

### § 15.113

the adverse judgment, the publisher shall—

(1) Give notice to the FAA as required by §15.107(d) of this part;

(2) Submit a copy of the trial court's decision to the FAA Chief Counsel not more than 5 business days after the adverse judgment is rendered; and

(3) If an appeal is taken from the adverse judgment, submit a copy of the appellate decision to the FAA Chief Counsel not more than 30 days after that decision is rendered.

(d) Within 60 days after receipt of the trial court's decision, the Administrator by registered mail will—

(1) Notify the publisher that indemnification is required under this part;

(2) Request that the publisher appeal the trial court's adverse decision; or

(3) Notify the publisher that it is not entitled to indemnification under this part and briefly state the basis for the denial.

### § 15.113 Indemnification agreements.

(a) Upon a finding of the Administrator that indemnification is required under this part, and after obtaining the concurrence of the United States Department of Justice, the FAA will promptly enter into an indemnification agreement providing for the payment of the costs specified in paragraph (c) of this section.

(b) The indemnification agreement will be signed by the Chief Counsel and the publisher.

(c) The FAA will indemnify the publisher for—

(1) Compensatory damages awarded by the court against the publisher;

(2) Reasonable costs and fees, including reasonable attorney fees at a rate not to exceed that permitted under the Equal Access to Justice Act (5 U.S.C. 504), and any postjudgment interest, if the publisher conducts a good faith defense, or pursues a good faith appeal, at the request, or with the concurrence, of the FAA.

(d) Except as otherwise provided in this section, the FAA will not indemnify the publisher for—

(1) Punitive or exemplary damages;

(2) Civil or criminal fines or any other litigation sanctions;

(3) Postjudgment interest;

(4) Costs;

(5) Attorney fees; or

(6) Other incidental expenses.

(e) The indemnification agreement must provide that the Government will be subrogated to all claims or rights of the publisher, including third-party claims, cross-claims, and counter-claims.

### § 15.115 Payment.

After execution of the indemnification agreement, the FAA will submit the agreement to the United States Department of Justice and request payment, in accordance with the agreement, from the Judgment Fund.

## PART 16—RULES OF PRACTICE FOR FEDERALLY-ASSISTED AIRPORT ENFORCEMENT PROCEEDINGS

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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, 47133, 47151–47153, 48103.

SOURCE: Docket No. 27783, 61 FR 54004, Oct. 16, 1996, unless otherwise noted.

### Subpart A—General Provisions

#### § 16.1 Applicability and description of part.

(a) *General.* The provisions of this part govern all Federal Aviation Administration (FAA) proceedings involving Federally-assisted airports, except for complaints or requests for determination filed with the Secretary under 14 CFR part 302, whether the pro-

ceedings are instituted by order of the FAA or by filing a complaint with the FAA 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 and other Federal obligations 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 and other Federal obligations 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 and other Federal obligations contained in grant-in-aid agreements issued under the Airport and Airway Improvement Act of 1982 (AAIA), as amended and recodified, 49 U.S.C. 47101 *et seq.*, specifically section 511(a), 49 U.S.C. 47107, and 49 U.S.C. 47133.

(6) Section 505(d) of the Airport and Airway Improvement Act of 1982, and the requirements concerning civil rights and/or Disadvantaged Business Enterprise (DBE) issues contained in 49 U.S.C. 47107(e) and 49 U.S.C. 47113; 49 U.S.C. 47123; 49 U.S.C. 322, as amended; 49 CFR parts 23 and/or 26; and/or grant assurance 30 and/or grant assurance 37.

(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

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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.

[Doc. No. 27783, 61 FR 54004, Oct. 16, 1996, as amended at Amdt. 16–1, 78 FR 56141, Sept. 12, 2013]

#### § 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.

*Administrator* means the Administrator of the FAA.

*Agency* means the FAA.

*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 FAA.

*Associate Administrator* means the FAA Associate Administrator for Airports or a designee. For the purposes of this part only, Associate Administrator also means the Assistant Administrator for Civil Rights or a designee for complaints that the FAA Associate Administrator for Airports transfers to the Assistant Administrator for Civil Rights.

*Complainant* means the person submitting a complaint.

*Complaint* means a written document meeting the requirements of this part and filed under this part:

(1) 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, or

(2) By a person under 49 CFR 26.105(c) against a recipient of FAA funds alleged to have violated a provision of 49 CFR parts 23 and/or 26.

*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.

*Director* means the Director of the FAA Office of Airport Compliance and Management Analysis, or a designee. For the purposes of this part only, Director also means the Deputy Assistant Administrator for Civil Rights for complaints that the Director of the FAA Office of Airport Compliance and Management Analysis transfers to the Deputy Assistant Administrator for Civil Rights or designee.

*Electronic filing* means the process of sending electronic mail (email) to the FAA Part 16 Docket Clerk, with scanned documents attached, as a Portable Document Format (PDF) file.

*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

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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.

*Hearing officer* means an attorney designated by the Deputy Chief Counsel 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 Regional or Center 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. Unless otherwise noted, mail also means electronic mail containing PDF copies of pleadings or documents required herein.

*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 same-day 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.

*Writing or written* includes paper documents that are filed and/or served by mail, personal delivery, facsimile, or email (as attached PDF files).

[Doc. No. 27783, 61 FR 54004, Oct. 16, 1996, as amended at Amdt. 16-1, 78 FR 56141, Sept. 12, 2013]

### § 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.

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

**§ 16.11 General processes.**

(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. This includes the extension of any time period prescribed, where necessary or appropriate for a fair and complete consideration of matters before the agency, prior to issuance of the Director's Determination.

(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.

(c) Other than those matters concerning a Corrective Action Plan, the jurisdiction of the Director terminates upon the issuance of the Director's Determination. All matters arising during the appeal period, such as requests for extension of time to make an appeal, will be addressed by the Associate Administrator.

(d) The Director may transfer to the FAA Deputy Assistant Administrator for Civil Rights or Office of Civil Rights designee the authority to prepare and issue Director's Determinations pursuant to §16.31 for complaints alleging violations of section 505(d) of the Airport and Airway Improvement Act of 1982, and the requirements concerning civil rights and/or Disadvantaged Business Enterprise (DBE) issues contained in 49 U.S.C. 47107(e) and 49 U.S.C. 47113; 49 U.S.C. 47123; 49 U.S.C. 322, as amended; 49 CFR parts 23 and/or

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26; and/or grant assurance 30 and/or grant assurance 37.

[Doc. No. 27783, 61 FR 54004, Oct. 16, 1996, as amended at Amdt. 16–1, 78 FR 56142, Sept. 12, 2013]

**§ 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 filed under this Part shall be filed with the Office of the Chief Counsel, Attention: FAA Part 16 Docket Clerk, AGC-600, Federal Aviation Administration, 800 Independence Avenue SW., Washington, DC 20591. Documents to be filed with a hearing officer shall be filed at the address and in the manner 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, by facsimile (when confirmed by filing on the same date by one of the foregoing methods), or electronically as set forth in paragraph (h) of this section. Unless the date is shown to be inaccurate, documents 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. Unless the date is shown to be inaccurate, documents filed electronically shall be deemed to be filed on the date shown on the certificate of service or, if none, the date of electronic transmission to the last party required to be served.

(c) *Number of copies.* With the exception of electronic filing or unless otherwise specified, an executed original and three copies of each document shall be filed with the FAA Part 16 Docket Clerk. One of the three copies shall not be stapled, bound or hole-punched. 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 unless otherwise prescribed by the hearing officer.

(d) *Form.* Documents filed under this part shall:

(1) Be typewritten or legibly printed;

(2) Include, in the case of docketed proceedings, the docket number of the proceeding on the front page; and

(3) Be marked to identify personal, privileged or proprietary information. Decisions for the publication and release of these documents will be made in accordance with 5 U.S.C. 552 and 49 CFR part 7.

(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, physical address, telephone number, facsimile number, if any, and email address, if filing electronically, 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 Docket Clerk 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.

(h) *Electronic filing.* (1) The initial complaint may be served electronically upon the respondent only if the respondent has previously agreed with the complainant in writing to participate in electronic filing. Documents may be filed under this Part electronically by sending an email containing

(an) attachment(s) of (a) PDF file(s) of the required pleading to the FAA Docket Clerk, and the person designated in paragraph (h)(3) of this section.

(2) The subject line of the email must contain the names of the complainant and respondent, and must contain the FAA docket number (if assigned). The size of each email must be less than 10 MB. Email attachments containing executable files (e.g., .exe and .vbs files) will not be accepted.

(3) The email address at which the parties may file the documents described in this section is *9-AWA-AGC-Part-16@faa.gov*. No acknowledgement or receipt will be provided by the FAA to parties using this method. A party filing electronically as described in this section must provide to the FAA Part 16 Docket Clerk and the opposing party an email address of the person designated by the party to receive pleadings.

(4) By filing a pleading or document electronically as described in this section, a party waives the rights under this part for service by the opposing party and the FAA by methods other than email. If a party subsequently decides to "opt-out" of electronic filing, that party must so notify the FAA Part 16 Docket Clerk and the other party in writing, from which time the FAA and the parties will begin serving the opting-out party in accordance with §§ 16.13 and 16.15. This subsection only exempts the parties from the filing and service requirements in § 16.13(a) (with the exception that "Documents to be filed with a hearing officer shall be filed at the address and in the manner stated in the hearing order."), the method of filing requirements in § 16.13(b), and the number of documents requirements in § 16.13(c).

(i) *Internet accessibility of documents filed in the Hearing Docket.* (1) Unless protected from public disclosure, all documents filed in the Hearing Docket are accessible through the Federal Docket Management System (FDMS): <http://www.regulations.gov>. To access a particular case file, use the FDMS number assigned to the case.

(2) Determinations issued by the Director and Associate Administrator in

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Part 16 cases, indexes of decisions, contact information for the FAA Hearing Docket, the rules of practice, and other information are available on the FAA Office of Airports' Web site at: <http://part16.airports.faa.gov/index.cfm>.

[Doc. No. 27783, 61 FR 54004, Oct. 16, 1996, as amended at Amdt. 16-1, 78 FR 56142, Sept. 12, 2013]

### § 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) *Whom must be served.* Copies of all documents filed with the FAA Part 16 Docket Clerk 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, facsimile numbers (if also served by facsimile), or email address (if served electronically in accordance with §16.13(h)), by [specify method of service]:

[list persons, addresses, facsimile numbers, email addresses (as applicable)]

Dated this \_day of \_, 20\_.

[signature], for [party]

(b) *Method of service.* Except as otherwise agreed by the parties and, if applicable, 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);

(2) When a properly addressed envelope, sent to the most current address submitted under §16.13(f), has been re-

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turned as undeliverable, unclaimed, or refused; or

(3) When the party serving the document electronically has a confirmation statement demonstrating that the email was properly sent to a party correctly addressed.

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

[Doc. No. 27783, 61 FR 54004, Oct. 16, 1996, as amended at Amdt. 16-1, 78 FR 56143, Sept. 12, 2013]

### § 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 first class mail or certified mail, 5 days shall be added to the prescribed period.

[Doc. No. 27783, 61 FR 54004, Oct. 16, 1996, as amended at Amdt. 16-1, 78 FR 56143, Sept. 12, 2013]

### § 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.

(d) *Deferred actions on motions.* A ruling on a motion made before the time set for the issuance of the Director's Determination may be deferred to and included with the Director's Determination.

(e) *Extension by motion.* A party shall file a written motion for an extension of time not later than 3 business days before the document is due unless good cause for the late filing is shown. A party filing a motion for extension should attempt to obtain the concurrence of the opposing party. A party filing a written motion for an extension of time shall file the motion as required under § 16.13, and serve a copy of the motion on all parties and the docket clerk as required under § 16.15.

[Doc. No. 27783, 61 FR 54004, Oct. 16, 1996, as amended at Amdt. 16-1, 78 FR 56143, Sept. 12, 2013]

### Subpart C—Special Rules Applicable to Complaints

#### § 16.21 Pre-complaint resolution.

(a) Except for those persons filing under 49 CFR 26.105(c), 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 Of-

fice, FAA Regional Airports Division responsible for administering financial assistance to the sponsor, or the FAA Office of Civil Rights will be available upon request to assist the parties with informal resolution.

(b) Except for complaints filed under 49 CFR 26.105(c), a complaint will be dismissed under § 16.27 unless the person or authorized representative filing the complaint certifies that:

(1) The complainant has made substantial and reasonable good faith efforts to resolve the disputed matter informally prior to filing the complaint; and

(2) There is no reasonable prospect for practical and timely resolution of the dispute.

(c) The certification required under paragraph (b) of this section, 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. Such efforts to resolve informally should be relatively recent and be demonstrated by pertinent documentation. There is no required form or process for informal resolution, but in each case the requirements to resolve the matter informally must meet the requirements of this paragraph.

[Doc. No. 27783, 61 FR 54004, Oct. 16, 1996, as amended at Amdt. 16-1, 78 FR 56143, Sept. 12, 2013]

#### § 16.23 Pleadings.

(a) A person directly and substantially affected by any alleged noncompliance or a person qualified under 49 CFR 26.105(c) may file a complaint under this part. 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;



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(2) Include all documents then available in the exercise of reasonable diligence, to be offered in support of the complaint, and to be served 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) Except for complaints filed under 49 CFR 26.105(c), 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 respondent in writing within 20 days after the date the FAA receives the complaint that the complaint has been docketed.

(d) The respondent shall file an answer within 20 days of the date of service of the FAA notification or, if a motion is filed under §16.26, within 20 days of the date of service of an FAA order denying all or part of that motion.

(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) Amendments or supplements to the pleadings described in this section will not be allowed without showing good cause through a motion and supporting documents.

(k) *Burden of proof.* Except as used in subpart F of this part,

(1) The burden of proof is on the complainant to show noncompliance with

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an Act or any regulation, order, agreement or document of conveyance issued under the authority of an Act.

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

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

(1) Except for good cause shown through motion and supporting documents, discovery is not permitted except as provided in §§ 16.213 and 16.215.

[Doc. No. 27783, 61 FR 54004, Oct. 16, 1996, as amended at Amdt. 16–1, 78 FR 56143, Sept. 12, 2013]

### § 16.25 Dismissals.

(a) Within 20 days after the receipt of the complaint, unless a motion has been filed under §16.26, the Director will dismiss a complaint, or any claim made in a complaint, with prejudice if:

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

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

(3) The complainant lacks standing to file a complaint under §§16.3 and 16.23.

(b) A dismissal under this section will include the reasons for the dismissal.

[Amdt. 16–1, 78 FR 56144, Sept. 12, 2013]

### § 16.26 Motions to dismiss and motions for summary judgment.

(a) In lieu of an answer, the respondent may file a motion to dismiss the complaint or a motion for summary judgment on the complaint. The respondent may move for dismissal of the entire complaint or move for dismissal of particular issues from adjudication. The motion must be filed within 20 days after the date of service of the FAA notification of docketing.

(b) *Motions to dismiss.* (1) A motion to dismiss shall be accompanied by a concise statement of the reasons for seeking dismissal. The respondent must show that the complaint should be dismissed, with prejudice, if:

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

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

(iii) The complainant lacks standing to file a complaint under §§ 16.3 and 16.23.

(2) A motion to dismiss may seek dismissal of the entire complaint or the dismissal of specified claims in the complaint. A motion to dismiss shall be accompanied by a supporting memorandum of points and authorities.

(3) A complainant may file an answer to the motion to dismiss within 10 days of the date the motion is served on the complainant, or within any other period set by the Director. The answer shall be accompanied by a concise statement of reasons for opposing dismissal, and may be accompanied by affidavits and other documentary evidence in support of that contention.

(4) Within 30 days of the date an answer to a motion to dismiss is due under this section, the Director may issue an order disposing of the motion. If the Director denies the motion to dismiss in whole or in part, or grants the motion in part, then within 20 days of when the order is served on the respondent, the respondent shall file an answer to the complaint.

(5) If the Director does not act on the motion to dismiss within 30 days of the date an answer to a motion is due under this section, the respondent shall file an answer to the complaint within the next 20 days.

(c) *Motions for summary judgment.* (1) A motion for summary judgment may be based upon the ground that there is no genuine issue of material fact for adjudication and that the complaint, when viewed in the light most favorable to the complainant, should be summarily adjudicated in favor of the respondent as a matter of law. A motion for summary judgment may seek dismissal of the entire complaint or dismissal of specified claims or issues in the complaint.

(2) The motion for summary judgment shall be accompanied by a concise statement of the material facts as to which the respondent contends there is no genuine issue of material fact. The motion may include affidavits and documentary evidence in support of the

contention that there is no genuine issue of material fact in dispute.

(3) A complainant may file an answer to the motion for summary judgment within 10 days of the date the motion is served on the complainant, or within any other period set by the Director. The answer shall be accompanied by a concise statement of the material facts as to which the complainant contends there is a genuine issue, and may be accompanied by affidavits and other documentary evidence in support of that contention.

(4) Within 30 days of the date an answer to a motion for summary judgment is due under this section, the Director may issue an order disposing of the motion. If the Director denies the motion in whole or in part, or grants the motion in part, then within 20 days of when the order is served on the respondent, the respondent shall file an answer to the complaint.

(5) If the Director does not act on the motion for summary judgment within 30 days of the date an answer to a motion is due under this section, the respondent shall file an answer to the complaint within the next 20 days.

[Amdt. 16-1, 78 FR 56144, Sept. 12, 2013]

#### § 16.27 Incomplete complaints.

(a) If a complaint is not dismissed pursuant to § 16.25, 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 refiling of the complaint after amendment to correct the deficiencies. The Director's dismissal will include the reasons for the dismissal.

(b) Dismissals under this section are not initial determinations, and appeals from decisions under this section will not be permitted.

[Amdt. 16-1, 78 FR 56144, Sept. 12, 2013]

#### § 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.

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(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 49 U.S.C. 40113 and 46104, and 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.

[Doc. No. 27783, 61 FR 54004, Oct. 16, 1996, as amended at Amdt. 16-1 78 FR 56145, Sept. 12, 2013]

### § 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 serve it upon each party within 120 days of the date the last pleading specified in § 16.23 was due.

(b)(1) The Director's Determination shall include findings of fact and conclusions of law, accompanied by explanations and based upon all material issues of fact, credibility of the evidence, law and discretion presented on the record, together with a statement of the reasons therefor.

(2) The Director shall issue a determination or rule in a party's favor only if the determination or ruling is in accordance with law and supported by a

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preponderance of the reliable, probative, and substantial evidence contained in the record.

(c) A party adversely affected by the Director's Determination may appeal the initial determination as provided in § 16.33. However, if the Director's Determination that is appealed contains a Corrective Action Plan, the Director has the discretion to suspend the Corrective Action Plan until the appeal is resolved.

(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 a hearing is required by statute or otherwise provided by the FAA. A hearing may be required by statute if the FAA determination would terminate eligibility for grants under 49 U.S.C. 47114(c) or (e), or terminate payments on a grant agreement under 49 U.S.C. subchapter 471. The respondent may elect or waive a hearing, as provided in subpart E of this part.

(e) The Director will not consider requests for rehearing, reargument, reconsideration, or modification of a Director's Determination without a finding of good cause.

[Amdt. 16-1, 78 FR 56145, Sept. 12, 2013]

### § 16.33 Final decisions without hearing.

(a) The Associate Administrator may transfer to the FAA Assistant Administrator for Civil Rights the responsibility to prepare and issue Final Agency Decisions pursuant to this section for appeals with issues concerning civil rights.

(b) 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.

(c) In the cases described in paragraph (b) of this section, within 30 days after the date of service of the initial determination, a party adversely affected by the Director's Determination may file in accordance with §16.13 and serve in accordance with §16.15 a simultaneous Notice of Appeal and Brief.

(d) A reply to an appeal brief may be filed within 20 days after the date of service of the appeal.

(e) On appeal, the Associate Administrator will consider the issues addressed in any order on a motion to dismiss or motion for summary judgment and any issues accepted in the Director's Determination using the following analysis:

(1) Are the findings of fact each supported by a preponderance of reliable, probative, and substantial evidence contained in the record?

(2) Are conclusions made in accordance with law, precedent and policy?

(3) Are the questions on appeal substantial?

(4) Have any prejudicial errors occurred?

(f) Any new issues or evidence presented in an appeal or reply will not be considered unless accompanied by a petition and good cause found as to why the new issue or evidence was not presented to the Director. Such a petition must:

(1) Set forth the new matter;

(2) Contain affidavits of prospective witnesses, authenticated documents, or both, or an explanation of why such substantiation is unavailable; and

(3) Contain a statement explaining why such new issue or evidence could not have been discovered in the exercise of due diligence prior to the date on which the evidentiary record closed.

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

(h) If no appeal is filed within the time period specified in paragraph (c) 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.

(i) No requests for rehearing, reargument, reconsideration, or modification

of a final order will be considered without a finding of good cause.

[Amdt. 16-1, 78 FR 56145, Sept. 12, 2013]

#### § 16.34 Consent orders.

(a) The parties may agree at any time before the issuance of a final agency decision to dispose of the case by proposing a consent order. Good faith efforts to resolve a complaint through issuance of a consent order may continue throughout the administrative process. However, except as provided in §16.11(a), 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; and

(3) An express waiver of the right to further procedural steps and of all rights of judicial review.

(c) If the parties agree to dispose of a case by issuance of a consent order before the FAA issues a Director's Determination, the proposal for a consent order is submitted jointly by the parties to the Director, together with a request to adopt the consent order and dismiss the case. The Director may issue the consent order as an order of the FAA and terminate the proceeding.

[Amdt. 16-1, 78 FR 56145, Sept. 12, 2013]

### 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

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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.

[Doc. No. 27783, 61 FR 54004, Oct. 16, 1996, as amended at Amdt. 16–1, 78 FR 56146, Sept. 12, 2013]

### Subpart E—Proposed Orders of Compliance

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

(a) The agency will provide the opportunity for a hearing if, in the Director's determination, the agency issues or proposes to issue an order terminating eligibility for grants pursuant to 49 U.S.C. 47106(d), an order suspending the payment of grant funds pursuant to 49 U.S.C. 47111(d); an order withholding approval of any new application to impose a passenger facility charge pursuant to 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.

(1) Within 20 days after service of a Director's Determination under § 16.31 that provides an opportunity for a hearing a person subject to the proposed compliance order may—

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

(ii) Waive hearing and appeal the Director's Determination in writing, as provided in § 16.33;

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

(iv) Submit, jointly with the agency, a proposed consent order under § 16.34(c).

(2) If the respondent fails to file an appeal in writing within the time periods provided in paragraph (c) of this section, the Director's Determination becomes final.

(c) The Director may either direct the respondent to submit a Corrective Action Plan or initiate proceedings to revoke and/or deny the respondent's application for Airport Improvement Program discretionary grants under 49 U.S.C. 47115 and general aviation airport grants under 49 U.S.C. 47114(d) when a Director's Determination finds a respondent in noncompliance and does not provide for a hearing.

(d) In the event that the respondent fails to submit, in accordance with a Director's Determination, a Corrective Action Plan acceptable to the FAA within the time provided, unless extended by the FAA for good cause, and/or if the respondent fails to complete the Corrective Action Plan as specified therein, the Director may initiate action to revoke and/or deny applications for Airport Improvement Program discretionary grants under 49 U.S.C. 47115 and general aviation airport grants under 49 U.S.C. 47114(d).

(e) For those violations that cannot be remedied through corrective action, the Director may initiate action to revoke and/or deny the respondent's applications for Airport Improvement Program discretionary grants under 49 U.S.C. 47115 and general aviation airport grants under 49 U.S.C. 47114(d).

(f) When the Director concludes that the respondent has fully complied with the Corrective Action Plan and/or when the Director determines that the respondent has corrected the areas of noncompliance, the Director will terminate the proceeding.

(g) A complainant's standing terminates upon the issuance of a Director's Determination that finds a respondent in noncompliance on all identified issues. The complainant may not appeal the Director's Determination if

the Director finds noncompliance on all identified issues.

[Amdt. 16-1, 78 FR 56146, Sept. 12, 2013]

### 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.

[Doc. No. 27783, 61 FR 54004, Oct. 16, 1996, as amended at Amdt. 16-1, 78 FR 56146, Sept. 12, 2013]

#### § 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, pre-hearing 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 person authorized by the hearing officer to be the party's 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 complainant(s) and respondent(s) named in the hearing order, and the agency. The style of any pleadings filed under this Subpart shall name the respondent as the Appellant, and the Federal Aviation Administration as 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.

[Doc. No. 27783, 61 FR 54004, Oct. 16, 1996, as amended at Amdt. 16-1, 78 FR 56146, Sept. 12, 2013]

#### § 16.207 Intervention and other participation.

(a) Intervention and participation by other persons are permitted only at the hearing stage of the complaint process

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and with the written approval of the hearing officer.

(b) A person may submit a written 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.

(c) If the hearing officer finds that intervention will not unduly broaden the issues or delay the proceedings and, if the person has an interest that will benefit the proceedings, 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.

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

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

[Amdt. 16-1, 78 FR 56146, Sept. 12, 2013]

### § 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

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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.

[Doc. No. 27783, 61 FR 54004, Oct. 16, 1996, as amended at Amdt. 16-1, 78 FR 56147, Sept. 12, 2013]

#### § 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.

(e) *Depositions of agency employees.* (1) Depositions of Agency Employees will not be allowed except under the provisions of 49 CFR part 9.



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(2) Such depositions will be allowed only with the specific written permission of the Chief Counsel or his or her designee.

[Doc. No. 27783, 61 FR 54004, Oct. 16, 1996, as amended at Amdt. 16-1, 78 FR 56147, Sept. 12, 2013]

### § 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

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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 infor-

mation, or is otherwise prohibited by law.

#### § 16.227 Standard of proof.

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

[Amdt. 16-1, as amended at 78 FR 56147, Sept. 12, 2013]

#### § 16.229 Burden of proof.

As used in this subpart, the burden of proof is as follows:

(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.

[Doc. No. 27783, 61 FR 54004, Oct. 16, 1996, as amended at Amdt. 16-1, 78 FR 56147, Sept. 12, 2013]

#### § 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, all documents included in the hearing record and the Director's Determination 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.* A copy of the record will be filed by the FAA Part 16 Docket Clerk in the Federal Docket Management System (FDMS). Any person desiring to review the record may then do so at <http://www.regulations.gov>.

[Amdt. 16-1, 78 FR 56147, Sept. 12, 2013]

**§ 16.235**

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**§ 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.

[Doc. No. 27783, 61 FR 54004, Oct. 16, 1996, as amended at Amdt. 16–1, 78 FR 56147, Sept. 12, 2013]

**§ 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.

**§ 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 60 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, in accordance with § 16.245(d), a statement of corrective action, if appropriate, and identifies sanctions for continued non-compliance.

(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.

[Doc. No. 27783, 61 FR 54004, Oct. 16, 1996, as amended at Amdt. 16–1, 78 FR 56147, Sept. 12, 2013]

**§ 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.

[Doc. No. 27783, 61 FR 54004, Oct. 16, 1996, as amended at Amdt. 16-1, 78 FR 56147, Sept. 12, 2013]

**§ 16.245 Associate Administrator review after a hearing.**

(a) The Associate Administrator may transfer to the FAA Assistant Administrator for Civil Rights the authority to prepare and issue Final Agency Decisions pursuant to § 16.241 for appeals from a hearing concerning civil rights issues.

(b) After a hearing is held, and, after considering the issues as set forth in § 16.245(e), if the Associate Administrator determines that the hearing officer's initial decision or order should be changed, the Associate Administrator may:

(1) Make any necessary findings and issue an order in lieu of the hearing officer's initial decision or order, or

(2) Remand the proceeding for any such purpose as the Associate Administrator may deem necessary.

(c) If the Associate Administrator takes review of the hearing officer's initial decision on the Associate Administrator's own motion, the Associate Administrator will issue a notice of review within 20 days of 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 brief to the hearing officer. A brief on review shall be filed not later than 10 days after service of the notice of review. Filing and service of a brief 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 brief. 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.

(d) When the final agency decision finds a respondent in noncompliance, and where a respondent fails to properly seek judicial review of the final agency decision as set forth in subpart G of this part, the Associate Administrator will issue an order remanding the case to the Director for the following action:

(1) In the event that the respondent fails to submit, in accordance with the final agency decision, a Corrective Action Plan acceptable to the FAA within the time provided, unless extended by the FAA for good cause, and/or if the respondent fails to complete the Corrective Action Plan as specified therein, the Director may initiate action to revoke and/or deny applications for Airport Improvement Program grants issued under 49 U.S.C. 47114(c)-(e) and 47115. When the Director concludes that the respondent has fully complied with the Corrective Action Plan, the Director will issue an Order terminating the proceeding.

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(2) For those violations that cannot be remedied through corrective action, the Director may initiate action to revoke and/or deny the respondent's applications for Airport Improvement Program grants issued under 49 U.S.C. 47114(c)–(e) and 47115.

(e) On appeal from a hearing officer's initial decision, the Associate Administrator will consider the following questions:

(1) Are the findings of fact each supported by a preponderance of reliable, probative and substantial evidence?

(2) Are conclusions made in accordance with law, precedent and policy?

(3) Are the questions on appeal substantial?

(4) Have any prejudicial errors occurred?

(f) Any new issues or evidence presented in an appeal or reply will not be allowed unless accompanied by a certified petition and good cause found as to why the new matter was not presented to the Director. Such a petition must:

(1) Set forth the new issues or evidence;

(2) Contain affidavits of prospective witnesses, authenticated documents, or both, or an explanation of why such substantiation is unavailable; and

(3) Contain a statement explaining why such new matter could not have been discovered in the exercise of due diligence prior to the date on which the evidentiary record closed.

(g) A Final Agency Decision may be appealed in accordance with subpart G of this part.

[Amdt. 16-1, 78 FR 56147, Sept. 12, 2013]

## Subpart G—Judicial Review

SOURCE: Docket No. 27783, 61 FR 54004, Oct. 16, 1996, unless otherwise noted. Redesignated by Amdt. 16-1, 78 FR 56148, Sept. 12, 2013.

### § 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, and of an order of dismissal with prejudice issued by the Director, as provided in 49 U.S.C. 46110 or 49 U.S.C. 47106(d) and

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47111(d). A party seeking judicial review shall file a petition for review with the Court not later than 60 days after the order has been served on the party or within 60 days after the entry of an order under 49 U.S.C. 46110.

(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 becomes the final decision of the Associate Administrator because it was not appealed within the applicable time periods provided under §§ 16.33(c) and 16.241(b).

[Doc. No. 27783, 61 FR 54004, Oct. 16, 1996. Redesignated and amended by Amdt. 16-1, 78 FR 56148, Sept. 12, 2013]

## Subpart H—Ex Parte Communications

SOURCE: Docket No. 27783, 61 FR 54004, Oct. 16, 1996, unless otherwise noted. Redesignated at 78 FR 56148, Sept. 12, 2013.

### § 16.301 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.

[Doc. No. 27783, 61 FR 54004, Oct. 16, 1996. Re-designated at Amdt. 16-1, 78 FR 56148, Sept. 12, 2013]

**§ 16.303 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.

[Doc. No. 27783, 61 FR 54004, Oct. 16, 1996. Re-designated at Amdt. 16-1, 78 FR 56148, Sept. 12, 2013]

**§ 16.305 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.

[Doc. No. 27783, 61 FR 54004, Oct. 16, 1996. Re-designated at Amdt. 16-1, 78 FR 56148, Sept. 12, 2013]

**PART 17—PROCEDURES FOR PROTESTS AND CONTRACT DISPUTES**

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APPENDIX A TO PART 17—ALTERNATIVE DISPUTE RESOLUTION (ADR)