

Federal Register

Wednesday
October 16, 1996

Part II

Department of Transportation

Federal Aviation Administration

14 CFR Parts 13 and 16

Rules of Practice for Federally-Assisted
Airport Proceedings; Final Rule

DEPARTMENT OF TRANSPORTATION**Federal Aviation Administration****14 CFR Parts 13 and 16**

[Docket No. 27783; Amendment No. 13-27, 16]

RIN 2120-AF43

Rules of Practice for Federally-Assisted Airport Proceedings

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This rulemaking establishes rules of practice for filing complaints and adjudicating compliance matters involving Federally-assisted airports. The rule addresses exclusively airport compliance matters arising under the Airport and Airway Improvement Act (AAIA) of 1982, as amended; certain airport-related provisions of the Federal Aviation Act of 1994, as amended; the Surplus Property Act, as amended; predecessors to those acts; and regulations, grant agreements, and documents of conveyance issued or made under those acts. The rule is intended to expedite substantially the handling and disposition of airport-related complaints.

EFFECTIVE DATE: This rule is effective December 16, 1996.

FOR FURTHER INFORMATION CONTACT: Barry Molar or Frank J. San Martin, Airports Law Branch (AGC-610), Office of the Chief Counsel, (202) 267-3473, Federal Aviation Administration, (FAA), 800 Independence Avenue, SW., Washington, DC 20591.

SUPPLEMENTARY INFORMATION:**Background**

A notice of proposed rulemaking (NPRM) for this rulemaking was issued on June 9, 1994 (59 FR 29880). The NPRM proposed to amend the FAA's existing complaint and adjudication procedures, 14 CFR Part 13, "Investigative and Enforcement Procedures," to remove from the coverage of part 13 the airport-related matters that will be handled under the new part 16. Certain disputes between U.S. and foreign air carriers and airport proprietors concerning the reasonableness of fees imposed by airport proprietors are not covered by the rule, but by 14 CFR part 302, subpart F, pursuant to section 113 of the Federal Aviation Act of 1994 (FAAct), Public Law No. 103-305 (August 23, 1994), 49 United States Code (U.S.C.) 47129.

On September 16, 1994, the FAA published a notice to withdraw subpart

J of the proposed rule, subpart J contained special procedures for handling airport fee complaints by air carriers [59 FR 47568]. The withdrawal became necessary with the passage of section 113 of the FAA Act, which contained specific provisions for airport fee complaints by air carriers that differed from, and were inconsistent with, subpart J. The withdrawal notice also extended the comment period for the remainder of the NPRM, subparts A through I, to December 1, 1994 [59 FR 47568].

Discussion of Comments

Sixteen commenters responded to the NPRM. Commenters included the Air Freight Association; Air Line Pilots Association (ALPA); Air Ottawa Flying Service, Inc.; Aircraft Owners and Pilots Association (AOPA); Airports Council International-North America (ACI-NA); American Car Rental Association (ACRA); Hawkins, Delafield & Wood; Hogan & Harston; Maryland Aviation Administration; Melbourne Airport Authority; National Association of State Aviation Officials (NASAO); National Business Aircraft Association, Inc. (NBAA); National Air Transportation Association (NATA); Newton & Associates, Inc. (NAI); Regional Airline Association (RAA); and the United States Parachute Association (USPA).

Seven commenters generally support the promulgation of the proposed rule with some reservations. The remaining commenters address specific sections of the proposed rule.

A discussion of the issues most widely addressed in the comments and an analysis of the final rule follows. All comments received were considered by the agency. The summary of comments is intended to represent the general divergence or correspondence in industry views on various issues, and is not intended to be an exhaustive restatement of the comments received. Comments pertaining to withdrawn subpart J will not be addressed.

Standing

A number of commenters address issues concerning who should be able to file a complaint under new part 16. ACI-NA strongly supports limiting a complainant to a person "directly and substantially affected by any alleged non-compliance," under proposed § 16.23. Otherwise, ACI-NA argues, proceedings could be initiated by persons making only minimal use of an airport, burdening both the respondent and the FAA with the time and expense of administrative proceedings. AOPA states it is concerned that, under proposed § 16.23, an association would

not have standing to file a complaint on behalf of its individual members. ACRA requests clarification that a nonaeronautical user of an airport, such as a car rental company, could file a complaint under part 16.

The final rule adopts the "directly and substantially affected" standard of the NPRM, with a special applicability provision for cases where revenue diversion is alleged. Under § 16.23(a) of the final rule, a person directly and substantially affected by any alleged noncompliance may file a complaint with the Administrator. Under § 16.3 of the final rule, a "complaint" is defined as "a written document * * * filed with the FAA by a person directly and substantially affected by anything allegedly done or omitted to be done * * * in contravention of any provision of any Act, as defined in this section." Complaints by persons not "directly and substantially affected" by respondent's alleged noncompliance will be subject to dismissal with prejudice under part 16.

Persons alleging revenue diversion by an airport, as defined in 49 U.S.C. 47107(b), that do business with, and pay fees or rents to, the airport, are considered in the final rule to be directly and substantially affected by the alleged revenue diversion for the sole purpose of having and standing to file a revenue diversion complaint under Part 16. This special applicability provision for complaints of revenue diversion is necessary because revenue diversion principally affects the United States as the grantor of the federal airport funds allegedly diverted. However, entities that do business on the airport and pay fees to the airport have some interest in alleging revenue diversion because their payments constitute airport revenue.

An association will have to meet the same "directly and substantially affected" standing requirement individually, but will be able to file a part 16 complaint as a representative of its members who are "directly and substantially affected" by an act or omission of respondent.

The standing requirement is necessary to assure that scarce agency resources are devoted to matters in which the complainant's interest is sufficient to justify the burden of processing a complaint under part 16. Parties who meet part 16 standing requirements may be represented by duly authorized representatives.

Nonaeronautical users of airports are subject to the same "directly and substantially affected" standard as aeronautical users, and could foreseeably have standing to file a complaint under

part 16. For example, an airport duty-free shop could have standing to file a part 16 complaint alleging revenue diversion, and an airport concession that is a disadvantaged business enterprise (DBE) could have standing to file a part 16 complaint alleging non-compliance with the applicable DBE regulation. However, most of an airport's obligations are intended for the benefit of aeronautical users. A complaint alleging that an airport operator's treatment of a nonaeronautical user violates such obligation would be dismissed even though the nonaeronautical user was directly and substantially affected by the alleged practice. For example, the assurance against unjust discrimination by an airport operator only applies to aeronautical users, so a complaint by a nonaeronautical user alleging unjust discrimination by an airport operator would be dismissed.

Notwithstanding, the standing requirement, complaints that are dismissed because complainant lacks standing under Part 16 may be referred by the FAA to the appropriate FAA region for consideration under Subpart D, Special Rules Applicable to Proceedings Initiated by the FAA.

Pre-complaint Resolution

Most commenters approve of the proposed requirement in § 16.21, that a person engage in good faith efforts to informally resolve a disputed matter, directly with the person or entity in alleged noncompliance, before filing a complaint. ACI-NA supports the proposed rule but is concerned that the mention of "mediation, arbitration, or use of a dispute resolution board" in § 16.21 will be interpreted to mean that such alternative dispute resolution (ADR) methods are mandatory. AOPA suggests that the requirement to undertake informal resolution before filing a complaint would be inappropriate to complaints filed by general aviation and add to the costs and time to arrive at resolution. USPA states that part 16 would not permit contact with the FAA at the local level for assistance.

Under § 16.21 as adopted, it will be necessary for a potential complainant to certify that good faith efforts have been made to achieve informal resolution. However, the final rule does not require any particular informal resolution method, and mentions mediation, arbitration, and dispute resolution board as examples only. The final rule has been changed to add that the local FAA Airport District Office (ADO), or FAA Regional Airports Division, may be asked by the parties to assist them in

resolving the dispute informally. That change is intended to make the local airports office available to mediate a dispute, and reflects the FAA's experience. In many cases, the involvement of the FAA ADO or regional airports division can facilitate informal resolution. Allegations of revenue diversion, however, may not lend themselves to full resolution in the pre-complaint process unless the proposed resolution addresses the total amounts allegedly diverted by the airport. Nevertheless, a complainant must show that informal resolution was attempted.

Hearing

Section 16.31(d) provides the respondent with the opportunity for a hearing if the initial determination finds the respondent in noncompliance and proposes the issuance of a compliance order and an opportunity for a hearing required by statute. In all other cases no opportunity for a hearing is provided, except at the discretion of the agency.

The law firm of Hogan & Hartson proposes a fact-finding hearing before the initial determination is issued in order to develop the factual record. This recommendation is not adopted in the final rule.

Before issuing the initial determination, the FAA engages in the process of investigating a complain. While complainants are entitled to having their complaints investigated, they do not have a property interest sufficient to require an oral evidentiary hearing as part of that investigation, even when the investigation leads to a dismissal of a complaint.

A respondent may be entitled to a hearing in some cases before the FAA takes adverse action. However, § 16.31(d) provides an opportunity for a hearing in those cases after the initial determination is made and before any final agency action is taken. There is no need to provide a respondent with an additional oral evidentiary hearing during the investigatory stage. Furthermore, the factual record will be developed by the supporting documents that are required to be submitted with each pleading under § 16.23, an by any additional information submitted by the parties or developed through informal investigation under § 16.29.

Several commenters argue that, contrary to § 16.203(b)(1), which provides in the NPRM that the respondent and the agency are the only parties to the post-initial determination hearing, the complainant should also be a party to the hearing. The NBAA argues that a complainant should be a party to the hearing because the complainant's

participation will help develop the record of the case. NATA and Air Ottawa Flying Service, Inc., argue that nonhearing party status for a complainant deprives the complainant of due process of law because the complainant may have property interests at stake.

The final rule revised § 16.203(b)(1) to allow complainant to be a party to a hearing along with the respondent and the agency. Under § 16.31(d), a case proceeds to a hearing only after the FAA has found against the respondent in an initial determination that proposes the issuance of a compliance order. Thus, at the hearing the FAA has the burden of proof to establish the validity of its initial determination, including the proposed order of compliance under § 16.109. The respondent is a party to the hearing who seeks reversal of the FAA's initial determination. Although, a complainant's status as an airport user alone does not give rise to a sufficient property interests to justify party status as a matter of right, party status for the complainant will permit it to have an opportunity to assist in the development of the factual record as pointed out by NBAA. In addition, providing automatic party status will avoid burdening the hearing officer and parties with routine requests for intervention by complainant. The rule provides the hearing officer with ample powers to control the conduct of the hearing and to assure that complainant's participation does not unduly delay the proceedings.

As noted in the NPRM, in the case in which an adjudicatory hearing would be held (under § 519 of the AAIA or § 1002 of the FAA Act), the hearing procedures are intended to permit the FAA to complete compliance hearings within 180 days, while assuring that a respondent receives a fair hearing and an opportunity to present evidence and argument to support its position. Section 519 specifies that the FAA may temporarily withhold new grants.

Several commenters object to proposed § 16.3 which provides that the part 16 hearing officer is an attorney designated by the FAA. They state that the proposed provision gives the appearance and possibility of nonobjectivity. NBAA suggests that hearing officers be administrative law judges.

The commenters' concerns about the independence and objectivity of an FAA designated hearing officer are misplaced. Under the terms of § 16.3, no FAA attorney in the region where the noncompliance allegedly occurred, or in the Airports and Environmental Law

Division, may be a hearing officer. This excludes all FAA attorneys who could have access to factual knowledge of a part 16 complaint obtained by means other than the administrative record, insures that the hearing officer is independent of the offices that conduct investigations and prosecutions, and insures that the hearing officer is objective and independent.

Further, section 519 by its terms requires the FAA to provide notice and "an opportunity for hearing" before imposing certain sanctions. The simple requirement for a hearing, without more, has been held not to constitute "an adjudication required by statute to be determined on the record after opportunity for an agency hearing," within the meaning of section 554 of the Administrative Procedure Act (APA). See, e.g., *Friends of the Earth v. EPA*, 966 F.2d 690, 693 (D.C. Cir. 1992); *St. Louis Fuel and Supply Co., Inc. v. FERC*, 890 F.2d 446, 448 (D.C. Cir. 1989). Accordingly, part 16 is not required by the APA to include all of the provisions of sections 554, 556 and 557 of the APA. In particular, the requirement that administrative law judges serve as hearing officers does not apply.

In the interests of assuring a fair hearing, however, part 16 includes many of the elements required by sections 554, 556 and 557 of the APA. For example, the hearing officer is required to issue an initial decision; *ex parte communications* are prohibited; separation of the prosecutorial and decision-making functions are required; and the hearing officer has virtually all of the authority specified in section 556(c).

Intervention

AOPA and NBAA comment that the intervention provisions of § 16.207 are too restrictive and give the hearing officer too much discretion in admitting a new party to a hearing. As explained earlier, a part 16 hearing is to a large extent a proceeding in which the FAA acts as a prosecutor seeking an order of compliance under § 16.109 against respondent within the statutory time limits for issuing such actions. Furthermore, complainant will under the final rule be a party to the hearing. For these reasons, intervention in such a proceeding should only be allowed if it will not unnecessarily broaden the issues, or cause delay, and, if the person requesting intervention has interests that need to be protected.

Analysis of the Provisions of the Final Rule

After careful review of the available data, including the comments received,

the FAA has determined to adopt this proposed rule with the changes described previously.

Subpart A—General Provisions

Subpart A includes provisions of general applicability to proceedings brought under part 16, definitions of terms used in the regulation, and a provision on separation of functions.

The final rule modifies proposed § 16.1(a) to exclude from the coverage of part 16 disputes between U.S. and foreign air carriers and airport-proprietors concerning the reasonableness of airport fees now covered by 14 CFR part 302, as mandated by Congress in the FAA Act, Public Law No. 103-305 (August 23, 1994).

Proposed § 16.1(d) is modified to specify that part 16 applies to investigations initiated by the FAA, as well as complaints filed with the FAA on or after the effective date of the rule.

The definitions in § 16.3 are, for the most part, derived from the definitions of like or similar terms in 14 CFR part 13. The term "agency employee" defined as any employee of the Department of Transportation, was added to indicate that other offices within the Department of Transportation may assist the FAA in part 16 cases.

The title of "Assistant Administrator for Airports" in the definitions section and throughout the text of the rule has been changed in the final rule to "Associate Administrator for Airports" to reflect the correct title for this FAA official, as changed by a recent agency reorganization.

The term "Director," defined as the Director of the Office of Airport Safety and Standards, was added to the definitions section and to the text of the rule. The "Director" replaces the "Assistant Administrator" as the decisionmaker of the initial determination without a hearing under § 16.31, as discussed more fully herein.

Although not technically incorrect, the term "FAA decisionmaker" was deleted from the definitions section and text of the final rule because the term is unnecessary. Deletion of the term should avoid confusion surrounding the ultimate decisionmaker in appeals from initial determinations of the Director without a hearing under § 16.31, and from the initial decisions of hearing officers after a hearing under § 16.241. In both cases, the appeal will be submitted to the Associate Administrator, who will issue a final decision under either § 16.33 or § 16.241.

The substitution of Director and Associate Administrator as decisionmakers instead of higher-level officials reflects the concerns and experiences of agency personnel who reviewed the proposed rule. The Director and Associate Administrator are experienced in airport matters and may be more accessible within the short time periods in the final rule for issuing decisions. The substitution also conforms more closely to current practice in deciding complaints regarding airport compliance.

The term "Presiding officer" was deleted from the definitions section because it was referred to only in subpart J, which was withdrawn.

The final rule contains no changes to the separation of function section, § 16.5, except that "Associate Administrator" replaces "Administrator" in § 16.5(b) and "FAA decisionmaker" in § 16.5(c).

Separation of functions is not required by statute because hearings under part 16 are not subject to APA hearing requirements; however, the separation is provided to promote confidence in the impartiality and integrity of decisions under the new procedures. Separation of prosecutorial and adjudicatory functions will be provided from the time the Director's determination is issued in all cases in which an opportunity for hearing is provided, including cases in which the respondent waives hearing and appeals the Director's determination in writing to the Associate Administrator. When separation applies, the Director will be considered as performing the investigatory and prosecutorial function and will not participate in the decision of the Associate Administrator or hearing officer.

Subpart B—General Rules Applicable to Complaints, Proceedings, and Appeals Initiated by the FAA

This subpart applies to all phases of the investigations and adjudications under this part.

The provisions governing filing and service of documents, computation of time, and motions (§§ 16.13, 16.15, 16.17, and 16.19), are based on similar provisions in the Federal Rules of Civil Procedure, the Department of Transportation's Rules of Practice in Proceedings (14 CFR part 302), the FAA Rules of Practice in Civil Penalty Actions (14 CFR part 13, subpart G), and the National Transportation Safety Board's (NSTB) Rules of Practice in Air Safety Proceedings (49 CFR part 821). The proposed rule was modified to change the agency address in § 16.13. To insure timely processing and to reflect

changes in the organization of the Office of the Chief Counsel "FAA Part 16 Airport Proceedings Docket (AGC-600)" replaces "FAA Enforcement Docket (AGC-10)." The additional 5 days provided after service on a party of a document by mail was changed to 3 days in § 16.17(c). This revision conforms to the "mail rule" used in federal practice under the Federal Rules of Civil Procedure.

Subpart C—Special Rules Applicable to Complaints

The final rule requires, under § 16.21, a potential complainant to engage in good faith efforts to resolve the disputed matter informally with potentially responsible respondents before filing a complaint with the FAA under part 16. Informal resolution may include mediation, arbitration, use of a dispute resolution board, or other form of third-party assistance, including assistance from the responsible FAA Airports District Office or FAA Regional Airports Division.

Under § 16.21, it will be necessary for the potential complainant or its representative to certify that good faith efforts have been made to achieve informal resolution. To protect the parties and for consistency with Rule 408 of the Federal Rules of Evidence, the certification will not include information on monetary or other settlement offers made but not agreed upon in writing. As explained earlier, under § 16.21(a), the FAA ADO or Regional Airports Division, will be available upon request to assist the parties with informal resolution.

The final rule retains the requirement that a complainant be "directly and substantially affected by any alleged noncompliance" in order to have standing to file a complaint under § 16.23. However, as explained above complainants alleging revenue diversion by an airport will be considered to be directly and substantially affected by the alleged revenue diversion, if complainants do business with the airport and pay fees or rentals to the airport.

To provide a more efficient and expedited process the time periods for filing a reply to the answer and a rebuttal to the reply in § 16.23 (e) and (f) were reduced from 15 to 10 days.

At the suggestion of one commenter, the final rule adds "lack of standing" as another possible ground for dismissal with prejudice under § 16.25. Besides dismissal of complaints that clearly do not state a cause of action, or those that do not come within the jurisdiction of the Administrator, a complaint may also be dismissed if the complainant lacks

standing to file the complaint under §§ 16.3 and 16.23. As a final order of the agency, a dismissal with prejudice would be appealable to a United States Court of Appeals.

As explained above, the final rule substitutes the Director of the Office of Airport Safety and Standards as the official who makes the initial determination after investigation under § 16.31. The Director would issue an initial determination in every case in which the FAA investigates a complaint. Under the final rule, the agency is required to issue a Director's determination in 120 days from the due date of the last pleading (*i.e.*, reply or rebuttal). The provision in the NPRM allowing the Director to extend the period for issuing an initial determination by 60 days for good cause was deleted from the final rule in order to further expedite this administrative complaint procedure.

The Director's determination is intended to provide a timely and authoritative indication of the agency's position on a complaint. While the Director's determination can be appealed to the Associate Administrator under § 16.33, the FAA expects that, in many instances, the Director's determination will resolve the issues raised in the complaint to the satisfaction of the parties. In such cases, the parties may find it more beneficial to negotiate a solution based on the FAA's initial position than to continue to litigate the matter.

Under the final rule, the Associate Administrator will issue the final decision on appeal from a Director's determination without a hearing under § 16.33. If the initial determination finds the sponsor in compliance and dismisses the complaint, the complainant may appeal the determination by a written appeal to the Associate Administrator within 30 days. The Associate Administrator is required to issue a final agency decision in an appeal by a complainant within 60, not 30 days of the due date for the reply brief, as proposed in the NPRM. The additional time for issuing a final agency decision was added to the final rule to assure the agency adequate time to review the record, prepare, and issue a final decision.

If the Director's determination contains a finding of noncompliance and the respondent is entitled to a hearing, the determination will provide the sponsor the opportunity to elect an oral evidentiary hearing under subpart F. The procedure for electing or waiving a hearing is set forth in subpart E. If the respondent waives a hearing and instead elects to file a written appeal to

the Associate Administrator, a final decision will be issued by the Associate Administrator under § 16.33.

Subpart D—Special Rules Applicable to Proceedings Initiated by the FAA

Section 16.101 makes clear the FAA's continuing authority to initiate its own investigation of any matter within the applicability of this part without having received a complaint, as authorized by §§ 313 and 1002 of the FAA Act and § 519 of the AAlA.

Subpart E—Proposed Orders of Compliance

Subpart E contains procedures that provide the respondent an opportunity to file a request for hearing within 20 days after service of the Director's determination if the determination proposes a sanction against the sponsor subject to § 519(b) of the AAlA or § 1002 of the FAA Act. The 20-day period to file a request for hearing was reduced from 30 days in the NPRM in order to provide a more efficient and expedited process. If the respondent elects a hearing, the agency will issue a hearing order.

Alternatively, if the respondent waives hearing and instead files a written appeal (within 30 days), the Associate Administrator will issue a final decision in accordance with the procedures set forth in § 16.33. If the respondent fails to respond to the Director's determination, the initial determination becomes final.

The final rule, based on comments received, includes a new ground for the agency to provide the opportunity for a hearing under § 16.109(a): If the agency proposes to issue an order withholding approval of any new application to impose a passenger facility charge pursuant to § 112 of the FAA Act, 49 U.S.C. 47111(e). That new statutory section creates additional enforcement mechanisms against illegal revenue diversion including the withholding of a new application to impose a passenger facility charge. The statute requires the FAA to provide an opportunity for hearing before imposing this sanction.

The opportunity for a hearing by the agency under part 16 is limited to those cases where there is a statutory requirement to offer the opportunity for a hearing before the FAA takes a particular action, or specific cases in which the FAA elects to offer a hearing.

Section 16.109(b)(3) allows respondent and complainant to file a joint motion to withdraw the complaint and dismiss the proposed compliance action. The FAA may, subject to its discretion, grant the motion if it finds that a settlement by the parties fully

resolves the complaint violation and further compliance action is not necessary.

Subpart F—Hearings

Subpart F contains the procedures for initiating and conducting adjudicative hearings. The hearing order, issued by the Deputy Chief Counsel under § 16.201, will set the scope of the hearing by identifying the issues to be resolved, as well as assigning the hearing officer. If no material facts that require oral examination of witnesses are in dispute, the hearing may be limited to submission of briefs and oral argument.

In the hearing, the agency attorney will represent the agency's position before the hearing officer and will have the same status as any other representatives of a party. The rule includes commonly used adjudicatory procedures, such as representation of the parties by attorneys, intervention, participation by non-parties, pretrial procedures and discovery, the availability of compulsory process to obtain evidence, and procedures for using at the hearing. These provisions are intended to provide the parties with a reasonable opportunity to prepare their cases, while allowing the process to be completed expeditiously. To assure an expeditious hearing process, paragraph (b) was added to § 16.213, discovery, to emphasize the hearing officer's authority and duty to limit discovery wherever feasible.

The final rule made the following clarifications and corrections to the subpart based on comments received. The final rule added "or notice of investigation" to § 16.201(1) to clarify that the provisions of subpart F may apply to proceedings initiated by the FAA under subpart D. The final rule deleted an incorrect citation in § 16.203(a)(2) and replaced it with a citation to § 16.13.

In the NPRM, the last phrase in proposed § 16.209(d) cited section 519(b) of the AAIA. The citation to the AAIA was included because the AAIA provision contains the 180-day time limitation for a determination which could affect the length of extensions of time granted under part 16. (Although, at this time, the FAA does not foresee any circumstances where it would provide for a hearing and section 519(b) of the AAIA would not be applicable, in a case not covered by section 519(b), an extension of time by the hearing officer for any reason could extend all of the due dates beyond the 180-day time limitation.) This provision is being modified in the final rule to clarify this point.

The provisions of § 16.233 on evidence, in part, are to permit the hearing officer to exercise control over the hearing. Contrary to the suggestion of one commenter, they are not intended to authorize the hearing officer to preclude all cross-examination of a witness.

In keeping with the time limitations imposed by section 519(b) of the AAIA, § 16.235(a) of the final rule retains the provision permitting the hearing officer to allow written argument during the hearing only if the hearing officer finds that such argument would not delay the hearing. Parties may make their arguments in posthearing briefs under § 16.235(b).

Subpart G—Initial Decisions, Orders and Appeals

Subpart G provides procedures for issuance of initial decisions and orders by hearing officers, appeals of the initial decision to the Associate Administrator for Airports, and issuance of consent orders.

Section 16.241 governs procedures and time frames for initial decisions and administrative appeals based on 14 CFR 13.20(g)–(i). However, shorter time periods are provided to accommodate the time limits of § 519 of the AAIA. In appeals from initial decisions of hearing officers, under § 16.241(c) and 16.241(f)(2), the Associate Administrator must issue the final agency decision within 30 days of the due date of the reply. This provision insures that the final agency decision is issued within the 180-day time period of section 519.

In addition, the rule includes a provision for *sua sponte* review of an initial decision by the Associate Administrator, consistent with the practice under 14 CFR 302.28(d).

Section 16.243 governing disposal of cases by consent orders is derived from 14 CFR 13.13.

As explained above, the final rule replaced all references to the "FAA decisionmaker," though technically correct, with the "Associate Administrator," to avoid confusion and clarify. The ultimate decisionmaker in part 16 proceedings, with or without hearings, is the Associate Administrator for Airports for the reasons previously given.

Subpart H—Judicial Review

Subpart H contains rules applicable to judicial review of final agency orders. Section 16.247(a) sets forth the basic authority to seek judicial review. The provision is based on 14 CFR 13.235. Specific reference to section 519(b)(4) of the AAIA has been added. Section

16.247(b) identifies FAA decisions and actions under part 16 that the FAA does not consider to be judicially reviewable final agency orders.

Subpart I—Ex Parte Communications

The rule on *ex parte* communications is based on subpart J of the Rules of Practice in Air Safety Proceedings of the NTSB, 49 CFR Part 821, subpart J, modified to reflect the fact that FAA employees function as both parties and decisional employees in hearings conducted under subpart F of part 16.

Subpart J—Alternative Procedure for Certain Complaints Concerning Airport Rates and Charges

As explained above, subpart J of the proposed rule, containing special procedures for the handling of airport fee complaints by U.S. and foreign air carriers, was withdrawn on September 16, 1994 [59 FR 47568].

Regulatory Evaluation Summary

Introduction

This regulatory evaluation examines the costs and benefits of the final rule concerning Rules for Federally-Assisted Airport Proceedings. The rule establishes rules of practice for filing complaints and adjudicating compliance matters involving Federally-assisted airports. The rule is intended to expedite substantially the handling and disposition of airport-related complaints. Since the impacts of the changes are relatively minor this economic summary constitutes the analysis and no regulatory evaluation will be placed in the docket.

Changes to Federal regulations must undergo several economic analyses. First, Executive Order 12866 directs that each Federal agency shall propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs. Second, the Regulatory Flexibility Act of 1980 requires agencies to analyze the economic effect of regulatory changes on small entities. Third, the Office of Management and Budget directs agencies to assess the effects of regulatory changes on international trade. In conducting these analyses, the FAA has determined that this rule is "a significant regulatory action" as defined in the Executive Order and the Department of Transportation Regulatory Policies and Procedures. This rule would not have a significant impact on a substantial number of small entities and would not constitute a barrier to international trade.

Costs And Benefits

This final rule adopts a new procedure for the filing, investigation, and adjudication of complaints against airports for violation of certain statutes administered by the FAA. The new procedures will substitute for existing procedures under 14 CFR part 13. There are no intended safety benefits that result from this rule. The intended

advantages of the rule are in the form of increased cost effectiveness and timeliness in resolving complaints. The rule will use FAA resources better and result in modest cost savings.

About 30 investigations are initiated per year due to complaints filed with the FAA. Each investigation takes an average of 3 years before a ruling is issued. The typical investigation requires a field investigation, an initial

review by the FAA's Office of Airports Safety and Standards, and a legal review by an attorney in the Office of Chief Counsel. A GS-12 (step 5) employee requires 30 hours to complete the field investigation, a GS-13 (step 5) requires 30 hours to complete the initial review, and a GS-14 (step 5) employee requires 20 hours to complete the legal review. The average cost per investigation is \$3,100. (See Table 1.)

TABLE 1.—COST OF INVESTIGATIONS CURRENT AND UNDER NEW RULE

	Hours	Average grade	Yearly salary	Hourly rate	Loaded rate	Cost
CURRENT SITUATION						
Field investigation	35	GS-12	\$50,388	\$24.14	\$31.39	\$1,098.54
Initial review at HQ	30	GS-13	59,917	28.71	37.32	1,119.68
Attorney review at HQ	20	GS-14	70,804	33.93	44.10	882.08
Average cost per investigation						\$3,100
Average annual number of investigations						30
Average annual cost of investigations						\$93,009
NEW SITUATION						
Field	4	GS-12	\$50,388	\$24.14	\$31.39	\$125.55
Initial review at HQ	40	GS-13	59,917	28.71	37.32	1,492.90
Attorney review at HQ	20	GS-14	70,804	33.93	44.10	882.08
Average cost per investigation						\$2,501
Average annual number of investigations						30
Average annual cost of investigations						\$75,016
Savings						\$17,993

This number assumes a 30-percent loaded hourly rate for fringe benefits. The annual cost of investigations is estimated to be \$93,000.

Under the new rule, determinations will be made without the need for a field investigation. The FAA will be able to decide the merits of the case by looking at the record solely. The field investigation is expected to require 4 hours of the GS-12 (step 5) employee time, mostly to complete the proper forms; the initial review at headquarters is expected to require 40 hours of the GS-13 (step 5) employee's time, and the legal review is expected to remain at 20 hours of the GS-14 (step 5) employee's time. The average cost per investigation is estimated to be \$2,500 and the annual cost of investigations will be \$75,000 (Table 1). The final rule will result in an average cost savings of \$18,000 per year on investigations. Furthermore the FAA estimates that instead of 3 years per investigation, each investigation will now take on average 1 year.

Conclusion

The FAA has determined that the final rule would have only moderate economic impacts on the industry, public, or government. The only

measurable economic impact the FAA estimates is a slight cost savings to administer airport proceedings due to the utilization of government resources in a more efficient manner. The FAA finds that the proposed rule is cost-beneficial.

International Trade Impact Assessment

The Office of Management and Budget directs agencies to assess the effects of regulatory changes on international trade. There should be no effect on aircraft manufacturers or operators (U.S. or foreign). Therefore, the FAA has determined that the proposed rule would neither have an effect on the sale of foreign aviation products nor services in the United States, nor would it have an effect on the sale of U.S. products or services in foreign countries.

Regulatory Flexibility Determination

The Regulatory Flexibility Act (RFA) of 1980 was enacted by Congress to ensure that small entities are not unnecessarily or disproportionately burdened by Government regulations. The RFA requires a Regulatory Flexibility Analysis if a rule would have a significant economic impact, either detrimental or beneficial, on a

substantial number or small entities. Based on the potential relief that the rule provides and the criteria contained in FAA Order 2100.14A, Regulatory Flexibility Criteria and Guidance, the FAA has determined that the rule will not have a significant economic impact on a substantial number of small entities.

Federalism Implications

The regulations adopted herein will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 12612, it is determined that this final rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

Paperwork Reduction Act

This final rule contains no information collection requirements that require approval of the Office of Management and Budget pursuant to the Paperwork Reduction Act of 1980 (44 U.S.C. 3507 *et seq.*)

Conclusion

For the reasons discussed in the preamble, and based on the findings in the Regulatory Flexibility Determination and the International Trade Analysis, the FAA has determined that this final rule is not economically significant under Executive Order 12866. This final rule is considered significant under DOT Regulatory Policies and Procedures (44 FR 111034, February 26, 1979) and Executive Order 12866. The FAA certifies that this final rule will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects*14 CFR Part 13*

Enforcement procedures,
Investigations, Penalties.

14 CFR Part 16

Enforcement procedures,
Investigations.

The Amendments

Accordingly, the Federal Aviation Administration amends chapter I of title 14 of the Code of Federal Regulations as follows:

PART 13—INVESTIGATIVE AND ENFORCEMENT PROCEDURES

1. The authority citation for part 13 continues to read as follows:

Authority: 18 U.S.C. 6002; 49 U.S.C. 106(g), 5121–5124, 40113–40114, 44103–44106, 44702–44703, 44709–44710, 44713, 46101–46110, 46301–46316, 46501–46502, 46504–46507, 47106, 47111, 47122, 47306, 47531–47532.

2. Section 13.3 is amended by adding a new paragraph (d) to read as follows:

§ 13.3 Investigations (general).

* * * * *

(d) A complaint against the sponsor, proprietor, or operator of a Federally-assisted airport involving violations of the legal authorities listed in § 16.1 of this chapter shall be filed in accordance with the provisions of part 16 of this chapter, except in the case of complaints, investigations, and proceedings initiated before December 16, 1996, the effective date of part 16 of this chapter.

3. A new part 16 is added to subchapter B to read as follows:

PART 16—RULES OF PRACTICE FOR FEDERALLY-ASSISTED AIRPORT ENFORCEMENT PROCEEDINGS**Subpart A—General Provisions****Sec.**

- 16.1 Applicability and description of part.
- 16.3 Definitions.
- 16.5 Separation of functions.

Subpart B—General Rules Applicable to Complaints, Proceedings Initiated by the FAA, and Appeals

- 16.11 Expedition and other modification of process.
- 16.13 Filing of documents.
- 16.15 Service of documents on the parties and the agency.
- 16.17 Computation of time.
- 16.19 Motions.

Subpart C—Special Rules Applicable to Complaints

- 16.21 Pre-complaint resolution.
- 16.23 Complaints, answers, replies, rebuttals, and other documents.
- 16.25 Dismissals.
- 16.27 Incomplete complaints.
- 16.29 Investigations.
- 16.31 Director's determinations after investigations.
- 16.33 Final decisions without hearing.

Subpart D—Special Rules Applicable to Proceedings Initiated by the FAA

- 16.101 Basis for the initiation of agency action.
- 16.103 Notice of investigation.
- 16.105 Failure to resolve informally.

Subpart E—Proposed Orders of Compliance

- 16.109 Orders terminating eligibility for grants, cease and desist orders, and other compliance orders.

Subpart F—Hearings

- 16.201 Notice and order of hearing.
- 16.202 Powers of a hearing officer.
- 16.203 Appearances, parties, and rights of parties.
- 16.207 Intervention and other participation.
- 16.209 Extension of time.
- 16.211 Prehearing conference.
- 16.213 Discovery.
- 16.215 Depositions.
- 16.217 Witnesses.
- 16.219 Subpoenas.
- 16.221 Witness fees.
- 16.223 Evidence.
- 16.225 Public disclosure of evidence.
- 16.227 Standard of proof.
- 16.229 Burden of proof.
- 16.231 Offer of proof.
- 16.233 Record.
- 16.235 Argument before the hearing officer.
- 16.237 Waiver of procedures.

Subpart G—Initial Decisions, Orders and Appeals

- 16.241 Initial decisions, orders, and appeals.
- 16.243 Consent orders.

Subpart H—Judicial Review

- 16.247 Judicial review of a final decision and order.

Subpart I—Ex Parte Communications

- 16.301 Definitions.
- 16.303 Prohibited ex parte communications.
- 16.305 Procedures for handling ex parte communications.
- 16.307 Requirement to show cause and imposition of sanction.

Authority: 49 U.S.C. 106(g), 322, 1110, 1111, 1115, 1116, 1718 (a) and (b), 1719,

1723, 1726, 1727, 40103(e), 40113, 40116, 44502(b), 46101, 46104, 46110, 47104, 47106(e), 47107, 47108, 47111(d), 47122, 47123–47125, 47151–47153, 48103.

Subpart A—General Provisions**§ 16.1 Applicability and description of part.**

(a) *General.* The provisions of this part govern all proceedings involving Federally-assisted airports, except for disputes between U.S. and foreign air carriers and airport proprietors concerning the reasonableness of airport fees covered by 14 CFR part 302, whether the proceedings are instituted by order of the FAA or by filing with the FAA a complaint, under the following authorities:

(1) 49 U.S.C. 40103(e), prohibiting the grant of exclusive rights for the use of any landing area or air navigation facility on which Federal funds have been expended (formerly section 308 of the Federal Aviation Act of 1958, as amended).

(2) Requirements of the Anti-Head Tax Act, 49 U.S.C. 40116.

(3) The assurances contained in grant-in-aid agreements issued under the Federal Airport Act of 1946, 49 U.S.C. 1101 *et seq* (repealed 1970).

(4) The assurances contained in grant-in-aid agreements issued under the Airport and Airway Development Act of 1970, as amended, 49 U.S.C. 1701 *et seq*.

(5) The assurances contained in grant-in-aid agreements issued under the Airport and Airway Improvement Act of 1982 (AAIA), as amended, 49 U.S.C. 47101 *et seq.*, specifically section 511(a), 49 U.S.C. 47107(a) and (b).

(6) Section 505(d) of the Airport and Airway Improvement Act of 1982, as amended, 49 U.S.C. 47113.

(7) Obligations contained in property deeds for property transferred pursuant to section 16 of the Federal Airport Act (49 U.S.C. 1115), section 23 of the Airport and Airway Development Act (49 U.S.C. 1723), or section 516 of the Airport and Airway Improvement Act (49 U.S.C. 47125).

(8) Obligations contained in property deeds for property transferred under the Surplus Property Act (49 U.S.C. 47151–47153).

(b) *Other agencies.* Where a grant assurance concerns a statute, executive

order, regulation, or other authority that provides an administrative process for the investigation or adjudication of complaints by a Federal agency other than the FAA, persons shall use the administrative process established by those authorities. Where a grant assurance concerns a statute, executive order, regulation, or other authority that enables a Federal agency other than the FAA to investigate, adjudicate, and enforce compliance under those authorities on its own initiative, the FAA may defer to that Federal agency.

(c) *Other enforcement.* If a complaint or action initiated by the FAA involves a violation of the 49 U.S.C. subtitle VII or FAA regulations, except as specified in paragraphs (a)(1) and (a)(2) of this section, the FAA may take investigative and enforcement action under 14 CFR part 13, "Investigative and Enforcement Procedures."

(d) *Effective date.* This part applies to a complaint filed with the FAA and to an investigation initiated by the FAA on or after December 16, 1996.

§ 16.3 Definitions.

Terms defined in the Acts are used as so defined. As used in this part:

Act means a statute listed in § 16.1 and any regulation, agreement, or document of conveyance issued or made under that statute.

Agency attorney means the Deputy Chief Counsel; the Assistant Chief Counsel and attorneys in the Airports/ Environmental Law Division of the Office of the Chief Counsel; the Assistant Chief Counsel and attorneys in an FAA region or center who represent the FAA during the investigation of a complaint or at a hearing on a complaint, and who prosecute on behalf of the FAA, as appropriate. An agency attorney shall not include the Chief Counsel; the Assistant Chief Counsel for Litigation, or any attorney on the staff of the Assistant Chief Counsel for Litigation, who advises the Associate Administrator regarding an initial decision of the hearing officer or any appeal to the Associate Administrator or who is supervised in that action by a person who provides such advice in an action covered by this part.

Agency employee means any employee of the U.S. Department of Transportation.

Associate Administrator means the Associate Administrator for Airports or a designee.

Complainant means the person submitting a complaint.

Complaint means a written document meeting the requirements of this part filed with the FAA by a person directly and substantially affected by anything

allegedly done or omitted to be done by any person in contravention of any provision of any Act, as defined in this section, as to matters within the jurisdiction of the Administrator.

Director means the Director of the Office of Airport Safety and Standards.

Director's determination means the initial determination made by the Director following an investigation, which is a non-final agency decision.

File means to submit written documents to the FAA for inclusion in the Part 16 Airport Proceedings Docket or to a hearing officer.

Final decision and order means a final agency decision that disposes of a complaint or determines a respondent's compliance with any Act, as defined in this section, and directs appropriate action.

Hearing officer means an attorney designated by the FAA in a hearing order to serve as a hearing officer in a hearing under this part. The following are not designated as hearing officers: the Chief Counsel and Deputy Chief Counsel; the Assistant Chief Counsel and attorneys in the FAA region or center in which the noncompliance has allegedly occurred or is occurring; the Assistant Chief Counsel and attorneys in the Airports and Environmental Law Division of the FAA Office of the Chief Counsel; and the Assistant Chief Counsel and attorneys in the Litigation Division of the FAA Office of Chief Counsel.

Initial decision means a decision made by the hearing officer in a hearing under subpart F of this part.

Mail means U.S. first class mail; U.S. certified mail; and U.S. express mail.

Noncompliance means anything done or omitted to be done by any person in contravention of any provision of any Act, as defined in this section, as to matters within the jurisdiction of the Administrator.

Party means the complainant(s) and the respondent(s) named in the complaint and, after an initial determination providing an opportunity for hearing is issued under § 16.31 and subpart E of this part, the agency.

Person in addition to its meaning under 49 U.S.C. 40102(a)(33), includes a public agency as defined in 49 U.S.C. 47102(a)(15).

Personal delivery means hand delivery or overnight express delivery service.

Respondent means any person named in a complaint as a person responsible for noncompliance.

Sponsor means:

(1) Any public agency which, either individually or jointly with one or more other public agencies, has received

Federal financial assistance for airport development or planning under the Federal Airport Act, Airport and Airway Development Act or Airport and Airway Improvement Act;

(2) Any private owner of a public-use airport that has received financial assistance from the FAA for such airport; and

(3) Any person to whom the Federal Government has conveyed property for airport purposes under section 13(g) of the Surplus Property Act of 1944, as amended.

§ 16.5 Separation of functions.

(a) Proceedings under this part, including hearings under subpart F of this part, will be prosecuted by an agency attorney.

(b) After issuance of an initial determination in which the FAA provides the opportunity for a hearing, an agency employee engaged in the performance of investigative or prosecutorial functions in a proceeding under this part will not, in that case or a factually related case, participate or give advice in an initial decision by the hearing officer, or a final decision by the Associate Administrator or designee on written appeal, and will not, except as counsel or as witness in the public proceedings, engage in any substantive communication regarding that case or a related case with the hearing officer, the Associate Administrator on written appeal, or agency employees advising those officials in that capacity.

(c) The Chief Counsel, the Assistant Chief Counsel for Litigation, or an attorney on the staff of the Assistant Chief Counsel for Litigation advises the Associate Administrator regarding an initial decision, an appeal, or a final decision regarding any case brought under this part.

Subpart B—General Rules Applicable to Complaints, Proceedings Initiated by the FAA, and Appeals

§ 16.11 Expedition and other modification of process.

(a) Under the authority of 49 U.S.C. 40113 and 47121, the Director may conduct investigations, issue orders, and take such other actions as are necessary to fulfill the purposes of this part, including the extension of any time period prescribed where necessary or appropriate for a fair and complete hearing of matters before the agency.

(b) Notwithstanding any other provision of this part, upon finding that circumstances require expedited handling of a particular case or controversy, the Director may issue an

order directing any of the following prior to the issuance of the Director's determination:

- (1) Shortening the time period for any action under this part consistent with due process;
- (2) If other adequate opportunity to respond to pleadings is available, eliminating the reply, rebuttal, or other actions prescribed by this part;
- (3) Designating alternative methods of service; or
- (4) Directing such other measures as may be required.

§ 16.13 Filing of documents.

Except as otherwise provided in this part, documents shall be filed with the FAA during a proceeding under this part as follows:

(a) *Filing address.* Documents to be filed with the FAA shall be filed with the Office of the Chief Counsel, Attention: FAA Part 16 Airport Proceedings Docket, AGC-610, Federal Aviation Administration, 800 Independence Ave., SW., Washington, DC, 20591. Documents to be filed with a hearing officer shall be filed at the address stated in the hearing order.

(b) *Date and method of filing.* Filing of any document shall be by personal delivery or mail as defined in this part, or by facsimile (when confirmed by filing on the same date by one of the foregoing methods). Unless the date is shown to be inaccurate, documents to be filed with the FAA shall be deemed to be filed on the date of personal delivery, on the mailing date shown on the certificate of service, on the date shown on the postmark if there is no certificate of service, on the send date shown on the facsimile (provided filing has been confirmed through one of the foregoing methods), or on the mailing date shown by other evidence if there is no certificate of service and no postmark.

(c) *Number of copies.* Unless otherwise specified, an executed original and three copies of each document shall be filed with the FAA Part 16 Airport Proceedings Docket. Copies need not be signed, but the name of the person signing the original shall be shown. If a hearing order has been issued in the case, one of the three copies shall be filed with the hearing officer. If filing by facsimile, the facsimile copy does not constitute one of the copies required under this section.

(d) *Form.* Documents filed with the FAA shall be typewritten or legibly printed. In the case of docketed proceedings, the document shall include the docket number of the proceeding on the front page.

(e) *Signing of documents and other papers.* The original of every document filed shall be signed by the person filing it or the person's duly authorized representative. The signature shall serve as a certification that the signer has read the document and, based on reasonable inquiry and to the best of the signer's knowledge, information, and belief, the document is—

- (1) Consistent with this part;
- (2) Warranted by existing law or that a good faith argument exists for extension, modification, or reversal of existing law; and
- (3) Not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of the administrative process.

(f) *Designation of person to receive service.* The initial document filed by any person shall state on the first page the name, post office address, telephone number, and facsimile number, if any, of the person(s) to be served with documents in the proceeding. If any of these items change during the proceeding, the person shall promptly file notice of the change with the FAA Part 16 Airport Proceedings Docket and the hearing officer and shall serve the notice on all parties.

(g) *Docket numbers.* Each submission identified as a complaint under this part by the submitting person will be assigned a docket number.

§ 16.15 Service of documents on the parties and the agency.

Except as otherwise provided in this part, documents shall be served as follows:

(a) *Who must be served.* Copies of all documents filed with the FAA Part 16 Airport Proceedings Docket shall be served by the persons filing them on all parties to the proceeding. A certificate of service shall accompany all documents when they are tendered for filing and shall certify concurrent service on the FAA and all parties. Certificates of service shall be in substantially the following form:

I hereby certify that I have this day served the foregoing [name of document] on the following persons at the following addresses and facsimile numbers (if also served by facsimile) by [specify method of service]:

[list persons, addresses, facsimile numbers]
Dated this ____ day of ____, 19 ____.
[signature], for [party]

(b) *Method of service.* Except as otherwise agreed by the parties and the hearing officer, the method of service is the same as set forth in § 16.13(b) for filing documents.

(c) *Where service shall be made.* Service shall be made to the persons identified in accordance with § 16.13(f).

If no such person has been designated, service shall be made on the party.

(d) *Presumption of service.* There shall be a presumption of lawful service—

(1) When acknowledgment of receipt is by a person who customarily or in the ordinary course of business receives mail at the address of the party or of the person designated under § 16.13(f); or

(2) When a properly addressed envelope, sent to the most current address submitted under § 16.13(f), has been returned as undeliverable, unclaimed, or refused.

(e) *Date of service.* The date of service shall be determined in the same manner as the filing date under § 16.13(b).

§ 16.17 Computation of time.

This section applies to any period of time prescribed or allowed by this part, by notice or order of the hearing officer, or by an applicable statute.

(a) The date of an act, event, or default, after which a designated time period begins to run, is not included in a computation of time under this part.

(b) The last day of a time period is included in a computation of time unless it is a Saturday, Sunday, or legal holiday for the FAA, in which case, the time period runs until the end of the next day that is not a Saturday, Sunday, or legal holiday.

(c) Whenever a party has the right or is required to do some act within a prescribed period after service of a document upon the party, and the document is served on the party by mail, 3 days shall be added to the prescribed period.

§ 16.19 Motions.

(a) *General.* An application for an order or ruling not otherwise specifically provided for in this part shall be by motion. Unless otherwise ordered by the agency, the filing of a motion will not stay the date that any action is permitted or required by this part.

(b) *Form and contents.* Unless made during a hearing, motions shall be made in writing, shall state with particularity the relief sought and the grounds for the relief sought, and shall be accompanied by affidavits or other evidence relied upon. Motions introduced during hearings may be made orally on the record, unless the hearing officer directs otherwise.

(c) *Answers to motions.* Except as otherwise provided in this part, or except when a motion is made during a hearing, any party may file an answer in support of or in opposition to a motion, accompanied by affidavits or other evidence relied upon, provided that the

answer to the motion is filed within 10 days after the motion has been served upon the person answering, or any other period set by the hearing officer. Where a motion is made during a hearing, the answer and the ruling thereon may be made at the hearing, or orally or in writing within the time set by the hearing officer.

Subpart C—Special Rules Applicable to Complaints

§ 16.21 Pre-complaint resolution.

(a) Prior to filing a complaint under this part, a person directly and substantially affected by the alleged noncompliance shall initiate and engage in good faith efforts to resolve the disputed matter informally with those individuals or entities believed responsible for the noncompliance. These efforts at informal resolution may include, without limitation, at the parties' expense, mediation, arbitration, or the use of a dispute resolution board, or other form of third party assistance. The FAA Airports District Office, FAA Airports Field Office, or FAA Regional Airports Division responsible for administering financial assistance to the respondent airport proprietor, will be available upon request to assist the parties with informal resolution.

(b) A complaint under this part will not be considered unless the person or authorized representative filing the complaint certifies that substantial and reasonable good faith efforts to resolve the disputed matter informally prior to filing the complaint have been made and that there appears no reasonable prospect for timely resolution of the dispute. This certification shall include a brief description of the party's efforts to obtain informal resolution but shall not include information on monetary or other settlement offers made but not agreed upon in writing by all parties.

§ 16.23 Complaints, answers, replies, rebuttals, and other documents.

(a) A person directly and substantially affected by any alleged noncompliance may file a complaint with the Administrator. A person doing business with an airport and paying fees or rentals to the airport shall be considered directly and substantially affected by alleged revenue diversion as defined in 49 U.S.C. 47107(b).

(b) Complaints filed under this part shall—

(1) State the name and address of each person who is the subject of the complaint and, with respect to each person, the specific provisions of each Act that the complainant believes were violated;

(2) Be served, in accordance with § 16.15, along with all documents then available in the exercise of reasonable diligence, offered in support of the complaint, upon all persons named in the complaint as persons responsible for the alleged action(s) or omission(s) upon which the complaint is based;

(3) Provide a concise but complete statement of the facts relied upon to substantiate each allegation; and

(4) Describe how the complainant was directly and substantially affected by the things done or omitted to be done by the respondents.

(c) Unless the complaint is dismissed pursuant to § 16.25 or § 16.27, the FAA notifies the complainant and respondents in writing within 20 days after the date the FAA receives the complaint that the complaint has been docketed and that respondents are required to file an answer within 20 days of the date of service of the notification.

(d) The respondent shall file an answer within 20 days of the date of service of the FAA notification.

(e) The complainant may file a reply within 10 days of the date of service of the answer.

(f) The respondent may file a rebuttal within 10 days of the date of service of the complainant's reply.

(g) The answer, reply, and rebuttal shall, like the complaint, be accompanied by supporting documentation upon which the parties rely.

(h) The answer shall deny or admit the allegations made in the complaint or state that the person filing the document is without sufficient knowledge or information to admit or deny an allegation, and shall assert any affirmative defense.

(i) The answer, reply, and rebuttal shall each contain a concise but complete statement of the facts relied upon to substantiate the answers, admissions, denials, or averments made.

(j) The respondent's answer may include a motion to dismiss the complaint, or any portion thereof, with a supporting memorandum of points and authorities. If a motion to dismiss is filed, the complainant may respond as part of its reply notwithstanding the 10-day time limit for answers to motions in § 16.19(c).

§ 16.25 Dismissals.

Within 20 days after the receipt of the complaint, the Director will dismiss a complaint, or any claim made in a complaint, with prejudice if:

(a) It appears on its face to be outside the jurisdiction of the Administrator under the Acts listed in § 16.1;

(b) On its face it does not state a claim that warrants an investigation or further action by the FAA; or

(c) The complainant lacks standing to file a complaint under §§ 16.3 and 16.23. The Director's dismissal will include the reasons for the dismissal.

§ 16.27 Incomplete complaints.

If a complaint is not dismissed pursuant to § 16.25 of this part, but is deficient as to one or more of the requirements set forth in § 16.21 or § 16.23(b), the Director will dismiss the complaint within 20 days after receiving it. Dismissal will be without prejudice to the refile of the complaint after amendment to correct the deficiency. The Director's dismissal will include the reasons for the dismissal.

§ 16.29 Investigations.

(a) If, based on the pleadings, there appears to be a reasonable basis for further investigation, the FAA investigates the subject matter of the complaint.

(b) The investigation may include one or more of the following, at the sole discretion of the FAA:

(1) A review of the written submissions or pleadings of the parties, as supplemented by any informal investigation the FAA considers necessary and by additional information furnished by the parties at FAA request. In rendering its initial determination, the FAA may rely entirely on the complaint and the responsive pleadings provided under this subpart. Each party shall file documents that it considers sufficient to present all relevant facts and argument necessary for the FAA to determine whether the sponsor is in compliance.

(2) Obtaining additional oral and documentary evidence by use of the agency's authority to compel production of such evidence under section 313 Aviation Act, 49 U.S.C. 40113 and 46104, and section 519 of the Airport and Airway Improvement Act, 49 U.S.C. 47122. The Administrator's statutory authority to issue compulsory process has been delegated to the Chief Counsel, the Deputy Chief Counsel, the Assistant Chief Counsel for Airports and Environmental Law, and each Assistant Chief Counsel for a region or center.

(3) Conducting or requiring that a sponsor conduct an audit of airport financial records and transactions as provided in 49 U.S.C. 47107 and 47121.

§ 16.31 Director's determinations after investigations.

(a) After consideration of the pleadings and other information obtained by the FAA after investigation,

the Director will render an initial determination and provide it to each party by certified mail within 120 days of the date the last pleading specified in § 16.23 was due.

(b) The Director's determination will set forth a concise explanation of the factual and legal basis for the Director's determination on each claim made by the complainant.

(c) A party adversely affected by the Director's determination may appeal the initial determination to the Associate Administrator as provided in § 16.33.

(d) If the Director's determination finds the respondent in noncompliance and proposes the issuance of a compliance order, the initial determination will include notice of opportunity for a hearing under subpart F of this part, if such an opportunity is provided by the FAA. The respondent may elect or waive a hearing as provided in subpart E of this part.

§ 16.33 Final decisions without hearing.

(a) The Associate Administrator will issue a final decision on appeal from the Director's determination, without a hearing, where—

(1) The complaint is dismissed after investigation;

(2) A hearing is not required by statute and is not otherwise made available by the FAA; or

(3) The FAA provides opportunity for a hearing to the respondent and the respondent waives the opportunity for a hearing as provided in subpart E of this part.

(b) In the cases described in paragraph (a) of this section, a party adversely affected by the Director's determination may file an appeal with the Associate Administrator within 30 days after the date of service of the initial determination.

(c) A reply to an appeal may be filed with the Associate Administrator within 20 days after the date of service of the appeal.

(d) The Associate Administrator will issue a final decision and order within 60 days after the due date of the reply.

(e) If no appeal is filed within the time period specified in paragraph (b) of this section, the Director's determination becomes the final decision and order of the FAA without further action. A Director's determination that becomes final because there is no administrative appeal is not judicially reviewable.

Subpart D—Special Rules Applicable to Proceedings Initiated by the FAA

§ 16.101 Basis for the initiation of agency action.

The FAA may initiate its own investigation of any matter within the applicability of this part without having received a complaint. The investigation may include, without limitation, any of the actions described in § 16.29(b).

§ 16.103 Notice of investigation.

Following the initiation of an investigation under § 16.101, the FAA sends a notice to the person(s) subject to investigation. The notice will set forth the areas of the agency's concern and the reasons therefor; request a response to the notice within 30 days of the date of service; and inform the respondent that the FAA will, in its discretion, invite good faith efforts to resolve the matter.

§ 16.105 Failure to resolve informally.

If the matters addressed in the FAA notices are not resolved informally, the FAA may issue a Director's determination under § 16.31.

Subpart E—Proposed Orders of Compliance

§ 16.109 Orders terminating eligibility for grants, cease and desist orders, and other compliance orders.

This section applies to initial determinations issued under § 16.31 that provide the opportunity for a hearing.

(a) The agency will provide the opportunity for a hearing if, in the Director's determination, the agency proposes to issue an order terminating eligibility for grants pursuant to 49 U.S.C. 47106(e) and 47111(d), an order suspending the payment of grant funds, an order withholding approval of any new application to impose a passenger facility charge pursuant to section 112 of the Federal Aviation Administration Act of 1994, 49 U.S.C. 47111(e), a cease and desist order, an order directing the refund of fees unlawfully collected, or any other compliance order issued by the Administrator to carry out the provisions of the Acts, and required to be issued after notice and opportunity for a hearing. In cases in which a hearing is not required by statute, the FAA may provide opportunity for a hearing at its discretion.

(b) In a case in which the agency provides the opportunity for a hearing, the Director's determination issued under § 16.31 will include a statement of the availability of a hearing under subpart F of this part.

(c) Within 20 days after service of a Director's determination under § 16.31 and paragraph (b) of this section, a person subject to the proposed compliance order may—

(1) Request a hearing under subpart F of this part;

(2) Waive hearing and appeal the Director's determination in writing to the Associate Administrator, as provided in § 16.33;

(3) File, jointly with a complainant, a motion to withdraw the complaint and to dismiss the proposed compliance action; or

(4) Submit, jointly with the agency attorney, a proposed consent order under § 16.243(e).

(d) If the respondent fails to request a hearing or to file an appeal in writing within the time periods provided in paragraph (c) of this section, the Director's determination becomes final.

Subpart F—Hearings

§ 16.201 Notice and order of hearing.

(a) If a respondent is provided the opportunity for hearing in an initial determination and does not waive hearing, the Deputy Chief Counsel within 10 days after the respondent elects a hearing will issue and serve on the respondent and complainant a hearing order. The hearing order will set forth:

(1) The allegations in the complaint, or notice of investigation, and the chronology and results of the investigation preliminary to the hearing;

(2) The relevant statutory, judicial, regulatory, and other authorities;

(3) The issues to be decided;

(4) Such rules of procedure as may be necessary to supplement the provisions of this part;

(5) The name and address of the person designated as hearing officer, and the assignment of authority to the hearing officer to conduct the hearing in accordance with the procedures set forth in this part; and

(6) The date by which the hearing officer is directed to issue an initial decision.

(b) Where there are no genuine issues of material fact requiring oral examination of witnesses, the hearing order may contain a direction to the hearing officer to conduct a hearing by submission of briefs and oral argument without the presentation of testimony or other evidence.

§ 16.202 Powers of a hearing officer.

In accordance with the rules of this subpart, a hearing officer may:

(a) Give notice of, and hold, prehearing conferences and hearings;

(b) Administer oaths and affirmations;
 (c) Issue subpoenas authorized by law and issue notices of deposition requested by the parties;

(d) Limit the frequency and extent of discovery;

(e) Rule on offers of proof;

(f) Receive relevant and material evidence;

(g) Regulate the course of the hearing in accordance with the rules of this part to avoid unnecessary and duplicative proceedings in the interest of prompt and fair resolution of the matters at issue;

(h) Hold conferences to settle or to simplify the issues by consent of the parties;

(i) Dispose of procedural motions and requests;

(j) Examine witnesses; and

(k) Make findings of fact and conclusions of law, and issue an initial decision.

§ 16.203 Appearances, parties, and rights of parties.

(a) *Appearances.* Any party may appear and be heard in person.

(1) Any party may be accompanied, represented, or advised by an attorney licensed by a State, the District of Columbia, or a territory of the United States to practice law or appear before the courts of that State or territory, or by another duly authorized representative.

(2) An attorney, or other duly authorized representative, who represents a party shall file a notice of appearance in accordance with § 16.13.

(b) *Parties and agency participation.*

(1) The parties to the hearing are the respondent (s) named in the hearing order, the complainant(s), and the agency.

(2) Unless otherwise specified in the hearing order, the agency attorney will serve as prosecutor for the agency from the date of issuance of the Director's determination providing an opportunity for hearing.

§ 16.207 Intervention and other participation.

(a) A person may submit a motion for leave to intervene as a party. Except for good cause shown, a motion for leave to intervene shall be submitted not later than 10 days after the notice of hearing and hearing order.

(b) If the hearing officer finds that intervention will not unduly broaden the issues or delay the proceedings and, if the person has a property or financial interest that may not be addressed adequately by the parties, the hearing officer may grant a motion for leave to intervene. The hearing officer may determine the extent to which an

intervenor may participate in the proceedings.

(c) Other persons may petition the hearing officer for leave to participate in the hearing. Participation is limited to the filing of post-hearing briefs and reply to the hearing officer and the Associate Administrator. Such briefs shall be filed and served on all parties in the same manner as the parties' post hearing briefs are filed.

(d) Participation under this section is at the discretion of the FAA, and no decision permitting participation shall be deemed to constitute an expression by the FAA that the participant has such a substantial interest in the proceeding as would entitle it to judicial review of such decision.

§ 16.209 Extension of time.

(a) *Extension by oral agreement.* The parties may agree to extend for a reasonable period of time for filing a document under this part. If the parties agree, the hearing officer shall grant one extension of time to each party. The party seeking the extension of time shall submit a draft order to the hearing officer to be signed by the hearing officer and filed with the hearing docket. The hearing officer may grant additional oral requests for an extension of time where the parties agree to the extension.

(b) *Extension by motion.* A party shall file a written motion for an extension of time with the hearing officer not later than 7 days before the document is due unless good cause for the late filing is shown. A party filing a written motion for an extension of time shall serve a copy of the motion on each party.

(c) *Failure to rule.* If the hearing officer fails to rule on a written motion for an extension of time by the date the document was due, the motion for an extension of time is deemed denied.

(d) *Effect on time limits.* In a hearing required by section 519(b) of the Airport and Airways Improvement Act, as amended in 1987, 49 U.S.C. 47106(e) and 47111(d), the due date for the hearing officer's initial decision and for the final agency decision are extended by the length of the extension granted by the hearing officer only if the hearing officer grants an extension of time as a result of an agreement by the parties as specified in paragraph (a) of this section or, if the hearing officer grants an extension of time as a result of the sponsor's failure to adhere to the hearing schedule. In any other hearing, an extension of time granted by the hearing officer for any reason extends the due date for the hearing officer's initial decision and for the final agency

decision by the length of time of the hearing officer's decision.

16.211 Prehearing conference.

(a) *Prehearing conference notice.* The hearing officer schedules a prehearing conference and serves a prehearing conference notice on the parties promptly after being designated as a hearing officer.

(1) The prehearing conference notice specifies the date, time, place, and manner (in person or by telephone) of the prehearing conference.

(2) The prehearing conference notice may direct the parties to exchange proposed witness lists, requests for evidence and the production of documents in the possession of another party, responses to interrogatories, admissions, proposed procedural schedules, and proposed stipulations before the date of the prehearing conference.

(b) *The prehearing conference.* The prehearing conference is conducted by telephone or in person, at the hearing officer's discretion. The prehearing conference addresses matters raised in the prehearing conference notice and such other matters as the hearing officer determines will assist in a prompt, full and fair hearing of the issues.

(c) *Prehearing conference report.* At the close of the prehearing conference, the hearing officer rules on any requests for evidence and the production of documents in the possession of other parties, responses to interrogatories, and admissions; on any requests for depositions; on any proposed stipulations; and on any pending applications for subpoenas as permitted by § 16.219. In addition, the hearing officer establishes the schedule, which shall provide for the issuance of an initial decision not later than 110 days after issuance of the Director's determination order unless otherwise provided in the hearing order.

§ 16.213 Discovery.

(a) Discovery is limited to requests for admissions, requests for production of documents, interrogatories, and depositions as authorized by § 16.215.

(b) The hearing officer shall limit the frequency and extent of discovery permitted by this section if a party shows that—

(1) The information requested is cumulative or repetitious;

(2) The information requested may be obtained from another less burdensome and more convenient source;

(3) The party requesting the information has had ample opportunity to obtain the information through other

discovery methods permitted under this section; or

(4) The method or scope of discovery requested by the party is unduly burdensome or expensive.

§ 16.215 Depositions.

(a) *General.* For good cause shown, the hearing officer may order that the testimony of a witness may be taken by deposition and that the witness produce documentary evidence in connection with such testimony. Generally, an order to take the deposition of a witness is entered only if:

(1) The person whose deposition is to be taken would be unavailable at the hearing;

(2) The deposition is deemed necessary to perpetuate the testimony of the witness; or

(3) The taking of the deposition is necessary to prevent undue and excessive expense to a party and will not result in undue burden to other parties or in undue delay.

(b) *Application for deposition.* Any party desiring to take the deposition of a witness shall make application therefor to the hearing officer in writing, with a copy of the application served on each party. The application shall include:

(1) The name and residence of the witness;

(2) The time and place for the taking of the proposed deposition;

(3) The reasons why such deposition should be taken; and

(4) A general description of the matters concerning which the witness will be asked to testify.

(c) *Order authorizing deposition.* If good cause is shown, the hearing officer, in his or her discretion, issues an order authorizing the deposition and specifying the name of the witness to be deposed, the location and time of the deposition and the general scope and subject matter of the testimony to be taken.

(d) *Procedures for deposition.*

(1) Witnesses whose testimony is taken by deposition shall be sworn or shall affirm before any questions are put to them. Each question propounded shall be recorded and the answers of the witness transcribed verbatim.

(2) Objections to questions or evidence shall be recorded in the transcript of the deposition. The interposing of an objection shall not relieve the witness of the obligation to answer questions, except where the answer would violate a privilege.

(3) The written transcript shall be subscribed by the witness, unless the parties by stipulation waive the signing, or the witness is ill, cannot be found, or

refuses to sign. The reporter shall note the reason for failure to sign.

§ 16.217 Witnesses.

(a) Each party may designate as a witness any person who is able and willing to give testimony that is relevant and material to the issues in the hearing case, subject to the limitation set forth in paragraph (b) of this section.

(b) The hearing officer may exclude testimony of witnesses that would be irrelevant, immaterial, or unduly repetitious.

(c) Any witness may be accompanied by counsel. Counsel representing a nonparty witness has no right to examine the witness or otherwise participate in the development of testimony.

§ 16.219 Subpoenas.

(a) *Request for subpoena.* A party may apply to the hearing officer, within the time specified for such applications in the prehearing conference report, for a subpoena to compel testimony at a hearing or to require the production of documents only from the following persons:

(1) Another party;

(2) An officer, employee, or agent of another party;

(3) Any other person named in the complaint as participating in or benefiting from the actions of the respondent alleged to have violated any Act;

(4) An officer, employee, or agent of any other person named in the complaint as participating in or benefiting from the actions of the respondent alleged to have violated any Act.

(b) *Issuance and service of subpoena.*

(1) The hearing officer issues the subpoena if the hearing officer determines that the evidence to be obtained by the subpoena is relevant and material to the resolution of the issues in the case.

(2) Subpoenas shall be served by personal service, or upon an agent designated in writing for the purpose, or by certified mail, return receipt addressed to such person or agent. Whenever service is made by registered or certified mail, the date of mailing shall be considered as the time when service is made.

(3) A subpoena issued under this part is effective throughout the United States or any territory or possession thereof.

(c) *Motions to quash or modify subpoena.*

(1) A party or any person upon whom a subpoena has been served may file a motion to quash or modify the subpoena with the hearing officer at or before the

time specified in the subpoena for the filing of such motions. The applicant shall describe in detail the basis for the application to quash or modify the subpoena including, but not limited to, a statement that the testimony, document, or tangible evidence is not relevant to the proceeding, that the subpoena is not reasonably tailored to the scope of the proceeding, or that the subpoena is unreasonable and oppressive.

(2) A motion to quash or modify the subpoena stays the effect of the subpoena pending a decision by the hearing officer on the motion.

§ 16.221 Witness fees.

(a) The party on whose behalf a witness appears is responsible for paying any witness fees and mileage expenses.

(b) Except for employees of the United States summoned to testify as to matters related to their public employment, witnesses summoned by subpoena shall be paid the same fees and mileage expenses as are paid to a witness in a court of the United States in comparable circumstances.

§ 16.223 Evidence.

(a) *General.* A party may submit direct and rebuttal evidence in accordance with this section.

(b) *Requirement for written testimony and evidence.* Except in the case of evidence obtained by subpoena, or in the case of a special ruling by the hearing officer to admit oral testimony, a party's direct and rebuttal evidence shall be submitted in written form in advance of the oral hearing pursuant to the schedule established in the hearing officer's prehearing conference report. Written direct and rebuttal fact testimony shall be certified by the witness as true and correct. Subject to the same exception (for evidence obtained by subpoena or subject to a special ruling by the hearing officer), oral examination of a party's own witness is limited to certification of the accuracy of written evidence, including correction and updating, if necessary, and reexamination following cross-examination by other parties.

(c) *Subpoenaed testimony.* Testimony of witnesses appearing under subpoena may be obtained orally.

(d) *Cross-examination.* A party may conduct cross-examination that may be required for disclosure of the facts, subject to control by the hearing officer for fairness, expedition and exclusion of extraneous matters.

(e) *Hearsay evidence.* Hearsay evidence is admissible in proceedings governed by this part. The fact that

evidence is hearsay goes to the weight of evidence and does not affect its admissibility.

(f) *Admission of evidence.* The hearing officer admits evidence introduced by a party in support of its case in accordance with this section, but may exclude irrelevant, immaterial, or unduly repetitious evidence.

(g) *Expert or opinion witnesses.* An employee of the FAA or DOT may not be called as an expert or opinion witness for any party other than the agency except as provided in Department of Transportation regulations at 49 CFR part 9.

§ 16.225 Public disclosure of evidence.

(a) Except as provided in this section, the hearing shall be open to the public.

(b) The hearing officer may order that any information contained in the record be withheld from public disclosure. Any person may object to disclosure of information in the record by filing a written motion to withhold specific information with the hearing officer. The person shall state specific grounds for nondisclosure in the motion.

(c) The hearing officer shall grant the motion to withhold information from public disclosure if the hearing officer determines that disclosure would be in violation of the Privacy Act, would reveal trade secrets or privileged or confidential commercial or financial information, or is otherwise prohibited by law.

§ 16.227 Standard of proof.

The hearing officer shall issue an initial decision or shall rule in a party's favor only if the decision or ruling is supported by, and in accordance with, reliable, probative, and substantial evidence contained in the record and is in accordance with law.

§ 16.229 Burden of proof.

(a) The burden of proof of noncompliance with an Act or any regulation, order, agreement or document of conveyance issued under the authority of an Act is on the agency.

(b) Except as otherwise provided by statute or rule, the proponent of a motion, request, or order has the burden of proof.

(c) A party who has asserted an affirmative defense has the burden of proving the affirmative defense.

§ 16.231 Offer of proof.

A party whose evidence has been excluded by a ruling of the hearing officer may offer the evidence on the record when filing an appeal.

§ 16.233 Record.

(a) *Exclusive record.* The transcript of all testimony in the hearing, all exhibits received into evidence, all motions, applications requests and rulings, and all documents included in the hearing record shall constitute the exclusive record for decision in the proceedings and the basis for the issuance of any orders.

(b) *Examination and copy of record.* Any interested person may examine the record at the Part 16 Airport Proceedings Docket, AGC-600, Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591. Any person may have a copy of the record after payment of reasonable costs for search and reproduction of the record.

§ 16.235 Argument before the hearing officer.

(a) *Argument during the hearing.* During the hearing, the hearing officer shall give the parties reasonable opportunity to present oral argument on the record supporting or opposing motions, objections, and rulings if the parties request an opportunity for argument. The hearing officer may direct written argument during the hearing if the hearing officer finds that submission of written arguments would not delay the hearing.

(b) *Posthearing briefs.* The hearing officer may request or permit the parties to submit posthearing briefs. The hearing officer may provide for the filing of simultaneous reply briefs as well, if such filing will not unduly delay the issuance of the hearing officer's initial decision. Posthearing briefs shall include proposed findings of fact and conclusions of law; exceptions to rulings of the hearing officer; references to the record in support of the findings of fact; and supporting arguments for the proposed findings, proposed conclusions, and exceptions.

§ 16.237 Waiver of procedures.

(a) The hearing officer shall waive such procedural steps as all parties to the hearing agree to waive before issuance of an initial decision.

(b) Consent to a waiver of any procedural step bars the raising of this issue on appeal.

(c) The parties may not by consent waive the obligation of the hearing officer to enter an initial decision on the record.

Subpart G—Initial Decisions, Orders and Appeals

§ 16.241 Initial decisions, order, and appeals.

(a) The hearing officer shall issue an initial decision based on the record developed during the proceeding and shall send the initial decision to the parties not later than 110 days after the Director's determination unless otherwise provided in the hearing order.

(b) Each party adversely affected by the hearing officer's initial decision may file an appeal with the Associate Administrator within 15 days of the date the initial decision is issued. Each party may file a reply to an appeal within 10 days after it is served on the party. Filing and service of appeals and replies shall be by personal delivery.

(c) If an appeal is filed, the Associate Administrator reviews the entire record and issues a final agency decision and order within 30 days of the due date of the reply. If no appeal is filed, the Associate Administrator may take review of the case on his or her own motion. If the Associate Administrator finds that the respondent is not in compliance with any Act or any regulation, agreement, or document of conveyance issued or made under such Act, the final agency order includes a statement of corrective action, if appropriate, and identifies sanctions for continued noncompliance.

(d) If no appeal is filed, and the Associate Administrator does not take review of the initial decision on the Associate Administrator's own motion, the initial decision shall take effect as the final agency decision and order on the sixteenth day after the actual date the initial decision is issued.

(e) The failure to file an appeal is deemed a waiver of any rights to seek judicial review of an initial decision that becomes a final agency decision by operation of paragraph (d) of this section.

(f) If the Associate Administrator takes review on the Associate Administrator's own motion, the Associate Administrator issues a notice of review by the sixteenth day after the actual date the initial decision is issued.

(1) The notice sets forth the specific findings of fact and conclusions of law in the initial decision that are subject to review by the Associate Administrator.

(2) Parties may file one brief on review to the Associate Administrator or rely on their posthearing briefs to the hearing officer. Briefs on review shall be filed not later than 10 days after service of the notice of review. Filing and service of briefs on review shall be by personal delivery.

(3) The Associate Administrator issues a final agency decision and order within 30 days of the due date of the briefs on review. If the Associate Administrator finds that the respondent is not in compliance with any Act or any regulation, agreement or document of conveyance issued under such Act, the final agency order includes a statement of corrective action, if appropriate, and identifies sanctions for continued noncompliance.

§ 16.243 Consent orders.

(a) The agency attorney and the respondents may agree at any time before the issuance of a final decision and order to dispose of the case by issuance of a consent order. Good faith efforts to resolve a complaint through issuance of a consent order may continue throughout the administrative process. Except as provided in § 16.209, such efforts may not serve as the basis for extensions of the times set forth in this part.

(b) A proposal for a consent order, specified in paragraph (a) of this section, shall include:

- (1) A proposed consent order;
- (2) An admission of all jurisdictional facts;
- (3) An express waiver of the right to further procedural steps and of all rights of judicial review; and
- (4) The hearing order, if issued, and an acknowledgment that the hearing order may be used to construe the terms of the consent order.

(c) If the issuance of a consent order has been agreed upon by all parties to the hearing, the proposed consent order shall be filed with the hearing officer, along with a draft order adopting the consent decree and dismissing the case, for the hearing officer's adoption.

(d) The deadline for the hearing officer's initial decision and the final agency decision is extended by the amount of days elapsed between the filing of the proposed consent order with the hearing officer and the issuance of the hearing officer's order continuing the hearing.

(e) If the agency attorney and sponsor agree to dispose of a case by issuance of a consent order before the FAA issues a hearing order, the proposal for a consent order is submitted jointly to the official authorized to issue a hearing order, together with a request to adopt the consent order and dismiss the case. The official authorized to issue the hearing order issues the consent order as an order of the FAA and terminates the proceeding.

Subpart H—Judicial Review

§ 16.247 Judicial review of a final decision and order.

(a) A person may seek judicial review, in a United States Court of Appeals, of a final decision and order of the Associate Administrator as provided in 49 U.S.C. 46110 or section 519(b)(4) of the Airport and Airway Improvement Act of 1982, as amended, (AAIA), 49 U.S.C. 47106(d) and 47111(d). A party seeking judicial review of a final decision and order shall file a petition for review with the Court not later than 60 days after a final decision and order under the AAIA has been served on the party or within 60 days after the entry of an order under 49 U.S.C. 40101 *et seq.*

(b) The following do not constitute final decisions and orders subject to judicial review:

- (1) An FAA decision to dismiss a complaint without prejudice, as set forth in § 16.27;
- (2) A Director's determination;
- (3) An initial decision issued by a hearing officer at the conclusion of a hearing;
- (4) A Director's determination or an initial decision of a hearing officer that becomes the final decision of the Associate Administrator because it was not appealed within the applicable time periods provided under §§ 16.33(b) and 16.241(b).

Subpart I—Ex Parte Communications

§ 16.301 Definitions.

As used in this subpart:

Decisional employee means the Administrator, Deputy Administrator, Associate Administrator, Director, hearing officer, or other FAA employee who is or who may reasonably be expected to be involved in the decisional process of the proceeding.

Ex parte communication means an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given, but it shall not include requests for status reports on any matter or proceeding covered by this part, or communications between FAA employees who participate as parties to a hearing pursuant to 16.203(b) of this part and other parties to a hearing.

§ 16.303 Prohibited ex parte communications.

(a) The prohibitions of this section shall apply from the time a proceeding is noticed for hearing unless the person responsible for the communication has knowledge that it will be noticed, in which case the prohibitions shall apply

at the time of the acquisition of such knowledge.

(b) Except to the extent required for the disposition of ex parte matters as authorized by law:

(1) No interested person outside the FAA and no FAA employee participating as a party shall make or knowingly cause to be made to any decisional employee an ex parte communication relevant to the merits of the proceeding;

(2) No FAA employee shall make or knowingly cause to be made to any interested person outside the FAA an ex parte communication relevant to the merits of the proceeding; or

(3) Ex parte communications regarding solely matters of agency procedure or practice are not prohibited by this section.

§ 16.305 Procedures for handling ex parte communications.

A decisional employee who receives or who makes or knowingly causes to be made a communication prohibited by § 16.303 shall place in the public record of the proceeding:

- (a) All such written communications;
- (b) Memoranda stating the substance of all such oral communications; and
- (c) All written responses, and memoranda stating the substance of all oral responses, to the materials described in paragraphs (a) and (b) of this section.

§ 16.307 Requirement to show cause and imposition of sanction.

(a) Upon receipt of a communication knowingly made or knowingly caused to be made by a party in violation of § 16.303, the Associate Administrator or his designee or the hearing officer may, to the extent consistent with the interests of justice and the policy of the underlying statutes, require the party to show cause why his or her claim or interest in the proceeding should not be dismissed, denied, disregarded, or otherwise adversely affected on account of such violation.

(b) The Associate Administrator may, to the extent consistent with the interests of justice and the policy of the underlying statutes administered by the FAA, consider a violation of this subpart sufficient grounds for a decision adverse to a party who has knowingly committed such violation or knowingly caused such violation to occur.

Issued in Washington, DC, on October 8, 1996.

David R. Hinson,
Administrator.

[FR Doc. 96-26180 Filed 10-10-96; 8:45 am]

BILLING CODE 4910-13-M