discretion to adjust the subsidy cap amount or refrain from enforcement.

One commenter offered several suggested changes to the proposed enforcement policy, such as: (1) the subsidy cap should be calculated based on actual subsidy paid, not the estimates

¹ Consistent with longstanding practice, DOT calculates the shortest driving distance between an EAS community and a large or medium hub airport from the center of the EAS community to the entrance of the nearest large or medium hub airport as determined by the Federal Highway Administration.

provided in the carrier's proposal that form the basis of the subsidy award in the selection order; (2) enforcement of the subsidy cap should be based on the contract term, not the fiscal year – so as to not disadvantage carriers and communities that will be mid-contract at the time of the enforcement action in 2016 (and each year after that); and (3) communities should be permitted to refund funds to the Department, or contribute funds to carriers so that the Federal Government's share of the subsidy is below the subsidy cap. We appreciate these suggestions.

First, regarding the suggestion that the calculation be based on actual subsidy paid, the method of calculating per passenger subsidy described in the Notice of Proposed Enforcement Policy reflects the Department's long standing practice. This method formed the basis of the enforcement actions taken under this provision since it first appeared in appropriations language in 1990. Carriers and communities are familiar with the use of this methodology and we do not, at this time, believe that a change is warranted. Moreover, if a community were over the \$200 per passenger cap based on the Department's traditional application, but under \$200 based on actual subsidy payments, the community could object to a tentative finding in the show-cause order or raise this point in a petition for waiver, and the Department would then assess those arguments on a case-by-case basis.

Second, with respect to the comment on enforcement by contract term, rather than fiscal year, the Department believes it has given all of the affected parties ample time to come into compliance with the subsidy cap by delaying enforcement until 2016. In addition, while most EAS subsidy contracts have a two-year term, there are several that are for four-year, or even five-year, terms. The Department believes it would not be fiscally prudent, or fair to communities operating under a two year contract, to permit communities with subsidy caps well in excess of \$200 per passenger to be essentially excused from this statutory requirement for

many years simply because they are operating under longer EAS contracts. While we recognize that there may be some drawbacks to enforcement on a fiscal year basis, there are also drawbacks to a contract-based approach, as noted in the preceding sentence. With this in mind, the Department will move forward with the fiscal year based approach described in the Notice of Proposed Enforcement Policy. We believe that this approach is the most fair to communities, given the variety of contract terms, and is consistent with the practice for enforcement of other EAS eligibility requirements, such as the requirement that EAS communities enplane ten or more passengers per day. 49 U.S.C. 41731(a)(1)(B). The Department intends to publish quarterly calculations of per passenger subsidies at EAS communities on its website. We believe that this will further support communities in their efforts to remain below the subsidy cap by providing them with on-going notice of their per passenger subsidy amounts that will hopefully facilitate proactive discussions between communities and carriers to address potential threats to their continued eligibility well in advance of any enforcement action by the Department.

Third, regarding the suggestion that communities be able to remit funds to the Department to lower its subsidy per passenger, section 323 of Public Law 106-69 (Oct. 9, 1999) states that “no [EAS] subsidies shall be provided” to communities that require a rate of subsidy in excess of \$200 per passenger. The Department has consistently construed this not as a limit on the Department’s ability to pay more than \$200 per passenger, but rather, as an overall limitation on *any* subsidy payment for EAS service when the required subsidy is in excess of \$200 per passenger. See DOT Order 89-12-52 (Dec. 29, 1989) (finding that the subsidy cap “was a disqualification for any subsidy at a point that exceeded” the cap). Thus, we do not believe that the statute permits this approach.

Having carefully considered the comments received and the statutory requirements for eligibility, we are finalizing the enforcement policy proposed in the Notice of Proposed Enforcement Policy, as follows:

Enforcement Policy

The Department will begin enforcement of the \$200 subsidy cap in 2016, based on data compiled from October 1, 2014, through September 30, 2015, as described in this policy. The Department will continue enforcement of the \$200 subsidy cap on an annual basis based on data compiled at the end of every fiscal year and submitted to DOT after the close of the most recent fiscal year.

If after September 30, 2015 (and each September 30 thereafter for the preceding fiscal year), a particular community's subsidy per passenger is above \$200 (as measured on an annual basis) and its location is less than 210 miles from a large or medium hub airport, the Department will initiate proceedings, consistent with 49 U.S.C. 41733(f) and Public Law 112-95 (Feb. 14, 2012), Section 426(c), directing interested persons to show cause why the Department should not terminate the eligibility of the community in question under the EAS Program. This process will provide each potentially affected community with a fair and reasonable opportunity to demonstrate compliance with the \$200 subsidy cap prior to a final decision by DOT.

Communities are reminded that the EAS program contains certain statutory protections that may be invoked by an EAS community adversely affected by the \$200 per passenger subsidy cap. First, in the event that DOT determines that a community is ineligible because it exceeds the \$200 subsidy cap provision in a given fiscal year, the community may petition the U.S. Transportation Secretary for a waiver pursuant to Pub. L. 112-95, Sec. 426(c) (Feb. 14, 2012). Under this provision, “[s]ubject to the availability of funds, the Secretary may waive, on

a case-by-case basis, the subsidy-per-passenger cap.” The law further provides: “A waiver . . . shall remain in effect for a limited period of time, as determined by the Secretary.” Second, a community that is deemed ineligible for subsidy based on the \$200 subsidy cap may submit a proposal to the Secretary for restoration of subsidy. Upon receipt of a proposal, the Department will restore the community’s subsidy eligibility if the Secretary determines that the rate of the per passenger subsidy under the proposal does not exceed \$200, and the proposal is likely to result in an average of more than 10 enplanements per day and is consistent with the EAS program’s other legal and regulatory requirements. 49 U.S.C. 41733(g).

Consistent with past practice and the Department’s obligations under 49 U.S.C. 41733(f)(2), DOT encourages potentially affected communities to work with air carriers providing subsidized EAS to maximize use of the service awarded under their respective carrier-selection orders to avoid exceeding the \$200 subsidy cap.

Issued in Washington, DC, on October 2, 2014.

Brandon M. Belford

Deputy Assistant Secretary for Aviation and International Affairs