UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC

SPA Rental, LLC
DBA MSI Aviation,

Complainant/Appellant

v.

Somerset – Pulaski County Airport Board,

Respondent/Appellee

FAA Docket No. 16-13-02

FINAL AGENCY DECISION

I. INTRODUCTION

This matter is before the Federal Aviation Administration (FAA) Associate Administrator for Airports on appeal filed by SPA Rental, LLC, d/b/a MSI Aviation (Complainant, SPA, MSI, or Appellant) from the Director's Determination of September 1, 2015, issued by the Director of the FAA Office of Airport Compliance and Management Analysis, pursuant to the Rules of Practice for Federally Assisted Airport Enforcement Proceedings found in Title 14 CFR part 16 (Rules of Practice).

Complainant argues in its appeal and brief dated October 27, 2015, to the Associate Administrator for Airports that the Director's Determination contains errors in that:

A. It fails to recognize that the Board, by amending the lease to Somerset Regional Aviation, LLC., (Somerset) Somerset's Limited Fixed Base Operator (LFBO)[1] Agreement, and by amending the Airport Minimum Standards the Board unjustly discriminated in favor of Somerset to the detriment of SPA. FAA Exhibit 1, Item 24, p. 1.

[1] The term "Limited Fixed Base Operator" is not defined by the FAA; it is analogous with the term "Specialized Aviation Service Operations" (SASO). SASOs are sometimes known as single service providers or special FBOs performing less than full services. These types of companies differ from a full service FBO in that they typically offer only a specialized aeronautical service such as aircraft sales, flight training, aircraft maintenance, or avionics services for example. Advisory Circular (AC) 150/5190-7, Appendix 1 par. 1.1(n).

B. It concludes that Minimum Standards of Operation comply with grant assurances as long as the Minimum Standards are uniformly, but indiscriminately applied to operators engaged in dissimilar businesses. FAA Exhibit 1, Item 24, p. 2.

Somerset – Pulaski County Airport Board (Respondent, Board, Sponsor, or Appellee) filed a Response dated December 18, 2015, to the Complainant's Appeal stating that it developed Minimum Standards after consulting with the FAA Airport District Office that established an Incentive Program which provided incentives to aircraft maintenance LFBOs. Respondent further states that SPA mischaracterizes the Incentive Program to obtain preferential treatment. Respondent argues because SPA is not similarly situated with the targeted aircraft maintenance LFBOs it cannot claim that Respondent unjustly discriminated against it in violation of the grant assurances. Respondent states that it offered to make the Airport available to SPA on reasonable terms and did not unjustly discriminate against SPA. Respondent requests that the Associate Administrator issue a Final Agency Decision affirming the Director's Determination. FAA Exhibit 1, Item 29, p. 13.

Upon an appeal of a Part 16 Director's Determination, the Associate Administrator will use the following analysis:

(1) Are the findings of fact each supported by a preponderance of reliable, probative, and substantial evidence contained in the record?
(2) Are conclusions made in accordance with law, precedent, and policy?
(3) Are questions on appeal substantial?
(4) Have any prejudicial errors occurred?

14 CFR § 16.33(e); *see also, e.g.*, Ricks v Millington Municipal Airport, FAA Docket No. 16-98-19, December 30, 1999, Final Decision and Order, p. 21.

In arriving at a final decision on this Appeal, the FAA has reexamined the record, including the Director's Determination, the administrative record supporting the Director's Determination, the Complainant's Appeal, and Respondent's Reply in light of applicable law and policy. Based on this reexamination, the FAA affirms the Director's Determination. The Associate Administrator concludes that the Director's Determination is supported by a preponderance of reliable, probative, and substantial evidence, and is consistent with applicable law, precedent, and FAA policy. The Complainant's Appeal does not contain persuasive arguments sufficient to reverse any portion of the Director's Determination.

This decision constitutes the final decision of the Associate Administrator for Airports pursuant to 14 CFR § 16.33(b).

II. SUMMARY OF THE DIRECTOR'S DETERMINATION

In its Complaint and Reply, SPA alleged Respondent violated Grant Assurance 22, *Economic Nondiscrimination*; Grant Assurance 23, *Exclusive Rights*; and Grant Assurance 24, *Fee and Rental Structure*. The Complainant claimed that Respondent engaged in

economic discrimination by demanding SPA enter into the new proposed LFBO lease with objectionable conditions. SPA further alleged that Respondent demanded that SPA perform a minimum of ten (10) third party annual aircraft inspections per annum. SPA alleges that Respondent is forcing SPA to alter its fundamental business by engaging in a business which it has not heretofore engaged. Finally, SPA alleged that Respondent was failing to credit the number of annual inspections performed by SPA's managing member, Walter Iversen,[2] on aircraft owned by himself, his spouse or SPA against the 10 third party minimum. FAA Exhibit 1, Item 20, p. 1.

The Director determined that the following issues required analysis to provide a complete review of Respondent's compliance with applicable Federal law and policy:

> 1. Whether Respondent is in violation of Grant Assurance 22, *Economic Nondiscrimination*, by requiring that Complainant (SPA) agree to a set of new Minimum Standards for Fixed Base Operation that would require changes to SPA's business model.
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> 2. Whether Respondent is in violation of Grant Assurance 23, *Exclusive Rights*, by requiring that Complainant meet the terms of revised Minimum Standards in order to receive incentives and subsidies.
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> 3. Whether Respondent is in violation of Grant Assurance 24, *Fee and Rental Structure*, by offering a financial incentive program to increase business at the airport.

FAA Exhibit 1, Item 20, pp. 16-17.

With respect to the first issue, the Director found that Respondent had justified changes to the minimum standards, when Respondent explained that attracting, developing, and sustaining meaningful third party maintenance services would facilitate growth at Lake Cumberland Regional Airport by attracting more users and allowing the Airport to generate additional revenue streams.

Regarding the second issue, the Director concluded that SPA itself was neither a certificated aircraft repair station nor had the ability to conduct annual inspections. Thus, it could not hold itself out to the public to conduct annual inspections. It was reasonable to conclude that SPA was not a traditional Fixed Base Operator (FBO)[3] but an aircraft refurbisher and

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[2] The FAA Record contains references to Mr. Walter P. Iversen with his name being spelled "Iversen" and "Iverson." It appears that Mr. W. Thomas Halbleib, Jr., used the spelling "Iverson" in his letter dated February 13, 2013, addressed to "Wally Iverson." FAA Exhibit 6, Item L. He further uses that spelling in his e-mail dated January 27, 2013, to Ms. Winter R. Huff. FAA Exhibit 6, Item N. The Director uses the spelling "Iverson" thirteen times in non-quoted references in the Director's Determination. *Numerous citations omitted.* The Associate Administrator accepts "Iversen" as the correct spelling because that is the spelling contained in Mr. Iversen's Affidavit. FAA Exhibit 1, Item 24, Exhibit A.

[3] A fixed-base operator (FBO) is a commercial entity providing multiple aeronautical services such as fueling, maintenance, storage, ground and flight instruction, etc., to the public. FAA Order 5190.68, Appendix Z, p. 314.

reseller. The Director explained that Grant Assurance 23, *Exclusive Rights*, does not preclude a sponsor from modifying minimum standards to reflect changing needs and to protect the public interest. The Director compared this analysis to that in the analysis of Issue 1, and concluded that the grant assurances do not require sponsors to develop and implement minimum standards. However, FAA policy specifies that sponsors choosing to establish minimum standards should apply them objectively and uniformly to all similarly situated on-airport aeronautical service providers. FAA Exhibit 1, Item 20, pp. 24-25.

Regarding the third issue, the Complainant argued that the incentives the Airport Board provided to Somerset were dramatically disproportionate to those offered to SPA. The Director found that SPA was not similarly situated to Somerset. He further found no evidence that Respondent had required SPA to change its business model. He found no sufficient evidence to support Complainant's claim that Respondent offered incentives to Somerset that were dramatically disproportionate or different to those offered to the Complainant to sustain a Grant Assurance 24 violation. FAA Exhibit 1, Item 20, p. 27.

The Director found that Respondent was currently not in violation of its Federal obligations with respect to Grant Assurance 22, *Economic Nondiscrimination;* Grant Assurance 23, *Exclusive Rights;* and Grant Assurance 24, *Fee and Rental Structure*. FAA Exhibit 1, Item 20, p. 2.

III. PARTIES

A. The Airport

The Lake Cumberland Regional Airport (KSME or Airport) is a federally-funded, public use, general aviation airport owned and operated by Somerset-Pulaski County, Kentucky. The 288-acre facility is located three miles south of Somerset, Kentucky. As of March 31, 2016, it had 29 based aircraft. The Airport had 36,628 operations for the 12-month period ending July 24, 2013. The airport has one paved runway approximately 5,800 feet long. FAA Exhibit 1, Item 32. The development of the Airport has been financed, in part, with funds provided to the County as the Airport sponsor 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*. As a result, the County is obligated to comply with the FAA sponsor assurances and related Federal law, 49 U.S.C. 47101. The most recent grants awarded include $82,875 in 2012 and $99,423 in 2014, both for obstruction removal. FAA Exhibit 1, Item 19.

B. Complainant/Appellant

The Complainant, SPA Rental, LLC, d/b/a/ MSI Aviation, was a Limited Fixed Base Operator (LFBO) under a prior agreement with the Airport. The company has been engaged in purchasing, refurbishing and reselling aircraft from two privately built hangars that have since reverted to the Airport. FAA Exhibit 1, Item 1, page 1. Operating from KSME since 1986, the Complainant is currently classified as a holdover tenant under the hangar leases that expired on December 31, 2011. FAA Exhibit 1, Item 6, Exhibits C and E.

IV. BACKGROUND AND PROCEDURAL HISTORY

A. Background

SPA describes itself as "engaged in the business of purchasing, refurbishing, and re-selling aircraft" from two leased hangars, Hanger B-3 and Hanger B-4, at the Lake Cumberland Regional Airport. FAA Exhibit 1, Item 1, p. 1. SPA constructed both hangars, sharing one common wall, at its own expense. Hanger B-3 is a 2,400 square foot structure completed in 1988. Hanger B-4, completed in 1992, is 3,200 square feet. The hangars became the property of the Airport Board on January 1, 2009, upon expiration of the ground leases between SPA and the Airport Board. FAA Exhibit 1, Item 5, pp. 4-5.

Walter Iversen is an FAA aircraft maintenance technician holding an Airframe and/or Powerplant (A & P) certificate accredited with an Inspection Authorization. He has provided mechanical repairs, including airworthiness inspections, to aircraft owned by SPA, himself, and his spouse, from the leased hangars. Three aircraft, owned Mr. Iversen, the managing director of SPA, and his spouse, are stored in the two hangars. During its history at KSME, SPA mechanics have never performed, in any 12-month period, more than three 100-hour or annual inspections for aircraft being refurbished and held for resale. SPA did not provide details of the number of aircraft it has purchased, refurbished and then sold from its hangar facilities at KSME. SPA has not conducted airworthiness inspections of aircraft to the general public. FAA Exhibit 1, Items 1 and 5.

SPA's last "Limited Fixed Base Operator" (LFBO) agreement became effective on June 30, 2009. As stated in the LFBO Agreement, automatic renewal required that SPA continue to meet all of the required qualifications contained in the Agreement. The Agreement states that SPA "shall operate a limited fixed base operation (aircraft, engine and accessories maintenance) in a 40 x 142 foot airplane hangar know as Hangar B3 and Hangar B4."[4] The Agreement also specifies that SPA "may also store two (2) non-owned aircrafts and manage said aircraft[s] for another by providing pilots, light maintenance and upkeep." In addition, the Agreement states that SPA "shall comply with all of the Minimum Standards for Fixed Base Operations at the Lake Cumberland Regional Airport as they are amended from time to time." FAA Exhibit 1, Item 1, Exhibit A.

By letter dated November 29, 2012, Respondent provided SPA notice that all three agreements (LFBO and two hangar lease agreements) terminated on December 31, 2012, and that SPA must vacate the hangars by that date. FAA Exhibit 1, Item 6, Exhibit E. Since January 1, 2013, SPA has continued to occupy Hangar B-3 and Hangar B-4 at the Lake Cumberland Regional Airport as a holdover tenant. FAA Exhibit 1, Item 5, p. 9.

Effective March 24, 2012, the Board approved Somerset Regional Aviation, LLC, (Somerset) to establish an LFBO at the airport, operating from a 4,800 square foot hangar (Hangar 10), for the purposes of performing aircraft repairs, maintenance, and airworthiness

[4] The LFBO Agreement lists the total square footage of the Hangars B-3 and B-4 as 5,680 square feet. FAA Exhibit 1, Item 1, Exhibits A and C.

inspections of aircraft. FAA Exhibit 1, Item 1, pp. 2-3. The one-year LFBO and Hangar 10 lease agreements both include a provision allowing Somerset to extend the LFBO Agreement and Hangar Lease for two successive periods of one year each. The fee for each year of the LFBO Agreement was one dollar. For the Hangar 10 Lease, the Airport Board waived rental fees in consideration for the on-site maintenance services that Somerset agreed to provide to the public under the terms of the LFBO Agreement. In addition, the Airport Board agreed to reimburse Somerset for the lease-mandated public liability insurance premiums in an amount not to exceed $8,000 per twelve month period. FAA Exhibit 1, Item 5, p. 5 and FAA Exhibit 1, Item 6, Exhibit F.

On April 4, 2012, Mr. James H. Williams, FAA Memphis ADO, wrote to Ms. Kellie Baker, Airport Manager, Somerset-Pulaski County Airport, seeking clarification regarding the new LFBO Agreement with Somerset. Specifically, Mr. Williams sought clarification of the following:

- Has an existing FBO at the airport expressed a desire to exercise a contract continuation clause? If not, specify the reasons for not renewing the contract.

- Why did the newspaper advertisement seeking an FBO not mention the availability of a less than market rate incentive package?

- Given that the Airport Board received two proposals in response to the ad, explain why the continued presence of SPA in conjunction with the interest of two potential FBO's did not negate the need for incentives?

Mr. Williams cautioned Ms. Baker that "fees and hangar rental well below fair market value violates the grant assurances and could be considered as 'Revenue Diversion.'" Mr. Williams further explained that "these terms would make it unreasonably costly or impractical for the airport to have more than one fixed-based operator because they would be subject to the same rates, fees, rentals as the other tenants making same or similar uses of the airport." FAA Exhibit 1, Item 6, Exhibit G.

On April 19, 2012, SPA filed an informal complaint in the form of a letter from Winter Huff, an attorney representing Complainant, to James H. Williams, FAA, citing refusal of the Board to renew the LFBO agreement with SPA while providing incentives to Somerset. In its informal complaint, SPA alleges that: (1) the Sponsor had refused to renew the LFBO Agreement with SPA; and (2) the Sponsor had offered "discriminatory incentives to Somerset to the detriment of SPA." FAA Exhibit 1, Item 1, p. 3; and Item 1, Exhibit E.

On April 23, 2012, John T. Mandt, an attorney representing the Somerset-Pulaski County Airport Board, replied to Mr. Williams' letter of April 4, 2012, answering the questions posed in the April 4 letter, detailing the rationale for the new LFBO Agreement, and providing background on the incentive plan. In reply to Mr. Williams' first question, Mr. Mandt explained that the Airport Board notified SPA that it's LFBO Agreement and Hangar Lease, set to expire on December 31, 2011, "would expire as written." Mr. Mandt also maintained that SPA "has no maintenance customers and has not for many years."

Responding to the second question, Mr. Mandt stated that the requirement for incentives originated with the bidders, rather than the Airport Board. Addressing the third question, Mr. Mandt reiterated that the need for incentives originated with the bidders. He also clarified that SPA "did not submit a bid and to the Board's knowledge none of the present users of the Airport do business with him." FAA Exhibit 1, Item 6, Exhibit G.

On May 9, 2012, the FAA Southern Region Memphis Airports District Office (Memphis ADO) issued a finding addressing the allegations raised in the informal complaint. The Memphis ADO determined that "this lease agreement fails to meet the Terms and Conditions of Accepting AIP Grants as stated in Grant Assurances 24." FAA Exhibit 1, Item 1, Exhibit D. The Memphis ADO further wrote that "in its opinion, the incentives included in the lease agreement make it unreasonably costly or impractical for the airport to have more than one fixed based operator. Therefore, we request that you terminate this lease agreement or modified (sic) it to show compensation based on fair market value." FAA Exhibit 1, Item 1, Exhibit D.

The FAA specified that the Airport Board should respond with a course of corrective action to the Memphis ADO no later than May 31, 2012. FAA Exhibit 1, Item 1, Exhibit D.

On May 18, 2012, Mr. Tom Halbleib, counsel for the Airport Board, replied to FAA's correspondence from May 9, 2012, and agreed to respond with a plan of corrective action. FAA Exhibit 1, Item 6, Exhibit H.

On July 23, 2012, Mr. Richard Van Hook, Chairman of the Airport Board's Maintenance Committee wrote to FAA's Mr. James Williams, outlining a corrective action plan to address FAA concerns. The letter explained the proposed incentive program was developed to ensure availability of maintenance services at the Airport, and describing the source of funding from the local occupational license fee. Mr. Van Hook described the subsidy incentive as consisting of "the deferral of rent for no more than one hangar leased from the Airport Board and the reimbursement of certain insurance costs (up to $8,000 toward the cost of a general commercial liability policy that names the Airport Board as an additional insured with limits in an amount not less than $1,000,000)." The funding source of the incentive program Mr. Van Hook advised was via Pulaski County assessing an occupational license fee on all people working in the county. He confirmed that the fee is not related to the use of the Airport, nor would it be subject to FAA's *Revenue Use Policy*. FAA Exhibit 1, Item 6, Exhibit B.

Additionally, Mr. Van Hook explained that given the Airport Board's interest in establishing and maintaining a meaningful volume of third party paid maintenance on the Airport, the Board would annually confirm that any recipient of incentives had completed no fewer than ten (10) third party annual inspections. He further advised that any incentive recipient failing to meet the inspection volume threshold, would be required to pay the rent as well as reimburse the Airport Board for the insurance. FAA Exhibit 1, Item 6, Exhibit B.

Mr. Van Hook also stated that if the proposed corrective action plan satisfactorily addressed FAA concerns then, pending Airport Board approval, amendments to the Hangar 10 Lease,

the LFBO Agreement, and Minimum Standards would be forwarded to Somerset for execution. Mr. Van Hook clarified that SPA and any other maintenance service provider on the Airport would be offered the same arrangement. Finally, Mr. Van Hook noted that the Airport Board would truncate the LFBO Agreement to one year, allowing the Airport Board to solicit bids, including the incentive package, for a maintenance provider at the end of one year. FAA Exhibit 1, Item 6, Exhibit B.

On August 7, 2012, Tom Halbleib forwarded to FAA's James Williams justification of the proposed threshold of completing ten annual aircraft inspections in order to qualify for the incentive. Mr. Halbleib explained that the development of meaningful third party maintenance services would facilitate growth and development at Lake Cumberland Regional Airport by attracting more users and allowing the Airport to generate additional revenue streams. FAA Exhibit 1, Item 6, Exhibit I.

Mr. Halbleib emphasized that based on the Airport Board's Maintenance Committee analysis setting the threshold below ten annual inspections would risk the incentive exceeding the revenues generated by the incentive. FAA Exhibit 1, Item 6, Exhibit I.

On August 21, 2012, Mr. Phillip J. Braden, FAA Manager, Memphis ADO, in a letter to Mr. Van Hook, Chairman Somerset-Pulaski County Airport Board Maintenance Committee, concurred with the Airport Board's "concept of providing incentives to promote additional commercial activities leading to additional airport revenue ... provided that these incentives are not funded with airport revenue." Mr. Braden advised that FAA does not object to the Airport Board using non-airport revenue as the source of funding for the incentives. Finally, Mr. Braden stressed that the incentive program would have to "be applied on an equal basis to all involved parties." FAA Exhibit 1, Item 6, Exhibit A.

On September 21, 2012, the Airport Board and Somerset agreed to an amendment of the LFBO Agreement, as well as corresponding Minimum Standards, and the Hangar Lease Agreement. Modifications to the LFBO Agreement include:

- a provision that the Airport Board would advance payment to Somerset for the cost of public liability insurance "in an amount not to exceed $8,000."

- a reporting requirement that Somerset report to the Airport Board "the number of FAA Annual Inspection the Second Party [Somerset] performed at the Airport, and for which the Second Party collected a reasonable fee, for unrelated third parties ('Paid Third Party Annuals') during the immediately preceding year."

- a confirmed report indicating that Somerset performed ten (10) or more Paid Third Party Annuals during the preceding year will result in the Airport Board forgiving Somerset's obligation to repay the insurance advance.

- failure to meet or exceed the annual inspection threshold will require Somerset to immediately repay the insurance advance within ten days of notice.

FAA Exhibit 1, Item 6, Exhibit F.

The Amendment to the accompanying Minimum Standards detailed the new reporting requirements in addition to a new section describing the incentive as follows:

- "Section 10. MAINTENANCE SUBSIDY INCENTIVE. The Airport Board in its sole discretion may from time to time determine that there exists insufficient availability of aircraft maintenance services at the Airport and, to incentivize the provision of such services, grant subsidy incentives on the terms and subject to the conditions set forth in the attached July 23, 2012, letter from the Chairman of the Airport Board's Maintenance Committee to the Federal Aviation Administration."

- "During any period when such subsidy incentives are offered, they will be offered to all similarly situated providers of maintenance services at the airport."

- "The corresponding amendment to the Hangar Lease at Section 7 addresses the insurance premium provisions covered in the amended LFBO Agreement."

- "In addition, Section 2 of the amended Hangar Lease is modified to include the provision of rent abatement in the amount of $400 each month provided that Somerset is able to meet or exceed the ten Third Party Annual thresholds detailed above."

FAA Exhibit 1, Item 6, Exhibit F.

On October 2, 2012, Mr. Halbleib sent to Winter Huff a form of hangar lease (for Hangar B-3 only) and a form of LFBO agreement including proposed modifications to minimum standards. Mr. Halbleib confirmed that the forwarded agreements "are substantially identical to those under which Somerset Regional Aviation will operate, upon completion of amendments to its Lease and FBO Agreement to conform to the Airport Board's recent actions." Mr. Halbleib further stipulates "[I]f other maintenance providers come onto the Airport before the Board modifies its actions, they too will be operating pursuant to Leases and FBO Agreements substantially the same as these." FAA Exhibit 1, Item 6, Exhibit M.

On November 29, 2012, Mr. Halbleib, via email to Winter Huff, stated that this letter constitutes notice of the Airport Board's intent to not renew the LFBO Agreement, the Hangar B-3 Lease and the Hangar B-4 Lease. Mr. Halbleib clarified "[T]o the extent any of the Agreements have not previously been effectively terminated, all three will terminate on December 31, 2012." FAA Exhibit 1, Item 6, Exhibit E. Mr. Halbleib reiterates "I have submitted to you proposed amendments for SPA Rental, LLC's consideration. I understand that you continue to assist SPA Rental, LLC, with its consideration of these documents. Although the Board remains willing to discuss those amendments until December 31, 2012, if SPA Rental, LLC, has not reached an agreement with the Board by that date, the Board will expect it to vacate Hangars B-3 and B-4 in accordance with the terms of the leases and

to discontinue any operations as a fixed base operator at the Airport." FAA Exhibit 1, Item 6, Exhibit E.

On January 27, 2013, a number of email communications occurred between Winter Huff and Tom Halbleib. Ms. Huff claims "Since SPA has no ownership interest in any airplanes, and since the Board is apparently unwilling to include Hangar B-3 in the LFBO arrangement otherwise, our request to change the identification of the Lessee is appropriate and reasonable, and would have no substantive effect on your client." FAA Exhibit 1, Item 6, Exhibit N.

Mr. Halbleib replied that he had not been aware that MSI (SPA) had no interest in aircraft, emphasizing "The pre-existing B-3 lease already limits the use of the space to the housing of aircraft owned or leased by MSI. Should I infer that MSI has been housing the Iverson's [sic, Iversen's] aircraft in violation of the pre-existing leases?" Mr. Halbleib clarifies "The Iverson's [sic, Iversen's] can then request that the Airport Board lease B-3 to them in the ordinary course of business, but I'm in no position to provide any assurance that it would be offered to them or upon what terms it might be offered. If MSI wants to continue negotiating other arrangements, it will first need to vacate the premises it currently occupies." FAA Exhibit 1, Item 6, Exhibit N.

Ms. Huff countered in a responding email, "It is my understanding that the prior usages of the B-3 hangar were in accordance with the terms and provisions of the 2009 lease[s], the last one offered by your client." Ms. Huff stressed "that the B-3 and B-4 hangars were both built by my client at great expense, and we advised you early on that any new arrangement had to encompass both hangars." Ms. Huff concludes "It is not our fault that these issues concerning B-3 have arisen this month- we didn't get a timely lease proposal for B-3 at all, and when we finally did it was neither consistent with the old terms or the new, nor, as I understand it, consistent with the square footage of hangar space being made available to the other LFBO." FAA Exhibit 1, Item 6, Exhibit N.

On February 7, 2013, Mr. Walter Iversen submitted to Kellie Baker, Airport Manager, an open record request, seeking copies of specific current and expired hangar leases, as well as Somerset's LFBO Agreement. FAA Exhibit 1, Item 6, Exhibit L.

On February 13, 2013, Mr. Halbleib replied to Mr. Iversen confirming the Airport Board would provide to Mr. Iversen, by February 14, 2013, its public records that are responsive to his request under Kentucky's Open Records Act, KRS 61.870-84. FAA Exhibit 1, Item 6, Exhibit L.

On April 25, 2013, Mr. Iversen submitted to Somerset-Pulaski County Airport Board a proposal to enter into an LFBO agreement. SPA proposed to continue to occupy Hangars B3 and B4 for an initial lease term of three years with an option to renew for seven additional one year terms. SPA would pay $400 per month in rent for the facilities if the Airport Board would provide "incentives consisting of rental abatement and forgivable advance up to $8,000 as indicated in invitation for proposals published on April 20, 2013." FAA Exhibit 1, Item 9, Exhibit 1.

On June 18, 2013, Mr. Halbleib replied to Konrad Kuczak, counsel for the Complainant, explaining that protracted discussions and negotiations with the Complainant ended when MSI "advised the Airport Board that it would proceed only if the Airport Board allowed Mr. Iverson [sic, Iversen], individually, to lease one of the two hangars previously leased to MSI." Mr. Halbleib added, "[T]he Complaint MSI filed with the FAA indicates that MSI intends to use Hangars B-3 and B-4 for maintenance and restoration of aircraft it owns. MSI has shown no willingness to remedy it's [sic] past failures or comply with generally applicable Airport Board policies. Under the totality of the circumstances, the Airport Board declines MSI's proposal." FAA Exhibit 1, Item 9, Exhibit 2.

B. Procedural History

The Complainant filed a Part 16 Formal Complaint dated March 27, 2013, alleging Respondent violated 49 U.S.C. 40101 *et seq.*, 47101 *et seq.*, and Grant Assurance 24. FAA Exhibit 1, Item 1.

On September 1, 2015, the Director issued the Director's Determination. FAA Exhibit 1, Item 20.

On September 15, 2015, SPA filed a Motion for Extension to File Notice of Appeal and Brief. FAA Exhibit 1, Item 21.

On September 28, 2015, the FAA issued an Order extending time for filing Appeal to November 2, 2015. FAA Exhibit 1, Item 22.

On October 27, 2015, SPA filed its Notice of Appeal and Brief in support of its Appeal. FAA Exhibit 1, Item 23 and 24.

On November 6, 2015, Respondent filed a Motion for Additional Time to Respond to Appeal. FAA Exhibit 1, Item 25.

On November 23, 2015, the FAA issued an Order extending time for Respondent's Response. FAA Exhibit 1, Item 26.

On December 18, 2015, Respondent filed its Response to SPA's Appeal of the Director's Determination. FAA Exhibit 1, Item 27.

On December 23, 2015, SPA filed a Motion for Leave to File Reply to Respondent's Brief dated. FAA Exhibit 1, Item 28.

On January 8, 2016, the FAA issued an Order denying SPA's Motion. FAA Exhibit 1, Item 29.

On March 4, 2016, the FAA issued a Notice of Extension of Time until May 31, 2016. FAA Exhibit 1, Item 30.

On June 8, 2016, the FAA issued a Notice of Extension of Time until July 31, 2016. FAA Exhibit 1, Item 31.

V. APPLICABLE LAW AND POLICY

The following is a discussion pertaining to (A) the Airport Improvement Program; (B) the FAA compliance program; (C) statutes, sponsor assurances, and relevant policies; (D) minimum standards; and (E) the complaint and appeal process.

A. The Airport Improvement Program

Section 47101, *et seq.*, of Title 49 U.S.C. provides for Federal airport financial assistance for the development of public-use airports under the Airport Improvement Program (AIP) established by the Airport and Airway Improvement Act of 1982, (AAIA) as amended. Section 47107 sets forth assurances to which an airport sponsor agrees as a condition of receiving Federal financial assistance. Upon acceptance of an AIP grant, the assurances become a binding obligation between the airport sponsor and the Federal Government. The assurances made by airport sponsors in AIP grant agreements are important factors in maintaining a viable national airport system.

B. FAA Airport Compliance Program

The FAA discharges its responsibility for ensuring that airport sponsors comply with their federal obligations through its Airport Compliance Program. The airport owner accepts these obligations when receiving federal grant funds or when accepting the transfer of federal property for airport purposes. The FAA incorporates these obligations in grant agreements and instruments of conveyance to protect the public's interest in civil aviation and to ensure compliance with federal laws.

The FAA designed the Airport Compliance Program to ensure the availability of a national system of safe and properly maintained public-use airports which airport sponsors operate in a manner consistent with their federal obligations and the public's interest in civil aviation. The Airport Compliance Program does not control or direct the operation of airports. Rather, it monitors the administration of valuable rights, which airport sponsors pledge to the people of the United States in exchange for monetary grants and donations of federal property, to ensure that airport sponsors serve the public interest.

FAA Order 5190.6B, *FAA Airport Compliance Manual,* September 30, 2009, (hereinafter Order) 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 for FAA personnel to follow in carrying out the FAA's responsibilities for ensuring airport compliance. The Order, *inter alia,* analyzes the various obligations set forth in the standard airport sponsor assurances, addresses the application of the assurances in the operation of public-use airports, and facilitates interpretation of the assurances by FAA personnel.

In addressing allegations of noncompliance, the FAA will make a determination as to whether an airport sponsor is *currently* in compliance with the applicable federal obligations. Consequently, the FAA will consider the successful action by the airport to cure any alleged or potential past violation of applicable federal obligation to be grounds for dismissal of such allegations. *See* e.g. Wilson Air Center v. Memphis and Shelby County Airport Authority, FAA Docket No. 16-99-10, August 30, 2001, Final Decision and Order, p. 5. *Affirmed*, Wilson Air Center, LLC v FAA, 372 F.3d 807, 6th Cir. 2004.

C. Statutes, Sponsor Assurances, and Relevant Policies

As a condition precedent to providing airport development assistance under AIP, the Secretary of Transportation, and by extension, the FAA receives certain assurances from the airport sponsor, including the statutory sponsorship requirements under 49 U.S.C. 47107(a). The FAA has a statutory mandate to ensure that airport owners comply with these sponsor assurances.[5]

Three grant assurances apply to the specific circumstances of this complaint: Grant Assurance 22, *Economic Nondiscrimination*; Grant Assurance 23, *Exclusive Rights*; and Grant Assurance 24, *Fee and Rental Structure*.

1. Grant Assurance 22, *Economic Nondiscrimination.*

Grant Assurance 22, *Economic Nondiscrimination*, requires the owner of any airport developed with Federal grant assistance 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. Grant Assurance 22 deals with both the reasonableness of airport access and the prohibition of adopting unjustly discriminatory conditions as a potential for limiting access. Grant Assurance 22 implements the provisions of 49 U.S.C. 47107(a)(1)-(6), and requires, in pertinent part, that the sponsor of a federally obligated airport:

> *(a) will make its airport available as an airport for public use on reasonable terms, and without unjust discrimination, to all types, kinds, and classes of aeronautical activities, including commercial aeronautical activities offering services to the public at the airport.*
>
> *(h) 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.*

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[5] *See, e.g.*, Federal Aviation Act of 1958, as amended and recodified, 49 U.S.C. 40101, 40113, 40114, 46101, 46104, 46105, 46106, 46110; Airport and Airway Improvement Act of 1982, as amended and recodified, 49 U.S.C. 47105(d), 47106(d), 47107(k), 47107(1), 47111(d), 47122.

(i) 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.

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 that would be detrimental to the civil aviation needs of the public.

FAA Order 5190.6B describes the responsibilities under Grant Assurance 22 assumed by the owners or sponsor 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* FAA Order 5190.6B, Chapter 9.

2. Grant Assurance 23, *Exclusive Rights.*

Grant Assurance 23, *Exclusive Rights*, implements the provisions of 49 U.S.C. 40103(e) and 47107(a)(4), and requires, in pertinent part, that the owner or 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.

will not, either directly or indirectly, grant or permit any person, firm, or corporation, the exclusive right at the airport to conduct any aeronautical activities...

In Chapter 8 of FAA Order 5190.6B, the FAA discusses its exclusive rights policy and broadly identifies aeronautical activities 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, FAA has taken the position that the application of any unreasonable requirement or any standard that is applied in an unjustly discriminatory manner may constitute the constructive grant of an exclusive right. Courts have found the grant of an exclusive right where a significant burden has been placed on one competitor that is not placed on another. *See, e.g.*, Pompano Beach v FAA, 774 F2d 1529 (11th Cir., 1985).

3. Grant Assurance 24, *Fee and Rental Structure*

Grant Assurance 24, *Fee and Rental Structure*, implements 49 U.S.C. 47107(a)(13) and requires:

[The airport owner or sponsor] will maintain a fee and rental structure for the facilities and services at the airport that will make the airport as self-sustaining as possible under the circumstances existing at the particular

airport, taking into account such factors as the volume of traffic and economy of collection.

The owner or sponsor's obligation to make an airport available for public use does not preclude the owner or sponsor from recovering the cost of providing the facility. The owner or sponsor is expected to recover its costs through the establishment of fair, reasonable, and not unjustly discriminatory fees, rentals, or other user charges that will make the airport as self-sustaining as possible under the circumstances existing at the particular airport. *See* FAA Order 5190.6B, *FAA Airport Compliance Manual*, Chapter 17, Self-sustainability.

In addition, Section 9.6.e of FAA Order 5190.6B states:

To aid in establishing uniform rates and charges applied to aeronautical activities on the airport, the sponsor should establish minimum standards to be met as a condition for the right to conduct an aeronautical activity on the airport.

D. Minimum Standards

Advisory Circular AC 150/5190-7, *Minimum Standards for Commercial Aeronautical Activities*, provides basic information pertaining to the FAA's recommendations on commercial minimum standards and related policies. Although minimum standards are optional, the FAA highly recommends their adoption as a means of minimizing the potential for violations of Federal obligations at Federally obligated airports.

The FAA's policy recommending minimum standards stems from the airport sponsor's grant assurances to make the airport available for public use on reasonable conditions and without unjust discrimination. The FAA objective in recommending the development of minimum standards serves to promote safety in all airport activities, protect airport users from unlicensed and unauthorized products and services, maintain and enhance the availability of adequate services for all airport users, promote the orderly development of airport land, and ensure efficiency of operations. Once the airport sponsor has established minimum standards, it should apply them objectively and uniformly to all similarly situated on-airport aeronautical service providers. The failure to do so may result in a violation of the prohibition against exclusive rights and/or a finding of unjust economic discrimination for imposing unreasonable terms and conditions for airport use.

Minimum standards can be amended periodically over time; however, a constant juggling of minimum standards is not encouraged. The FAA expects airport sponsors to apply their minimum standards consistently through their interactions with aeronautical users and service providers. With that said, the standard of compliance does not require that airport sponsors enforce minimum standards so rigidly as to require identical tone and posture toward all airport users that have different records and history with the sponsor. Aircraft Management Services, Inc. v. Santa Rosa County, Florida, FAA Docket No. 16-12-02, March 27, 2015, Director's Determination, p. 15; *citing* Rick Aviation, Inc. v. Peninsula Airport Commission, FAA Docket No. 16-05-18, May 8, 2007, Director's Determination, p.

16; Rick Aviation Inc. v. Peninsula Airport Commission, FAA Docket No . 16-05-18, November 6, 2007, Final Decision and Order, p. 9; and Springfield Flight Academy v. City of Springfield, FAA Docket No. 16-10-03, August 25, 2011, Director's Determination, p. 15. *Also see* FAA Advisory Circular 150/5190-7, Minimum Standards for Commercial Aeronautical Activities, p. 4.

E. The Complaint and Appeal Process

1. Filing a Formal Complaint

Pursuant to 14 CFR § 16.23, a person directly and substantially affected by any alleged noncompliance may file a complaint with the FAA. The complainant shall provide a concise but complete statement of the facts relied upon to substantiate each allegation. The complaint shall also describe how the complainant was directly and substantially affected by the things done or omitted by the respondents. 14 CFR § 16.23(b)(3)-(4).

If, based on the pleadings, there appears to be a reasonable basis for further investigation, the FAA will investigate the subject matter of the complaint. In rendering its initial determination, the FAA may rely entirely on the complaint and the responsive pleadings provided. Each party shall file documents that it considers sufficient to present all relevant facts and arguments necessary for the FAA to determine whether the sponsor is in compliance. 14 CFR, § 16.29(b)(1).

Part 16 further provides that the burden of proof is on the complainant to show noncompliance with a statute, regulation, order, agreement, or document of conveyance. 14 CFR § 16.23(k)(1). The proponent of a motion (including a motion to dismiss, or for summary judgment), request, or order has the burden of proof. 14 CFR § 16.23(k)(2). Additionally, a party who has asserted an affirmative defense has the burden of proving the affirmative defense. 14 CFR § 16.23(k)(3).

2. Appealing the Director's Determination

A party adversely affected by the Director's Determination may file an appeal with the Associate Administrator within 30 days after the date of service of the initial determination. 14 CFR § 16.33(c).

The Associate Administrator does not consider new allegations or issues on appeal unless finding good cause to do so. 14 CFR § 16.33(f). Review by the Associate Administrator is limited to an examination of the Director's Determination and the administrative record upon which such determination was based. Failure to raise issues and allegations in the original complaint documents may be cause for such issues and allegations to be deemed waived and not reviewable upon appeal.

3. FAA's Responsibility with Regard to an Appeal

Pursuant to 14 CFR § 16.33(b)(1), the Associate Administrator will issue a final decision on appeal from the Director's Determination, without a hearing, where the complaint is dismissed after investigation.

In such cases, the Associate Administrator will use the following analysis:

(1) Are the findings of fact each supported by a preponderance of reliable, probative, and substantial evidence contained in the record?
(2) Are conclusions made in accordance with law, precedent, and policy?
(3) Are questions on appeal substantial?
(4) Have any prejudicial errors occurred?

14 CFR § 16.33(e); *see also, e.g.*, Ricks v Millington Municipal Airport, FAA Docket No. 16-98-19, December 30, 1999, Final Decision and Order, p. 21.

VI. ISSUES ON APPEAL

Upon consideration of the Complaint from the Complainant, filed with the FAA on March 27, 2013, the FAA Office of Airport Compliance and Management Analysis previously determined Respondent is not currently in violation of its federal obligations regarding the issues argued in the Complaint. The specifics of these findings are detailed in the above Section II, Summary of the Director's Determination.

On appeal, Complainant alleged the Director made errors in interpreting the evidence and making conclusions from the evidence. Specifically, Complainant argues on appeal the Director:

A. Failed to recognize that the Board, by amending the lease to Somerset Regional Aviation, LLC., (Somerset) Somerset's Limited Fixed Base Operator (LFBO) Agreement, and by amending the Airport Minimum Standards the Board unjustly discriminated in favor of Somerset to the detriment of SPA. FAA Exhibit 1, Item 24, page 1.

B. Concluded that Minimum Standards of Operation comply with grant assurances as long as the Minimum Standards are uniformly, but indiscriminately applied to operators engaged in dissimilar businesses. FAA Exhibit 1, Item 24, page 2.

Developing these two issues, Complainant argues six points in its appeal:

1. Viewing the massive disparity between the rental structure charged to Somerset with that offered to SPA based upon the Board's requirement that every operator perform the required ten (10) paid third party annual inspections per annum reveals a violation of Grant Assurance 22, *Economic Nondiscrimination*. FAA Exhibit 1, Item 24, p. 9.

SPA states that while the Director's Determination correctly concluded that SPA and Somerset were not similarly situated prior to the amendment of the Airport's Minimum Standards, the Director's Determination ignores the obvious fact that the new Minimum Standards were applicable to all operators on the airport and would have rendered all operators "similarly situated" by requiring them to go into the "annual inspection" business. Notwithstanding that SPA admits it is not similarly situation with Somerset, it goes on to compare the "massive disparity between the rental rates charged to Somerset and those charged to SPA." SPA concluded that the two tenants' rental structure was $29,199 per annum less favorable to SPA. FAA Exhibit 1, Item 24, p. 10.

SPA went on to argue that by cutting SPA's hanger space to 2,400 square feet, SPA was immediately in violation of the Minimum Standards. FAA Exhibit 1, Item 24, p. 10.

2. The Director's Determination was based upon the improper assumption that SPA was required to prove that it offered services similar to Somerset. FAA Exhibit 1, Item 24, p. 12.

SPA argues that Respondent was required to make the airport available to SPA on reasonable terms. SPA argues that, contrary to the Director's Determination, it was not required to prove that it was similarly situated to any other operator to require the Board to offer to renew the lease on reasonable terms and negotiate in good faith. FAA Exhibit 1, Item 24, p. 12.

SPA states that the Board's amended Minimum Standards require operators who repaired or maintained aircraft or aircraft accessories to prove that they performed ten (10) third party annual inspections in order to do business on the airport or be ousted from the airport property. SPA argues that Respondent applied this standard to all operators at KSME and not just aircraft maintenance LFBOs. SPA concludes that the appropriate inquiry is not whether the Board properly enacted the same minimum standards for similar operations, but whether the Board unreasonably applied the same minimum standards to dissimilar operations. FAA Exhibit 1, Item 24, p. 12.

3. The Board unlawfully manipulated the amendment to the airport's Minimum Standards to favor Somerset over SPA. FAA Exhibit 1, Item 24, p. 15.

SPA argues that Respondent entered into a lease and LFBO Agreement with Somerset, without any requirement that Somerset perform any annual inspections. In responding to the Informal Complaint Respondent modified the airport's minimum standards to include the performance of ten (10) paid third party annual inspections, knowing that SPA was not in the business of performing annual inspections of non-owned aircraft. SPA argues that consequently, the Board made it impossible for SPA to continue doing its refurbishment and resale business on the field. SPA argues that amending the minimum standards for one tenant is illegal. It states that it cannot change its business model to include offering annual inspections to the public because it is not a certified FAA repair station. SPA concludes that by amending its Minimum Standards to include performance of a maintenance requirement

Respondent gave exclusive rights to Somerset and discriminated against SPA. FAA Exhibit 1, Item 24, pp. 15-16.

4. The "ten annuals" requirement is unreasonable. FAA Exhibit 1, Item 24, p. 16.

SPA argues that it was not reasonable for the Board to cut SPA's hangar space and to expect SPA to change its business model to engage in a facet of aeronautical activities which it had never done in its history in that shrunken space while Somerset had 4,800 sq. ft. of hangar space in which to complete its ten (10) paid third party annual inspections. SPA argues that it does not hold a certificate qualifying it to perform annual inspections. SPA concludes that it was unreasonable for Board to require Somerset to perform annual inspections in order to obtain the incentives and remain a tenant on the airport property while imposing the same requirement on SPA. SPA concluded that proof of the "unreasonableness" of the 10-annual requirement is that Somerset went out of business. FAA Exhibit 1, Item 24, pp. 16-17.

5. The Minimum Standard, as applied, unjustly discriminated against SPA. FAA Exhibit 1, Item 24, p. 17.

SPA states that the Amended Lease and the Amended LFBO Agreements require Somerset to report the ten (10) paid third party annuals if it is to receive the rent subsidy and the insurance subsidy. SPA argues that failing to produce any of the mandatory reports which Somerset was required to file confirmed that Somerset failed to satisfy the conditions for the rent and insurance subsidies. The lists of "Annual Inspections" that the Board did produce are highly suspect. SPA concludes that without evidence that the Board actually enforced the "ten annuals" Minimum Standard in Somerset's case, it is clear that the Board unjustly discriminated against SPA by demanding that it adhere to a minimum standard which it disregarded as to Somerset. FAA Exhibit 1, Item 24, pp. 17-18.

6. The Director's Determination repudiates the Agency's own interpretation of its rules. FAA Exhibit 1, Item 24, p. 18.

SPA states that FAA guidance[6] contains a listing of about three dozen acceptable subjects of inquiry for the drafting of minimum standards applicable to specific types of operators. SPA finds that "volume of the service provided" is not one of the appropriate enumerated considerations. It then draws the conclusion that the Agency did not consider a minimum volume of service to be provided by any operator to be an appropriate topic for minimum standards. FAA Exhibit 1, Item 24, pp. 18-19.

The Appellant concludes its Appeal by saying that Walter Iversen had become personally unpopular with the Board because of a personality conflict with some of the frequenters of the airport, and his actions personally irritated the powers who operate the airport. SPA concludes that the Board retaliated against SPA by amending the airport's minimum standards in order to rationalize the intended ouster of SPA. SPA closes with, "Whether or not the Board actually enforced the minimum standards in Somerset's case remains

[6] § 2.1 (e) of Appendix C to FAA Order 5190.6B.

problematical. The plain fact is that nobody appears to be beating down the door for the opportunity to do business under such patently unreasonable conditions." FAA Exhibit 1, Item 24, pp. 19-20.

For an appeal to be successful, the appellant must demonstrate with evidence that the Director (a) made – or failed to make – findings of fact supported by a preponderance of reliable, probative, and substantial evidence; or (b) made conclusions of law that were not in accordance with applicable law, precedent, and public policy. 14 CFR §16.33(e)(1)-(2). The appeal is not an opportunity to reargue the same issues from the initial complaint or to bring new issues forward that were not presented in the initial complaint.

The arguments contained in SPA's Appeal are the same to those in its Complaint and Reply (Complainant's Memorandum Opposing Dismissal. FAA Exhibit 1, Item 9). The arguments are cast in different verbiage stating that the Minimum Standards were indiscriminately applied in a non-uniform manner to dissimilarly situated tenants (FAA Exhibit 1, Items 9, p. 10, and 24, p. 2), the requirement compelling operators to perform 10 annual inspections was a violation of Grant Assurance 22 (FAA Exhibit 1, Items 9, p. 7, and 24, pp. 16-17), it was a violation of the grant assurances to make SPA prove that it offered services similar to that of Somerset (FAA Exhibit 1, Items 9, p. 7, and 24, p. 17), the Minimum Standards favored Somerset over SPA (FAA Exhibit 1, Items 9, p. 11, and 24, p. 19), and that the requirement to perform 10 annual inspections was discriminatory against SPA (FAA Exhibit 1 Items 9, p. 8, and 24, p. 18).

Issue A: Determine whether the Director erred in failing to recognize that the Board, by amending the lease to Somerset, by amending Somerset's Limited Fixed Base Operator (LFBO) Agreement, and by amending the Airport Minimum Standards, unjustly discriminated in favor of Somerset to the detriment of SPA. FAA Exhibit 1, Item 24, p. 1.

SPA argues that Respondent's amending Somerset's lease, Somerset's LFBO Agreement, and the Airport Minimum Standards resulted in unjust discrimination to SPA. FAA Exhibit 1, Item 24, page 1. Specifically SPA states:

> *When confronted with its violations, the Board suddenly found it "necessary" to modify the airport's minimum standards to include the performance of ten (10) paid third party annual inspections, knowing full well that SPA was not in the business of performing annual inspections of non-owned aircraft. By this transparent artifice, the Board made it impossible for SPA to continue doing its refurbishment and resale business on the field.* FAA Exhibit 1, Item 24, p. 15.

SPA argues that by changing the Minimum Standards to now require operators to conduct at least 10 annual aircraft inspections, Respondent was effectively requiring SPA to change its business model to now become a maintenance service provider. FAA Exhibit 1, Item 24, p. 15.

Respondent argues that it was justified in amending the Airport Minimum Standards. It explained that attracting, developing, and sustaining meaningful third party maintenance services would facilitate growth at the Airport by attracting more users and allowing the Airport to generate additional revenue streams. FAA Exhibit 1, Item 29, p. 6.

Respondent states further that the minimum standards regarding the subsidies also applies only when "there exists insufficient availability of aircraft maintenance services at the Airport and, to incentivize the provision of such services, grant subsidy incentives" as set forth in correspondence with the FAA. Standards. [The Minimum Standards] state the incentives "will be offered to all similarly situated providers of maintenance services at the airport." FAA Exhibit 1, Item 29, p. 9.

While SPA acknowledges it is not a maintenance service provider, it claims entitlement to the incentives available under the Incentive Program. FAA Exhibit 1, Item 24, p. 13. Effectively, SPA wants Respondent to offer the incentives to SPA without SPA's compliance with the Incentive Program requirements. The Incentive Program requires, among other actions, that maintenance service providers conduct at least 10 annual inspections a year; it was developed in cooperation with the FAA, the purpose of which is to enhance the availability of maintenance services to the public at the Airport. Respondent argues, again, that the ten annual inspection requirement and the incentives apply to maintenance service providers and not to SPA. Respondent further argues that these terms of the Minimum Standards are not meant to apply to all operators at the Airport and that a different section of the minimum standards applies to those businesses selling aircraft from the Airport. FAA Exhibit 1, Item 5, Exhibit M.

Conclusion on Issue A

The Director is correct when he concludes:

> *Contrary to SPA's assessment, this sample question section serves merely as a reference guide to assist an airport sponsor in formulating effective minimum standards that address some of the types of commercial aeronautical services or activities frequently offered to the public. The AC explains that the sample questions are provided to address some of the various types of specific services or activities frequently offered to the public, and is not a limitation on what can be covered in the minimum standards. Accordingly, consistent with the ADO's August 21, 2012 letter, an airport sponsor may establish a minimum standard provision based on the volume of a particular service if justified.*

FAA Exhibit 1, Item 20, p. 25.

Adopting minimum standards is a valid action on the part of the airport sponsor. A review of the minimum standards indicates that they cover many aeronautical activities and services including FBO services, aircraft maintenance, aircraft sales, aircraft rental, charter operations, and flight training. A review of the minimum standards concerning aircraft maintenance shows that, as written, they are not contrary to Respondent's federal

obligations. The standards outlined by Respondent are generally consistent with FAA's guidance on the matter. The provisions that implement a sound and economic-based approach in managing incentives and competition are in line with FAA recommendations and guidance.

Moreover, in light of the economic issues documented in the record, Respondent's actions relating to establishing, updating, and enforcing minimum standards are not only justified, but necessary. As provided in Grant Assurance 22, Respondent must retain the ability to impose such additional reasonable restrictions or conditions on operations from time to time it may deem to be necessary in order to ensure the efficient operation of the Airport. *See* Skydive Myrtle Beach, Inc., v. Horry County Department of Airports, South Carolina, FAA Docket No. 16-14-05, October 7, 2015, Director's Determination, p. 41.

The FAA recognizes that both minimum standards and lease terms may change over time. Leases are legal documents that exist in time and are rarely identical between users because of differing circumstances such as sites , users, negotiations, business plans, economic circumstances, minimum investment requirements, demand, location, venture risk, ownership of facilities, time remaining on contract terms, condition of facilities, and market conditions. Aircraft Management Services, Inc. v. Santa Rosa County, Florida, FAA Docket No. 16-12-02, March 27, 2015, Director's Determination, p. 22. *Also see* FAA Order 5190.6, section 9.5(d).

Here Somerset and SPA are users with differing circumstances; Somerset was a maintenance service provider, and SPA is an aircraft sales dealer. FAA Exhibit 1, Item 24, p.13. It is, therefore, permissible for Respondent to have different leases with the two entities, and to have developed minimum standards that address the different concerns of the two entities.

The Associate Administrator concludes that Director did not err in his finding; that he correctly found it permissible for the Board to amend the lease to Somerset for the reasons stated herein; and in amending the Airport Minimum Standards, the Board did not discriminate in favor of Somerset to the detriment of SPA.

Issue B: Determine whether the Director erred in concluding that Minimum Standards of Operation comply with grant assurances as long as the Minimum Standards are uniformly, but indiscriminately applied to operators engaged in dissimilar businesses. FAA Exhibit 1, Item 24, page 2.

In the appeal, Complainant argues that applying Minimum Standards in a non-uniform manner to dissimilar businesses is a violation of the grant assurances. FAA Exhibit 1, Item 24, page 2. The Director was clear in his Director's Determination that the businesses must be similar when looking to apply the nondiscriminatory requirement of Grant Assurance 22.

The Director quoted from Chapter 9 of FAA Order 5190.6B that describes the responsibilities under Grant Assurance 22 assumed by the owners or sponsor of public use airports developed with Federal assistance. The Order states that 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. FAA Exhibit 1, Item 20, p. 11. FAA policy specifies that sponsors choosing to establish minimum standards should apply them objectively and uniformly to all similarly situated on-airport aeronautical service providers. FAA Exhibit 1, Item 20, p. 25.

The Director found that the incentives contained in the Minimum Standards and the Airport Leases were offered to all similarly situated operators at KSME; that is, they were offered to all maintenance service providers at KSME. FAA Exhibit 1, Item 20, p. 22.

The Director stated that Complainant did not provide evidence demonstrating that the Sponsor had not universally applied uniform Minimum Standards to similarly situated commercial aeronautical tenants on the airport. Furthermore, Complainant did not articulate how modification to the Minimum Standards created an exclusive right for Somerset or how the new Minimum Standards would preclude SPA from continuing to engage in its business of purchasing, refurbishing, and re-selling aircraft from facilities leased to it at the Lake Cumberland Regional Airport. FAA Exhibit 1, Item 20, p. 25.

Contrary to Complainant's assertions, Respondent is not "forcing" SPA to become a maintenance service provider so that SPA can receive the incentive. The incentive was offered to all maintenance service providers under certain conditions (among others, to perform 10 aircraft annual inspections a year) in order to encourage business at KSME. Respondent did not offer the incentive to aircraft sales businesses to, for example, achieve a certain number of aircraft sales, or to aircraft charter businesses to conduct a certain number of charter flights. Respondent concluded that servicing aircraft by performing annual inspection would bring more business to the airport. It was within the business prerogative of Respondent to make this decision and such a decision, if applied in a uniform manner to maintenance service providers, is not discriminatory as analyzed in this issue.

Conclusion on Issue B:

The Associate Administrator concludes that the Director did not err in concluding that Minimum Standards of Operation comply with grant assurances and that the Minimum Standards were uniformly applied to all operators similarly situated. The Minimum Standards were not indiscriminately applied to operators similarly situated at KSME. The Respondent is not required by the Grant Assurances and current applicable rules, regulations and statutes to apply the Minimum Standards to businesses that are dissimilarly situated.

The Complainant has misapplied the standard required to determine if a violation of Grant Assurance 22 has occurred in this matter, which causes the Complainant's argument to fail.

It is not discriminatory for Respondent to non-uniformly apply the Minimum Standards incentives to dissimilar tenants.

New Evidence.

Complainant offers new evidence in its Appeal stating that subsequent to the issuance of the Directors Determination Somerset Aviation has gone out of business. Complainant argues that this supports its argument that Respondent's application of its Minimum Standards is discriminatory. However, SPA does not argue that this new evidence moots any extant issues. SPA surmises that Somerset Aviation went out of business because it was not profitable trying to satisfy the Minimum Standards. FAA Exhibit 1, Item 24, p. 16. Respondent offers evidence showing that Somerset closed business due to personal reasons, that is, retirement of the business principals. FAA Exhibit 1, Item 27, Exhibit A-3. While the Associate Administrator allows the introduction of the new evidence demonstrating that Somerset closed its business, he finds that it does not alter any findings in the Director's Determination. The Director finds that the Respondent's counter argument is more reliable.

SPA also offered new evidence, *to wit*, Respondent's records obtained under the Kentucky Open Records Act, purporting to show that the Airport Board failed to apply the Incentive Program requirements to Somerset. FAA Exhibit 1, Item 24, pp. 17-18. SPA argues that the list of annual inspections performed by Somerset and kept by Respondent contained identical lists of aircraft type which are highly suspect. SPA argues that common sense teaches that it is virtually impossible for any FBO to have performed annual inspections on the same 12 planes in any two successive calendar years. Respondent replies that the list of annual inspections are the very same un-redacted lists that Somerset provided to Respondent each year to comply with the Minimum Standards. FAA Exhibit 1, Item 27, p. 8. The Associate Administrator is unpersuaded by Complainant's speculative arguments since the evidence presented demonstrates Respondent reasonably applied its criteria for incentives. The Associate Administrator allows introduction of this evidence, but he does not find it alters any findings in the Director's Determination.

When SPA asserted in its Appeal that the absence of insurance records proved that Somerset failed to comply with the Minimum Standards, Respondent produced records to prove Somerset had the required insurance. FAA Exhibit 1, Item 27, Exhibits A-1 and A-2. While the Associate Administrator will allow the introduction of the new evidence regarding the possession of the requisite insurance, the evidence does not alter any findings in the Director's Determination. The Respondent's evidence and counter-argument are more reliable.

The Associate Administrator concludes that the new evidence produced by SPA to show that Somerset had not complied with the Minimum Standards by failing to perform 10 annual inspections per year and failing to carry the requisite insurance is not persuasive in reversing the conclusions in the Director's Determination.

SPA's Motion to Respond.

SPA filed a motion to respond to Respondent's Response to SPA's Appeal. FAA Exhibit 1, Item 28. The Associate Administrator denied the motion in an Order dated January 8, 2016. FAA Exhibit 1, Item 29. The reasoning for the denial is contained in said Order and will not be reiterated here.

VII. FINDINGS AND CONCLUSION

Upon an appeal of a Part 16 Director's Determination, the Associate Administrator will use the following analysis:

> (1) Are the findings of fact each supported by a preponderance of reliable, probative, and substantial evidence contained in the record?
> (2) Are conclusions made in accordance with law, precedent, and policy?
> (3) Are questions on appeal substantial?
> (4) Have any prejudicial errors occurred?

14 CFR § 16.33(e); *see also, e.g.*, Ricks v Millington Municipal Airport, FAA Docket No. 16-98-19, December 30, 1999, Final Decision and Order, p. 21.

In arriving at a final decision on this appeal, the FAA has reexamined the record, including the Director's Determination, the administrative record supporting the Director's Determination, the appeal submitted by the Complainant, the Response submitted by Respondent, and applicable law and policy. Based on this reexamination, this decision concludes that the Director's Determination is supported by a preponderance of reliable, probative, and substantial evidence, and his conclusions are consistent with applicable law, precedent, and public policy.

The Appeal does not contain persuasive arguments sufficient to reverse any portion of the Director's Determination. The Director's Determination is affirmed. This decision constitutes the final decision of the Associate Administrator for Airports pursuant to 14 CFR § 16.33(b).

ORDER

ACCORDINGLY, it is hereby ORDERED that (1) the Director's Determination is affirmed, and (2) the appeal is dismissed, pursuant to 14 CFR § 16.33.

RIGHT TO APPEAL

A party to this decision disclosing a substantial interest in the final decision and order of the Federal Aviation Administration may file a petition for review pursuant to 49 U.S.C. 46110, in the United States Court of Appeals for the District of Columbia Circuit or in the court of appeals of the United States for the Circuit in which the person resides or has its principal

in the United States Court of Appeals for the District of Columbia Circuit or in the court of appeals of the United States for the Circuit in which the person resides or has its principal place of business. The petition must be filed not later than 60 days after a Final Agency Decision has been served on the party. 14 CFR, § 16.247(a).

Eduardo A. Angeles
Associate Administrator
for Airports

August 04, 2016
Date