UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, D.C.

CENTENNIAL EXPRESS AIRLINES and GOLDEN EAGLE CHARTERS d/b/a CENTENNIAL EXPRESS AIRLINES v. ARAPAHOE COUNTY PUBLIC AIRPORT AUTHORITY	Docket No. 16-98-05
THOMAS KEHMEIER v. ARAPAHOE COUNTY PUBLIC AIRPORT AUTHORITY	Docket No. 13-94-25
CENTENNIAL EXPRESS AIRLINES and GOLDEN EAGLE CHARTERS d/b/a CENTENNIAL EXPRESS AIRLINES v. v. ARAPAHOE COUNTY PUBLIC AIRPORT AUTHORITY	Docket No. 13-95-03

Director's Determination

INTRODUCTION

This matter is before the Federal Aviation Administration (FAA) based on the formal complaint filed in accordance with our Rules of Practice for Federally Assisted Airport Proceedings (FAA Rules of Practice), 14 C.F.R. Part 16.

Centennial Express Airlines (CEA) has filed a formal complaint pursuant to the FAA Rules of Practice against the Arapahoe County Public Airport Authority (ACPAA), owner and operator of the Centennial Airport, alleging that the Airport Authority has unlawfully prohibited scheduled passenger service at Centennial Airport under FAR Part 135, with aircraft having a maximum capacity of 30 seats and under.

The Airport: Centennial Airport (APA) is a public-use airport located approximately 14 miles southeast of Denver, Colorado. The airport is owned and operated by the Arapahoe County Public Airport Authority (ACPAA). In 1996 there were 635 based aircraft and 402,735 annual operations at the airport. [FAA Exhibit 1, Item 1] APA does not hold an airport operating certificate issued under 14 CFR Part 139, Certification and Operations: Land Airports Serving Certain Air Carriers.

The planning and development of the airport has been financed, in part, with funds provided by the FAA under the Airport Improvement Program (AIP), authorized by the Airport and Airway Improvement Act of 1982, as amended, 49 U.S.C. § 47101, *et seq.* [FAA Exhibit 1, Item 2][1] Since 1983, the ACPAA has entered into numerous AIP grant agreements with the FAA and has received a total of $18,625,636 in federal airport development assistance. In 1996, the ACPAA received its most recent AIP grant in the amount of $898,733 to rehabilitate taxiway lighting and runway/taxiway signs. FAA Exhibit 1, Item 1][2]

Colorado State Litigation

On December 20, 1994, CEA, in accordance with its Air Carrier Certificate, began scheduled air carrier operations with one 6 passenger Beechcraft aircraft. CEA based its operation at Centennial Airport in building space it subleased from Colorado Air Center, Inc. (now known as Denver JetCenter).

On December 22, 1994, the District Court, County of Arapahoe, State of Colorado, issued a temporary restraining order prohibiting Centennial Express Airlines from providing scheduled service at Centennial Airport. [FAA Exhibit 1, Item 5, Permanent Injunction Order, page 1]

On January 10, 1995, a permanent injunction was issued by the District Court, County of Arapahoe, State of Colorado. [FAA Exhibit 1, Item 4, Tab A, Permanent Injunction Order]

On July 18, 1995, CEA appealed the Permanent Injunction Order through the Court of Appeals, State of Colorado, Case No. 95 CA 307. [FAA Exhibit 1, Item 7, Exhibit H]

On December 12, 1996, the Colorado Court of Appeals reversed the permanent injunction entered in favor of the ACPAA. *Appeal from the District Court of Arapahoe County, 942 P.2d 1270 Colorado App. 1996* [FAA Exhibit 1, Item 4, attachment A]

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[1] FAA Exhibit 1, Item 2, Grant History

[2] FAA Exhibit 1, Item 1, Airport Master Record (5010)

On April 13, 1998, the Supreme Court, State of Colorado issued its decision on review of the *Court of Appeals decision in Arapahoe County Public Airport Authority v. Centennial Express Airlines, Inc. No.97-SC-123* The Supreme Court, with two justices dissenting and one abstaining, ruled that the Court of Appeals erred in reversing the permanent injunction entered in favor of the ACPAA.

The Court declined to defer to the FAA's primary jurisdiction over the matter, finding that the issue was not Federally preempted under the 49 U.S.C. 41713(b)(1) provision prohibiting state or local regulation of "price, route or service of an air carrier" but rather fell within the provisions of §41713(b)(3), proprietor exception.

The majority also held that the ban did not violate FAA grant assurances requiring the sponsor to "make its airport available as an airport for public use on fair and reasonable terms without unjust discrimination, to all types, kinds and classes of aeronautical users." Furthermore, the majority said that "the authority's ban on scheduled service is necessary to ensure safe operation of the airport...since increased congestion is sure to have an impact on safety." [FAA Exhibit 1, item 5]

As an expert administrative agency, the FAA (along with the Secretary of Transportation (Secretary) in connection with certain economic issues) is charged with interpreting and implementing the Federal aviation statutes, including the airport grant program and the program for the transfer of surplus property for airport purposes. Moreover, Federal courts, including the Supreme Court, have recognized the unique expertise of the FAA and the Secretary in interpreting the Federal statutory provisions at issue. *See New England Legal Foundation v. Massachusetts Port Authority*,883 F.2d 157 (1st Cir. 1989); *Interface Group, Inc. v. Massachusetts Port Authority* (816 F.2d 9 (1st Cir. 1987); *and, Northwest Airlines, Inc. v. County of Kent, Michigan, 510 U.S.355 (1994).* The FAA is not bound to follow the reasoning of the Colorado Supreme Court's decision and has conducted a *de novo* review of the matters raised in the complaint.

Issues

The complainants present the following issues for decision:

- Whether the ACPAA, by prohibiting Centennial Express from operating scheduled air service at APA, is violating its federal obligations regarding economic nondiscrimination as set forth in 49 U.S.C. § 47107(a)(1) and in the Authority's grant agreements.

- Whether the ACPAA, by prohibiting Centennial Express from operating scheduled air service at APA, is violating its federal obligations regarding exclusive rights as set forth in 49 U.S.C. § 40103(e), 47107(a)(4), and in its grant agreements.

- Whether the ACPAA, by prohibiting Centennial Express from operating scheduled air service at APA, is violating provisions of Federal law prohibiting state and local regulation of air carrier prices, routes and service as set forth in 49 U.S.C. § 41713(b)(1), and thereby exceeding its lawful authority under the Supremacy Clause of the United States Constitution.

Under the specific circumstances at Centennial Airport, discussed below, and based on the evidence of record, we find that the ACPAA, by denying access to Centennial Express Airlines, Inc., is in non-compliance with the provisions of 49 U.S.C. 47107(a)(1) regarding economic nondiscrimination; with the provisions regarding exclusive rights as set forth in 49 U.S. C. Sections 47107(a)(4) and 40103(e); with 49 U.S.C. 41713(b)(1), regarding federal preemption over regulations relating to air carrier prices, routes, and services; and with the Authority's Federal grant agreements. By virtue of the violation of section 41713(b)(1), the ACPAA has exceeded its authority, as a state or local government, under the Supremacy Clause of the United States Constitution.

Our decision in this matter is based on the applicable law and FAA policy, review of the arguments and supporting documentation submitted by the parties, and the administrative record in this proceeding. [FAA Exhibit 1].

APPLICABLE LAW AND POLICY

The Federal Aviation Act of 1958, as amended (FAAct), 49 U.S.C. Section 40101, et seq., assigns the FAA Administrator broad responsibilities for the regulation of air commerce in the interests of safety, security, and development of civil aeronautics. The Federal role in developing civil aviation has been augmented by various legislative actions, which authorize programs for providing funds and other assistance to local communities for the development of airport facilities. In each such program, the airport sponsor assumes certain obligations, either by grant assurance or by restrictive covenants in property deeds and conveyance instruments, to maintain and operate its airport facilities safely, efficiently, and in accordance with specified conditions.

Commitments assumed by airport sponsors in property conveyance or grant agreements are important factors in maintaining a high degree of safety and efficiency in airport design; construction, operation and maintenance as well as ensuring the public reasonable access to the airport. Pursuant to 49 USC § 47122, the FAA has a statutory mandate to ensure that airport owners comply with their sponsor assurances.

FAA Order 5190.6A, Airport Compliance Requirements, (hereinafter Order) provides the policies and procedures to be followed by the FAA in carrying out its legislatively mandated functions related to federally obligated airport owners' compliance with their sponsor assurances.

The Airport Sponsor Assurances

As a condition precedent to providing airport development assistance under the AAIA, the Secretary of Transportation receives certain assurances from the airport sponsor.

The AAIA, 49 USC § 47101(a), *et seq.*, sets forth assurances to which an airport sponsor receiving Federal financial assistance must agree as a condition precedent to receipt of such assistance. These sponsorship requirements are included in every airport improvement grant agreement. Upon acceptance of an AIP grant by an airport sponsor, the assurances become a binding obligation upon the airport sponsor.

Enforcement of Airport Sponsor Assurances

Enforcement procedures regarding airport compliance matters are set forth in the FAA Rules of Practice for Federally-Assisted Airport Proceedings, 14 CFR Part 16. These enforcement procedures were published in the Federal Register (61 FR 53998, October 16, 1996) and were effective on December 16, 1996. For complaints filed before that date, the enforcement procedures are set forth in 14 CFR Part 13.

The FAA Airport Compliance Program

The FAA discharges its responsibility for ensuring airport sponsor compliance with Federal obligations through its Airport Compliance Program. The FAA's airport compliance efforts are based on the contractual obligations, which 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 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; rather, it monitors the administration of the valuable rights pledged by airport sponsors to the people of the United States in exchange for monetary grants and donations of Federal property to ensure that the public interest is being served.

FAA Order 5190.6A sets forth policies and procedures for the FAA Airport Compliance Program. The Order is not regulatory and is not controlling with regard to airport sponsor conduct; rather it establishes the policies and procedures to be followed by FAA personnel in carrying out the FAA's responsibilities for ensuring airport compliance. It provides basic guidance for FAA personnel in interpreting and administering the various continuing commitments made to the United States by airport owners as a condition for the grant of Federal funds or the conveyance of Federal property for airport purposes. The Order, *inter alia*, analyzes the various obligations set forth in the standard airport sponsor assurances; addresses the nature of those assurances; addresses the application of these assurances in the operation of public-use airports; and facilitates interpretation of the assurances by FAA personnel.

Airport Owner Rights and Responsibilities

Assurance 5, "Preserving Rights and Powers," of the prescribed sponsor assurances implements the provisions of the AAIA, 49 USC Section 47107(a), et seq., and requires, in pertinent part, that the sponsor of a federally obligated airport "...will not take or permit any action which would operate to deprive it of any of the rights and powers necessary to perform any or all of the terms, conditions, and assurances in the grant agreement without the written approval of the Secretary, and will act promptly to acquire, extinguish or modify any outstanding rights or claims of right of others which would interfere with such performance by the sponsor."

In addition to obligating the airport sponsor to preserve its rights and powers to carry out all grant agreement requirements, this assurance also places certain obligations on the sponsor regarding land upon which Federal funds have been spent, including the operation and maintenance of other airports managed by the sponsor.

FAA Order 5190.6A, Airport Compliance Requirements, (Order) describes the responsibilities under Assurance 5 assumed by the owners of public use airports developed with Federal assistance. Among these is the responsibility to enforce adequate rules, regulations, or ordinances as are necessary to ensure the safe and efficient operation of the airport.
See Order, Sec. 4-7 and 4-8.

Use on Reasonable and Not Unjustly Discriminatory Terms

Assurance 22, of the prescribed sponsor assurances, "economic nondiscrimination," implements the provisions of 49 U.S.C. 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 fair and reasonable terms, and without unjust discrimination, to all types, kinds, and classes of aeronautical uses." Assurance 22(a)

"...may establish such fair, equal, 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)

"...may...limit any given type, kind, or class of aeronautical use of the airport if such action is necessary for the safe operation of the airport or necessary to serve the civil aviation needs of the public." Assurance 22(i)

Subsection (h) qualifies subsection (a) and subsection (i) represents an exception to subsection (a) to permit the sponsor to exercise control of the airport sufficient to preclude unsafe and inefficient conditions which would be detrimental to the civil aviation needs of the public.

FAA Order 5190.6A describes the responsibilities under Assurance 22 assumed by the owners of public use airports developed with Federal assistance. Among these is the obligation to treat in a uniform manner those users making the same or similar use of the airport and to make all airport facilities and services available on reasonable terms without unjust discrimination. See Order, Sec. 4-14(a)(2) and 3-1.

The FAA considers it inappropriate to provide Federal assistance for improvements to airports where the benefits of such improvements will not be fully realized due to inherent restrictions on aeronautical activities. See Order, Sec. 3-8(a).

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 fair and reasonable terms, and without unjust discrimination. See Order, Sec. 4-13(a).

The Prohibition Against Exclusive Rights

Section 308(a) of the FAAct, 49 USC § 40103(e), provides, in relevant part, that "there shall be no exclusive right for the use of any landing area or air navigation facility upon which Federal funds have been expended."

Section 511(a)(2) of the AAIA, 49 USC § 47107(a)(4), similarly provides, in pertinent part, that "there will be no exclusive right for the use of the airport by any person providing, or intending to provide, aeronautical services to the public."

Assurance 23, of the prescribed sponsor assurances, "Exclusive Rights," requires, in pertinent part, that the sponsor of a federally obligated airport "...will permit no exclusive right for the use of the airport by any persons providing, or intending to provide, aeronautical services to the public...and that it will terminate any exclusive right to conduct an aeronautical activity now existing at such an airport before the grant of any assistance under the Airport and Airway Improvement Act of 1982."

In FAA Order 5190.1A, Exclusive Rights, the FAA published its exclusive rights policy and broadly identified aeronautical activities (any activity which involves, makes possible, or is required for the operation of aircraft, or which contributes to or is required for the safety of such operations) as subject to the statutory prohibition against exclusive rights. While public use airports may impose qualifications and minimum standards upon those who engage in aeronautical activities, we have taken the position that the application of any unreasonable requirement or a standard that is applied in an unjustly discriminatory manner may constitute a constructive grant of an exclusive right. See FAA Order 5190.1A, Para. 11.c.

FAA Order 5190.6A provides additional guidance on the application of the statutory prohibition against exclusive rights and FAA policy regarding exclusive rights at public-use airports. See Order, Ch. 3.

Minimum Standards

The FAA encourages airport management, as a matter of prudence, to establish minimum standards to be met by all who would engage in a commercial aeronautical activity at the airport. It is the prerogative of the airport owner to impose conditions on users of the airport to ensure its safe and efficient operation. Such conditions must, however, be fair, reasonable and not unjustly discriminatory. They must be relevant to the proposed activity, reasonably attainable, and uniformly applied. See, Order @ 3-12.

While an airport sponsor may impose minimum standards on those engaged in aeronautical activities, an unreasonable requirement or any requirement which is applied in an unjustly discriminatory manner could constitute the grant of an exclusive right. A standard which a tenant operator is required to meet must be uniformly applicable to all operators seeking the same franchise privileges. See Order @ 3-17[c]

The FAA ordinarily makes an official determination regarding the relevance and/or reasonableness of the minimum standards only when the effect of a standard denies access to a public-use airport. Such determination is limited to a judgment as to whether failure to meet the qualifications of the standard is a reasonable basis for such a denial, or whether the standard results in an attempt to create an exclusive right. See Order @ 3-17(b)

The airport owner may quite properly increase the minimum standards from time to time in order to ensure a higher quality of service to the public. Manipulating the standards solely to protect the interest of an existing tenant, or tenants, however, is unacceptable. See Order @ 3-17(c).

Federal Preemption of Authority Over Air Carrier Service

49 U.S.C. § 41713 prohibits a state or local government from regulating the rates, routes or services of an air carrier authorized to provide air transportation. 49 U.S.C. § 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 [49 U.S.C. §§ 41101 through 42112]."

However, 49 U.S.C. § 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."

Air Taxi Operations and Commercial Air Service

49 U.S.C. § 44101, *et seq.*, authorizes the FAA, among other things, to establish rules and regulations for the safe operation of aircraft. Federal Aviation Regulations (FAR) Part 135, *Air Taxi Operators and Commercial Operators*, in pertinent part, prescribes rules governing the carriage in air commerce of persons or property for compensation or hire as a commercial operator . . . "in common carriage operations solely between points entirely within any state of the United States in aircraft having a maximum seating capacity of 30 seats or less."[3] 14 CFR Part 135 also provides, in pertinent part, "that no person may operate an aircraft under this part without, or in violation of, an air taxi/commercial operator . . . operating certificate and appropriate operations specifications issued under this part, or, for operations with large aircraft having a maximum passenger seating configuration . . . of more than 30 seats . . . without, or in violation of, appropriate operations specifications issued under [FAR] Part 121 [*Certification and Operations: Domestic, Flag, and Supplemental Air Carriers and Commercial Operators of Large Aircraft*].[4]

[3] FAR Section 135.1(a)(3).
[4] FAR Section 135.5.

In addition, 14 CFR § 121.590 prohibits air carriers and air carrier pilots from operating an aircraft with 31 or more seats, into a land airport in any State of the United States unless the airport is certificated under 14 CFR Part 139.

Commuter Fitness Requirement

The FAAct, 49 USC § 41101 prohibits any person from engaging in air transportation, without a certificate authorizing air transportation issued by the Department of Transportation, unless otherwise authorized by Federal statute or regulation. In turn, 49 USC § 40109(f) authorizes passenger air transportation with aircraft having a maximum capacity of 55 seats without regard to the requirements of section 41101. Section 40109(f) also authorizes the Secretary of Transportation to raise the maximum seating capacity for aircraft operating under this statutory provision.

The Department of Transportation has adopted 14 CFR Part 298 "exemptions for Air Taxi and Commuter Air Carrier Operations" to implement the provisions of section 40109(f). Part 298 defines "commuter air carrier" as "an air taxi operator that carries passengers on at least five round trips per week on at least one route according to a public schedule." 14 CFR § 298.2(e). An air taxi operator in turn is an air carrier that does not operate aircraft with a seating capacity of more than 60 seats. 14 CFR § 298.2(a) and 14 CFR§ 298.3.

In 14 CFR Part 204, "Data to Support Fitness Determinations," the Department of Transportation has established data filing requirements support applications to conduct operations as a commuter air carrier. The effect of Part 204 is to require air carriers proposing to conduct commuter air carrier operations within the meaning of Part 298 to be found fit by the Department before commencing their operations. Based on the definition of commuter air carrier, this fitness requirement does not apply to air taxi operators conducting no more than four scheduled flights per week on any route.

Airport Operating Certificates

49 U.S.C. § 44706 authorizes the FAA to issue airport operating certificates. Federal Aviation Regulations (FAR) Part 139, *Certification and Operations: Land Airports Serving Scheduled Air Carriers Operating Large Aircraft* (14 CFR Part 139), provides for the issuance of such airport operating certificates. This part prescribes rules governing the certification and operation of airports which serve any scheduled or unscheduled passenger operation of an air carrier that is conducted with an aircraft having a seating capacity of more than 30 passengers.

Section 404 of the Federal Aviation Authorization Act of 1996, amended to 49 U.S.C. § 44706, authorizes the FAA to certify airports, except those located in Alaska, that serve scheduled air carrier operations operating aircraft with 10 to 30 seats.

The FAA has initiated a rulemaking project to amend Part 139 to include certification of these airports. A Notice of Proposed Rulemaking (NPRM) is scheduled to be published in early 1999. Upon the publication of the NPRM, the public will be provided ample opportunity to comment on the proposal and all comments received will be considered before the FAA takes action on the proposal. The statute requires that any regulation related to the certification of commuter airports shall undergo Congressional review prior to implementation. If the final rule is adopted, that rule would prohibit scheduled operations at the airport by aircraft having 10 or more passenger seats unless the airport holds a Part 139 operating certificate. The FAA will not require ACPAA to obtain a Part 139 certificate.

BACKGROUND

Part 13 Proceedings

A. Docket No. 13-94-25, Thomas Kehmeier v. ACPAA

On August 7, 1994, formal complaint No. 13-94-25 was filed by Thomas Kehmeier against the Arapahoe County Public Airport Authority, in accordance with the FAA Investigative and Enforcement Procedures (14 CFR Section 13.5).

Mr. Kehmeier, a private citizen, alleged that banning scheduled service at Centennial Airport violated provisions of the ACPAA's grant assurances.

On February 2, 1995, the Arapahoe County Public Airport Authority responded to the complaint by Mr. Thomas Kehmeier denying the allegations and requesting that the FAA dismiss the complaint, or, in the alternative, decline to institute an investigation as provided for in Part 13.5(h). [FAA Exhibit 1, Item 4, Tab F]

B. Docket No. 13-95-03, Centennial Express Airlines v. ACPAA

On June 18, 1986, the FAA Denver Flight Standards District Office, issued an Air Carrier Certificate to Golden Eagle Charters, Inc., d/b/a. Centennial Express Airlines, 7625 South Peoria Street, Englewood, CO. 80112. On December 20, 1994, this Certificate was reissued with the following language. [FAA Exhibit 1, Item 3 Ex. A. "Copy of Air Carrier Certificate"]

> "Centennial Express Airways, Inc. has met the requirements of the Federal Aviation Act of 1958, as amended, and the rules, regulations, and standards prescribed thereunder for the

issuance of this certificate and is hereby authorized to operate as an air carrier and conduct common carriage operations in accordance with said Act and the rules, regulation, and standards prescribed thereunder and the terms, conditions and limitations contained in the approved operations specifications."

Beginning in 1985, CEA established contact with the Arapahoe County Airport Authority (ACPAA) and/or the airport manager regarding the startup of scheduled 14 CFR Part 135 passenger service at Centennial Airport. [FAA Exhibit 1, Item 3, page 3]

On February 20, 1989, in the Centennial Aerogram, a newsletter published by the ACPAA, the Authority stated its position regarding Part 135 aeronautical activities. The Authority stated:

> "It should be recognized that commercial service has always existed at Centennial in the form of Part 135 charter/air taxi certification, which permits "for hire" passenger and freight service, whether scheduled or unscheduled. Such activity may not be prohibited but is limited to aircraft with 30 seats or less." [FAA Exhibit 1, Correspondence C-6]

In the Centennial Aerogram of October 3, 1989, the ACPAA published the following statement:

> "No scheduled air carrier, either large or small, has applied to the Authority to operate at the airport. Should any apply, the Authority will consider only the smaller, regional air service applications. No action will be taken by the Authority to consider such applications, however, without extensive community input and public hearing." [FAA Exhibit 1, Correspondence C-6 "Aerogram", page 3]

On December 12, 1991, a letter was sent to the ACPAA from CEA asking the airport to set standards which would allow CEA to operate. CEA alleges that the ACPAA notified them that it was revising its airport policy statement and that the new policy statement would need to be completed prior to the enactment of minimum standards for scheduled passenger service under Part 135. [FAA Exhibit 1, Item 3, page 3"]

On March 12, 1992, the Airport adopted and promulgated a policy statement, which states that:

> "The Authority reaffirms the original intent of the airport to service the general aviation community. To this end, Centennial will continue to accommodate aircraft operating under Federal

Aviation Regulations Part 135/Operations Specifications 135 (30 or fewer seats.) Requests for scheduled air service shall be reviewed for compliance with this policy, the established weight limit, and the application minimum standards." [FAA Exhibit 1, Correspondence C-5, "Centennial Airport Policy Statement"]

In the May 1, 1992 Centennial Aerogram, (which included the Report of Airport Authority Board Meetings of March 12th and April 23rd) published and disseminated to the public the same policy statement. [FAA Exhibit 1, Correspondence C-5,]

On April 8, 1993, the ACPAA adopted minimum standards for Part 135. At the same time, the ACPAA also adopted a Resolution that states in pertinent part that:

"There is hereby imposed a moratorium on the review or consideration of any applications for Scheduled Air Carrier Operations filed under the Airport's Minimum Standards for Commercial Aeronautical Activities and this moratorium shall be in effect until lifted by further order of the Authority or by final court order."

In the same document, the ACPAA went on to state that:

"The Authority Board hereby directs the attorneys for the Authority to commence legal action on behalf of the Authority and in conjunction with the Arapahoe County Attorney's Office to determine whether Scheduled Air Carrier Operations are allowed to operate at the Airport and/or whether the Authority Board may prohibit Scheduled Air Carrier Operations at the Airport." [FAA Exhibit 1, Correspondence C-1]

On July 21, 1993, the ACPAA sent a letter to the United States Department of Transportation (USDOT) requesting policy guidance on the relationship between Centennial Express' proposal and commitments made in exchange for Federal airport development grants. The Airport Authority argued that federal airport grant obligations should not be construed to require airports to accept commuter service. The Airport Authority provided voluminous supporting documentation with its letter. [FAA Exhibit 1, Correspondence C-5]

In the course of preparing a response, the FAA met with officials from Arapaho County and the City of Denver, heard directly from CEA, and received substantial amounts of correspondence from supporters and opponents of the proposed air service.

The FAA conducted a comprehensive review of the material provided by the airport Authority, Centennial Express, and supporters and opponents of the

proposed air service and provided policy guidance to the Airport Authority on December 23, 1994. [FAA Exhibit 1, Correspondence, C-11]

In August 9, 1993, a letter was received by Patrick V. Murphy, Deputy Assistant Secretary for Policy and International Affairs and Leonard E. Mudd, Director, Office of Airport Safety and Standards from the law firm of Brownstein, Hyatt, Farber & Strickland, P.C,. (The intent of the letter was to comment directly about the July 21, 1993 letter to the DOT from the ACPAA. Interest from this firm had previously been indicated in letters dated 6/28/93 and 8/4/93 and the 8/9/93 letter was supportive of CEA's proposal. [FAA Exhibit 1, Correspondence C-6]

On September 8, 1994, the ACPAA adopted an airport policy statement/minimum standards banning any scheduled passenger service. The policy stated in part that: "Under no circumstances shall the Airport purpose include scheduled air carrier service." [FAA Exhibit 1, Item 6,]

On December 23, 1994, DOT responded to the July 21, 1993 letter from the ACPAA by stating that the ACPAA has taken numerous AIP grants over the years and has a continuing obligation to comply with the grant assurances based on current FAA policy. The letter in which the DOT advised the ACPAA of the DOT's policy review stated that "The issue that this raises is whether the Department should change its policy to extend the flexibility now afforded to multiple airports under joint ownership to individually-owned multiple airports which are planned and operated under a regional agreement." The letter also advised that "in addressing similar cases in the past, FAA has found it arbitrary to exclude any particular class of service due to factors that are not reasonably related to the impacts of the Service." The DOT went on to conclude that the ACPAA had not proved that the number of passengers or operations at Centennial would warrant a ban on scheduled service.

DOT also indicated that unless ACPAA obtains an airport operating certificate under Part 139, scheduled passenger operations at Centennial Airport would be limited to aircraft with 30 or fewer seats. The DOT also stated that CEA could not serve any two points with five or more scheduled round trips per week without additional certification from DOT. [FAA Exhibit 1, Correspondence C-11]

The letter went on to state that:

> "separate from the matter of the airport's obligations under the grant assurances, your letter also raises a policy issue relating to how to harmonize several important goals..."

Additionally, the letter stated:

> "The issue that this raises is whether the Department should change its policy to extend the flexibility now afforded to

multiple owners under joint ownership to individually-owned multiple airports which are planned and operated under a regional agreement. Therefore, we will be initiating early next year a process to obtain a full range of views on this issue."

However, the letter also stated that "[c]urrently, existing policy on airport access must be complied with. DOT initiated the process by publishing a Notice of Proposed Policy (NPP) (Policy Encouraging Metropolitan Planning Organizations and Airport Operators to Cooperate in Transportation Planning) on January 28, 1997, (62 FR 4091). Docket No. OST-97-2085 was established to receive comments. The focus of the NPP is regional planning of airports and improved integration of airport planning with overall regional transportation planning. The NPP did not propose to authorize a single sponsor to enter into agreements with other airport sponsors to allocate traffic among regional airports.

Sublease with Colorado Jet Center:

In 1979, ACPAA, pursuant to its proprietary rights as owner of the Airport, entered into a lease with Colorado Jet Center (now known as the Denver Jet Center). Paragraph 5B provides as follows:

"Operations by Lessee. Lessee shall have the exclusive right at the Airport, to use and occupy the leased premises, in the areas as depicted on Exhibit A, for any one or more general aviation and related uses and any one or more purposes customarily related and incidental to the conduct of a full-service and full facility fixed base operation or the general conduct of any aviation related business, including the following permitted uses (I) Aircraft and Rotorcraft (sic), charter, air taxi, air freight and commuter service, scheduled and nonscheduled air carrier service."

On December 19, 1994, Golden Eagle Charter entered into a sublease with the Denver Jet Center. The sublease provided that Golden Eagle may carry on certain operations approved in the lease between Jet Center and the Airport Authority (ACPAA). Under the sublease, Golden Eagle was allowed to use the premises for the "purpose of operating aircraft charter, air taxi, air freight, and commuter service as provided for in paragraph 5B(I) of the Arapahoe County Fixed Base Operation Lease between Sub-lessor and ACPAA. [FAA Exhibit 1, Item 5, Brief in Opposition to Preliminary Injunction Order, pages 16-17]

In accordance with its Air Carrier Certificate, Golden Eagle (d/b/a Centennial Express) began scheduled air carrier operations on December 20, 1994. Golden Eagle began its operations with one, six-passenger Beechcraft King Air aircraft, the only aircraft approved by the FAA for Golden Eagle use. CEA's Air Carrier

Certificate entitled it up to four (4) round trips per week, per destination, both intra and interstate. In order to exceed four round trips per week per city pair, the air carrier becomes a commuter air carrier, subject to different regulatory requirements. [FAA Exhibit 1, Item 3, exhibit H, page 4]

On January 30, 1995, CEA filed a formal complaint in Docket No. 13-95-03 alleging that the ACPAA had prohibited scheduled passenger service at Centennial Airport under FAR Part 135.

On April 24, 1995, the Arapahoe County Public Airport Authority answered Formal Complaint No. 13-95-03 stating that the ACPAA has not violated Federal transportation laws or its Airport Improvement Program (AIP) grant assurances.[FAA Exhibit 1, Item 4, Tab G]

In it's answer, the ACPAA raised seven points:

1. That complainant alleges that a regulation adopted by the ACPAA limiting use of Centennial Airport for conducting scheduled passenger services violates the Federal air transportation laws and grant assurances associated with the ACPAA's acceptance of Federal funds under the Airport Improvement Program but in fact, the Complainant has neither been found fit nor been granted certification as an air carrier.
2. That the Complaint's allegation that the Authority has violated preemption provisions of the Federal Air Transportation Law and Airport Grant Assurances is misguided;
3. That CEA has not been found fit and therefore is not affected by the Authority's policy; (see I.)
4. That the Authority's regulation preserving Centennial Airport as a general aviation reliever facility is a reasonable limitation on the use of the airport.
5. That an FAR Part 13.5 enforcement proceeding is an inappropriate forum to resolve the issue of retaining Centennial Airport as a general aviation reliever airport.
6. That forcing Centennial to accept scheduled service would needlessly undermine the Federal investment in the Denver International Airport; and;
7. That compelling Centennial to accept scheduled operations would be at least premature in light of pending action to extend the airport certification requirement. (Aviation Rulemaking Advisory Committee; Airport Certification Issues – New Task 60 Fed. Reg. 21582)[5]

[5] The Aviation Rulemaking Advisory Committee (ARAC) is currently reviewing its task as assigned. To date, no official notice has been published requesting public comment on this issue.

On July 31, 1995, CEA responded to the ACPAA's Answer (13-95-03) generally asserting that the allegations contained in the Complaint have merit and responding point by point to each of the County's contentions as follows: [FAA Exhibit 1, Item 3, Attachment C]

1. The ACPAA's accusation that CEA did not have proper Department of Transportation (DOT) authority is incorrect because Golden Eagle Charters, Inc., d/b/a Centennial Express Airways, Inc. holds a valid part 135 Air Carrier Certificate (attached as Exhibit A) which is limited to four (4) round trips per week both inter-and intrastate.
2. The Federal government should invoke the AIP grant assurances to compel ACPAA to allow scheduled service under 14 CFR Part 135 (30 seats or less).
3. CEA was and always had been in compliance with all rules and regulations set by DOT and FAA governing CEA's actions.
4. The allegations from ACPAA that Centennial Airport was conceived as a general aviation reliever airport and would serve all types of civil service other than scheduled air carriers was erroneous.
5. ACPAA should not be permitted under FAA Order 5190.6A to approve limitations on the use of an airport by a particular type, kind, or class or aeronautical use, because such action is not necessary for the safe operation of the airport or necessary to serve the civil aviation needs of its public.
6. There is no justification to have a forced monopoly at the Denver International Airport (DIA) for all Denver residents; there are certain local areas and regional routes that could be better served by the outlying airports, such as Centennial.
7. CEA believes that nothing will change under the action referenced by the ACPAA.

On September 21, 1995, the ACPAA responded to CEA's reply by stating generally that the issue is "whether the fundamental role of the Centennial Airport should be compelled to change...on the basis of Complainant's intentions." ACPAA also states that "based on the evidence provided by Complainant itself, there is no question that Complainant's objective...is to have Centennial Airport transformed into a full-fledged commercial service facility." [FAA Exhibit 1, Item 4, Exhibit H]

The ACPAA's answer and CEA's reply were included as exhibits in each party's pleading in the Part 16 proceeding discussed below. Because the ACPAA's answer represented the most comprehensive statement of its position, its answer is addressed in detail in this determination.

Part 16 Proceeding

On February 23, 1998, CEA re-filed its original Part 13 complaint under FAR Part 16. In this new submission (FAA Docket No. 16-98-05), CEA raised the same allegations as had previously been alleged under FAR Part 13.

Substantially the same documents were used in this Part 16 proceeding as were considered in the Part 13 complaint. [FAA Exhibit 1, Item 3]

On April 8, 1998, ACPAA answered the Part 16 complaint and continued to present its argument that the airport should not be required to accept scheduled commercial air carrier service. [FAA Exhibit 1, Item 4]

The ACPAA states in their Answer that CEA is not entitled to any relief; and that it is not preempted by federal law from banning scheduled passenger service because of its reserved proprietary powers to ban such service. ACPAA also states that the Minimum Standards for commercial aeronautical activities banning scheduled passenger service is, as determined by the trial court, consistent with the safe operation of Centennial Airport. [FAA Exhibit 1, Item 4, page 3]

On April 16, 1998, John Andrews submitted a letter to Docket No. 16-98-05 that stated that "we are in receipt of the answer by the Arapahoe County Public Airport Authority, to our complaint...we choose not to reply." [FAA Exhibit 1, Item 8]

On April 29, 1998, the ACPAA submitted a rebuttal to the Docket. Because CEA did not submit a reply to ACPAA's answer, and so stated by letter, there is no pleading to rebut. Part 16 complainants and respondents are each entitled to two (2) submissions to the Docket, however, a party to the proceeding may choose not to exercise this right. In that case, the Docket would then be closed. ACPAA's rebuttal is therefore being rejected as an unauthorized pleading.

However, we will take this opportunity to note that the rebuttal presented by the ACPAA consisted entirely of the Opinion of the Colorado Supreme Court Case No. 97-SC-123. The FAA is taking official notice of this Opinion as discussed below.

FAA is consolidating the Part 13 dockets and their administrative records into the Part 16 proceeding. Consolidation into Part 16 will avoid duplicative proceedings and assure that the Part 16 complaint is addressed within the time requirements of that regulation. Exhibits provided by the ACPAA in response to the Part 13 proceedings are also included as exhibits in the Part 16 proceeding.

ANALYSIS AND DISCUSSION

Economic Discrimination

CEA alleges that its proposed application for scheduled commuter air service at the Centennial Airport has been denied without fair consideration. CEA further alleges that this violates the commitments made by the ACPAA in accepting airport development grants.

CEA proposed to initiate scheduled passenger service at Centennial Airport, offering commuter service using aircraft with a maximum capacity of 30 passenger seats or less under Federal Aviation Regulation Part 135. Currently, Centennial Airport has non-scheduled, air taxi operations with aircraft seating 30 passengers or less. CEA proposes a similar operation except on a scheduled basis. Under current FAA regulations, the activity proposed can be accommodated at Centennial Airport without the requirement to obtain a Part 139 certificate

According to FAA regulations, the airport sponsor is not required to possess a Part 139 certificate for this type of operation. If, however, any operator desires to exceed the 30 seat limit, the airport sponsor must possess an airport operating certificate. However, the FAA will not require the sponsor to seek a Part 139 certificate simply because an operator is petitioning to provide service with aircraft accommodating more than 30 seats.

As the owner of the airport, the ACPAA has entered into agreements with the FAA for assistance to finance airport development. As required by the Airport and Airway Improvement Act of 1982 and predecessor statutes, the Authority, in each such agreement, has provided the FAA with assurances regarding the operation of the airport. The standard assurances include a commitment that the airport will be available for public use on fair and reasonable terms without unjust discrimination to all types, kinds and classes of aeronautical uses.

Assurance No. 22 conveys FAA's policy on economic nondiscrimination and states in part that the airport will be available as an airport, for public use, on reasonable terms and without unjust discrimination, to all types, kinds and classes of aeronautical use. By banning a scheduled Part 135 service, merely because it is scheduled, while permitting unscheduled Part 135 air taxi and charter operations, Centennial Airport is effectively discriminating against CEA. The ACPAA has not provided sufficient justification for this discrimination, as discussed below.

The Grant Assurance [No. 22, Economic Nondiscrimination] that permits the County to limit or prohibit an aeronautical use for safety or to meet civil aviation needs would not ordinarily, in and of itself, provide sufficient basis for excluding scheduled Part 135 operations. In this case, ACPAA has not provided evidence of safety, efficiency or environmental concerns that would justify the restriction at this airport. In fact, ACPAA has provided virtually no evidence of any kind to support its conclusory claim of adverse safety, efficiency, or environmental effects from scheduled service.

Safety. Because ACPAA permits operation of the same aircraft in nonscheduled commercial service as it has attempted to ban in scheduled service, the Authority cannot argue a safety impact of the scheduled operations *per se*. The argument

that scheduled service will result in increased operations at the airport does not support the ban. First, ACPAA has presented no evidence that increased operations would be a safety problem, and indeed could not present such evidence because FAA operating rules and air traffic control would assure safe operations at any level of activity. Second, ACPAA claims that increased airport operations would be a problem but has not taken any measure to limit the total number of operations; the ban of *scheduled* operations does not limit total operations at the airport. Finally, all operations at the airport are conducted by pilots tested and licensed by the FAA; use aircraft certificated by the FAA for airworthiness; follow FAA operating rules; and follow the direction of FAA air traffic controllers. ACPAA has not provided a single item of information that would suggest any safety problem in any of these operations, scheduled or otherwise.

Congestion. ACPAA has not provided information that would support a claim that congestion at Centennial Airport is or will become a problem requiring a limit on operations. Centennial is a busy airport, and individual operators may experience delays at times of peak operation. However, a limit on the number of operations at an airport for reasons of congestion is an extraordinary measure that has been adopted and upheld at only a very small number of airports in the U.S. Also, the concerns about congestion are speculative. In order to uphold an airport restriction on operations, courts have required that existing levels of service have resulted in congestion. *See Midway Airlines, Inc. v. County of Westchester*, 584 F. Supp. 436, (S.D. NY 1984). In any event, the ban on scheduled operations adopted by ACPAA does not limit total operations, and therefore would not directly address the problem of congestion even if it existed.

Environmental effects. Similarly, there is no basis for the ban on environmental grounds, such as limiting the airport operator's liability for noise damages. In order to justify a restriction based on environmental grounds, the ACPAA must prove two things; first, that a noise or other environmental problem actually exists, and second, that the restrictions in question are rationally related to the problem. ACPAA has presented no evidence of specific actual or projected noise impacts to support regulation of any kind. Even if ACPAA presented evidence of a noise problem, a ban on scheduled operations does not control any characteristic of airport operation relating to the generation of aircraft noise. It does not limit the operation or frequency of use of a particular aircraft type; it does not limit total operations; it does not limit hours of operation; and it does not prescribe a maximum noise level, either for single events or cumulative effect. There is no evidence or even a claim that the turboprop aircraft proposed for scheduled operation would be the noisiest aircraft operating at the airport; in fact, the airport receives a substantial number of business turbojet operations, which ACPAA has not limited in any way. This situation is comparable to the FAA determination in *San Francisco Airports Commission, FAA Docket 13-86-2*, decided on 12/21/88, where FAA determined that a restriction based on the date

of an aircraft's certification as a Stage II aircraft was unjustly discriminatory because other, noisier aircraft were allowed to operate.

A restriction to control noise might also be subject to the requirements of the Airport Noise and Capacity Act (ANCA). ANCA and the FAA's implementing regulations, 14 C.F.R. Part 161, stipulate specific steps that must be followed before an airport sponsor imposes certain airport noise or access restrictions. ACPAA did not follow the specified procedures before imposing restrictions in this case.

In addition, the assurance permitting a sponsor to limit aeronautical use to serve the public's civil aviation needs has not been applied in a case where the restricted use did not impair other uses of the airport necessary to meet the public's needs. Thus, the grant assurance would apply only if Centennial's scheduled service interfered with the function of Centennial Airport as a reliever airport. Review of the record does not substantiate any claims that the scheduled service would adversely affect the use Centennial Airport for general aviation.

Until CEA approached the ACPAA with its proposal to establish scheduled Part 135 operations, ACPAA's public position was that scheduled air carrier service, with fewer that 30 seats, was within the airport's mission. [FAA Exhibit 1, C-6, page 2]

By denying access to CEA to establish scheduled Part 135 operations, ACPAA has effectively violated the grant assurance no. 22(a) restriction on economic nondiscrimination.

In its defense, ACPAA presents several arguments that will be addressed individually below. The FAA has found none of these arguments to be persuasive. [FAA Exhibit 1, Item 4]

1 ACPAA states in its Answer that CEA has "neither been found fit or been granted the certification as an air carrier by the Department of Transportation and therefore, CEA may not hold out or operate scheduled service.

CEA, in it's Reply, states that "Golden Eagle Charters, Inc., d/b/a Centennial Express Airways, Inc., holds a valid Part 135 Air Carrier Certificate which is limited to four (4) round trips per week, both inter-and intrastate. [FAA Exhibit 1, Item 3, Exhibit A] The ACPAA may require in a lease agreement that CEA or any other applicant performing the same or similar operations hold the requisite Federal authority for conducting operations conducted at the Centennial Airport. The record establishes, however that CEA holds FAA authority that permits limited scheduled service. [FAA Exhibit 1, Item 3, Exhibit A]

2 ACPAA argues that the introduction of scheduled service at Centennial would raise significant safety and environmental concerns. ACPAA does not state which specific safety or environmental concerns this activity would raise, appearing instead to rely on the grant assurance that states that "In the interest of safety, the airport owner may prohibit or limit a given aeronautical use of the airport if such action is necessary for the safe operation of the airport."

For the reasons discussed above, the FAA has determined that the ACPAA has not justified an access restriction based on safety, congestion or environmental grounds. Moreover, a ban on scheduled operations would not be a reasonable and nondiscriminatory response even if some restrictions were justified. The FAA recognizes the sponsor's obligation to protect against adverse effects on airport operations such as undue ramp congestion on the ground or lack of adequate ground-side facilities. However, in accordance with the grant obligations, these concerns can and should be addressed in the first instance through adoption of appropriate minimum standards for scheduled commuter facilities and operations. Lack of a public passenger terminal with baggage handling facilities does not justify a commuter service ban at this airport, since on-demand air taxi operations have been providing passenger services without these facilities. The FAA Chief Counsel has determined that a carrier may not be denied access to an airport solely based on the non-availability of currently existing facilities and that some arrangements for accommodation must be made if reasonably possible. See FAA Order 5190.6A@ 4-15(d). This guidance is especially applicable in this case, where CEA had obtained access to facilities through a sub-lease.

Where a sponsor has defended a challenged restriction on safety grounds, the FAA will make the final determination of the reasonableness of the airport owner's restrictions which deny or restrict use of an airport. [FAA Airport Compliance Order 5190.6A, page 16]

3 ACPAA presents the argument that the Federal government should not invoke the airport grant assurances to compel Centennial to accept scheduled service despite strong community opposition and continuous confirmation of its role as a reliever airport in both regional and Federal airport plans. ACPAA also argues that the context of a Part 13 enforcement proceeding is not the proper forum for this type of decision to be made.

When an airport sponsor requests and accepts Federal airport assistance, it signs a binding agreement that includes a commitment to comply with specific grant assurances. These grant assurances are included in the documents that an airport sponsor receives with each and every grant. Most of the grant assurances, including those at issue in this case, are established by statute, and the sponsor does not have the option to pick and choose those assurances with which it will comply. It is a sponsor's responsibility and right, before accepting a

grant, to understand and determine if compliance with all of the grant assurances is acceptable to the community. The responsibility includes a reasonable effort to resolve differences of opinion over the nature of those obligations. Once a grant is accepted, a sponsor's local authority is constrained by the obligations, which the sponsor undertakes in exchange for valuable consideration, *i.e.*, the Airport Improvement Program grants. Further, Part 16 (or Part 13 for cases filed before December 16, 1996) is the appropriate forum to analyze alleged violations, as will be discussed.

4 The ACPAA sets forth the argument that the Authority's regulation preserving Centennial as a general aviation reliever facility is a reasonable limitation on the use of the airport.

Airport sponsors can plan for, promote and orient sponsor-financed infrastructure to advance the airport's role as a reliever airport. Additionally, an airport does have the right to designate certain runways or other aviation use areas at the airport to a particular class or classes of aircraft as a means of enhancing airport capacity or ensuring safety. Any such restrictions should be clearly supportable, based on operational considerations and not instituted as a means of deliberately discriminating against a particular class.

As the owner of the airport, the ACPAA has entered into agreements with the FAA for assistance to finance airport development. As required by the AAIA, and predecessor statutes, the ACPAA, in each such agreement has provided the FAA with an assurance that the airport will be available for public use on fair and reasonable terms without unjust discrimination to all types, kinds and classes of aeronautical uses. The FAA does consider an airport's classification as a general aviation and/or reliever airport to limit the obligation to provide for access to all types, kinds and classes of aeronautical use.

A designation as "reliever airport" is not a basis for banning scheduled Part 135 operations at Centennial. As noted previously, the claim that commuter operations will fundamentally alter Centennial Airport's character is speculative and unsupported. Non-scheduled FAR Part 135 operations are considered a general aviation use. There are currently operators based at Centennial Airport that do provide FAR Part 135 non-scheduled services. The operations of the same aircraft types in scheduled service would not have distinct operational effects that would support an access restriction.

Prior to CEA's efforts to initiate scheduled service, ACPAA itself apparently did not consider scheduled Part 135 operations to be inconsistent with its role as a reliever airport. ACPAA, in public documents, has stated that "The Authority has the responsibility and authority to promote and facilitate air transportation, commerce and navigation by air for the benefit and welfare of the State of Colorado, its political subdivisions, and its inhabitants." Additionally, ACPAA has stated that "No scheduled air carrier, either large or small, has applied to the

Authority to operate at the Airport. Should any apply, the Authority will consider only the smaller, regional air service applications." Also, the ACPAA has stated that "The Authority reaffirms the original intent of the airport to serve the general aviation community. To this end, Centennial will continue to accommodate aircraft operating under Federal Aviation Regulation Part 135/Operations Specifications 135 (30 or fewer seats). Requests for scheduled air service shall be reviewed for compliance with this policy, the established weight limit, and the applicable minimum standards."

It had been the intention of the ACPAA to accept applications from entities such as CEA and that, at one time, the ACPAA viewed air service as a positive aspect of the services provided by the Centennial Airport to the surrounding community. A sponsor is not free, once Federal funds have been used to support its infrastructure needs, under the grant assurances, to bar service at the airport just because local preferences change. In some localities, a single airport sponsor owns and operates more than one airport. In such a case, where the volume of air traffic is approaching or exceeding the maximum practical capacity of an airport, an airport owner may designate a certain airport in a multiple airport system (under the same ownership and serving the same community) for use by a particular class or classes of aircraft. The owner must be in a position to assure that all classes of aeronautical needs can be fully accommodated within the system of airports under the sponsor's control and without unreasonable penalties to any class and that the restriction is fully supportable as being beneficial to overall aviation system capacity. See Order @ 4-8(d)

As the operator of a single airport, the ACPAA may not rely on this policy to exclude scheduled Part 135 operations. It cannot assure that all classes of aeronautical need can be fully accommodated if they are barred from Centennial airport.

In these circumstances, the ACPAA cannot rely on the reliever airport concept to exclude 14 CFR Part 135 scheduled operations.

5 ACPAA avers that an enforcement proceeding is an inappropriate forum to resolve the issue of retaining Centennial as a general aviation reliever airport, arguing instead that this is a matter of broad airport policy and should be addressed within a deliberative process. ACPAA additionally states that "an enforcement proceeding necessarily deals with specific allegations involving the conduct of one party."

FAA believes that an enforcement proceeding is in fact the proper forum to decide if a denial of access to a federally-funded airport is unjustly discriminatory. The ACPAA has taken numerous AIP grants over the years and has a continuing obligation to comply with the grant assurances based on current FAA policy.

6. ACPAA argues that forcing Centennial to accept scheduled service would needlessly undermine the Federal investment in Denver International Airport. ACPAA states in its arguments that "Compelling Centennial Airport to accept scheduled service will needlessly undermine the Federal government's investment in Denver International and contravene Centennial's intended purpose. Centennial is meant to play a supporting role in the success of Denver International by helping to meet the region's general aviation needs."

Potential economic harm to another airport would never justify an access restriction under the grant assurance that requires Centennial Airport to be accessible to all categories of aeronautical users on reasonable terms, except possibly in the limited circumstances of a single operator of a multiple airport system, as discussed above.

Moreover, ACPAA's suggestion that introduction of scheduled commuter services would have a significant adverse impact on Denver International Airport (DIA) is speculative. DIA holds an airport operating certificate under Part 139; it was designed and constructed primarily to serve Part 121 operations. While DIA has extensive commuter operations under Part 135, many of the passengers on those flights use DIA to connect to the Part 121 operations. Part 121 operations cannot be conducted at Centennial. Thus, there is no danger that introduction of scheduled commuter operations at Centennial will cause a transfer of Part 121 operations away from DIA. Moreover, to the extent that the Part 135 scheduled operations at DIA depend on connecting passengers for their economic viability, those operations are not likely to relocate either.

7. ACPAA states that compelling APA to accept scheduled operations would be at least premature in light of pending consideration of recommendations to require that all airports served by air carriers that provide scheduled passenger service be certificated under Part 139.

Section 404 of the 1996 FAA Authorization Act permits the FAA to extend the airport certification requirement to airports with scheduled service with aircraft with 10 or more seats. To date, the FAA has not yet published even a notice of proposed rulemaking. Until an amendment to Part 139 is adopted as a final rule, any airport may receive scheduled service by aircraft with 30 seats or fewer. The FAA is obliged to consider ACPAA's compliance in light of the current requirement of FAR part 139. Should the FAA adopt an amendment to part 139 to apply to more than 10 seat aircraft, than any scheduled operation at Centennial would need to conform to the requirements of the new amendment.

Exclusive Rights

CEA alleges that by denying permission to conduct an aeronautical activity, Part 135 *scheduled* air service, on the airports in question, and by permitting other

Part 135 *unscheduled* activities to be conducted, the ACPAA is in violation of the provisions regarding exclusive rights set forth in Section 511 (a)(2) of the Airport and Airway Improvement Act (AAIA), 49 U.S.C., 47107(a)(4) as amended, and Section 308(a) of the Federal Aviation Act of 1958, as amended, 49 U.S.C. Section 40103(e), as amended, and the Federal grant assurances.

The ACPAA claims that it has not granted an exclusive right to operate *unscheduled* air carrier service

The FAA interprets an exclusive right as the granting of any special privilege, power or right to provide an aeronautical service on the airport to the exclusion of others. Existence of an exclusive right to conduct any aeronautical activity at an airport limits the usefulness of the airport and deprives the using public of the benefits of a competitive enterprise.

The ACPAA has allowed commercial operators to conduct 14 CFR Part 135 *unscheduled* operations without unreasonable restriction while it has denied CEA the ability to operate under Part 135 with *scheduled* air services even though both operations use the same general kind of aircraft. Indeed, the ACPAA obtained and successfully defended a permanent state court injunction barring CEA's scheduled operations. By granting unscheduled operators the right to provide aeronautical services while excluding scheduled operators, the airport operators have granted a prohibited exclusive right to conduct air carrier operations to on-demand air taxi operators.

FAA Order 5190.6A explains the FAA's policy, stating,

> [a]part from legal considerations, the FAA considers it inappropriate to provide Federal funds for improvements to airports where the benefits of such improvements will not fully be realized due to the inherent restrictions of an exclusive monopoly on *aeronautical activities*.
>
> FAA Order 5190.6A, paragraph 3-8(a), page 8.

The policy applies equally here where one class of Part 135 service, scheduled operations, is excluded, while another, on-demand services, is permitted and there is no significant operational difference between the two.

In addition, Airport Improvement Program Assurance 23 (to which all AIP grant recipients are bound), states that the sponsor "... will permit no exclusive right for the use of the airport by any person providing, or intending to provide, *aeronautical services* to the public." Airport Improvement Program sponsor assurance no. 23, page 11 (Jan. 1995 edition) (emphasis added). FAA Order 5190.1A, "Exclusive Right," paragraph 8, which states that "the grant of an exclusive right for the conduct of any aeronautical activity is contrary to applicable law ...whether such exclusive right s results from express agreement

or from the imposition of unreasonable standards or requirements, or any other means." As discussed above, the ACPAA has established an unreasonable policy. It has, therefore, granted a prohibited exclusive right.

The FAA is charged with the responsibility of bringing about or enforcing compliance with the exclusive right provision of Section 308 of the Federal Aviation Act of 1958 and Section 303 of the Civil Aeronautics Act of 1938.

Even before adopting an explicit ban on scheduled service, and obtaining an injunction against CEA, the ACPAA took actions, or failed to act, in violation of the exclusive rights prohibition. Prior to 1991, when CEA sent a letter to the ACPAA requesting that minimum standards be set under which CEA would be allowed to operate, Centennial had a stated airport policy of encouraging commercial service "in the form of Part 135 charter/air taxi certification, whether scheduled or unscheduled. Such activity may not be prohibited but is limited to aircraft with 30 seats or less." [FAA Exhibit 1, C-6, page 2]

After a delay of several months following the request for minimum standards, the ACPAA notified CEA that the airport was revising its airport policy statement and that the new policy would have to be completed prior to the minimum standards being enacted. After 16 months, the ACPAA adopted minimum standards for Part 135. At the same time, a moratorium on accepting new applications for scheduled service operations was also adopted. [FAA Exhibit 1, Item 3, page 3]

There is nothing in the record in this proceeding that shows that the moratorium has ever been lifted. Significant delay in processing an application or request for entry to a Federally-funded airport can in itself be construed as denial of access. *(British Airways Board v. The Port Authority of New York and New Jersey, 564 F.2d 1002 (1997)* This unreasonable denial of access to part of the category of Part 135 operators amounts to a prohibited grant of an exclusive right.

Federal Preemption of Scheduled Service Ban

Title 49 U.S.C. § 41713 prohibits a state or local government from regulating the rates, routes or services of an air carrier authorized to provide air transportation. Section 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 [49 U.S.C. §§ 41101 through 42112]."

However, 49 U.S.C. § 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 provision preserves the proprietor's rights to conduct the business of an airport, but it does not create any new powers for the proprietors. The proprietor's rights are still governed, in the case of a grant funded airport, by section 308 of the Federal Aviation Act of 1958, 49 U.S.C. 40103 and the grant assurances. *See New England Legal Foundation v. Massachusetts Port Authority*, 883 F.2d 157 (1st Cir. 1989). Moreover, by virtue of the Commerce and Supremacy Clauses of the Constitution, an airport proprietor would be limited to adopting restrictions on rates, routes and services that are reasonable, non-arbitrary and non-discriminatory. *See British Airways BD. v. Port Authority of New York, 558 F.2d 75 (1977).*

The FAA has authority to consider this issue under Section 1002 of the Federal Aviation Act of 1958 (FAAct), 49 U.S.C., §46101, and §46105. These provisions grant the FAA the authority to investigate compliance with provisions of the Federal Aviation Act, as recodified, in part A of subtitle VII of Title 49 of the United States Code, including section 41713(b). For the reasons set forth below, the FAA has determined that the ACPAA's ban on scheduled service amounts to the regulation of rates, routes and service within the meaning of § 41713(b), and that the ACPAA's actions fall outside the scope of the proprietor's exemption.

This determination is based on and limited to the specific circumstances existing at Centennial Airport; i.e., the access restriction was implemented after the statutory restrictions contained in 41713(b) were enacted and after the sponsor accepted a grant of Federal airport assistance under the AIAA; the access restriction was adopted by the ACPAA on its own initiative and without a claim of legal obligation; and the complainant in this case had never agreed to any form of restriction on access or service to the airport.

The ban on scheduled service at Centennial Airport by the ACPAA constitutes the regulation of both air carrier service and air carrier routes. With respect to service, the ACPAA has effectively prescribed the kind of commercial air service that may operate at Centennial Airport -- on-demand Part 135 operations. The ACPAA is exercising control over a fundamental air carrier business decision on the kind of service to provide – scheduled or charter. In this regard, the decision in *Hodges v. Delta Airlines, Inc.*, 44 F.3d 334, 336 (5th Cir. 1995) does not limit section 41713(a) to regulations relating to "ticketing, boarding procedures, providing meals and drinks to passengers, and baggage handling." Rather, the *Hodges* decision identified these activities as elements of air carrier service "in addition to the transportation itself." *Id.* A decision to offer scheduled or charter service to the public in a particular market is, in the words of the United States

District Court in *Butcher v. City of Houston*, 813 F. Supp. 515, 517-518 (S.D. TX 1993), "distinctively incident to the provision of airline service to the public..." [6]

In carrying out the purpose of the preemption provision -- to avoid inconsistent and conflicting state and local laws regulating the airline industry, we consider the prohibition on scheduled services to be prohibited regulation of an air carrier. In evaluating the restrictions at issue here, the FAA has also considered the impact if corresponding regulations were enacted by local jurisdictions across the country. *See Lockheed Air Terminal Company v. City of Burbank, 411 U.S. 624 (1974).* If the ACPAA's ban on scheduled service were replicated around the country, inconsistent and conflicting laws would almost certainly be developed as some jurisdictions permitted scheduled service into a particular airport while other jurisdictions barred it.

In addition, this unilateral ban on scheduled service creates an inherent conflict with Federal law, which permits an air carrier holding authority to provide scheduled passenger service to provide that service to any airport in the United States. Thus, the ban cannot be considered to be "only a peripheral concern of the Act so [that] it could not be inferred that Congress intended to deprive the State of the power to act." *Local 926, International Union of Operating Engineers, AFL-CIO v. Jones*, 460 U.S. 669, 676 (1983).

The ACPAA's unilateral ban on scheduled service also represents a regulation of air carrier routes, because the effect of the ban is to prohibit regular operations over any route involving the Centennial Airport. An outright prohibition on operating over any route is as much a regulation of routes as a restriction on the number of routes that a carrier can operate from an airport, or a local ordinance either prohibiting service on a named route. Each of these ordinances would be considered to be a regulation relating to air carrier routes within the meaning of section 41713. *See, e.g. Butcher v. City of Houston, supra*, 813 F. Supp. at 517-518.

Based on the current record in this investigation, the ACPAA has not adequately justified the ban as an exercise of proprietary powers under section 41713(b). As previously noted, the discretion of an airport proprietor under section 41713(b) is not unlimited. In this case, ACPAA's proprietary rights are limited by its obligations under the AIP grant assurances and the statutory prohibition on exclusive rights. A restriction that is inconsistent with these Federal obligations

[6] In the quoted passage, the court was referring to regulations requiring a certain frequency of airline service or mandating non-stop service between certain cities. If these requirements are considered to be regulations relating to air carrier services, it follows that a total ban on scheduled service must also be considered a regulation relating to air carrier services.

is not within the proprietary powers preserved by section 41713(b). *New England Legal Foundation v. Massachusetts, supra*, 883 F.2d 157. [7]

For the reasons discussed above, the FAA has determined that the ACPAA's scheduled service prohibition is inconsistent with the ACPAA's obligation to provide access to the airport on reasonable terms without unjust discrimination and with the prohibition on granting exclusive rights. The restriction is, therefore, outside the scope of the ACPAA's proprietary powers.

The ban on scheduled service is subject not only to Federal grant obligations but also to limitations under the Commerce Clause and Supremacy Clause of the U.S. Constitution. As a local restriction on interstate commerce, the ban could be permitted under the proprietor's exception only if it were reasonable, non-arbitrary and non-discriminatory. *See British Airways BD v. Port Authority of New York, 558 F.2d 75 (1977).* However, based on the analysis of the restriction at Centennial under the grant assurances, the FAA is unable to find that the restriction meets this standard.

The courts have recognized that prevention or elimination of ground-side congestion, including congestion in passenger terminals, can provide a basis under the proprietor's exception for restricting air carrier scheduled operations, very limited circumstances. Those cases are not applicable to Centennial Airport. One case involved a perimeter rule adopted by the Port Authority of New York and New Jersey (Port Authority), setting a maximum distance for nonstop flights to LaGuardia airport[8]. The Port Authority controlled two other local airports at which it permitted (and encouraged) nonstop service to the New York City metropolitan area from points beyond the perimeter, and the Port Authority permitted flights to LaGuardia from beyond the perimeter so long as there was at least one stop within the perimeter. While the court recognized that control of ground-side congestion was a legitimate proprietor concern on which to base restrictions on air traffic, and that it was reasonable for the Port Authority to adopt rules designed to alleviate those problems, the decision also turned on the fact that the sponsor operated multiple airports and, through its control of these airports, could assure that scheduled service between New York City and any point in the United States could be accommodated. The ACPAA is not in the position of the Port Authority. It controls only Centennial Airport.[9]

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[7] The Department of Transportation is currently considering an air carrier access issue in connection with Dallas-Love Field. The circumstances and facts at Dallas-Love Field will be evaluated separately from this proceeding based on the airport specific circumstances existing at the airport.

[8] *Western Air Lines v. Port Auth. of New York & New Jersey, (Western Air Lines)* 658 F. Supp. 952, *aff'd* 817 F.2d 222 (2d Cir. 1987).

[9] The other decision involving a perimeter rule, *City of Houston v. Federal Aviation Admin.*, 679 F.2d 1184 (5th Cir. 1982) does not provide useful guidance in defining the authority of local governments that are airport proprietors. The perimeter rule in that case was imposed by the Federal Aviation Administration in its role as operator of Washington National and Dulles airports. The court was considering the scope of the

Another case involved the imposition of an hourly limit on the number of scheduled flights. *Midway Airlines, Inc. v. County of Westchester*, 584 F. Supp. 436, (S.D. NY 1984). In that case, the airport had presented compelling factual evidence that the airport terminal suffered from severe overcrowding at existing levels of operations, and that increased operations would, therefore, pose significant risks. As noted previously, the ACPAA's claims of congestion and inadequate facilities are speculative and not supported by evidence. Moreover, the Westchester restriction avoided a discriminatory effect because it did not deny access to the airport to any entire class of operations. Rather, the restriction capped the number of scheduled operations permitted in any hour and distributed the limitation across operations by all scheduled operators. In contrast, the ACPAA ban on scheduled service attempts to resolve claimed congestion and noise problems through a restriction on one class of operator, even though all operators would contribute to the problems if they existed. For these reasons, we conclude that the ACPAA ban on scheduled operations is an impermissible restriction on interstate commerce not permitted under an exception for proprietary rights.

Applicability of National Environmental Policy Act

While the Department was considering the ACPAA's July 1993 request for policy guidance on providing access for scheduled service, the City and County of Denver sought guidance on the application of the National Environmental Policy Act (NEPA) to the introduction of scheduled airline service at Centennial Airport and to an FAA compliance action to require to ACPAA to accept scheduled service at the airport. The Chief Counsel of the FAA provided that guidance in a letter dated October 22, 1993.To avoid any confusion or misunderstanding, the FAA is taking this opportunity to reaffirm that guidance, subject to clarification based on a change in the nature of the operation that CEA's proposed operation that occurred after the Chief Counsel issued his opinion. [FAA Exhibit 1, C-7]

First, NEPA, and specifically the NEPA requirement to conduct environmental reviews, applies to Federal actions. The action of an airport sponsor to permit individual commercial operators to do business on the airport is not itself a Federal action and is not, therefore, subject to NEPA.

Second, administrative civil enforcement actions, such as the issuance of this determination, are not Federal actions subject to NEPA under the regulations implementing NEPA, 40 CFR § 1508.18(a). Therefore, this decision is not subject to environmental review.

Finally, when scheduled air carrier service is introduced at an airport, the Federal action that could trigger environmental review would be the issuance of an air

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Federal government's authority to set perimeter rules. It was not, therefore, applying the same legal standards that govern state and local airport proprietors.

carrier operating certificate and operations specifications to an air carrier proposing to introduce scheduled service at the airport. The Chief Counsel's letter concluded that issuance of operations specifications to CEA permitting scheduled service at Centennial would require preparation of an environmental assessment (EA), largely because CEA was, at the time, proposing to operate turbojet service. However, FAA guidelines provide that issuance of an air carrier operating certificate or approval of operating specifications requires an EA only if the new service "may significantly change the character of the operational environment of an airport." FAA Order 1050.1(D), Appendix 4, paragraph 3(e). Thus, if the proposed turbojet service will not change the character of the operational environment at Centennial, no EA is required.

In any event, the issue would be addressed when, and if, CEA submits an application for approval of a modification to its operating specifications to permit scheduled service at Centennial Airport.

FINDINGS AND CONCLUSIONS

Upon consideration of the responses and submissions of the parties, and the entire record herein, including the material in the consolidated Part 13 proceedings, and the applicable law and for the reasons stated above, the FAA Office of Airport Safety and Standards finds and concludes as follows:

1. The Arapaho Public Airport Authority (ACPAA), by unreasonably delaying adoption of minimum standards for the operation of scheduled Part 135 air carrier services at Centennial Airport, and by adopting a moratorium on consideration of applications for scheduled Part 135 air carrier services at Centennial Airport in conjunction with the adoption of minimum standards for such services, violated its Federal obligations regarding Economic Nondiscrimination, as set forth in 49 USC § 47107(a)(1) and standard Airport Improvement Program (AIP) grant assurance No. 22.

2. The ACPAA, by banning scheduled air carrier service on or about September 8, 1994, violated its Federal obligations regarding Economic Nondiscrimination, as set forth in 49 USC § 47107(a)(1) and standard AIP grant assurance No. 22.

3. The ACPAA, by unreasonably delaying adoption of minimum standards for the operation of scheduled Part 135 air carrier services at Centennial Airport, and by adopting a moratorium on consideration of applications for scheduled Part 135 air carrier services at Centennial Airport in conjunction with the adoption of minimum standards for such services, violated its Federal obligations regarding Exclusive Rights, as set forth in 49 USC §§ 47107(a)(4) and 40103(e) and standard AIP grant assurance No. 23.

4. The ACPAA by banning scheduled air carrier service on or about September 8, 1994, violated its Federal obligations regarding Exclusive Rights, as set forth in 49 USC §§ 47107(a)(4) and 40103(e) and standard AIP grant assurance No. 23.

5. The ACPAA, by unreasonably delaying adoption of minimum standards for the operation of scheduled Part 135 air carrier services at Centennial Airport, and by adopting a moratorium on consideration of applications for scheduled Part 135 air carrier services at Centennial Airport in conjunction with the adoption of minimum standards for such services, violated the prohibition on state and local regulations relating to a price route or service of an air carrier as set forth in 49 USC § 41713.

6. The ACPAA, by banning scheduled air carrier service on or about September 8, 1994, violated the prohibition on state and local regulations relating to a price, route or service of an air carrier as set forth in 49 USC § 41713.

ACCORDINGLY, the FAA Orders that:

1. The Arapahoe County Public Airport Authority (ACPAA) present a plan to the Airports Division, Northwest Mountain Region of the FAA within 20 days from the date of this Director's Determination on how it intends to address the FAA's concerns by eliminating the violations outlined above;

2. Pending FAA approval of the corrective action plan specified in Ordering Paragraph 1, or until further notice, the ACPAA is ineligible to apply for new FAA grants pursuant to 49 USC § 47106(d).[10]

FURTHER:

If the ACPAA does not submit a corrective action plan in accordance with Ordering Paragraph 1 above or appeal this determination as set forth below, the FAA proposes to issue an order pursuant to 49 USC § 47122 directing the ACPAA to eliminate the violations outlined above. The failure to comply with that order would result in permanent termination of the eligibility of the ACPAA for new FAA grants.

These determinations are made under 49 U.S.C. Section 47107 (a)(4) as amended by Pub. L. No. 103-305 (August 23, 1994).

[10] The 180-day limit on suspension of eligibility contained in section 47106(d) applies only to applications to receive AIP funds apportioned under 49 USC §§47114(c) and (e). The ACPAA is not eligible to receive these apportioned funds. Therefore, the 180-day limit does not apply.

Opportunity to Request a Hearing Or an Appeal

Pursuant to Federal Aviation Regulations, 14 CFR Part 16, the Arapahoe County Public Airport Authority may request a hearing under subpart F of Part 16 within 20 days after service of the Director's Determination. See 14 CFR Section 16.109. The Arapahoe County Public Airport Authority may waive a hearing and appeal the Director's determination directly to the FAA Associate Administrator for Airports within 30 days of service of the Director's determination as provided in 14 CFR Section 16.33.

David L. Bennett
Director, Office of Airport Safety
and Standards

August 21, 1998