



**UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY
WASHINGTON, D.C.**

**Issued by the Department of Transportation
on the 6th day of February, 2019**

AirGate Aviation, Inc.

Docket OST 2019-0001

**Violations of 49 U.S.C. §§ 41101, 41712, and
41738 and 14 CFR Part 298**

Served February 6, 2019

CONSENT ORDER

This consent order concerns unauthorized scheduled passenger service as a commuter air carrier by AirGate Aviation, Inc., (AirGate) in violation of 49 U.S.C. §§ 41101, 41712, and 41738 and 14 CFR Part 298. It directs AirGate to cease and desist from further violations of these statutory and regulatory provisions and assesses the carrier a compromise civil penalty of \$50,000.

Applicable Law

Pursuant to 49 U.S.C. § 41101, citizens of the United States¹ must have economic authority in the form of a certificate of public convenience and necessity from the Department prior to engaging in air transportation.² Part 298 creates an exemption from the certificate requirement in section 41101 for a class of air carriers called “air taxi

¹ A “citizen of the United States” includes a corporation organized in the United States that (1) meets certain specified standards regarding the citizenship of its president, officers and directors, and holders of its voting interest and (2) is under the actual control of citizens of the United States. 49 U.S.C. § 40102(a)(15).

² The economic licensing requirement of section 41101 is separate and distinct from the safety-related licensing requirements of the Federal Aviation Administration (FAA).

operators,” which are carriers that use only small aircraft³ and perform either on-demand service or four or fewer round-trip flights per week between two or more points according to a published schedule.⁴ Scheduled service in excess of this level renders the air taxi operator a “commuter air carrier” for purposes of Part 298. Under 49 U.S.C. § 41738, the Department must find a commuter air carrier “fit, willing, and able” prior to commencing such scheduled service. Section 298.21(d) implements this statutory fitness requirement with respect to air taxi operators seeking to provide service as commuter air carriers. Operating, advertising, or otherwise “holding out” commuter air service without having first been found fit violates 14 CFR 298.21(d), as well as 49 U.S.C. §§ 41101 and 41738. In addition, such conduct also violates 49 U.S.C. § 41712, which prohibits carriers from engaging in unfair or deceptive practices or unfair methods of competition.

A holding out can occur by direct means⁵, by indirect means⁶, or by reputation⁷. Whether air service is or has been “held out” is determined by an objective analysis of the carrier’s conduct, rather than by the carrier’s characterization of the nature of its operations or by any motive the carrier ascribes to its operations.

Facts and Conclusion

AirGate is a Florida-based air taxi registered under 14 CFR Part 298. AirGate’s website advertises air-taxi operations between New Smyrna Beach, Florida, and Marsh Harbour,

³ Small aircraft are aircraft originally designed to have a maximum passenger capacity of 60 seats or fewer or a maximum payload capacity of 18,000 pounds or less. 14 CFR 298.2.

⁴ Scheduled service is defined as transport service operated over routes pursuant to published flight schedules or pursuant to mail contracts with the U.S. Postal Service. 14 CFR 298.2. A “scheduled operation” under 14 CFR 110.2 is any common carriage passenger-carrying operation for compensation or hire conducted by an air carrier or commercial operator for which the certificate holder or its representative offers in advance the departure location, departure time, and arrival location.

⁵ E.g., *Airmark Aviation, Inc., Violations of 49 U.S.C. § 1371*, Order 92-2-14 (Feb. 11, 1992) (carrier obtained charter customers through a sales presentation given by the carrier’s president).

⁶ E.g., *Contract Air Cargo, Inc., Violations of 49 U.S.C. § 41101 and 41712*, Order 2005-3-39 (Mar. 30, 2005) (unlicensed air carrier *inter alia* performed sub-service for direct air carriers that were licensed to engage in air transportation and transported the cargo of an air freight forwarder that was engaging indirectly in air transportation pursuant to 14 CFR 296); *IDM Corporate Aviation Services, LLC, Violations of 49 U.S.C. § 41101 and 41712*, Order 2007-2-6 (Feb. 5, 2007) (carrier provided lift to customers obtained by an air charter broker acting as the carrier’s agent).

⁷ E.g., *Principal Air Services, LLC, and David C. Bernstein, Violations of 49 U.S.C. § 41101 and 41712*, Order 2006-7-13 (Jul. 11, 2006) (by serving a number of customers, carrier engaged in a course of conduct that evinced a willingness to provide passenger air transportation to the public); see also *Southeast Airlines, Enforcement Proceedings*, 32 C.A.B. 1281, 1285 (1961) citing *Transocean Air Lines, Inc., Enforcement Proceeding*, 11 C.A.B. 350, 353 (1950).

Bahamas as a part of its “Bahamas Service.”⁸ During 2016 and 2017, AirGate regularly operated more than four flights per week between New Smyrna Beach and Marsh Harbour. At all times relevant to this matter, AirGate did not hold a commuter air carrier authorization from the Department.

Although AirGate does not openly advertise flight schedules between New Smyrna Beach and Marsh Harbour, AirGate’s website states that the carrier “offers flights from New Smyrna Beach to Marsh Harbour” and air travel may be booked by calling an AirGate reservations agent. DOT investigators called AirGate to inquire about flights from New Smyrna Beach to Marsh Harbour. In response, AirGate reservation agents told them about a specific flight leaving on the following Wednesday at 7:30 a.m. When asked if they could fly out at 10:00 a.m., rather than 7:30 a.m., the AirGate representative stated that was not possible - but there was a flight available on Thursday at 12:30. Subsequently, a second DOT investigator called AirGate reservations. In this conversation, AirGate’s reservation agent indicated to the investigator that the carrier had seat availability on multiple flights through July going to Marsh Harbour for one way or round trip and it expected that its entire fleet (five aircraft) would be utilized during this peak travel time.⁹

In addition to verbally holding out scheduled service, numerous tourist and resort websites in Marsh Harbour list AirGate as a scheduled air service provider offering “several daily flights to choose from” and “regularly scheduled one-way and round trip flights.” As a result, this information could lead members of the public to believe that AirGate was authorized to provide more than four round-trip flights per week based on a published schedule.

Further, our investigation of AirGate’s flight records revealed that AirGate performed more than four round-trip flights between New Smyrna Beach and Marsh Harbour each week, and these flights departed and arrived consistently within a 15-30-minute window, such that a lay person could surmise that flights were generally available at specific times of day. As such, AirGate exceeded the scope of its exemption authority under 14 CFR Part 298, thereby also violating 49 U.S.C. §§ 41101, 41712, and 41738, and constituting a level of service that required it to be found fit as a commuter air carrier.

Response

In mitigation, AirGate states that it does not publish a written schedule regarding flights nor does it condone any characterization or “marketing” of its flight operations by third parties. With respect to representations by third parties that AirGate operates scheduled service, AirGate contends that it has requested several third parties to correct their websites regarding the nature of the air transportation offered by AirGate.

⁸ AirGate also offers charter service, under which it will fly customers who charter the entire capacity of its aircraft anywhere in the continental United States and the Caribbean. This service is separate and distinct from its Bahamas Service.

⁹ AirGate has been granted authority to conduct up to four round-trip flights per week between two points, pursuant to a published schedule or an unlimited amount of on demand charter flights not related to published scheduled flights; however, AirGate does not have authority to hold out, or operate, more than four round-trips between two points pursuant to a published schedule.

Further, AirGate states that it's intent is to negotiate charters with customers prior to arranging any charter flights; however, the timing of its flights is often driven by outside factors such as the opening of Bahamian customs. AirGate states that it does in fact fly charters to locations around the United States and the Caribbean, in addition to Marsh Harbour, but the location of the Marsh Harbour airport is a popular destination due to its proximity to passengers' ultimate destinations which are otherwise inaccessible by plane.

Notwithstanding the foregoing, AirGate recognizes the concerns expressed by the DOT and the importance of the resolution of these concerns amicably and without unnecessary delay. AirGate states that it intends to pursue commuter air taxi authority, under which its existing practices would be better suited.

Decision

The Office of Aviation Enforcement and Proceedings (Enforcement Office) has carefully considered the information provided by AirGate, but continues to believe that enforcement action is warranted. The Enforcement Office and AirGate have reached a settlement of this matter in order to avoid litigation. AirGate consents to the issuance of an order to cease and desist from future violations of 49 U.S.C. §§ 41101, 41712, and 41738 and 14 CFR Part 298 of the Department's regulations, and to the assessment of \$50,000 in compromise of potential civil penalties otherwise due and payable pursuant to 49 U.S.C. § 46301.

This compromise assessment is appropriate considering the nature and extent of the violations described herein and serves the public interest. It represents a strong deterrent to future noncompliance with the Department's economic licensing requirements by AirGate as well as by other carriers.

This order is issued under the authority contained in 49 CFR Part 1.

ACCORDINGLY,

1. Based on the above discussion, we approve this settlement and the provisions of this order as being in the public interest;
2. We find that AirGate Aviation, Inc., violated 14 CFR 298.21(d) and 49 U.S.C. §§ 41101 and 41738 by holding out and operating commuter air service without having first been found fit as a commuter air carrier;
3. We find that by violating 14 CFR 298.21(d) and 49 U.S.C. §§ 41101 and 41738 as described in ordering paragraph 2, above, AirGate Aviation, Inc., has engaged in an unfair and deceptive practice and unfair method of competition in violation of 49 U.S.C. § 41712;

4. We order AirGate Aviation, Inc., and all other entities owned or controlled by or under the common ownership of AirGate Aviation, Inc., and its successors and assignees, to cease and desist from violations of 49 U.S.C. §§ 41101, 41712, and 41738 and 14 CFR Part 298;
5. We assess AirGate Aviation, Inc., a compromise civil penalty of \$50,000 in lieu of civil penalties that might otherwise be assessed for the violations found in ordering paragraphs 2 and 3, above. Of this amount, \$25,000 shall become due and payable within 60 days after issuance of this order. The remaining \$25,000 shall be forgiven if AirGate Aviation, Inc., and its successors and assignees, refrains from further violations for eighteen months following the issuance of this order;
6. Failure to pay the penalty as ordered shall also subject AirGate Aviation, Inc., to the assessment of interest, penalty, and collection charges under the Debt Collection Act and to additional enforcement action; and
7. Payment shall be made by wire transfer through the Federal Reserve Communication System, commonly known as “Fed Wire,” to the account of the U.S. Treasury in accordance with the attached instructions.

This order will become a final order of the Department 10 days after its service date unless a timely petition for review is filed or the Department takes review on its own motion.

BY:

BLANE A. WORKIE
Assistant General Counsel for
Aviation Enforcement and Proceeding

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