



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

Issued by the Department of Transportation
On the 29th day of April, 2011

OpenSkies SAS

**Violations of 49 U.S.C. § 41712 and
14 CFR 399.84**

Docket OST 2011-0003

Served April 29, 2011

CONSENT ORDER

This consent order concerns violations by OpenSkies SAS (OpenSkies), a foreign air carrier, of the full fare advertising requirements specified in 14 CFR 399.84 and the statutory prohibition against unfair and deceptive practices, 49 U.S.C. § 41712. It directs OpenSkies to cease and desist from future violations of section 399.84 and section 41712, and assesses the carrier a compromise civil penalty of \$20,000.

Applicable Law

As a foreign carrier, OpenSkies is subject to the advertising requirements of Part 399 of the Department's rules. Pursuant to 14 CFR 399.84, advertisements specifying airfares must state the full price to be paid by the consumer. Under long-standing enforcement case precedent, the Department has allowed taxes and fees collected by carriers and ticket agents, such as passenger facility charges and departure taxes, to be stated separately from base fares in advertisements, so long as such taxes and fees are levied by a government entity, are not *ad valorem* in nature, i.e., not assessed as a percentage of the fare price, are collected on a per-passenger basis, and their existence and amounts are clearly indicated at the first point in the advertisements where a fare is presented so that consumers can immediately determine the full fare to be paid.¹ Thus, for example, fare

¹ On April 20, 2011, the Department issued a rule changing its enforcement policy with respect to section 399.84 to require that airlines and ticket agents comply with the rule as written. Under this new

advertisements that 1) fail entirely to identify the existence and amount of separate additional taxes and fees at the first point at which a fare is displayed, or 2) include only general statements regarding the existence of such taxes and fees, do not comply with section 399.84, or the Department's enforcement case precedent. Violations of section 399.84 constitute unfair and deceptive practices in violation of 49 U.S.C. § 41712.

With respect to Internet fare listings, additional charges that properly may be stated separately from the advertised fare may be disclosed through a prominent link placed adjacent to the stated fares that notes that taxes and fees are extra. The link must directly take the viewer to a pop-up, or to a place on a separate screen, where the nature and amount of taxes and fees are prominently and immediately displayed.²

Background

For a period of time during 2010, OpenSkies advertised certain fares on its homepage and "Special Offers" section of its website that did not contain notice of the amount or nature of additional taxes and fees that were excluded from the advertised fare at the first point in which the fares were displayed. Instead, these fares were followed by an asterisk that referred the reader to fine print below that stated, "o/w based on r/t purchase, taxes & fees extra..." There was no hyperlink proximate to the fares taking consumers directly to the full amount of additional taxes and fees. Rather, consumers who clicked on the advertisement were taken to a second page where they had to scroll down past the first screen to the bottom of that page to see the required tax and fee disclosures. Accordingly, OpenSkies' advertisements violated the Department's full-fare advertising rule, 14 CFR 399.84, and the prohibition against unfair and deceptive practices and unfair methods of competition, 49 U.S.C. § 41712.

Mitigation

In mitigation, OpenSkies states that this is a first time offense and that it is committed to compliance with all applicable governmental requirements and has fully cooperated with the Department in this matter. OpenSkies further states that this proceeding results from a limited promotion based on a template that had been developed prior to issuance of

enforcement policy, which is effective October 24, 2011, airlines and ticket agents must include all government taxes and fees in every advertised fare. The Department's long-standing prohibition on omitting carrier- or agent-imposed charges, such as fuel surcharges or convenience fees, from advertised fares remains in effect.

² For example, under current policies, a carrier or ticket agent could advertise a flight in the following manner: \$260 + Taxes and Fees with the taxes and fees language as a hyperlink that takes the viewer directly to the bottom of the screen, or to the place on a separate screen, where the nature and amount of taxes and fees are prominently and immediately displayed. See Department notices entitled "Disclosure of Air Fare Variations: Web vs. Other Sources, Surcharges that May be Listed Separately in Advertisements," dated November 4, 2004; "Disclosure of Additional Fees, Charges and Restrictions on Air Fares in Advertisements, Including 'Free' Airfares," dated September 4, 2003; and "Prohibition on Deceptive Practices in the Marketing of Airfares to the Public Using the Internet," dated January 18, 2001, available at: <http://airconsumer.ost.dot.gov/rules/guidance.htm>.

Order 2010-5-30 and, for that reason, may not have fully complied with what OpenSkies characterizes as the new requirements specified in that order. OpenSkies points out that at all times, its website, including the limited promotion at issue here, ultimately disclosed all applicable taxes and fees, and OpenSkies is not aware of any consumer complaint resulting from the promotion. Moreover, OpenSkies notes that it modified its website to fully comply with the Department's concerns immediately upon learning of those concerns.

Decision

The Office of Aviation Enforcement and Proceedings (Enforcement Office) has carefully considered the information provided by OpenSkies SAS but continues to believe that enforcement action is warranted. The Enforcement Office and OpenSkies SAS have reached a settlement of this matter in order to avoid litigation. OpenSkies SAS, without admitting any violation, consents to the issuance of this order to cease and desist from future violations of 49 U.S.C. § 41712 and 14 CFR 399.84 and to the assessment of \$20,000 in compromise of potential civil penalties otherwise due and payable pursuant to 49 U.S.C. § 46301.

This compromise assessment is appropriate considering the nature and extent of the violations described herein and serves the public interest. It represents a strong deterrent to future noncompliance with the Department's advertising requirements by OpenSkies SAS and other carriers.

This order is issued under the authority contained in 49 CFR 1.57a and 14 CFR 385.15.

ACCORDINGLY,

1. Based on the above discussion, we approve this settlement and the provisions of this order as being in the public interest;
2. We find that OpenSkies SAS violated 14 CFR 399.84 by causing to be published airfare advertisements that failed to state the entire price to be paid by the consumer;
3. We find that by violating 14 CFR 399.84 as described in ordering paragraph 2, above, OpenSkies SAS has engaged in an unfair and deceptive practice and unfair method of competition in violation of 49 U.S.C. § 41712;
4. We order OpenSkies SAS and its successors and assignees to cease and desist from violations of 14 CFR 399.84 and 49 U.S.C. § 41712. Failure to comply with this cease and desist provision shall subject OpenSkies SAS and its successors and assignees to further enforcement action;
5. We assess OpenSkies SAS a compromise civil penalty of \$20,000 in lieu of civil penalties that might otherwise be assessed for the violations described in ordering

paragraphs 2 and 3, above. Of this total penalty amount, \$10,000 shall be due and payable within fifteen (15) days of the date of issuance of this order. The remaining \$10,000 shall be due and payable immediately if OpenSkies SAS violates this order's cease and desist or payment provisions during the twelve (12) months following the service date of this order; and

6. We order OpenSkies SAS to pay the compromise civil penalty assessed in ordering paragraph 5, above, by wire transfer through the Federal Reserve Communications System, commonly known as "Fed Wire," to the account of the U.S. Treasury. The wire transfer shall be executed in accordance with the instructions contained in the Attachment to this order. Failure to pay the compromise penalty as ordered shall subject OpenSkies SAS to the assessment of interest, penalty, and collection charges under the Debt Collection Act and to possible enforcement action for failure to comply with this order.

This order will become a final order of the Department ten (10) days after its service date unless a timely petition for review is filed or the Department takes review on its own motion.

BY:

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Deputy General Counsel

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