



GLPTC from receiving FTA financial assistance in an amount equivalent to the gross proceeds GLPTC received from its unauthorized charter operations.<sup>3</sup>

GLPTC timely appealed the Regional Administrator's decision. In its appeal GLPTC accepts the Regional Administrator's decision regarding service it provided to Purdue University, but challenges the remainder of the decision.<sup>4</sup>

## II. REGULATORY FRAMEWORK

### A. Standard of Review

GLPTC faces a challenging initial burden when seeking to appeal the Regional Administrator's decision. Under the applicable regulations, "[t]he Administrator will only take action on an appeal if the appellant presents evidence that there are new matters of fact or points of law that were not available or not known during the investigation of the complaint."<sup>5</sup>

### B. Burden of Persuasion and Standard of Proof

When a statute is silent regarding a party's burden of persuasion, that is, which party loses if the evidence is closely balanced, the default rule is that the plaintiff or claimant bears the burden of persuasion.<sup>6</sup> Thus, in a charter service case, where Congress was silent regarding which party bears the burden of persuasion, the appellant bears the burden of persuading the Administrator that there are new matters of fact or points of law that were not available or not known during the investigation of the complaint.

When a statute is silent regarding the standard of proof that should apply in a case, "the preponderance of the evidence is the proper standard, as it is the default standard in civil and administrative proceedings."<sup>7</sup> Therefore, when deciding a charter service case, FTA applies a preponderance of the evidence standard. To hold something by a preponderance of the evidence means that something is more likely so than not so.<sup>8</sup>

## III. DISCUSSION

Under the applicable regulation I may only take action to review the Regional Administrator's decision if GLPTC persuades me that there are new matters of fact or points of law that were not available or not known during the investigation of the complaint. Because GLPTC has failed to meet its burden in this regard, I decline to take

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<sup>3</sup> *Id.*

<sup>4</sup> See Respondent GLPTC's Appeal to the Administrator of the Federal Transit Administration from the Regional Administrator's Decision, *Imperial Travel Serv. v. Greater Lafayette Pub. Transp. Corp.*, Charter Service Docket No. 2006-15 (FTA Region V, Jan. 9, 2008) [hereinafter "GLPTC Appeal"] at 9.

<sup>5</sup> 49 C.F.R. § 604.19(b) (2007).

<sup>6</sup> *Schaffer ex rel Schaffer v. Weast*, 546 U.S. 49, 56 (2005).

<sup>7</sup> *Yzaguirre v. Barnhart*, 58 F.App'x 460, 462 (10th Cir. 2003) (quoting *Jones ex rel Jones v. Chater*, 101 F.3d 509, 512 (7th Cir. 1996)).

<sup>8</sup> See, e.g., *Williams v. Eau Claire Pub. Sch.*, 397 F.3d 441, 444 (6th Cir. 2005).

action and I do not address GLPTC's arguments that it acted in good faith in attempting to comply with the FTA's charter bus regulation or that it relied upon findings and determinations by FTA's chief counsels and regional administrators in providing service.

A. No New Matters of Fact

Based on the evidence presented on appeal, GLPTC has failed to persuade me that there are new matters of fact that were not available or known during the Regional Administrator's investigation of Imperial's complaint.<sup>9</sup> Construed liberally, GLPTC's appeal argues that FTA's Fiscal Year ("FY") 2006 GLPTC Triennial Review supports the conclusion that there are new facts that were not available or known during the Regional Administrator's investigation. However, because the Regional Administrator considered the FY 2006 GLPTC Triennial Review in reaching her decision,<sup>10</sup> I find that the FY 2006 GLPTC Triennial Review does not provide any new facts.

GLPTC's additional proffered sources of fact similarly do not indicate any new facts that were not available or known during the Regional Administrator's investigation. The facts offered on appeal by GLPTC, such as (1) a March 11, 1993, letter from Regional Administrator Joel P. Ettinger;<sup>11</sup> (2) a June 23, 1992, letter from FTA Chief Counsel Steven A. Diaz;<sup>12</sup> (3) a February 29, 1988, letter from Urban Mass Transportation Administration Chief Counsel Edward J. Babbitt;<sup>13</sup> (4) a November, 1995, decision letter from FTA Chief Counsel Berle M. Schiller;<sup>14</sup> (5) a September 15, 1993 letter from FTA Acting Chief Counsel Gregory F. McBride;<sup>15</sup> (6) a 1995 subcontract;<sup>16</sup> (7) three 2005 "Willing and Able" Letters;<sup>17</sup> and (8) an October 28, 2003 letter from FTA Regional Administrator Robert C. Patrick<sup>18</sup> all are dated or occurred before the Regional Administrator's January 9, 2008 decision. GLPTC has failed to allege, much less to prove by a preponderance of the evidence, that these facts were not available during the Regional Administrator's investigation. I therefore find that these facts were either available to or known by the Regional Administrator throughout her investigation.

GLPTC also cites a "Bus Transportation Agreement" executed on October 2, 2006, between GLPTC and the Tippecanoe County Historical Association.<sup>19</sup> However, Imperial referred to this agreement in an amendment to its complaint dated October 31, 2006, and the Regional Administrator addressed these "additional allegations" in her decision.<sup>20</sup>

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<sup>9</sup> See 49 C.F.R. § 604.19(b).

<sup>10</sup> *Imperial Travel Serv.*, Charter Service Docket No. 2006-15, at 8.

<sup>11</sup> See GLPTC Appeal at 2.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 3, 7.

<sup>14</sup> *Id.* at 3, 5.

<sup>15</sup> *Id.* at 4.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* Attachment F.

<sup>18</sup> *Id.* at 8.

<sup>19</sup> *Id.* Attachment G.

<sup>20</sup> *Imperial Travel Serv.*, Charter Service Docket No. 2006-15, at 1.

**B. No New Points of Law**

Based on the evidence presented on appeal, GLPTC has failed to persuade me that there are any new points of law that were not available or known to the Regional Administrator during her investigation of Imperial's complaint. GLPTC cites letters from various FTA officials<sup>21</sup> ("guidance documents") in support of its argument that new points of law exist, but FTA issued each of the cited guidance documents before Imperial filed its complaint. Therefore, the guidance documents do not identify new points of law.

GLPTC also cites FTA's revised charter regulation codified at 49 C.F.R. Part 604<sup>22</sup> in support of its argument that new points of law exist. This regulation does not constitute a new point of law within the meaning of 49 C.F.R. § 604.19(b). Even if I assume—and I decline to so decide—that this regulation is on point and could lead to a different result on the merits, it would violate fundamental notions of due process to hold the parties to a regulation that did not exist when the parties acted and that was not in effect when Imperial filed its complaint.

GLPTC further cites FTA's *Charter Service Question and Answer Notice*<sup>23</sup> in support of its argument that new points of law exist.<sup>25</sup> However, this source was available before Imperial filed its complaint on September 12, 2006, and before the Regional Administrator issued her decision on January 9, 2008. It therefore does not identify new points of law.

Finally, GLPTC argues on appeal that reliance on federal actions can serve as a defense, but each of the cases it cites in support of this proposition were decided before Imperial filed its complaint on September 12, 2006, and before the Regional Administrator issued her decision on January 9, 2008.<sup>26</sup> GLPTC fails to allege, and I decline to find, that these cases were unavailable to the Regional Administrator when she conducted her investigation. I therefore do not reach the merits of this claim.

**IV. CONCLUSION AND FINAL ORDER**

The Regional Administrator's decision stands. My decision is administratively final and is subject to judicial review pursuant to 5 U.S.C. §§ 701–706.

IT IS SO ORDERED.

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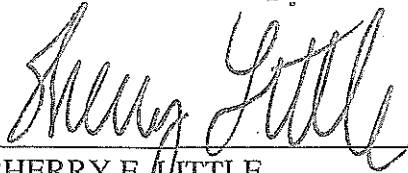
<sup>21</sup> See *supra* notes 11–18.

<sup>22</sup> 73 Fed. Reg. 2,334–35 (January 14, 2008); see GLPTC Appeal at 5–6, 10.

<sup>23</sup> 52 Fed. Reg. 42,251 (April 13, 1987).

<sup>25</sup> See GLPTC Appeal at 4, 7–8.

<sup>26</sup> See *id.* at 6.



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Dated