



Order 2004-5-21

**UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY
WASHINGTON, D.C.**

Issued by the Department of Transportation
on the 24th day of May, 2004

Essential Air Service at

HAGERSTOWN, MARYLAND

under 49 U.S.C. 41731 *et seq.*

Served: May 27, 2004

DOCKET OST-2004-17010

**ORDER GRANTING MOTION FOR LEAVE TO FILE AND DENYING
PETITION FOR RECONSIDERATION**

Summary

By this order, the Department is granting the motion of Regional Aviation Partners (RAP) for leave to file a petition for reconsideration of Order 2004-3-19, issued March 18, 2004, and, upon review, denying RAP's petition.

Background

On January 30, 2004, Shuttle America filed a 90-day notice of its intent to suspend service at Hagerstown, effective May 1, 2004. The carrier, the only one providing service at Hagerstown, was providing four daily nonstop round trips between Hagerstown and Pittsburgh using 34-seat SAAB 340 aircraft.

On February 23, 2004,¹ the Hagerstown Regional Airport filed an Objection to Shuttle America's notice. The airport stated that "according to Mapquest.com, the airport is located 73.97 driving miles from Dulles International Airport." The Airport also stated that it "brings \$50 million of economic impact to its geographical region annually. When compared with non-commercial airports of equal operations, it is evident that the difference in economic impact is tens of millions of dollars less than Hagerstown annually." The Airport further stated that local, State and Federal agencies have spent millions of dollars and countless hours in air service to Hagerstown, and, should Shuttle America be permitted to terminate service without benefit of a replacement carrier to Pittsburgh or a US Airways-type hub, the community's investment and economic impact return would be lost, or, at the least, sorely diminished.

¹ Although the Objection was dated February 19, we did not receive it until February 23.

Finally, the Airport asserted that the loss of scheduled air service would jeopardize its eligibility for funding for its Aircraft Rescue Fire Fighting crews and equipment and put pilots, crews and passengers at risk.

On February 20, 2004, Shuttle America filed an answer to Hagerstown's objection. The carrier took issue with Hagerstown Airport's claims that the airport is 73.97 miles from Dulles. While sympathizing with the community's desire to maintain scheduled air service, the carrier noted that the Department previously conducted its own analysis some two years ago when Chautauqua Airlines filed a notice to suspend its service at Hagerstown, effective May 1, 2002. The Department at that time determined that Hagerstown was substantially less than 70 miles from Dulles. "Using a 1996 Rand McNally software program, we have measured the distance from the center of Hagerstown to the entrance of Dulles International Airport as 57 miles." (Order 2002-3-22, at p. 2.) Shuttle America stated that, based on this information, the Department concluded that Hagerstown "is within 70 driving miles of [Dulles], a large hub airport, and, thus, prohibited from paying subsidy for air service at Hagerstown under the Essential Air Service (EAS) program and is also precluded from requiring the carrier to continue service at the community after the end of the 90-day notice period."

On March 23, 2004, by Order 2004-2-19, the Department affirmed that Hagerstown is significantly less than 70 driving miles from Dulles International Airport, a large hub, and allowed Shuttle America to suspend its scheduled service.

Though not decisional, we note that effective May 2, Allegheny Airlines, another US Airways Express carrier, inaugurated service at Hagerstown and is providing four round trips a day to Pittsburgh with 37-seat aircraft.

Motion for Leave to File Petition for Reconsideration

On March 25, 2004, the Regional Aviation Partners (RAP) filed a motion for leave to file a petition for reconsideration of Order 2004-3-19, pursuant to Rule 6(d) of the Department's Rules of Practice. RAP asserts that it should be granted leave to file, despite the fact that it has not previously appeared as a party in this docket, because it only recently became aware that certain statutory issues were not addressed by the parties or the Department in Docket OST-2004-17010. RAP argues that Shuttle America is wrong in claiming that the law regarding mileage calculations has not changed and that the Department erred in failing to correct Shuttle America's statement. RAP cites section 409 of the recently passed Vision 100 -- Century of Aviation Reauthorization Act in its argument, claiming that Hagerstown's tentative termination of eligibility in Order 2002-3-22 falls squarely within the two-year window contemplated by the new law. Under Section 409, any community whose subsidy eligibility has been eliminated or tentatively eliminated by virtue of its being too close to a large or medium hub airport may request reinstatement on the basis of using "the most commonly used route" between the EAS community and the nearby airport.

Decision

We have decided to grant RAP's motion for leave to file a petition for reconsideration, and, upon review, we deny RAP's petition and affirm our decision in Order 2004-3-19 allowing Shuttle America to suspend service. RAP attempts to justify its motion for leave to file by stating that its

members are “keenly interested in the conduct of the Essential Air Service (“EAS”) program, and the legal arguments herein will aid the Department in resolving the subsidy eligibility issues involved in [other EAS] proceedings.” However, RAP does not claim to represent Hagerstown, nor has it given any indication that Hagerstown supports RAP’s motion. RAP further requests to have Order 2002-3-22 reconsidered, an Order that was final over two years ago. RAP’s argument that the finding in Order 2002-3-22 was never finalized is simply incorrect. Order 2002-3-22 clearly states, “If no objections are filed, all procedural steps will be deemed waived and this order shall become effective on the 21st day following the date of service.” The Order was self-executing. The Department received no objections, and, thus, the order became final.

RAP’s reliance on Section 409 of Vision 100 as permitting it to request reconsideration of the Department’s mileage determination is misplaced. That section affords “an eligible place” an opportunity to request a review of specified EAS eligibility. RAP is not an “eligible place,” and no eligible place has sought reconsideration here.

RAP also maintains that the Department should have acknowledged the community’s disputed distance argument, stated the applicable law, and provided the community with all available options under the law. In response, we would note that Section 409 is a matter of public record and is fully available to the public. In fact, as RAP pointed out in its Motion, the Department had such requests for Secretarial review from two other communities “on their desk” at the time.

RAP further argues that the Department should vacate order 2004-3-19 and hold Shuttle America in until and if Hagerstown seeks section 409 review. Vision 100 gives standing to request review to Hagerstown alone, and Hagerstown is capable of acting in its own interest. Moreover, as noted above, Allegheny Airlines began service in Hagerstown on May 2, 2004. Thus, RAP’s claimed harm to Hagerstown, that it will face a huge economic loss without air service, has not materialized.

Further, we note that no changes to Dulles’s hub classification or the highways have occurred that would change our finding in Order 2004-3-19. Dulles is still a large hub airport and the highways remain the same. As noted earlier, the community argues in their objection that, according to Mapquest.com, the airport is located 73.97 driving miles from Dulles, more than the 70 miles that would disqualify it. However, the community erred by computing the driving mileage between the airport and Dulles airport. The point of a mileage standard is clear: how far would people have to drive if there were no air service at their local airport? As a result, our longstanding program practice has been to measure from the *center* of the EAS community to the entrance of the nearest large or medium hub airport.² That measurement, even using Mapquest.com, is clearly less than 70 driving miles.

Based on all of the above, we grant RAP’s motion for leave to file a petition for reconsideration of Order 2004-3-19, and, upon review, deny its petition on the merits.

This order is issued under authority delegated in 49 CFR 1.56a(f).

² See, for example, Order 2000-12-8.

ACCORDINGLY,

1. We grant the Regional Aviation Partners' Motion for Leave to File a Petition for Reconsideration of Order 2004-3-19, and, upon review, deny the Petition; and
2. We will serve a copy of this order on the Mayor and Airport Manager of Hagerstown, Regional Aviation Partners, and Shuttle America.

By:

KARAN K. BHATIA
Assistant Secretary for Aviation
and International Affairs

(SEAL)

*An electronic version of this document is available on the World Wide Web at
<http://dms.dot.gov>*