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May 29, 2003

BY MESSENGER

Office of the Chief Counsel (Room 922B)
ATTN: FAA Part 16 Airport Proceedings Docket (AGC-610)
Federal Aviation Administration
800 Independence Avenue, S.W.
Washington, DC 20591-0004

Re: Skydance Helicopters, Inc. d/b/a Skydance Operations, Inc. v. Sedona Oak-Creek Airport Authority and Yavapai County, Arizona, FAA Docket Number 16-02-02

Dear Ladies and Gentlemen:

Pursuant to 14 CFR section 16.19(c), enclosed is an executed original and three copies of the Complainant's Opposition to Motion to Reopen the Record or to Review the Complaint De Novo filed by Respondents on May 19, 2003.

Sincerely,

Marshall S. Filler

Marshall S. Filler
Counsel to Complainant Skydance Helicopters, Inc.

Enclosures

U.S. DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC 20591-0004

SKYDANCE HELICOPTERS, INC. d/b/a SKYDANCE OPERATIONS, INC.,	)	
Complainant	)	
vs.	)	
SEDONA OAK-CREEK AIRPORT AUTHORITY	)	DOCKET NO. 16-02-02
and	)	
YAVAPAI COUNTY, ARIZONA,	)	
Respondents	)	

COMPLAINANT'S OPPOSITION TO RESPONDENTS' MOTION TO REOPEN THE RECORD OR TO REVIEW THE COMPLAINT DE NOVO

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Dated: May 29, 2003

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COMPLAINANT'S OPPOSITION TO RESPONDENTS' MOTION TO REOPEN THE RECORD OR TO REVIEW THE COMPLAINT DE NOVO[1]

I. Introduction

Pursuant to 14 CFR section 16.19(c) of the Federal Aviation Administration's (FAA) Rules of Practice for Federally-Assisted Airport Enforcement Proceedings, 14 CFR section 16.19(c), Complainant Skydance Helicopters, Inc. d/b/a Skydance Operations, Inc. ("Complainant" or "Skydance") submits its Opposition to Respondents' Motion to Reopen the Record or to Review the Complaint De Novo. Respondents are the Sedona Oak-Creek Airport Authority d/b/a the Sedona Airport Administration (SAA) and Yavapai County, Arizona (collectively, the "Respondents").

[1] Respondents' latest pleading is entitled "Reply to Complainant's Opposition to Motion for Leave to Supplement the Record and for Reconsideration of the Director's Determination." Respondents also indicated that, in the alternative, their pleading could be considered a "Motion to Reopen the Record or to Review the Complaint De Novo." Since section 16.19(c) only authorizes one response to a motion, the instant pleading is entitled Complainant's Opposition to Respondents' Motion to Reop en the Record or to Review the Complaint De Novo. However, for ease of reading, Complainant will refer to the Respondents' latest pleading as their "Filing of May 19, 2003."

Acknowledging that "part 16 does not specifically provide for a reply to Complainant's Opposition", Respondents nevertheless ask the Director to ignore the so-called "procedural niceties" of the Federal Aviation Regulations and substitute their own version of the law instead. [Respondents' Filing of May 19, 2003, page 7 and page 15, footnote 8]. Beginning with their filing of April 28, 2003, Respondents have offered a total of six pleadings in two separate documents. They have recited a litany of reasons why the FAA should apply different law in this "unique" case than it has in other Part 16 cases, including: (1) Respondents' use of local counsel who, in spite of his inexperience in Part 16 matters, was fully aware of the requirements of section 16.23 and the importance of submitting exhibits in support of his pleadings, (2) Respondents need to supplement the record with exhibits that are notable primarily by their redundancy and their ongoing smear campaign against Complainant, (3) their overconfidence following Tony Garcia's conclusion that the license agreement was reasonable and non-discriminatory, perhaps explaining why they elected not to file a rebuttal under section 16.23(f), (4) Respondents' disregard of the legal standard that applies to Motions for Leave to Supplement the Record (as evident by their omitting any reference to it in their Filing of April 28, 2003) and then offering another that is more to their liking in their most recent filing, and (5) their use of pleadings that are neither contemplated nor authorized by Part 16.

For these reasons and those described more fully below, Complainant urges the Director and/or the Associate Administrator to deny and summarily dismiss Respondents' Filing of May 19, 2003.

II. Procedural History Following the Director's Determination

Following the Director's Determination of March 7, 2003, Respondents filed a Motion for Leave to Supplement the Record, a Motion for Reconsideration of the Director's Determination, or in the alternative, an Appeal under Section 16.33(c). These multiple pleadings were filed in a single document on April 28, 2003.

On May 8, 2003, Complainant submitted an opposition to Respondents' two motions pursuant to section 16.19(c). On May 19, 2003, Complainant filed its Reply to Respondents' Appeal pursuant to section 16.33(c). That same day, Complainant was served with Respondents' latest multiple pleading.

III. Discussion and Analysis

A. Respondents' Reply to Complainant's Opposition to Motion For Leave to Supplement the Record and for Reconsideration of the Director's Determination is an Unauthorized Pleading

Respondents filed their latest pleading under section 16.19(c), which provides, in pertinent part:

> *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**...(emphasis added)

Respondents filed their original Motion for Leave to Supplement the Record and for Reconsideration of the Director's Determination on April 28, 2003. Complainant filed an Answer in Opposition to these motions on May 8, 2003, noting that the Respondents had failed to set forth the governing legal standard for supplementing the record at this stage of the proceedings and, more importantly, that they had not made the required showing that would allow the documents to be included.

Respondents acknowledge that in Ricks v. Millington Airport, FAA Docket No. 16-98-19, Final Decision and Order, 1999 WL 1295210 (FAA) (December 30, 1999), the FAA rejected Ricks' rebuttal to Complainant's Reply because a rebuttal pleading was not contemplated by the rules during the appeal phase of the proceedings. Respondents attempt to distinguish their Filing of May 19, 2003 from the rebuttal document in Ricks because the former was made under section 16.19 rather than section 16.33. [Respondents' Filing of May 19, 2003 at footnote 8, page 15].

This is a distinction without a difference. As with section 16.33, section 16.19 provides only for a motion and a single responsive pleading. Paragraph 16.19(c) gives the non-moving party the right to file an answer in support of, or in opposition to, a motion filed under section 16.19(a). Respondents filed their motion on April 28,2003 and Complainant filed its answer in opposition on May 8, 2003. The rule does not contemplate further pleadings relating to the original motion.

Part 16 pleadings were intended to provide "a more efficient and expedited process." 61 FR 53998, 54001 (October 16, 1996) than the previous Part 13 procedures. Reading into section 16.19 a right of rebuttal would be contrary to both the letter and the intent of Part 16.

Apparently concerned that their Reply to Complainant's Opposition was not authorized by section 16.19, Respondents' also referred to their Filing of May 19, 2003 as a Motion to Reopen the Record or to Review the Complaint De Novo. In order to comply with section 16.19(c), Complainant has elected to respond to the Respondents' Motions (rather than their Reply) since to do otherwise would require Complainant to submit an unauthorized document.

Nevertheless, Complainant urges the Director and the Associate Administrator to take notice of the fact that the Respondents' Motions are repetitive and appear designed to delay these proceedings. The only material difference between the Filing of May 19, 2003 and their earlier Motion For Leave to Supplement the Record or for Reconsideration of the Director's Determination is that they have recognized that some legal standard, albeit an incorrect one, controls whether they should be permitted to supplement the record.

B. Respondents' repetitive attempts to introduce new documents should be denied because, as with their original motions, they have not met the required legal standard.

It is a well established tenet of administrative law that in "an internal agency appeal process new evidence need not be admitted unless the evidence was not available and could not have been discovered or presented at the prior proceeding." Ricks v. Millington Municipal Airport Authority, Docket No. 16-98-19 Final Decision and Order, 1999 WL 1295210 (F.A.A.) (December 30, 1999), citing *Charles H. Koch, Jr. Administrative Law and Practice*, Vol. 1, § 6.76 (1997).

Granting Respondents' request would be contrary to Ricks and several other cases governing the introduction of new evidence in Part 16 cases. Roberts v. Davies County, Indiana Board of Aviation Commissioners", Docket No. 16-00-06, Final Decision and Order, 2001 WL 1683273 (FAA) (December 13, 2001) at 8; Wilson Air Center v. Memphis and Shelby County Airport Authority, Docket No. 16-99-10, Final Agency Decision and Order, 2001 WL 1085348 (FAA) (August 30, 2001); Robert G. Martin v. City of Prescott, Docket No. 16-97-01, Final Decision and Order, 19997 WL 1120738 (FAA) (October 7, 1997).

Part 16 presents both parties with ample opportunities to submit exhibits to the FAA. Section 16.23(g) provides that "the answer, reply, and rebuttal shall, like the complaint, be accompanied by supporting documentation upon which the parties rely." Supporting documentation is defined as "**all documents then available in the exercise of reasonable diligence**." 14 CFR section 16.23(b)(2). (Emphasis added.) Further, section 16.29 states:

> 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.

Similarly, the preamble to the Part 16 final rule provides as follows:

> Because the FAA could rely exclusively on information and documentary evidence filed with the pleadings, parties would be expected to provide thorough submissions in order to protect their interests." 59 FR 29880, 29883 (June 9, 1994)

The rationale for not allowing new documents after the Record of Determination has been closed should be affirmed in this case. Indeed, Respondents even acknowledged that the "information presented in the Motion to Supplement the Record could have been presented earlier." [Respondents' filing of May 19, 2003 at footnote 3, page 2]. As the Ricks' decision noted: **"[a] party may not correct a mistake in its original selection of evidence by compelling the agency to consider it on appeal."** Ricks at footnote 3, page 15 (emphasis added). Yet, this is exactly what Respondents are attempting to do.

Respondents' allegation that the Director and Associate Administrator are "entitled" to the same information as the "original investigator" mischaracterizes Tony Garcia's role in this case. [Respondents' Filing of May 19, 2003, at page 8]. Although Mr. Garcia participated in the pre-complaint informal resolution process under section 16.21, he had no formal fact-finding role in this proceeding. Fact-finding is the responsibility of the Director under section 16.31(b). On appeal, the Associate Administrator must determine whether the facts as determined by the Director are supported by a preponderance of reliable, probative and substantial evidence. Wilson v. Memphis and Shelby County Airport Authority, Docket No. 16-99-10 Final Agency Decision and Order, 2001 WL 1085348 (FAA) (August 30, 2001).

The issue before the Director and the Associate Administrator is whether Respondents met the required legal standard to introduce new evidence after the Director's Determination was issued. Clearly, they did not. Their Motion for Leave to Supplement the Record did not articulate a standard; it just asserted that new evidence could be introduced. Perhaps concerned about this omission, they filed an unauthorized

pleading and offered a different legal standard for supplementing the record than the one previously recognized by the FAA. The Director and the Associate Administrator are required to follow the established law to determine whether to admit new documents after the Director's Determination has been issued. Respondents have not met that standard; therefore, their motions should be denied.

C. Respondents' Filing of May 19, 2003 should be summarily dismissed because it is a repetitive pleading.

There is no dispute that section 16.19 allows a party to file a motion even though it is not specifically provided for in Part 16. However, section 16.19 was certainly not intended to allow a party to file repetitive pleadings, thereby defeating the very purpose of having an efficient and expedited procedure to resolve complaints against airport sponsors.

There is nothing in Part 16 that specifically addresses the FAA's authority to dismiss Respondents' Filing of May 19, 2003. However, Part 13 contemplates such a situation under section 13.234(d) and Complainant submits that it is entirely appropriate in this instance:

> *Repetitious and frivolous petitions.* The FAA decisionmaker will not consider repetitious or frivolous petitions. The FAA decisionmaker may summarily dismiss repetitious or frivolous petitions to reconsider or modify.

By ignoring both the letter and spirit of Part 16, Respondents' second multiple pleading appears calculated to frustrate and further delay this proceeding. Accordingly, Complainant urges the Director and the Associate Administrator to summarily dismiss Respondents' Filing of May 19, 2003.

D. Safety Issues

Respondents' continuing insistence that safety concerns justified their unfair, unreasonable and discriminatory treatment of Complainant shows that they have still

not grasped the distinction between the need to address an issue (i.e., a congested ramp area) and the means used to do so. Their argument is tantamount to suggesting that the FAA's safety authority would allow it to revoke an air carrier's certificate to reduce the number of operations at an airport. As the Director's Determination made perfectly clear, Respondent Yavapai County must comply with its obligations as a sponsor under the federal airport improvement statutes as well as the Federal Airport Act.

Complainant has adequately responded to the Respondents' general safety allegations in previous filings and sees no need to repeat those statements here. Similarly, Complainant will again resist the urge to respond to Respondents' new safety attacks, believing that doing so will only distract the Director and Associate Administrator from the real issues in this case. Nevertheless, if the FAA has concerns about these issues, it can take cognizance of Complainant's regulatory compliance and accident/incident record during the time it was a tenant at the Sedona Airport from 1994 until its eviction in 2001, even comparing it to other operators on the field. Similarly, the FAA can discuss Complainant's compliance disposition with those Flight Standards inspectors in Reno and Scottsdale who were responsible for overseeing Skydance's certificate and geographic operations.

As the record reflects (Complaint Exhibit 23, page 4), several years ago Respondent SAA requested Complainant to abandon its previous helipads 150 yards to the south and move to a location on the ramp. The area soon became congested and undoubtedly contributed to the difficulties among the tour operators. In 2000, Respondent SAA then requested that Complainant move again – this time to the undeveloped south end of the airport. Although the prospect of moving a second time would have been disruptive to Complainant's business, it decided that it presented the best opportunity to move the business forward.

During the meeting of October 31, 2000 (see Respondent SAA's letter of November 1, 2000)[2], Respondent SAA offered a 30-year lease for Complainant to construct its own facilities away from the congested ramp area. Remarkably, Respondent SAA ultimately withdrew its offer and replaced it with a two-year lease when Complainant raised objections to the unreasonable and discriminatory license agreement.

Complainant has consistently requested a long-term lease so it could have some stability in its business and recoup its $300,000 investment. Complainant was also willing to sign a fair and reasonable license agreement that provided some protection from the possibility that Respondent SAA would act in an arbitrary manner. Had Respondent SAA truly wanted to negotiate a long-term lease and license agreement to reflect what it now says it intended all along, this proceeding would never have been instituted.

[2] Complaint, Exhibit 7

IV. Conclusion

For the foregoing reasons, Complainant urges the Director and/or the Associate Administrator to deny and summarily dismiss Respondents' Motions of April 28 and May 19, 2003. In addition, Complainant urges the Associate Administrator to decide the Respondents' appeal at the earliest practicable time.

Respectfully submitted,

Marshall S. Filler
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May 29, 2003

CERTIFICATE OF SERVICE

I, Kristy Herrick, certify that on May 29, 2003, I caused the executed original and three (3) copies of the foregoing Complainant's Reply to Respondents' filing of May 19, 2003 to be hand-delivered to:

Office of the Chief Counsel (Room 922B)
ATTN: FAA Part 16 Airport Proceedings Docket (AGC-610)
Federal Aviation Administration
800 Independence Avenue, SW
Washington, DC 20591

I further certify that on May 29, 2003 I have caused true copies of the document referenced above to be personally delivered, via Federal Express, to the following:

Kenneth P. Quinn, Esq.
Jennifer E. Trock, Esq.
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Kristy Herrick

Kristy Herrick