

**UNITED STATES DEPARTMENT OF TRANSPORTATION  
FEDERAL AVIATION ADMINISTRATION  
WASHINGTON, DC**

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**Flamingo Express, Inc.** )  
**Complainant** )  
 )  
**v.** )  
 )  
**City of Cincinnati, OH** )  
**Respondent** )  
\_\_\_\_\_ )

**Docket No. 16-06-04**  
**Final: August 9, 2007**

**FINAL DECISION AND ORDER**

**I. INTRODUCTION**

This matter is before the Federal Aviation Administration (“FAA”) Associate Administrator for Airports on appeal filed by Flamingo Express, Inc. (“Complainant” or “Flamingo”), from the Director’s Determination of February 26, 2007, issued by the Director of the FAA Office of Airport Safety and Standards, pursuant to the *Rules of Practice for Federally-Assisted Airport Proceedings*, 14 CFR Part 16 (FAA Rules of Practice).

In its formal complaint, the Complainant alleged the City of Cincinnati engaged in economic discrimination, a violation of 49 USC § 47107 (a) and Federal Grant Assurance 22, *Economic Nondiscrimination*, when it failed to approve Complainant’s request to operate scheduled 14 CFR Part 121 commuter air service with aircraft seating between 10 and 30 passengers<sup>1</sup>, by limiting scheduled commuter air service to aircraft with not more than 9 seats, by requiring aircraft liability insurance in the amount of \$20 million per occurrence, and by imposing a \$200 monthly operating fee. [FAA Exhibit 1, Item 3.]

<sup>1</sup> The Record reflects confusion between the parties as to exactly what kind of service Complainant proposed to operate. Complainant submitted its required ‘Permit to Operate’ with proposed Part 121 service with aircraft seating less than 30 passengers. [FAA Exhibit 1, Item 3, exhibit B.] Respondent offered Complainant an Operating Agreement for ‘scheduled service’ with aircraft seating 9 or less passengers. [FAA Exhibit 1, Item 5, exhibit F.] Complainant declined this Operating Agreement. In the Complaint and Reply, Complainant asks for “scheduled commuter service up to 30 seats” and “...operations with more than nine seats.” [See FAA Exhibit 1, Items 3, pg. 2 & Item 23 pg. 1.] For the purposes of clarity in this Final Decision and Order, however, the Associate Administrator will reference Complainant’s request for scheduled service by aircraft with seating between 10 and 30 passengers because Complainant declined the City’s offer of operations of aircraft seating 9 passengers.

In his February 26, 2007 Determination, the Director found the Respondent in compliance with its Federal grant obligations.

As will be more fully explained in the Analysis section for the issues on appeal, the Director determined that Respondent did not unreasonably delay Complainant's request for scheduled service nor did it unreasonably deny Complainant's request for scheduled service with aircraft seating between 10 and 30 seats since Complainant did not take "concrete steps toward [FAA] Part 121 certification." [FAA Exhibit 1, Item 22, pg. 18.] Further, the Director found no violation with regard to Respondent's required \$20 million aircraft liability insurance based on Complainant's request of scheduled service for aircraft seating between 10 and 30 passengers. Finally, the Director upheld Respondent's \$200 monthly operating fee, citing "there is no evidence that it is unreasonable for the Airport to charge \$200 per month for up to 40 flights or \$5 per flight to a scheduled air carrier using 20-seat turboprop aircraft for the privilege of using its ramp areas as well as other public areas in the terminal building associated with passengers, aircraft servicing equipment, luggage handling, and security." [FAA Exhibit 1, Item 22, pg. 23.]

On April 2, 2007, Complainant appealed the Director's Determination in accordance with FAA Rules of Practice. Complainant disputes factual findings and legal determinations reached by the Director and raises the following issues on appeal:

1. Whether the Director erred in concluding that the City's refusal to permit scheduled operations by aircraft with more than nine seats was reasonable?
2. Whether the Director erred in concluding that the City's \$20 million liability insurance requirement was reasonable?

In accordance with 14 CFR 16.33, FAA has reexamined the record to reassess the findings in the Director's Determination with regard to Complainant's issues on appeal. Upon receiving an appeal of a Director's Determination, the Associate Administrator must determine whether (1) the findings of fact made by the Director are supported by a preponderance of reliable, probative, and substantial evidence, and (2) each conclusion of law is made in accordance with applicable law, precedent, and public policy. Based on this reexamination, FAA affirms the Director's Determination, which found the Respondent had not violated 49 U.S.C § 47107(a) or Federal Grant Assurance 22, *Economic Nondiscrimination*. This Final Decision and Order finds that the appeal did not contain persuasive arguments sufficient to reverse any portion of the Director's Determination.

## **II. AIRPORT**

The City of Cincinnati is the owner and operator of the Lunken Airport. [FAA Exhibit 1, Item 5, p. 1.] The Airport occupies 1,025 acres of land and is included in the National Plan of Integrated Airport Systems (NPIAS). It is a reliever airport and serves the aviation needs in the tri-state area by providing needed runway capacity and landside support facilities relief to the Cincinnati/Northern Kentucky International Airport (CVG).

The Airport is the base for more than 270 aircraft and serves a wide spectrum of aeronautical activities totaling 130,000 annual operations. LUK's airfield infrastructure is composed of three runways, the longest of which is 6,101 feet in length.<sup>2</sup> The Airport is equipped with a Category I Instrument Landing System (CAT I ILS) and also has a fulltime Air Traffic Control Tower (ATCT).

Prior to June 2004, the Airport was classified as a Limited 14 CFR Part 139 category airport. This level of certification allowed it to serve charter or unscheduled operations and scheduled operations of 30 seats or less. [FAA Exhibit 1, Item 3, p. 2; Item 5, p. 1-3.] Since December 2, 2005, the Airport has held a Class IV 14 CFR Part 139 certificate.<sup>3</sup> [See discussion in Applicable Law and Policy regarding 14 CFR Part 139 and designation of 'Class'.]

FAA records indicate that the planning and development of LUK has been financed, in part, with funds provided by the FAA under the Airport Improvement Program (AIP), and between 1983 and 2005, the Airport received more than \$9.53 million in federal airport development assistance in AIP grants. [FAA Exhibit 1, Item 9.]

### **III. BACKGROUND AND PROCEDURAL HISTORY**

On April 21, 2004, Complainant submitted to Respondent a permit application (Permit to Operate) to operate scheduled 14 CFR Part 121 commuter air service, with aircraft seating less than 30 but more than 9 passengers. The City recorded the submittal and the associated \$100.00 permit fee. The Airport manager approved Complainant's Permit to Operate on April 21, 2004, while the City's Risk Manager did so on May 19, 2004. On August 10, 2004, Complainant submitted a preliminary proposal in the form of an operating agreement. [FAA Exhibit 1, Item 3, exhibit E.] A public hearing on Complainant's Permit to Operate was held on August 24, 2004. [FAA Exhibit 1, Item 3, pg. 2-3.]

In October 2004, Complainant voiced concerns regarding the City's failure to move forward with its Permit to Operate and proposed operating agreement. [FAA Exhibit 1, Item 3, exhibit D.] On January 11, 2005, Complainant wrote to the City complaining about the City's inaction and on January 19, 2005, the City provided Complainant with a proposed "Air Route Operating Agreement" (Operating Agreement) in conjunction with Complainant's Permit to Operate. [FAA Exhibit 1, Item 3, exhibit D.] The Operating Agreement offered by the City permitted, among other things, commuter operations of aircraft with nine seats or less, required a \$200 per month fee for up to 40 flights per month along with a \$5 surcharge for each flight thereafter, and required liability coverage

<sup>2</sup> Airport Master Plan Update (DRAFT), Cincinnati Municipal Airport – Lunken Field, November 24, 2004, 1-7. This document is located at the FAA's Detroit Airports District Office (ADO), in Romulus, Michigan.

<sup>3</sup>[http://www.faa.gov/airports\\_airtraffic/airports/airport\\_safety/part139\\_cert/media/part139\\_cert\\_status\\_table.xls](http://www.faa.gov/airports_airtraffic/airports/airport_safety/part139_cert/media/part139_cert_status_table.xls) and FAA Exhibit 1, Item 5, p.1. Although the City states in its Answer that "it is awaiting certification as a Class IV Airport under the 2004 revision of Part 139," current FAA records indicate that the Airport holds that classification today. [See FAA Exhibit 1, Item 15.]

in the minimum amount of \$20 million per occurrence. [FAA Exhibit 1, Item 3, exhibits D & F.]

On February 11, 2005, Complainant replied and noted that the City's proposed Operating Agreement was unreasonable, in part, because it did not allow Complainant to conduct scheduled service with aircraft seating between 10 and 30 seats and required a high \$20 million minimum in liability insurance. Complainant also opposed the \$200 monthly fee and asked for the Operating Agreement to be revised. [FAA Exhibit 1, Item 3, exhibit D, item 6.] On February 18, 2005, the City stated that it did not use the Operating Agreement to delay consideration and argued that the \$20 million liability insurance requirement as well as the \$200 per month fee were justified. Moreover, the City stated that the agreement it had under consideration was for the use of aircraft with nine seats or less and not with larger aircraft of up to 30 seats.<sup>4</sup> [FAA Exhibit 1, Item 3, exhibit D, item 7.] The City's response included justifications of the City's position and a request for Complainant to submit additional information justifying its stance. [FAA Exhibit 1, Item 5, pg. 9.]

On March 10, 2005, Complainant reiterated its request for air carrier service with aircraft seating between 10 and 30 passengers and argued it could not attain the City's insurance requirement of \$20 million. Complainant argued that its current insurance coverage of \$1 million is consistent with industry standards and continued to oppose the \$200 monthly fee. [FAA Exhibit 1, Item 5, exhibit I.] On March 24, 2005, the City reiterated its position and noted that the insurance requirements and \$200 monthly fee were reasonable and the Complainant's application was "specifically for a 9-seat airplane", and that Complainant only had a 9-seat aircraft at that time. [FAA Exhibit 1, Item 5, exhibit J.] Finally, the City added that "sadly, it doesn't appear we are making any progress as these are the exact same 3 issues you raised in your previous correspondence" and since Complainant is "not willing to move on these issues" it should "consider withdrawing their application." [*id.*]

On July 11, 2005, Complainant stated that the City had taken no serious action regarding Complainant's Permit to Operate and reiterated its position that the City's insurance requirement cannot be written for the type of operation Complainant was proposing. Once again, Complainant argued that the request for air carrier service was to permit scheduled service with aircraft seating between 10 and 30 passengers. [FAA Exhibit 1, Item 5, exhibit K.] On July 24, 2005, the City responded that Complainant had not responded to the City's March 24, 2005, letter and advised Complainant to withdraw its Permit to Operate if the matters in that letter were not addressed. [FAA Exhibit 1, Item 5, exhibit L.]

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<sup>4</sup> There is some dispute between the parties as to Complainant's original proposal for service. Both parties submitted to the Record what they claimed was 'Complainant's Permit to Operate'. The documents appear to be identical except for the designation of the proposed service. Complainant's submission indicates a request for "Part 121 Scheduled Commuter service < 30 seats." [FAA Exhibit 1, Item 3, exhibit B.] However, Respondent's submission shows Complainant's request as for "Scheduled Air Route," with no specific provision for seating. [FAA Exhibit 1, Item 5, exhibit C.] Respondent's version was visibly altered by an unknown individual since it includes that individual's initials next to the proposed service of "Scheduled Air Route."

On March 10, 2006, the FAA received Complainant's formal Complaint. [FAA Exhibit 1, Item 1.] On March 24, 2006, the FAA dismissed the Complaint without prejudice as incomplete under 14 CFR Part 16.27. [FAA Exhibit 1, Item 2.] On May 31, 2006, Complainant re-filed the Complaint [FAA Exhibit 1, Item 3.] and on June 14, 2006, the FAA issued a Notice of Docketing as FAA Docket No. 16-06-04. [FAA Exhibit 1, Item 4.] In its Complaint, Complainant contends that since the City has failed to approve Complainant's April 2004 Permit to Operate scheduled 14 CFR Part 121 commuter service with aircraft seating between 10 and 30 passengers, the City is violating its Federal obligations. [See FAA Exhibit 1, Item 3, pg. 2.]

On July 3, 2006, the City filed its Answer to the Complaint denying Complainant's allegations and requesting that the FAA dismiss Flamingo's Part 16 Complaint. [See FAA Exhibit 1, Item 5, pg. 5 & 11.] On July 15, 2006, Complainant filed its Reply to the City's Answer, and on July 24, 2006, the City filed its Rebuttal. [FAA Exhibit 1, Items 6 & 7.] On December 28, 2006, the FAA issued a Notice of Extension of Time. [FAA Exhibit 1, Item 14.]

On February 26, 2007 the Director's Determination found the Respondent was not in violation of its grant assurances pursuant to 49 U.S.C. § 47107(a) and related Federal Grant Assurance (22, *Economic Nondiscrimination*.) [FAA Exhibit 1, Item 22.]

Complainant submitted its appeal to the Director's Determination by letter of April 2, 2007. [FAA Exhibit 1, Item 23.]

By letter of April 18, 2007, the Respondent provided its Reply to the Complainant's appeal. [FAA Exhibit 1, Item 24.]

#### **IV. APPLICABLE LAW AND POLICY**

##### **The Airport Improvement Program and the Airport Sponsor Assurances**

Title 49 USC § 47101, et seq., provides for Federal financial assistance for the development of public-use airports under the Airport Improvement Program (AIP) established by the Airport and Airway Improvement Act (AAIA), as amended. Section 47107, et seq., sets forth assurances to which an airport sponsor agrees as a condition of receiving Federal financial assistance. Upon acceptance of an AIP grant, the assurances become binding obligations between the airport sponsor and the Federal government. The FAA has a statutory mandate to ensure that airport owners comply with these sponsor assurances.<sup>5</sup> FAA Order 5190.6A, Airport Compliance Requirements, issued on October 1, 1989, provides the policies and procedures to be followed by the FAA in carrying out its legislatively-mandated functions related to compliance with sponsor assurances for federally-obligated airports.

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<sup>5</sup> See eg., 49 USC § 40101, 40103(e), 40113, 40114, 46101, 46104, 46105, 46106, 46110, 47104, 47105(d), 47106(d), 47106(e), 47107, 47108, 47111(d), 47122.

### **Public Use of the Airport – Grant Assurance 22**

The owner of any airport developed with Federal grant assistance is required to operate the airport for the use and benefit of the public and to make it available to all types, kinds, and classes of aeronautical activity on reasonable terms and without unjust discrimination. Grant Assurance 22, *Economic Nondiscrimination*, of the prescribed sponsor assurances, implements the provisions of 49 USC 47107 (a)(1) through (6), and requires, in pertinent part, that the sponsor of a federally-obligated airport:

“...will make its airport available as an airport for public use on reasonable terms, and without unjust discrimination, to all types, kinds, and classes of aeronautical activities, including commercial aeronautical activities offering services to the public at the airport.” [Assurance 22(a).]

“...may establish such reasonable, and not unjustly discriminatory, conditions to be met by all users of the airport as may be necessary for the safe and efficient operation of the airport.” [Assurance 22 (h).]

FAA Order 5190.6A describes, in detail, the responsibilities assumed by the owners of public-use airports developed with Federal assistance. [See FAA Order 5190.6A, Sec. 4-13(a).]

### **Federal Preemption of Authority Over Air Carrier Service**

49 USC § 41713 prohibits a state or local government from regulating the rates, routes or services of an air carrier authorized to provide air transportation. 49 USC 41713(b)(1) provides, in relevant part, that “a State, political subdivision of a State, or political authority of at least 2 States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier that may provide air transportation under this subpart.”<sup>6</sup>

However, 49 USC § 41713(b)(3) establishes an exception to this general prohibition by providing, in pertinent part, that “this subsection does not limit a State, political subdivision of a State, or political authority of at least 2 States that owns or operates an airport served by an air carrier holding a certificate issued by the Secretary of Transportation from carrying out its proprietary powers and rights.” This provisions preserves the proprietor’s rights to conduct the business of an airport, but it does not create any new powers for the proprietors. The proprietary rights are still subject, in the case of a grant-funded airport, to section 308 of the Federal Aviation Act of 1958, 49 USC § 40103, and the grant assurances. The FAA has found that a ban on scheduled service can be tantamount to the regulation of rates, routes, and service within the meaning of 49 USC § 41713, and that the airport sponsor’s actions to restrict that service may fall outside the scope of the proprietor’s exemption.<sup>7</sup>

<sup>6</sup> See Director’s Determination, FAA Docket No. 16-98-05, Centennial Express Airlines, Golden Eagle Charters d/b/a Centennial Express Airlines v. Arapahoe County Public Airport Authority, pg. 9, affirmed Arapahoe County Public Airport Authority v. FAA, 242 F. 3d 1213 (10<sup>th</sup> Cir, 2001).

<sup>7</sup> *Id.*

### **Background on 14 CFR Part 139 and Related Policies**

Under Title 49 USC § 44706, the FAA has the statutory authority to issue Airport Operating Certificates (AOC) to airports serving passenger-carrying operations of air carriers and establish minimum safety standards for the operation of those airports. The FAA uses this authority to issue requirements for the certification and operation of public use airports through 14 CFR Part 139 (Part 139). Part 139 requires the FAA to issue AOCs to airports that (1) serve scheduled and unscheduled air carrier aircraft with more than 30 seats; (2) serve scheduled air carrier operations in aircraft with between 10 and 30 seats; and (3) those airports the FAA Administrator requires to have an AOC. To obtain an AOC, the airport operator must agree to certain operational and safety standards for such things as firefighting and rescue service equipment. These requirements vary depending on the size of the airport and the type of flight operations conducted.

In 2004, the FAA issued a final rule that revised Part 139 and established certification requirements for airports serving scheduled air carrier operations in aircraft designed for between 10 and 30 passenger seats. This final rule went into effect on June 9, 2004. [See 69 F.R. 6424 (dated February 10, 2004) or 24069 (dated May 3, 2004.)] The previous major revision to Part 139 had taken place in 1988 and provided for two categories of AOC: Unlimited and Limited.<sup>8</sup> The revised Part 139 regulation changed the airport certification process to incorporate all airports covered by the statute, including those serving scheduled operations of smaller air carrier aircraft and those airports that serve a mixture of air carrier operations. Under this changed certification process, airports were reclassified into four new classes, based on the type of air carrier operation served. The following table identifies the four classes of Part 139 airports.

Type of Air Carrier Operation	Class I	Class II	Class III	Class IV
Scheduled Large Air Carrier Aircraft (30+ seats)	X			
Unscheduled Large Air Carrier Aircraft (30+ seats)	X	X		X
Scheduled Small Air Carrier Aircraft (10-30 seats)	X	X	X	

Source: [http://www.faa.gov/airports\\_airtraffic/airports/airport\\_safety/part139\\_cert/?p1=classes](http://www.faa.gov/airports_airtraffic/airports/airport_safety/part139_cert/?p1=classes)

Under the new rules, airports that held a Limited AOC could become either Class II or Class IV airports. Class IV airports are those airports that serve only unscheduled operations of large air carrier aircraft.

As part of the implementation of the new rules, the FAA issued program policy guidance (Policy 75) entitled *Designation of Class of Certificate under the Revised 14 CFR Part*

<sup>8</sup> The 1988 rule provided for two categories of airport operations certificate (AOC): unlimited and limited. The new regulation has four classes of AOC. The purpose of providing four separate classes of AOC, as with the two types of AOC under the prior rule, is to apply the right level of safety regulation for the kind of aircraft operations at each airport and avoid imposing more stringent requirements than are actually required.

139 in June of 2004. [FAA Exhibit 1, Item 16.] This policy provided general guidance to address changes in Part 139. In its guidance, the FAA noted that the operator of a certificated airport that has received Federal assistance (AIP grants or property conveyances) also has the independent obligation to provide reasonable, not unjustly discriminatory access to the airport. This is because the class of AOC held by an airport can affect an aeronautical operator's access, in that commercial aircraft operators can operate only at airports with a certain level of AOC. In other words, the FAA would generally expect an airport operator to meet the requirements of the AOC that corresponds to the kinds of commercial operations at the airport at the time it applies for the new certificate, in order to meet the obligation for reasonable and not unjustly discriminatory access.

There are limitations to an airport's ability to downgrade its AOC classification without affecting its obligation to provide reasonable access. An airport that had a Limited AOC, and air carrier service, could surrender its AOC at any time under 14 CFR § 139.109. However, if that airport has accepted Federal assistance, surrendering the AOC could conflict with the Federal requirements for reasonable access if current or planned air carrier operations must be cancelled as a result. If an airport had a Limited AOC under the previous Part 139 requirements and had scheduled service with 10-30 seat aircraft, a Class II AOC would be required after the new rules came into effect in order to permit current operations to continue. In such a case, the airport operator cannot elect to be a Class IV Airport under the new Part 139, because that would effectively require the scheduled service to cease.<sup>9</sup>

The FAA generally treats planned service the same as existing service, where planned service is reasonably expected to operate. If there was no scheduled service at a Limited-AOC airport, but an air carrier has notified an airport that it intends to begin scheduled service, the airport cannot elect not to meet the requirements for the needed AOC class in order to prevent the air carrier from beginning scheduled service. The FAA would consider an operator that was prevented from starting service to be "directly and substantially affected" by the airport's actions not to seek the AOC classification applicable to the existing or planned service. FAA would view the selection of a Class IV certificate, in such a case, as a potential violation of the airport's Federal obligations.<sup>10</sup>

### **The FAA Airport Compliance Program**

The FAA ensures that airport owners comply with their Federal grant obligations through the FAA's Airport Compliance Program. The program is based on the obligations that an airport owner accepts when receiving federal grant funds or the transfer of federal property for airport purposes. These obligations are incorporated in grant agreements and

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<sup>9</sup> Note that 49 USC § 44706(f) does not apply to changes in class of AOC by a certificated airport. Since the Airport already had an AOC (even if Limited), it would be required to continue to meet appropriate certification requirements for the kinds of operations at the Airport and convert its AOC to one of the new Part 139 classes.

<sup>10</sup> See Part 139 Certification FAQ at [http://www.faa.gov/airports\\_airtraffic/airports/airport\\_safety/part139\\_cert/?p1=faq#q1](http://www.faa.gov/airports_airtraffic/airports/airport_safety/part139_cert/?p1=faq#q1).

instruments of conveyance in order to protect the public's interest in civil aviation and to ensure compliance with federal laws.

The FAA Airport Compliance Program is designed to ensure the availability of a national system of safe and properly maintained public-use airports operated in a manner consistent with the airport owners' federal obligations and the public's investment in civil aviation. The Airport Compliance Program does not control or direct the operation of airports; it monitors the administration of the valuable rights pledged by airport sponsors to the United States in exchange for monetary grants and donations of federal property to ensure that the public interest is being served. In addressing allegations of noncompliance, the FAA will make a determination as to whether an airport sponsor is currently in compliance with the applicable federal obligations. FAA may also take into consideration any action or program the sponsor has taken or implemented or proposed to take which, in FAA's judgment, is adequate to reasonably carry out the obligations under the grant assurances.<sup>11</sup>

## V. ISSUES ON APPEAL

The issues on appeal are:

1. Whether the Director erred in concluding that the City's refusal to permit scheduled operations by aircraft with more than nine seats was reasonable?
2. Whether the Director erred in concluding that the City's \$20 million liability insurance requirement was reasonable?

## VI. ANALYSIS AND DISCUSSION

As stated above, in the Applicable Law and Policy section, the Associate Administrator reviews the Director's findings of fact and application of Federal law, policy, and precedent to the circumstances of the Complaint, in light of the appellant's allegations of an error in the Determination.

While Complainant appealed the Director's Determination on "all grounds," Complainant only provides substantive argument for two issues on appeal. [FAA Exhibit 1, Item 23, pg. 1.] The Associate Administrator will analyze those two issues as follows.

### **Issue 1 – No Scheduled Operations by Aircraft With More than 9 Seats**

In its complaint, Flamingo alleged Respondent "refused to allow, or even consider, Flamingo's request to operate scheduled service up to 30 seats..." [FAA Exhibit 1, Item 22, pg. 13.] Respondent denied the allegations citing that it had not received any

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<sup>11</sup> See FAA Order 5190.6A, Sec. 5-6. Thus, the FAA can take into consideration reasonable corrective actions by the airport sponsor as measures to resolve alleged or potential violations of applicable federal obligations, and as measures that could prevent recurrence of noncompliance in the future.

indication from Flamingo of its intention to use aircraft other than those with 9 seats or less.<sup>12</sup> [*id.*]

In his analysis, the Director reviewed the multiple facets of the issue including the City's required submission by Complainant of a Permit to Operate, the recertification and classification of the airport through Part 139, and the extent of Complainant's intention to operate Part 121 service.

Based on analysis of the Record provided and additional information gathered during investigation regarding Complainant's proposed operations and its Permit to Operate, the Director found "that although Complainant envisaged some level of operations using a 9-seat aircraft, it also submitted an application for the use of aircraft with seating capacity of less than 30 seats." [FAA Exhibit 1, Item 22, pg. 15.]

With that said, the Director then turned his discussion to Respondent's recertification. During negotiations between Complainant and Respondent regarding its proposed scheduled operations, FAA revised its Part 139 regulations. Under the old Part 139 regulations, Respondent had held a Limited Operating Certificate that would have permitted scheduled operations with aircraft of 30 or less seats. Under the revised Part 139 regulations, airports with Limited Operating Certificates were reclassified as either Class II or Class IV.<sup>13</sup>

At the time of reclassification, there was no scheduled service at Lunken Airport, but Complainant and Respondent continued their negotiations with regard to Complainant's Permit to Operate and its proposal to conduct Part 121 scheduled commuter operations with aircraft having between 10 and 30 seats. Respondent pursued and FAA awarded Lunken a Class IV Airport Operating Certificate that only permits unscheduled large air carrier operations with aircraft seating of more than 30 passengers. The revised Part 139 regulations do not apply to scheduled operations with aircraft of 9 seats or less. That is, scheduled operations with aircraft of 9 seats or less may operate regardless of the class of Airport Operating Certificate held by the airport.

FAA awarded Respondent a Class IV Airport Operating Certificate on June 9, 2004. [FAA Exhibit 1, Item 15, pg. 2.] On January 19, 2005, Respondent transmitted its

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<sup>12</sup> Again, there is some dispute between the parties as to Complainant's original proposal for service. Both parties submitted to the Record what they claimed was 'Complainant's Permit to Operate'. The documents appear to be identical except for the designation of the proposed service. Complainant's submission indicates a request for "Part 121 Scheduled Commuter service < 30 seats." [FAA Exhibit 1, Item 3, exhibit B.] However, Respondent's submission shows Complainant's request as for "Scheduled Air Route," with no specific provision for seating. [FAA Exhibit 1, Item 5, exhibit C.] Respondent's version was visibly altered by an unknown individual since it includes that individual's initials next to the proposed service of "Scheduled Air Route." Throughout its pleadings, Respondent continues to contend that Complainant's request was only for scheduled service with aircraft seating 9 or less passengers. [FAA Exhibit 1, Item 5, 7.]

<sup>13</sup> Under the revised Part 139 regulations, Class II Airport Operating Certificates permit operations including unscheduled large air carrier aircraft operations with more than 30 seats and scheduled small air carrier aircraft operations with 10 to 30 seats. Class IV Airport Operating Certificates permit unscheduled large air carrier aircraft operations with more than 30 seats. [See 14 CFR Part 139.]

proposed Operating Agreement to Complainant “in conjunction with [Complainant’s] application for schedule air route operating permit [Permit to Operate].” [FAA Exhibit 1, Item 5, exhibit F.] Respondent’s Operating Agreement, if Complainant accepted, would permit Complainant to operate only a scheduled commuter service with aircraft of 9 seats or less.<sup>14</sup>

The Director stated that he could “perhaps find that the City [had] effectively banned scheduled air service...” since Complainant notified Respondent of its intent to begin scheduled service through submission of the City’s required Permit to Operate before the revised Part 139 requirements came into effect. [FAA Exhibit 1, Item 22, pg. 16.]

However, the Director further analyzed the extent of Complainant’s intent of planned service since FAA would not expect an airport sponsor/operator to meet Class II requirements based on “unsubstantiated or unrealistic” proposals. [FAA Exhibit 1, Item 22, pg. 17.] Based on the Record, the Director found that Complainant had not taken steps sufficient to demonstrate substantial or realistic intent such as seeking the required FAA certification to engage in Part 121 operations which would have included filing a Pre-Application Statement of Intent and Schedule of Events with FAA’s local Flight Standards District Office. [*id.*]

Therefore, the Director reasoned Respondent had not violated Grant Assurance 22 since Complainant had not taken “concrete steps towards Part 121 certification.” [FAA Exhibit 1, Item 22, pg. 18.]

On appeal, Complainant states

“...the Director relies entirely upon the original Permit to Operate dated April 21, 2004, which sought permission to operate scheduled Part 121 service and the Director’s determination that Complainant had not taken steps toward obtaining Part 121 certification. In doing so, the Director has failed to appreciate the party’s alteration of the original Permit to Operate which modified the request to operate a Part 121 operation to “Scheduled Air Route” [under its Part 135 certificate.]<sup>15</sup> [FAA Exhibit 1, Item 23, pg. 4.]

Complainant continues

“...the Director’s Determination that the City’s inappropriate actions are of no consequence since the Complainant has not taken steps to obtain Part 121

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<sup>14</sup> Respondent’s proposed Operating Agreement also included other items that Complainant alleged were unjustly discriminatory. [See FAA Exhibit 1, Item 3.] Issue 2 of the Final Decision and Order further analyses the aircraft liability insurance requirement as specified in Respondent’s proposed Operating Agreement.

<sup>15</sup> Complainant’s argument on appeal that the “Director has failed to appreciate the party’s alteration of the original Permit to Operate” represents a complete reversal from Complainant’s argument in its complaint. In its Complaint, Complainant submitted to the Record its Permit to Operate which proposed Part 121 Scheduled Service with less than 30 seats, and not a specific proposal to conduct scheduled operations using its current Part 135 operating certificate.

certification completely fails to appreciate the City's ongoing insistence that the Complainant herein needed a permit for any scheduled air route including service for operations of only nine passengers which the City has refused to provide contrary to its Federal obligations because of the City's attempt to restrict all scheduled service." [FAA Exhibit 1, Item 23, pg. 5.]

It appears that Complainant's argument on appeal is that the Director failed to recognize that Complainant could continue to operate aircraft with seating between 10 and 30 passengers using its current Part 135 operating certificate<sup>16</sup>, while it sought Part 121 scheduled air service with less than 30 seats.

Complainant admits that it did not take steps to obtain Part 121 certification "because, after discussions with the City, it was determined the Complainant could continue to operate under its current Part 135 certification but still was required to obtain a permit [Permit to Operate] in order to operate any scheduled air service whether nine seats or up to thirty seats." [FAA Exhibit 1, Item 23, pg. 4.]

In its Reply, Respondent believes Complainant "is trying to have it both ways by arguing that the Director's Determination focused solely on Complainant's lack of realistic Part 121 preparations instead of considering its Part 135 operations and then turns around and faults the City of altering Complainant's request for Part 121 service." [FAA Exhibit 1, Item 24, pg. 2.] Respondent also believes "Complainant incorrectly states that the Director relied on facts surrounding the City's permit process in reaching this conclusion, when the Director clearly cited the FAA's own record." [id.]

The Associate Administrator is not persuaded by Complainant's arguments on appeal. The Director did not err in his analysis or conclusion of Complainant's original complaint, which focused on its Permit to Operate and request to operate Part 121 scheduled commuter operations with aircraft having less than 30 seats. Neither in its Complaint nor its Reply did Complainant specify its interest in establishing the requested service using its Part 135 certificate. Complainant only used the term "scheduled service" and provided documentation of its Permit to Operate which specified "Part 121 Scheduled Commuter Operations with <30 passengers." [See FAA Exhibit 1, Items 3 & 6; Item 3, Exhibit B.]

Complainant's own argument in its original complaint stated

"The City seeks to deny Flamingo from operating the *requested* service either through its failure to act on the Permit [to Operate] and/or it intentionally unreasonable demands as outlined in [Respondent's] Operating Agreement." [FAA Exhibit 1, Item 3, pg. 4.] [emphasis added.]

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<sup>16</sup> To be more fully discussed later, Complainant's current Part 135 operating certificate only permits 'On-Demand Airplane' operations with passengers or cargo using its six-seat (configured for 5 passengers and 1 crewmember) Piper Cherokee Six. Complainant's statement that it could continue Part 135 operations with aircraft seating between 10 and 30 passengers conflicts with its current Part 135 operating certificate of record.

From Complainant's submitted documents, the "*requested*" service was to operate "Part 121 Scheduled Commuter operations with less than 30 seats." [See FAA Exhibit 1, Item 3, pg. 2, & exhibit B.]

Using documents provided by the parties and information gathered during the investigation, the Director noted the Record "shows that the actual permit application made by Complainant specifically mentioned "Part 121 Scheduled Commuter < 30 seats." [FAA Exhibit 1, Item 22, pg. 14.]

Furthermore, the Record fails to include any documents showing Complainant actually sought to conduct its operations under its existing Part 135 certificate, other than Complainant's assertion upon appeal. As indicated in the Director's Determination, Complainant's current Part 135 certificate only permits 'On-Demand Airplane' operations with passengers or cargo using its Piper Cherokee Six (PA-32-300). [FAA Exhibit 1, Item 22, pg. 2.] The Piper Cherokee Six is configured for 5 passengers and 1 crewmember.<sup>17</sup>

While Respondent's proposed Operating Agreement allows Complainant to operate scheduled service with aircraft seating 9 or less passengers, Complainant must still meet its Federal requirements under the Federal Aviation Regulations and obtain the necessary Federal documentation/concurrence to conduct 'scheduled' air service using its Part 135 operating certificate.

Also, in its original complaint, Complainant clearly stated that it was "about to partner with a full Part 121 Flag operator." [FAA Exhibit 1, Item 3, exhibit D, item 2.] Yet, on appeal, Complainant states "the City indicated Complainant could operate up to thirty seats under its Part 135 certification, if it leased a larger craft, *as was intended*, from a Part 121 certified operator." [FAA Exhibit 1, Item 23, pg. 5.]

The Record presented by the parties for investigation by the Director clearly indicated that Complainant sought a Permit to Operate at Lunken Field for Part 121 scheduled commuter service with less than 30 seats and Complainant's own letters to Respondent confirm that fact. Only on appeal does Complainant now state its intention to lease an aircraft from a Part 121 operator and operate under its Part 135 certification.<sup>18</sup> The Director could not have been expected to assume that Complainant really meant it would conduct Part 135 operations by leasing an aircraft from a Part 121 operator. These facts were only presented on appeal, *after* the Director's initial determination.<sup>19</sup>

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<sup>17</sup> Data from Cincinnati FSDO, Mr. Mark Holtgrave, FAA telephone conversation, September 11, 2006 & follow-up on June 4, 2007.

<sup>18</sup> The Associate Administrator notes that under FAA policy, simply leasing an aircraft is not enough to demonstrate intent to provide Part 121 air carrier service. Various Federal requirements under the Federal Aviation Regulations need to be met including obtaining the necessary Federal documentation/concurrence to conduct 'scheduled' air service.

<sup>19</sup> For example, in Complainant's Reply, its final pleading, Flamingo states that its request to the Respondent was "to operate scheduled service up to 30 seats." [Item 6, p. 2.] See also page 6, "Since that

Moreover, 14 CFR § 16.23(b)(3) directs a complainant to “provide a concise but *complete* statement of the facts relied upon to substantiate each allegation.” [Emphasis added]. In reviewing and analyzing formal complaints, the Director may rely entirely on the complaint and the responsive pleadings provided by the parties. [See 14 CFR § 16.29(b)(1).] While the Director gathered additional information outside the provided pleadings to make a finding in the case [See FAA Exhibit 1, Item 22, pg. 14.], all information pointed to the fact that Complainant sought permission to conduct scheduled Part 121 operations.

Again, based on information provided by Complainant in its original complaint and on appeal, the Director correctly analyzed the issue with regard to scheduled Part 121 operations. The Associate Administrator affirms the Director’s finding that the City is not currently in violation of its obligation to provide reasonable access under 49 USC § 47107(a) and Federal Grant Assurance 22, *Economic Nondiscrimination*.

If Complainant now seeks to conduct Part 135 scheduled operations with an aircraft seating less than 30 passengers, Complainant must communicate its proposal to Respondent and petition to amend Respondent’s proposed Operating Agreement. If after the parties engage in good faith efforts to resolve the disputed matter informally, Complainant continues to experience what it believes to be unjust discrimination, Complainant has the option to file a new formal complaint through 14 CFR Part 16.

### **Issue 2 – The City’s \$20 million Liability Insurance Requirement**

In its complaint, Complainant alleged the City’s proposed \$20 million liability insurance requirement was unreasonable and unjustly discriminatory since it is “unobtainable.” [FAA Exhibit 1, Item 22, pg. 18.] The Record shows that Respondent’s proposed January 2005 Operating Agreement included a requirement for aircraft liability insurance in the minimum amount of \$20 million per occurrence. [FAA Exhibit 1, Item 22, pg. 18.]

Upon review, the Director stated “it is not uncommon for an airport sponsor to require aviation liability insurance from those providing aeronautical services to the public...[including] air carriers.” [FAA Exhibit 1, Item 22, pg. 19.] The Director also stated that “it is not uncommon for airport sponsors to require aircraft liability insurance coverage in an amount of not less than \$1 million per occurrence for piston-engine aircraft and not less than \$10 million per occurrence for turbine-engine aircraft.” [FAA Exhibit 1, Item 22, pg. 19.]

Further, the Director indicated that there are Federal requirements that govern the minimum insurance requirements for air carrier operations. These minimum requirements depend on the type of operation and aircraft type. The Director also considered past air carrier service at Lunken Airport.<sup>20</sup>

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time, the City has insisted upon limiting the service requested to nine (9) seats contrary to the Application which seeks scheduled service up to 30 seats.” [Item 6, p. 6.]

<sup>20</sup> The City had previously contracted for air carrier service in 1989. [FAA Exhibit 1, Item 22, pg. 21.] These previous operating agreements included an insurance requirement of \$1 million in liability coverage.

After analysis, the Director stated “the fact that the City requires a higher insurance coverage amount than the minimum Federal requirements<sup>21</sup> does not mean that the City’s requirement is unreasonable.” [FAA Exhibit 1, Item 22, pg. 21.] Also, the City has no obligation to simply accept the terms and conditions proposed by an air carrier based on operating agreements reached in years past for other operators. [See Footnote 20.]

The Director further concluded that there was no evidence to suggest that the \$20 million in aircraft liability insurance was “not obtainable or is so high that it is cost prohibitive for the type of operation Complainant intends to conduct...,” that is, aircraft seating less than 30 passengers. [FAA Exhibit 1, Item 22, pg. 22.] The Director further stated that aircraft types commonly used in Part 121 operations with less than 30 seats are required to carry insurance coverage from \$10 to \$20 million and that this insurance is “rather common and attainable in the industry ....” [FAA Exhibit 1, Item 22, pg. 22.]

While the Director made no finding of a violation based on a \$20 million aircraft liability insurance requirement for Complainant’s proposed operation of scheduled service with aircraft of less than 30 seats, the Director cautioned that “a requirement for \$20 million in liability coverage applied to operations using a 9-seat Piper PA-31-350 Chieftain piston twin-engine aircraft may not be attainable, and hence would be unreasonable and inconsistent with Grant Assurance 22...” [FAA Exhibit 1, Item 22, pg. 22.]

In its appeal, the Complainant questions the Director’s finding of no violation since the Director cautioned that a \$20 million liability insurance requirement for an aircraft seating 9 passengers “may not be attainable, and hence would be unreasonable and inconsistent with Grant Assurance 22...” [FAA Exhibit 1, Item 23.] Complainant reasons that Respondent’s only proposal which included the \$20 million insurance requirement was for scheduled service of up to nine seats. Therefore, “having found that the City’s insistence upon \$20 million in insurance coverage for scheduled air route of up to nine seats would violate the City’s Federal obligations...the Director then inconsistently dismisses the Complaint.” [FAA Exhibit 1, Item 23, pg. 7.]

Upon reply, Respondent states, “Complainant never really addresses the Director’s point that while \$20 million of insurance coverage might be too high for a 9-seat airplane, it was acceptable for bigger planes and that it is also perfectly legitimate to require more

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The Director found that “the circumstances existing at the Airport in 1989-1990 are not adequately reflected in the record, and although Central States Airlines used BAe Jetstream turboprop aircraft in its routes to and from Lunken, the actual operations an airline conducted are also not documented in the record.” [i.d.] Complainant and these previous operators are not similarly situated. [i.d.]

<sup>21</sup> To determine an approximate minimum Federal requirement for liability insurance applicable to Complainant’s proposed operations, the Director applied the minimum Federal requirements to a similar aircraft to Complainant’s proposed operations, a Beech 1900 with 20 passengers. [See Footnote 158 in the Director’s Determination, which provides a summary of the minimum Federal requirements under 49 U.S.C. § 47138, 14 CFR Part 298, and 14 CFR Part 205.] For a Beech 1900 with 20 passengers, the minimum Federal requirement may range from \$1.25 million to \$4.5 million (which reflects the variety of type of operation and the amount of service.)

than \$1 million of insurance coverage for a 9-seat airplane engaged in scheduled air service.” [FAA Exhibit 1, Item 24, pg. 2.]

The Associate Administrator finds that the Director’s findings of fact are correct; a \$20 million aircraft liability insurance requirement, as applied to Complainant’s proposed Part 121 scheduled operations for aircraft seating less than 30 but more than 9 passengers, is not unreasonable or inconsistent with Grant Assurance 22.

Complainant incorrectly interprets that the Director determined that a \$20 million insurance requirement would be unattainable and unreasonable. In fact, the Director did not find that a requirement for \$20 million in liability coverage for a 9-seat Piper 31-350 Chieftain piston aircraft was not attainable; rather the Director cautioned that it “may not be attainable, and hence would be unreasonable and inconsistent with Grant Assurance 22...”

Again, Complainant’s complaint specified the fact that it wanted to conduct scheduled operations with aircraft seating less than 30 but more than 9 passengers. [See Issue 1 of the Final Decision & Order Analysis and Discussion section.] The Director had no reason to assume that Complainant wanted the Director to change the facts of the case and focus on aircraft seating 9 or less passengers instead of aircraft seating less than 30 but more than 9 passengers.

Should Complainant wish to accept Respondent’s proposal of scheduled operations with aircraft seating 9 passengers or less [See Operating Agreement, FAA Exhibit 1, Item 5, exhibit f.], Complainant should request a new Operating Agreement that reflects a proposed liability requirement within the bounds of the Director’s findings and in compliance with Grant Assurance 22. The Associate Administrator recommends that Complainant engage in substantial and reasonable good faith efforts to resolve the insurance issue informally with Respondent, consistent with the requirements of 14 C.F.R. 16.21, “Pre-complaint Resolution.” Complainant should make sure that it has enough documentation to support its certifications under this provision before bringing any new formal complaint before the agency. Respondent must be given an opportunity to revise its insurance requirement for aircraft seating 9 or less passengers to reflect the Director’s finding.

Based upon the above, the Associate Administrator upholds the Director’s finding that, at this time, Respondent is not in violation of Federal Grant Assurance 22, *Economic Nondiscrimination*, with regard to its \$20 million aircraft liability insurance requirement for aircraft seating less than 30 but more than 9 passengers.

## **VII. CONCLUSION**

Based on the foregoing discussion and analysis, the record of this case, and the arguments on appeal, the Associate Administrator concludes that the Director’s Determination in this matter is supported by a preponderance of reliable, probative, and substantial

evidence, and is consistent with applicable law, precedent, and FAA policy. The Complainant's appeal does not provide a sufficient basis for reversing the Director's Determination with regard to alleged violations of 49 U.S.C. § 47107(a) or Federal Grant Assurance 22, *Economic Nondiscrimination*.

### ORDER

**ACCORDINGLY**, it is hereby ORDERED that:

1. The Director's Determination is affirmed, and
2. The Appeal is dismissed, pursuant to 14 C.F.R. § 16.33.

This Decision by the FAA Associate Administrator for Airports constitutes the final FAA action in this proceeding, pursuant to 14 C.F.R. § 16.33(a), as authorized under 49 U.S.C. §§ 40103(e), 40113, 40114, 46104, 46110, 47105(b), 47107(a), 47107(g)(1), 47111(d), and 47122.

### RIGHT OF APPEAL

A person disclosing a substantial interest in this final agency decision and order of the Federal Aviation Administration may file a petition for review pursuant to 49 U.S.C. § 46110, in the United States Court of Appeals for the District of Columbia Circuit or in the court of appeal of the United States for the circuit in which the person resides or has its principal place of business. The petition must be filed not later than 60 days after the Final Decision and Order has been served on the party.



August 9, 2007

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D. Kirk Shaffer  
Associate Administrator  
for Airports

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Date