JUN 29 1993

Mr. Dennis Rohlfs
Executive Air Taxi Corp.
P.O. Box 2273
Bismarck Municipal Airport
Bismarck, ND 58501

Mr. David C. Miller
City of Bismarck
P.O. Box 991
Bismarck, ND 58502

Re: Executive Air Taxi Corp. v. City of Bismarck, ND
Formal Complaints Nos. 13-91-5 and 13-92-4

Dear Messrs. Rohlfs and Miller:

Enclosed is a copy of the final decision of the Federal Aviation Administration (FAA) with respect to the above-referenced formal complaints.

We find that the city of Bismarck is not in violation of its grant assurances under the Airport and Airway Improvement Act of 1982 (49 U.S.C. App. 2210) and the Airport and Airway Development Act of 1970 (49 U.S.C. 1718) and that the city of Bismarck is not in violation of Section 308(a) of the Federal Aviation Act of 1958 (49 U.S.C. App. 1349(a)). However, we have determined that certain further action in this matter is warranted.

In order to ensure continued compliance with its grant assurances, we request that the city, with the assistance of the FAA Airports Division, Great Lakes Region, review its commercial aeronautical activity leases to identify those terms and conditions, if any, which may be inconsistent with the city's Federal grant assurances. We further request that the city remove from its leases those obsolete terms and conditions inconsistent with its Federal grant assurances and offer to the affected individual lessees an amended contract with any such terms and conditions removed.

We also request that the city furnish to the FAA Airports Division, Great Lakes Region, an annual special financial report for its "Airport Flightline Account" depicting all income and expenses associated with the city's sale of aviation fuel at Bismarck Municipal Airport. This report shall be in sufficient detail as to identify, at a minimum, the income sources and

amounts and the expense items and amounts. This report shall be filed, on an annual basis covering the city's previous fiscal year, with the FAA Airports Division, Great Lakes Region, no later than January 31 of each year until further notice.

Accordingly, the above-referenced formal complaints are dismissed and the dockets are closed. The reasons for dismissal of the subject complaints are set forth in the enclosed Record of Decision. This Record of Decision is the FAA's final agency action with respect to this matter.

Original Signed By
Leonard E. Mudd

Leonard E. Mudd
Director, Office of Airport
Safety and Standards

Enclosure

AAS-313:JKKennedy::267-8725:06/28/93
cc: AAS-1/300/313:AGL-600/620/MSPADO/BISAFO
AGC-1/600/610
ARP-11b
PC (Bismarck.xmt)

EXECUTIVE AIR TAXI CORPORATION
v.
CITY OF BISMARCK, NORTH DAKOTA

FORMAL COMPLAINT DOCKET NOS. 13-91-5 and 13-92-4

RECORD OF DECISION

I. INTRODUCTION

This matter is before the Federal Aviation Administration (FAA) based on the formal complaints filed by Executive Air Taxi (ExecAir) against the city of Bismarck (city or sponsor), owner of Bismarck Municipal Airport, in accordance with our Investigative and Enforcement Procedures, 14 CFR Part 13. The FAA Minneapolis Airports District Office (ADO) conducted an informal investigation of the issues raised in the complaints. The ADO, with the concurrence of the FAA Airports Division, Great Lakes Region, determined that the city is in compliance with the terms and conditions of its Federal grant assurances and recommended that the complaint be dismissed. The region's determinations and recommendations have been referred to this office for review and final FAA decision.

The issues presented for decision are:

* Whether the city, by refusing to lease to ExecAir its preferred site from which to conduct its commercial aeronautical activities, violated the provisions regarding economic nondiscrimination set forth in Section 511(a)(1) of the Airport and Airway Improvement Act of 1982, as amended (AAIA), and the city's Federal grant agreements.

* Whether the city, by regulating those services ExecAir must and may provide as a condition of conducting commercial aeronautical activities on the airport, violated Section 105 of the Federal Aviation Act of 1958, as amended (FAA Act), Section 511(a)(1) of the AAIA, and the city's Federal grant agreements.

* Whether the city refused to permit ExecAir to service itself with petroleum products thereby violating the right of each air carrier using an airport to service itself set forth in Section 511(a)(1)(C) of the AAIA and the city's Federal grant agreements.

* Whether the City, by imposing restrictions on ExecAir's aviation fueling business different from those conditions applied to the city's own aviation fueling business, violated the provisions regarding economic nondiscrimination set forth in Section 511(a)(1)(B) of the AAIA and the city's Federal grant agreements.

* Whether the city, by imposing fuel flowage fees on ExecAir's fuel sales and associated services, violated the provisions regarding economic nondiscrimination set forth in Section 511(a)(2) of the AAIA and the city's Federal grant agreements;

* Whether the city, by imposing fuel flowage fees on ExecAir's fuel sales and associated services, attempted to reestablish an exclusive right in violation of Section 308(a) of the FAA Act and the city's Federal grant agreements.

* Whether the city, by refusing to permit ExecAir to use rapid refueling procedures on its emergency helicopters, violated the provisions with regard to economic nondiscrimination set forth in Section 511(a)(1) of the AAIA and the City's Federal grant agreements.

II. THE AIRPORT

Bismarck Municipal Airport is a public-use airport certificated under Part 139 of the Federal Aviation Regulations. The Airport has approximately 78 based aircraft and over 73,000 annual operations, including scheduled air carrier, commuter air carrier, general aviation and military operations. Bismarck Municipal Airport is owned and operated by the city of Bismarck.

From 1971 to the present, the city has received approximately $18.5 million in Federal grant funds. These funds were used for numerous projects and improvements at the Airport. In 1992, the city received its most recent FAA grant in the amount of $774,386 for airport improvements including installation of runway and taxiway signs, construction of a service road, and security system improvements. **[FAA Exhibit 1]**

ExecAir, a commercial aeronautical activity, began doing business on the airport in 1973 and has been an airport tenant since 1976. ExecAir holds FAA certificates authorizing operations as an air taxi and as an aircraft repair station. It also currently provides other aeronautical services to the

public, including flight instruction, aircraft and hangar rental, and aircraft fueling.

Capital Aviation, a commercial aeronautical activity, began doing business on the airport in 1946. It currently provides aeronautical services to the public, including flight instruction, aircraft charter, and aircraft maintenance. Capital Aviation also holds a permit to provide fuel service, which it is not currently exercising. Prior to 1946, the owner of Capital Aviation operated at the airport under the name of Bismarck Flying Service.

III. BACKGROUND

During a period from the 1940's until 1988, the city exercised its proprietary exclusive right, as a federally obligated airport sponsor, to sell fuel on the airport. The city, however, permitted aircraft owners to self-fuel their own aircraft after obtaining a self-fueling permit. In January 1987, the FAA Airports Field Office in Bismarck (AFO) reviewed the city's proposed Bismarck Municipal Airport Self-Fueling Permit. The AFO concluded that the proposed permit was consistent with the city's assurances in Federal grant agreements. The AFO had no objection to the proposed permit, provided that it met applicable State and local statutes. **[FAA Exhibit 2]**

In the 1980's strong outside efforts began to be made to open the airport fueling operation to private enterprise. These efforts were supported by a 1986 financial audit which concluded that the city was not realizing a profit on its airport fueling operation. This led to divisiveness in the city administration, with one group supporting turning the fueling operation over to private enterprise and another group supporting continuation of the City's exclusive right to sell fuel at the airport. (ExecAir Complaint I, Declaration of Callen Cermak)

The city subsequently sought FAA policy guidance regarding the proper exercise of its proprietary exclusive right to sell fuel and the grant assurance compliance implications of the possible transfer of the city's fueling facilities to a private party.

On November 27, 1987, the AFO provided the requested guidance. The AFO advised that only the city could hold an exclusive right to fuel aircraft under the terms of grant agreements; that any transfer of the city's considerable fueling facilities to a private party must be accomplished in a manner that would not give that party an unfair economic advantage over potential competitors; and that grant of an exclusive right to a private party could result in the potential loss of future Federal funds. **[FAA Exhibit 3]**

On February 5, 1988, the AFO advised the city that, in coordination with the Region, it had reviewed the proposed Bismarck Municipal Airport Retail-Fueling Permit. The AFO returned a copy of the permit annotated with FAA comments. **[FAA Exhibit 4]**

On May 6 and June 23, 1988, ExecAir advised the AFO that ExecAir was seeking city approval to become a wholesale purchaser and retailer of aviation fuels on the airport. ExecAir requested that the AFO clarify the policy guidance provided in its November 27, 1987, letter to the city regarding the exclusive right implications of ExecAir becoming the sole provider of fuel services at the Airport. **[FAA Exhibits 5, 6]**

On July 29, 1988, the AFO advised the city that under certain circumstances the existence of a single private enterprise selling fuel on the Airport may not constitute an exclusive right. **[FAA Exhibit 7]**

On August 30, 1988, FAA headquarters concurred in the region's position that, under certain circumstances, allowing ExecAir to sell fuel, even if it was the sole refueling operation on the airport, would not be inconsistent with the provisions of Section 308(a) of the FAA Act. **[FAA Exhibit 8]**

On October 7, 1988, the city requested FAA policy guidance regarding the future grant funding impact of any lease or sale of its airport fueling facilities and the need, if any, for the city to provide equal facilities if other private enterprises wished to sell fuel on the airport. **[FAA Exhibit 9]**

On December 6, 1988, the city, by passage of two resolutions, authorized private entities to sell aviation fuel at the airport and ordered the cessation of its own airport fuel sales by January 15, 1990, subject to establishment of a qualified private fuel operation. (Sponsor Response I, Exhibits 23, 40)

On June 6, 1989, a voter referendum on the city's December 6, 1988 resolutions was held. The voters upheld the city's decision to open up the aviation fuel sales opportunities to private enterprise, but overturned the city's decision to cease its own fuel sales at the Airport. The referendum results required that the city itself remain in the business of selling fuel at the airport.

On October 30, 1989, the city requested AFO policy and legal guidance regarding the imposition of flowage fees on airport tenants. The Sponsor asked whether assessing a fuel flowage fee on tenants would be contrary to any law, rule, or regulation. (Sponsor Response I, Exhibit 1)

On November 15, 1989, the AFO advised the city that the imposition of flowage and other user charges is permissible, in view of the Sponsor's responsibility to make the airport as self-sustaining as possible and the Sponsor's right to recover the cost of providing airport facilities through fair and reasonable fees, rentals or other user charges. (Sponsor Response I, Exhibit 2)

ExecAir contacted the AFO, in letters dated December 13 and December 29, 1989, alleging that the Sponsor's assessment of the fuel flowage fee was contrary to Section 308(a) of the FAA Act, Section 511(a)(2) of the Airport Act, and grant assurances. (Sponsor Response I, Exhibits 5.1 and 5.2)

The AFO subsequently served a copy of these letters on the sponsor and requested a response to the allegations. The sponsor responded on February 16, 1990. **[FAA Exhibit 10]**

On March 13, 1990, following its evaluation of ExecAir's allegations and the city's response, the AFO advised ExecAir of its conclusion that the city's current fuel flowage fee policy is not inconsistent with its Federal grant assurances; that a flowage fee is an acceptable user charge; that the flowage fee charged ExecAir is not unreasonable and does not appear to provide the city with an unfair competitive advantage. The AFO informed ExecAir that, as a result of its evaluation of the allegations, it was concurrently advising the city to establish an accounting system separating fuel sales from other airport operations, to assess itself an equal fuel flowage fee as an expense before determining profit or loss, and to use its fuel sales revenues for airport purposes. **[FAA Exhibit 11]**

On June 26, 1990, the AFO requested that the city provide a status report on its progress toward complying with the AFO's March 13 letter regarding the city's fueling operations and the proposed new airport revenue accounting procedures. **[FAA Exhibit 12]**

On August 20, 1990, the city advised the AFO that its fuel-related airport activities had been separated in the city's 1991 budget and that a consultant had been retained to review the airport's revenue structure. **[FAA Exhibit 13]**

On August 27, 1990, the ADO advised ExecAir that the city had confirmed that all airport revenues were being used for airport purposes; that the city's airport and accounting personnel had

isolated the airport fuel-related revenues in the city's 1991 budget, effective January 1, 1991; and that the city had retained a consultant to review its airport revenue structure. The ADO further advised ExecAir that it was concurrently advising the airport director of the need for the city to assess itself a fuel flowage fee at the same rate charged private fuelers and to show this flowage fee on the profit/loss statement for the airport fueling account. The ADO also confirmed that the city had been advised to implement the fuel flowage fee as soon as possible and, in no event, later than January 1, 1991, when the new accounting procedures would be instituted. **[FAA Exhibit 14]**

On September 11, 1990, the city contacted the ADO explaining the difficulties in trying to assess the flowage fee upon itself prior to January 1, 1991. **[FAA Exhibit 15]**

On January 16, 1991, the ADO acknowledged the city's notification that its self-assessment of fuel flowage fees comparable to those charged ExecAir became effective on January 1, 1991, with the initiation of the new airport revenue accounting procedures. The ADO also provided comments on the apparent composition of the airport fuel account included in the city's FY 1991 budget, and suggested that the structure of the fuel account be reviewed by an independent accounting firm. (Sponsor Response I, Exhibit 28)

On March 27, 1991, the city advised the ADO that the airport accounts had been reviewed by the firm of Orser, Olson, & St. Peter during a fuel study. The city also addressed other related airport revenue items, i.e., building maintenance as an expenditure, fuel truck storage fee, hangar rental, Aeronautics Agency rental, electric sales, and redundancy of accounting review. **[FAA Exhibit 16]**

On April 9, 1991, ExecAir filed a formal complaint, in accordance with our Investigative and Enforcement Procedures, alleging unjustly discriminatory airport management practices by the city. The complaint was assigned Formal Complaint Docket No. 13-91-5.

On June 11, 1991, the city responded to the complaint. The city requested dismissal of the complaint.

On September 30, 1991, the ADO completed its informal investigation of ExecAir's complaint and determined that the sponsor was not in violation of its grant assurances. The ADO concluded that, while there had been a period during which the city did not allow self-fueling and imposed fees on services provided by ExecAir, but not on similar services provided by the city, the city had taken action to correct these conditions prior to the filing of the formal complaint by ExecAir.

On December 26, 1991, ExecAir filed a second formal complaint, in accordance with our Investigative and Enforcement Procedures, alleging additional unjustly discriminatory airport management practices, specifically by not allowing ExecAir to rapid refuel its emergency helicopters. The complaint was assigned Formal Complaint Docket No. 13-92-4.

On March 17, 1992, the city filed its response to ExecAir's second complaint.

On October 2, 1992, the region completed its investigation of ExecAir's complaints.

IV. LEGAL AND POLICY GUIDANCE

The Federal Aviation Act of 1958, as amended (FAA Act), assigns the FAA Administrator broad responsibilities for the regulation of air commerce in the interests of safety and, among other things, the promotion, encouragement, and development of civil aeronautics. Under these broad powers, the FAA seeks to achieve safety and efficiency of the total airspace system through direct regulation of airman, aircraft, and airspace.

Section 105(a) of the FAA Act prohibits State and local governments from enacting or enforcing any laws, rules or regulations relating to the rates, routes and services of any air carrier holding economic authority under Title IV of the FAA Act. Section 105(b) contains exceptions to the general prohibition set forth in Section 105(a). Section 105(b) preserves the authority of State and local governments that own or operate airports to exercise proprietary rights and powers over their airports. These provisions were added to the FAA Act by the Airline Deregulation Act of 1978, Public Law 95-504, 92 Stat. 1708 (1978). Congress enacted Section 105 to ensure that all operations of federally authorized air carriers are subject to a single regulatory regime and to stop the proliferation of state regulation of such carriers' operations when conducted in a single state. [S. Rep. 95-631, 95th Cong., 2d Sess. at 98-99, (February 6, 1978)]

The Federal role in promoting civil aviation has been augmented by various legislative actions which authorize programs for providing funds and other assistance to local communities for the development of airport facilities. In each such program, the airport sponsor assumes certain obligations, either by contract or by restrictive covenants in property deeds and conveyance instruments, to maintain and operate its airport facilities safely and efficiently and in accordance with specified conditions. Commitments assumed by airport sponsors in property conveyance or grant agreements are important factors in maintaining a high degree of safety and efficiency

in airport design, construction, operation and maintenance as well as ensuring the public fair and reasonable access to the airport.

The planning and development of Bismarck Municipal Airport has been financed, in part, with funds provided by the FAA and the U.S. Department of Transportation under the Airport Development Aid Program, authorized by the Airport and Airway Development Act of 1970, and the Airport Improvement Program, authorized by the Airport and Airway Improvement Act of 1982 (AAIA). These programs provide financial assistance to an airport sponsor for airport development in exchange for binding commitments designed to assure that the public interest will be served. These commitments are set forth in the sponsor's applications for Federal assistance and in the grant agreement as sponsor assurances, i.e. a list of applicable Federal laws, regulations, executive orders, statute-based assurances, and other requirements, binding the sponsor upon acceptance of the Federal assistance.

The FAA has a statutory mandate to ensure that airport owners comply with these sponsor assurances. See Sections 308(a), 313, and 1002 of the FAA Act, 49 U.S.C. App. Sections 349(a), 1354(a), and 482, and Sections 509(b)(1)(E), 511(a), 511(b), and 519 of the AAIA, 49 U.S.C. App. Sections 2208(b)(1)(E), 2110(a), 2210(b), and 2218.

The FAA Airport Compliance Program

The FAA discharges its responsibility for ensuring airport owners' compliance with their Federal obligations through its Airport Compliance Program. The FAA's airport compliance efforts are based on the contractual obligations which an airport owner accepted when receiving Federal grant funds or the transfer of Federal property for airport purposes. These contractual obligations were levied on airport owners in an effort to protect the public's interest in civil aviation and to achieve compliance with Federal laws.

The Airport Compliance Program is designed to ensure the availability of a national system of safe and properly maintained public-use airports operated in a manner consistent with the airport owners' Federal obligations and the public's investment in civil aviation.

FAA Order 5190.6A, Airport Compliance Requirements, issued October 2, 1989, (hereinafter Order) sets forth policies and procedures for the FAA Airport Compliance Program. It provides basic guidance for FAA personnel in interpreting and administering the various continuing commitments made to the United States by airport owners as a condition for the grant of Federal funds or the conveyance of Federal property for airport

purposes. The Order, inter alia, analyzes the various obligations set forth in the standard airport sponsor assurances, addresses the nature of those assurances, addresses the application of these assurances in the operation of public-use airports, and facilitates interpretation of the assurances by FAA personnel.

The Order covers all aspects of the airport compliance program except enforcement procedures. Enforcement procedures regarding airport compliance matters, absent the filing of a formal complaint under Federal Aviation Regulations Part 13 (14 CFR 13.5), continue to be set forth in the predecessor order, FAA Order 5190.6 issued August 24, 1973, and incorporated by reference in FAA Order 5190.6A. See FAA Order 5190.6, Sec. 5-3, and FAA Order 5190.6A, Sec. 6-2.

The Airport Sponsor Assurances

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

Section 511(a) of the AAIA sets forth assurances to which an airport sponsor receiving Federal financial assistance must agree as a condition precedent to receipt of such assistance.

Section 511(b) of the AAIA authorizes the Secretary to prescribe project sponsorship requirements to insure compliance with Section 511(a).

These sponsorship requirements are included in every airport improvement grant agreement as set forth in FAA Order 5100.38A, Airport Improvement Program (AIP) Handbook, Ch. 15, Sec. 1, "Sponsor Assurances and Certification."

The Prohibition Against Exclusive Rights

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

Assurance 23, "Exclusive Rights", of the prescribed sponsor assurances requires, in pertinent part, that the sponsor of a federally obligated airport

> "...will permit no exclusive right for the use of the airport by any persons providing aeronautical services to the public....and that it will terminate any exclusive right to conduct an aeronautical activity now existing at such an airport before the grant of any assistance under the Airport and Airway Improvement Act of 1982."

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

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

Public Use on Fair, Reasonable, and Not Unjustly Discriminatory Terms

Assurance 22, "Economic Nondiscrimination", of the prescribed sponsor assurances requires, in pertinent part, that the sponsor of a federally obligated airport

> "...will make its airport available as an airport for public use on fair and reasonable terms, and without unjust discrimination, to all types, kinds, and classes of aeronautical uses." Assurance 22(a)
>
> "...may establish such fair, equal, and not unjustly discriminatory conditions to be met by all users of the airport as may be necessary for the safe and efficient operation of the airport." Assurance 22(h)
>
> "...may....limit any given type, kind, or class of aeronuatical use of the airport if such action is necessary for the safe operation of the airport or necessary to serve the civil aviation needs of the public." Assurance 22(i)

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

Assurance 22(b) provides that "in any agreement, contract, lease or other arrangement under which a right or privilege at the airport is granted to any person...to conduct or engage in any aeronautical activity for furnishing services to the public at the airport, the sponsor will...enforce provisions requiring the contractor to...charge fair, reasonable, and not unjustly

discriminatory prices for each unit or service, provided that the contractor may be allowed to make reasonable and nondiscriminatory discounts, rebates, or other similar types of price reductions to volume purchasers."

Assurance 22(c) provides that "each fixed-based operator at any airport owned by the sponsor shall be subject to the same rates, fees, rentals, and other charges as are uniformly applicable to all other fixed-based operators making the same or similar uses of such airport and utilizing the same or similar facilities."

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

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

The owner of any airport developed with Federal grant assistance is required to operate the airport for the use and benefit of the public and to make it available to all types, kinds and classes of aeronautical activity on fair and reasonable terms, and without unjust discrimination. See Order, Sec. 4-13(a).

Minimum Standards

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

The FAA ordinarily makes an official determination regarding the relevance and/or reasonableness of the minimum standards only when the effect of a standard denies access to a public-use airport, and such determination is limited to a judgment as to whether failure to meet the qualifications of the standard

is a reasonable basis for such denial or the standard results in an attempt to create an exclusive right. See Order, Sec. 3-17(b).

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

While an airport sponsor may impose minimum standards on those engaged in aeronautical activities, an unreasonable requirement or any requirement which is applied in an unjustly discriminatory manner could constitute the grant of an exclusive right. See FAA Order 5190.1A, Para. 11.c.

Public Use of the Airport

The owner of an airport developed with Federal assistance is responsible for operating the aeronautical facilities for the benefit of the public. See Order, Sec. 4-7(a). This means, for example, that the owner should adopt and enforce adequate rule, regulations, or ordinances as necessary to ensure the safe and efficient operation of the airport. See Order, Secs. 4-7 and 4-8.

In fact, the prime requirement for local regulations is to control the use of the airport in a manner that will eliminate hazards to aircraft and to people on the ground. As in the operation of any public service facility, we advise that adequate rules covering, inter alia, vehicular traffic, sanitation, security, crowd control, access to certain areas, and fire protection be established. See Order, Sec. 4-7.

Restrictions on Aeronautical Use of the Airport

While an airport sponsor must allow its use by all types, kinds, and classes of aeronautical activities, the obligating agreements do provide for exceptions to this requirement. See Order, Sec. 4-8(a)(1).

An airport owner may prohibit or 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. This allows the imposition of reasonable rules or regulations to restrict aeronautical use of the airport. The FAA will make the final determination of the reasonableness of airport rules which deny or restrict use of the airport. See Order, Sec. 4-8(a).

Aviation Fuel Sales as an Aeronautical Use

The FAA considers "aeronautical activity" to include "any activity which involves, makes possible, or is required for the operation of aircraft, or which contributes to or is required for the safety of such operations. "Sale of aviation petroleum products" is specifically identified as one kind of aeronautical activity. See Order, Appendix 5(a)(1)(j).

Any restriction, limitation, or ban against aviation fuel sales on the airport must be based on the grant assurance which provides that the sponsor may prohibit or limit an aeronautical use "for the safe operation of the airport or when necessary to serve the civil aviation needs of the public," unless the sponsor elects to exercise its proprietary exclusive right to sell fuel. See Order, Sec. 3-9(d).

Restrictions on Self-servicing of Aircraft

Grant Assurance 22(d) provides, in pertinent part, that "each air carrier using such airport shall have the right to service itself..."

Grant Assurance 22(f) provides that a sponsor "will not exercise or grant any right or privilege which operates to prevent any person, firm, or corporation operating aircraft on the airport from performing any services on its own aircraft with its own employees (including, but not limited to, maintenance, repair, and fueling) that it may choose to perform."

The FAA considers the right to self-service as prohibiting the establishment of any unreasonable restriction on the owners or operators of aircraft regarding the servicing of their own aircraft and equipment. See Order, Sec. 3-9(e)(1).

Aircraft owners must be permitted to fuel, wash, repair and otherwise take care of their own aircraft with their own personnel, equipment and supplies. The sponsor, however, is obligated to operate the airport in a safe and efficient manner. The establishment of fair and reasonable rules, applied in a not unjustly discriminatory manner, governing the introduction of equipment, personnel or practices which would be unsafe, unsightly, detrimental to the public welfare, or which would affect the efficient use of airport facilities by others, would not be unreasonable. See Order, Sec. 3-9(d)(2).

Aeronautical Activities by Airport Owner (Proprietary Exclusive)

FAA policy provides that the owner of a public-use airport may elect to provide any or all of the aeronautical services needed by the public at the airport; and that the statutory prohibition against exclusive rights does not apply to these owners, although an airport sponsor may not grant to any other entity the exclusive right to conduct any aeronautical activity. An airport owner exercising its proprietary exclusive right to conduct aeronautical activities, however, must engage in such activities as the sole principal using its own employees and resources. An independent commercial enterprise, even if designated as the agent of the airport owner, may not exercise nor be granted an exclusive right to conduct aeronautical activities on a federally obligated airport. See Order, Sec. 3-9(d).

Airport Financial Reports

Section 511(a)(10) of the AAIA requires an airport sponsor to submit such annual or special financial reports as the Secretary may reasonably request.

Section 511(a)(11) provides that all airport records will be available for inspection by any duly authorized agent of the Secretary upon reasonable request. Section 113(a) of the Intermodal Transportation Act of 1992 amended Section 511(a)(11) of the AAIA to require that an airport sponsor assure that a report of the airport budget is available to the public at reasonable times and places.

Assurance 26, "Reports and Inspections," provides that a sponsor "will submit to the Secretary such annual or special financial...reports as the Secretary may reasonably request...it will also make...all airport records and documents affecting the airport, including deeds, leases, operation and use agreements, regulations and other instruments, available for inspection by any duly authorized agent of the Secretary upon reasonable request."

V. ANALYSIS AND DISCUSSION

Location of ExecAir on the Airport

ExecAir alleges that the city unjustly discriminated against ExecAir by denying approval of its proposed construction of a facility on a site directly north of Capital Aviation's facilities. Capital Aviation occupies a site on the northwest corner of the Airport, which it purchased from the City in 1946.

In 1975, both ExecAir and Capital Aviation were interested in developing the area immediately to the north of Capital Aviation's existing facilities. (ExecAir Complaint I, Exhibit 2 and Sponsor Response I, Exhibit 15)

Whether ExecAir's interest in the area stimulated the interest by Capital Aviation is unknown and is not relevant to the FAA's finding on this issue. Capital Aviation still occupies the building it purchased from the city in 1946 and has never expanded beyond that single building.

The city's decision not to lease the area north of Capital Aviation's leasehold to ExecAir appears to have been based more on the inadequacy of the site to accommodate any commercial aeronautical activity and not on the possibility of Capital Aviation needing the area in the future.

ExecAir's April 16, 1975, proposal indicated that its initial requirements would be a 80' x 100' building and that it anticipated expanding the facility by an additional 150' and adding 15 T-hangars within 5 years. (ExecAir Complaint I, Exhibit 2) On September 17, 1975, the city informed ExecAir that the site adjacent to Capital Aviation's leasehold desired by both ExecAir and Capital Aviation would not be made available to any commercial aeronautical activity until the airport master plan could be amended and approved by the FAA and the other affected Federal agencies. (Sponsor Response I, Exhibit 15)

In 1976, on its current leasehold at the southwest corner of the tiedown apron, ExecAir constructed a building approximately 10,000 square feet in size with a subsequent addition to the building, in 1990, of approximately 3,800 square feet. According to the Airport Director, ExecAir has also expressed interest in the area immediately to the north of its present leasehold, which is currently occupied by a 10-unit T-hangar. The current lease for the 10-unit T-hangar does not expire until January 1, 1998. In 1991, the city offered to purchase the 10-unit T-hangar from the current lessee, but its offer was not accepted.

The evidence persuades us that the city's decision with regard to this issue was fair and proper and, therefore, consistent with the sponsor's Federal obligations. The sponsor's Airport Layout Plan (ALP) at the time of ExecAir's request in April 1975 clearly shows that the sponsor had developed a 750' building restriction line (BRL) in the area at issue on the southwest side of Runway 13/31 to protect Runway 13/31 from encroachment by buildings. (Sponsor Response I, Exhibit 29) This BRL comes within approximately 40' of the northeast corner of Capital Aviation's building. The existence of the BRL leaves an extremely limited area within which to build in the

area north of Capital Aviation. The triangular area bounded by Capital Aviation on the south, the BRL on the northeast, and Airport Road on the west would not have been sufficient to accommodate the anticipated five year requirements identified in ExecAir's 1975 proposal. This still held true in 1986 when ExecAir again proposed to build north of Capital Aviation. (Sponsor Response I, Exhibit 11)

Services Provided by ExecAir

ExecAir alleges that it was unjustly discriminated against in that other than fair and reasonable terms were required in its lease. ExecAir argues that, as a condition of obtaining an airport leasehold, the city required it to provide multiple aeronautical services not required of other commercial aeronautical activities.

FAA prefers to leave to airport management discretion the setting of an appropriate level of services to be required of commercial aeronautical activities, provided that such requirements are reasonable, relevant to the proposed activity, and applied in a not unjustly discriminatory manner.

ExecAir's January 1, 1976, lease clearly requires ExecAir to provide multiple aeronautical services in the form of flight instruction, aircraft charter service, and maintenance and repair of aircraft and aircraft engines. The requirement of that level of services, however, is not unreasonable, given the level and types of activity at the Airport.

Moreover, the evidence provided by ExecAir does not support a finding that the Sponsor mandated that ExecAir provide multiple services. ExecAir did not indicate that it did not want to provide multiple services when it entered into its January 1, 1976, lease with the city or that the lease signed at the time was not the result of arms-length lease negotiations. While the FAA letter to the Sponsor, dated April 21, 1969, indicates that the FAA previously advised the Sponsor to discontinue its practice of requiring prospective airport tenants to provide multiple services, one cannot conclude from this that the sponsor continued to require multiple services of ExecAir at the time ExecAir and the Sponsor entered into the January 1, 1976, lease. **[FAA Exhibit 17]**

Furthermore, the Airport Director attests that prospective lessees are no longer required to offer multiple aeronautical services as a condition of airport tenancy. (Sponsor Response I, Attachment A, Paras. 11-13) In fact, ExecAir indicates in its initial complaint that more recent lessees have not been required to provide multiple services. (ExecAir Complaint I, Declaration of Dennis Rohlfs)

In this case, the Sponsor applied to ExecAir the minimum standards in effect in 1976 when ExecAir entered into its lease. As a result, ExecAir was required to provide multiple services as was Capital Aviation under its earlier lease. The evidence, therefore, does not suggest that the Sponsor discriminated against ExecAir when executing the 1976 lease.

The evidence also shows that between 1976 and 1983, when Waypoint Avionics entered into its lease, the sponsor elected to permit commercial aeronautical tenants to provide a limited range of aeronautical services. This decision appears to be the result of a change in the sponsor's minimum standards for commercial aeronautical tenants. Such a change in policy is permitted under the Sponsor's grant assurances.

Against this background, we conclude that the aeronautical service requirements in ExecAir's lease are reasonable and in accordance with the airport policy in effect at the time of the execution of the lease between ExecAir and the city.

The aeronautical services required of the airport's commercial tenants have changed over time. The requirements at issue, however, are not unjustly discriminatory. The requirements included in ExecAir's lease appear to be no more restrictive than those included in Capital Aviation's earlier lease.

As a practical matter, an airport sponsor may quite properly adjust the airport's minimum standards to reflect the changing needs of the public and to accommodate changes in the level of commercial aeronautical services available at the airport. Such changes in minimum standards for commercial aeronautical activities, whether prescribed in leases or in airport regulations, are not inconsistent with an airport sponsor's Federal obligations.

Self-fueling

ExecAir alleges that the Sponsor has refused to permit ExecAir to self-fuel its own aircraft.

ExecAir's January 1, 1976, lease stated: "Second party further agrees to purchase from the party of the first part all of its needed aviation fuels to the extent that first party is able to make same available for sale."

The Airport Director acknowledges that early city ordinances precluded self-fueling of aircraft at the airport. The Airport Director also states that, although the applicable city ordinance was not revised to delete the restriction on self-fueling until 1986, the city had not been enforcing the restriction since the mid-1960's when the FAA determined that such unreasonable prohibitions on self-fueling were

inconsistent with a sponsor's Federal grant obligations. (Sponsor Response I, Attachment A, Para. 15)

The currently effective airport operating standards are set forth in the City of Bismarck Code of Ordinances (City Code). The City Code states, in pertinent part, that "Owners or operators may fuel their own aircraft, with fuel not purchased from the city, or use lubricants and coolants not purchased from the city in their own aircraft, provided they obtain a self-fueling permit from the city." Pursuant to this provision of the City Code, aircraft owners are granted the right to self-fuel their own aircraft, provided that they obtain a self-fueling permit from the city. (City Code, Para. 10-08-01.1)

Established FAA policy provides that aircraft owners have the right to fuel their own aircraft with their own personnel, equipment and supplies. The sponsor, however, is obligated to operate the Airport in a safe and efficient manner, and is permitted to establish fair and reasonable rules, applied in a not unjustly discriminatory manner, governing the introduction of equipment, personnel or practices which would be unsafe, unsightly, detrimental to the public welfare, or which would affect the efficient use of airport facilities by others. A requirement that aircraft owners obtain a self-fueling permit from the city as a prerequisite for exercising their right to fuel their own aircraft is neither unreasonable nor inconsistent with FAA policy.

ExecAir also alleges that by not being permitted to self-fuel it suffered substantial damages in that the prices charged by the city sometimes averaged as much as $0.50 per gallon in excess of those charged by private fuel suppliers.

While the airport director's July 21, 1986, letter to ExecAir demonstrates that ExecAir communicated with the Airport director regarding self-fueling as early as 1986, ExecAir has not presented any evidence to indicate that it formally requested or was denied a self-fueling permit prior to January 26, 1989. (ExecAir Complaint I, Exhibit 15, Sponsor Response I, Exhibit 24)

In response to ExecAir's January 26, 1989, request, the City granted a self-fueling permit to ExecAir on February 14, 1989. ExecAir has now installed its own fuel storage tanks and has the option of purchasing fuel through the city or from private fuel suppliers.

Against this background, we conclude that the city is acting appropriately within the bounds of its Federal grant assurances to permit self-fueling by ExecAir.

Restrictions on ExecAir's Airport Fueling Operation

ExecAir alleges that the sponsor has violated its Federal obligations by requiring that ExecAir's fueling operation comply with more stringent requirements than the sponsor's.

ExecAir contends that the permit and ground lease for its fuel farm imposed duties on ExecAir to which the city's fueling facility was not subject. It maintains that the city has imposed thoroughly different and fewer restrictions on its own fueling operations and that the city does not require its own fueling operations to comply with NFPA standards. (ExecAir Complaint I)

The city acknowledges the differing fueling facility requirements. It argues, however, that the fuel facility differences are not unjustly discriminatory, but rather reflect the fact that the Sponsor's and ExecAir's facilities were designed and constructed at different times and each in accordance with the standards in effect at the time based on the requirements of the city's Uniform Fire Code in existence at the time of installation.

The city maintains that its fueling facility was built before the city adopted its current fire codes and standards. The city submits that code requirements are constantly being modified; that modification of all existing construction whenever the code requirements change is not feasible; and that it is a commonly accepted practice in the adoption and enforcement of building codes in the United States that new construction meet the code requirements, including fire codes, in effect at the time while existing facilities are grandfathered. The city indicates that, following adoption of its 1991 Uniform Fire Code, ExecAir would not be required to upgrade its facility to meet any new fueling facility standards even though new fueling installations would be required to follow the newly adopted code. (Sponsor Response I, Exhibit 25)

We agree with the city's argument that the differing fueling facility standards are a function of the city's building codes, including the Uniform Fire Code, applicable at the time of construction. We are unpersuaded by ExecAir's argument that the differing standards for the fueling facilities built by ExecAir and the city are the result of a manipulation of the standards to promote the city's own interest and to place ExecAir at a competitive disadvantage.

Furthermore, we are unpersuaded that the city's fueling operations are subject to less stringent requirements than those imposed on ExecAir. The city's and ExecAir's fueling operations appear to be subject to regular inspection by the

Bismarck Fire Department. Both operations are inspected once each quarter by the same inspector using the same standards. **[FAA Exhibit 18]**

Fuel Flowage Fee

ExecAir alleges that the city has violated its Federal obligations by imposing fuel flowage fees on fuel sales by ExecAir, but not on the city's own aviation fuel sales at the Airport.

On March 13, 1990, consistent with established FAA policy, the AFO advised the city that it needed to assess itself a fuel flowage fee at the same rate charged private fuelers and that the Sponsor needed to establish an accounting system to separate its fuel operation from other airport activities.

The basis for advising the city that it needed to assess itself a fuel flowage fee in the same amount as it assessed ExecAir is the city's assurance, as a recipient of Federal airport improvement grant, that each fixed-based operator at any airport owned by the sponsor shall be subject to the same rates, fees, rentals, and other charges as are uniformly applicable to all other fixed-based operators making the same or similar uses of such airport and utilizing the same or similar facilities. In selling fuel on its own behalf, the Sponsor is operating as a "fixed-based operator" within the meaning of the applicable grant assurance and, therefore, is subject to the conditions of this portion of the sponsor Assurance.

On March 27, 1991, the city confirmed that it began assessing itself the flowage fee as of January 1, 1991, with the initiation of the new airport revenue accounting procedures. **[FAA Exhibit 16]**

ExecAir contends that the assessment of a fuel flowage fee by the city upon city fuel sales is a sham and that no fuel flowage fee should be assessed against fuel sales by either ExecAir or the city.

We disagree with ExecAir's contention. An airport sponsor, pursuant to its Federal obligation to make the airport as self-sufficient as possible under the existing circumstances, has the right to recover the cost of providing airport facilities through the introduction of fair and reasonable fees, rentals or other user charges. Fuel flowage fees are a generally accepted method for recovering the cost of providing airport facilities, since fuel consumption is often regarded as a measure of relative usage or benefit derived from the availability of the public landing area.

In this case, the city has elected to assess fuel flowage fees at the airport. So as not to be applied in an unjustly discriminatory manner, the fuel flowage fees must be assessed for all fuel sales, including those by the city itself.

The FAA's objective in requiring the city to establish an accounting system separating its fuel operation from other airport activities, with the fuel flowage fees shown both as an expense to the sponsor's fueling operation and as a source of airport revenue, was to facilitate preparation of a profit-and-loss statement for the city's airport fueling operation. Our intent was to ensure that the city's fuel operation was not being subsidized by other airport revenues. While the fuel flowage fee paid by the sponsor would appear as an expense on the fueling account, that fee, as well as the fuel flowage fee derived from ExecAir's fuel sales, would appear as a revenue in the other overall airport account.

The ADO also recommended that the Sponsor have an independent certified pubic accountant review the city's separate fueling account and other airport accounts to ensure compliance with the its Federal obligations as outlined in previous FAA correspondence in the matter.

The city subsequently provided evidence that the airport accounts had been reviewed by the firm of Orser, Olson, & St. Peter during a fuel study. **[FAA Exhibit 16]**

In addition, we have obtained a copy of the city's Comprehensive Annual Financial Report for the Fiscal Year Ended December 31, 1991, (Financial Report). This report contains letters dated April 9, 1992, from Eide Helmeke & Co., Certified Public Accounting firm, confirming its audit of the city's general purpose financial statements using generally accepted auditing standards and Government Auditing Standards. The Financial Report contains financial statements for the Airport Revenue and Airport Flightline Enterprise Funds. The Airport Flightline Enterprise Fund includes the sponsor's aviation fuel sales. No material weaknesses were noted by the audit. The Financial Report confirms that the "Airport operation was split into two separate accounting departments, Airport and Airport Flightline on December 31, 1989, this split was per a recommendation passed down to us from FAA, to better track the effect of the fuel sales and flightline operations at the Airport." **[FAA Exhibit 19]**

The Financial Report also indicates that the Airport Flightline Enterprise Fund had a net income of $39,822. However, since the Airport Flightline Enterprise Fund includes more than just fuel sales, we cannot state with certainty that this was the net income of the airport fueling operation.

Regarding ExecAir's contention that there are other revenue sources at the Airport which could be drawn upon in the absence of the fuel flowage fee, we conclude that a fuel flowage fee is one of several commonly accepted methods for an airport sponsor to recover the cost of providing aircraft landing and parking areas to the public. The decision as to which of the revenue recovery methods is used at a particular airport is left to the discretion of the airport sponsor and is of no concern to the FAA as long as such methods are applied in a not unjustly discriminatory manner. The fuel flowage fees at the Airport appear to be applied fairly, and the amount of revenues being collected from all sources on the Airport do not appear to be in excess of the needs for sustaining the airport operation. (Sponsor Response I, Exhibit 9, Pp. 10-18)

ExecAir also contends that the city's charge to airlines for into-plane fueling service above a certain volume, i.e., $0.03 per gallon over 100,000 gallons, is the same as the $0.03 per gallon fuel flowage fee charged for retail fuel sales at the airport. ExecAir argues that, if it were to offer this service on a competitive price basis equivalent to the city's, it would have to perform the service for free.

Into-plane service exists when the aircraft owner provides the fuel and the into-plane servicing agent provides fuel storage and dispensing facilities and services. ExecAir maintains that, unless an into-plane servicing agent were to charge airlines an into-plane service fee of more than $0.03 per gallon for monthly gallonage, the into-plane servicing agent would be unable to recoup its expenses for providing the fuel storage and dispensing service, since it must pay the $0.03 per gallon fuel flowage fee applicable to retail fuel sales at the Airport.

The city acknowledges that it charges airlines a $0.03 per gallon into-plane service fee for monthly purchases in excess of 100,000 gallons. In addition, it charges each airline a $4000 monthly minimum into-plane servicing fee in addition to the gallonage fee. This monthly service fee is designed to offset the effect of its discount to volume purchasers. **[FAA Exhibit 20]**

Volume discounts to aviation fuel purchasers are not inconsistent with the city's Federal grant agreements. The city, like ExecAair or any other commercial aeronautical activity providing fueling services, may make available reasonable and nondisriminatory discounts, rebates, or other similar types of price reductions to volume purchasers, so long as the charges are fair, reasonable and made available on a not unjustly discriminatory basis.

ExecAir has not furnished evidence that would support a conclusion that the city is not complying with the applicable Federal grant assurance or that the city's commercial aeronautical activities are being subsidized by other airport revenues. Nor are the city's financial records and audits sufficiently specific with regard to its commercial aeronautical activities as to offer a basis for making a conclusive determination regarding these operations.

In the absence of any corroborating factual information, however, it appears that the city's conduct of its commercial aeronautical activities, specifically the fueling operation, is not prejudicial to competition and does not result in the creation of an exclusive right for the city or a competitive disadvantage for ExecAir.

Nevertheless, while we are unpersuaded that the city has engaged in any anticompetitive behavior with respect to ExecAir's airport fueling operations, it is appropriate here to restate established FAA policy in this regard. Commercial aeronautical activities conducted by a federally obligated airport sponsor, which correspond to those commercial operations conducted by its airport tenants, must not be subsidized by other airport revenues.

Against this background, we conclude that the city's actions with regard to the assessment of and accounting for aviation fuel flowage fees at the Airport are consistent with its Federal obligations.

Rapid or "Hot" Refueling

ExecAir further alleges that the city has discriminated against ExecAir and created an exclusive right by refusing to allow ExecAir to rapid refuel its emergency helicopters. Rapid or "hot" refueling consists of refueling while the aircraft engines are running.

ExecAir contends, and the city acknowledges, that rapid refueling of ExecAir's helicopters was performed by employees of the sponsor in the past when the sponsor exercised its proprietary exclusive right to provide all fueling services at the Airport. (Sponsor Response II, Para. 45) ExecAir refers to several Federal Aviation Regulations (FAR), i.e., FAR Parts 139, 121, and 135 (14 CFR § 139.321(h), § 121.133, and § 135.21, respectively), as the basis for its assertion of the right to rapid refuel its helicopters.

ExecAir further contends that the city's refusal to permit rapid refueling preempts Federal law. (ExecAir Complaint II, Paras. 15-18) The city counters with the argument that "Federal preemption is predicated on action by the Federal

government in the form of either a legislative enactment or a regulatory promulgation" and that in this situation there has been neither Federal legislative enactment nor a Federal regulatory promulgation. (Sponsor Response II, Para. 51)

Notwithstanding ExecAir's contentions, the FAR references cited by ExecAir do not convey to an air carrier an undeniable right to rapid refuel aircraft.

An airport owner is under no obligation to permit aircraft owners to introduce equipment, personnel or practices on the airport which would be unsafe, unsightly, detrimental to the public welfare, or which would affect the efficient use of airport facilities. See Order, Sec. 3-9e(3). Based on information provided in FAA Advisory Circular 150/5230-4, Aircraft Fuel Storage, Handling, and Dispensing on Airports, the National Fire Protection Association NFPA 407, Standard for Aircraft Fuel Servicing, the U.S. Air Force T.O. 00-25-172, and the U.S. Army Field Manual 10-68, which discuss in detail the rapid refueling of aircraft, it is clear that "hot" refueling is potentially dangerous and should not be done as a matter of routine. The airport owner has the right to adopt reasonable rules and regulations applicable to this type of operation.

Although the city ordinance prohibiting rapid refueling may not have been enforced in the past, the city has the right to begin enforcing the ordinance, provided that it is applied in a not unjustly discriminatory manner. It appears that at the present time the prohibition is being enforced in such manner. City employees, as well as employees of private refuelers, are prohibited from utilizing rapid refueling operations at the Airport.

G. Other Allegations

ExecAir also asserts that the Airport's minimum standards have the effect of impermissibly regulating the rates, routes or services of ExecAir's air carrier operations under Section 105 of the FAA Act.

The city established the minimum standards in its capacity as an airport owner and operator. Section 105(b) preserves the authority of local governments in their capacity as owners or operators of airports to exercise proprietary powers. As discussed above, the adoption of reasonable airport minimum standards which are not unjustly discriminatory is within the scope of the city's proprietary powers.

In these circumstances, we have no basis for finding that the city's application of its airport minimum standards to ExecAir's air taxi activities is preempted by Section 105(a) of the FAA Act. This conclusion is consistent with the guidance

given by the Department of Transportation in its Opinion and Order in re Investigation Into Massachusetts Port Authority Landing Fees, FAA Docket 13-88-2 (December 22, 1988). In that decision, the Department concluded that MassPort's assessment of reasonable airport landing fees would not be preempted by Section 105 of the FAA Act, even if the fees had some impact on air carriers' rates, routes or services. [Opinion and Order at 11]

ExecAir also alleges unfair use of the city's power as the airport owner to harm ExecAir's ability to freely compete on the airport. (ExecAir Complaint I, Para. 28)

ExecAir's allegations in this regard are nonspecific and vague, with the exception of its allegation that only city services are listed on an automated printout available from an automated weather system in the city's fueling facility.

Review of a copy of the automated printout reveals no identification on the printout as to who provides the services listed. (ExecAir Complaint I, Exhibit 24) ExecAir has offered no information as to the entity responsible for the information provided on the printout or whether ExecAir has made any attempt to have the information revised or clarified.

ExecAir also alleges that communication via the airport UNICOM diverts business from ExecAir. ExecAir proposed a possible solution in its letter of December 21, 1990, to the Airport Director, but ExecAir provides no information on the City's response to its proposal. (ExecAir Complaint I, Exhibit 25)

Absent more detailed information, we are unable to reach a conclusion on these issues.

V. FINDINGS

Many of ExecAir's allegations are based on actions by the city which, to the extent that they occurred, occurred a number of years ago. Moreover, these practices are no longer employed by the sponsor. We find that these allegations are no longer appropriate for our action.

The city now permits self-servicing of aircraft and single-purpose commercial aeronautical tenants. The city is also applying the airport fuel flowage fee to itself in the same amount as applied to ExecAir.

Regarding the city's allegedly discriminatory prohibition of rapid refueling, we do not find the City's actions to be inconsistent with its Federal grant obligations. While it had not enforced the ordinance prohibiting rapid refueling in the past, the city has the right to begin enforcing the ordinance,

provided the subject prohibition is applied in a not unjustly discriminatory manner. At the present time, no entity is permitted to conduct rapid refueling on the Airport.

Our primary consideration in making these findings is whether the sponsor is satisfying its Federal grant obligations at this time. The purpose of the FAA Airports Compliance Program is not to punish past transgressions, but to take action to assist airport owners in coming into compliance when problems have been identified.

The record in this case supports a finding that, with regard to the particular issues raised by ExecAir, the sponsor is in compliance with the terms and conditions of its Federal grant agreements. Moreover, when made aware of compliance deficiencies, the city has taken effective action to correct those deficiencies consistent with the advice and guidance provided by the ADO.

We find, however, that the city has been lax in removing obsolete terms and conditions from existing airport leases. We will request that the city take appropriate action to eliminate from existing airport leases those terms and conditions which are inconsistent with its Federal grant assurances.

Many of these lease discrepancies were identified in a study of the Airport conducted by the Airport Corporation of America, a consulting firm hired by the city in 1990 to review the Airport's revenue structure. The city attests that it is committed to rectifying these discrepancies as leases expire and come up for renewal. However, the City has no plan to take unilateral action to remove obsolete terms and conditions in advance of lease expiration, unless individual leaseholders request removal of the terms and conditions and lease renegotiation can be mutually agreed upon. (Sponsor Response I, Declaration of David Miller, Para. 14-15)

We recognize that the city is not enforcing the obsolete lease terms and conditions. In order to ensure continued compliance with its grant assurances, we request that the city, with the assistance of the FAA Airports Division, Great Lakes Region, review its airport leases to identify those terms and conditions, if any, which may be inconsistent with the city's Federal grant assurances. We further request that the city remove from its leases those obsolete terms and conditions inconsistent with its Federal grant assurances and offer to the affected individual lessees an amended contract with any such terms and conditions removed.

Finally, during the course of its investigation, the ADO expressed concern regarding various expense and revenue items shown in the city's 1991 budget for the fueling account.

(Sponsor Response I, Exhibit 28) Since it does not have on staff the specialized accounting and auditing expertise necessary to make a valid determination in the matter, the ADO recommended, but did not require, that the City have the structure of the airport fueling account reviewed by an independent certified public accounting firm to ensure that the account included all applicable expenses and revenues. The Sponsor chose not to follow this recommendation. Rather, the city relied upon the knowledge and expertise of its own accounting department in establishing the fueling account. We find that, with regard to this matter, the city's actions are not inconsistent with its Federal obligations.

To affirm this, however, we request that the city furnish to the FAA Airports Division, Great Lakes Region, an annual special financial report for its "Airport Flightline Account" depicting all income and expenses associated with the city's sale of aviation fuel at the Airport. This report shall be in sufficient detail as to identify, at a minimum, the income sources and amounts and the expense items and amounts. This report shall be filed, on an annual basis covering the city's previous fiscal year, with the FAA Airports Division, Great Lakes Division, no later than January 31 of each year until further notice.

ORDER

Under the specific circumstances at Bismarck Municipal Airport as discussed, and based upon the evidence of record in its entirety, we find:

(a) that the city, by refusing to lease to ExecAir its preferred airport site from which to conduct its commercial aeronautical activities did not violate the provisions regarding economic nondiscrimination set forth in Section 511(a)(1) of the Airport and Airway Improvement Act of 1982, as amended (AAIA), and the city's Federal grant agreements;

(b) that the city, by regulating those services ExecAir must and may provide as a condition of conducting commercial aeronautical activities on the Airport, did not violate Section 105 of the Federal Aviation Act of 1958, as amended (FAA Act), Section 511(a)(1) of the AAIA, and the city's Federal grant agreements;

(c) that the city is not refusing to permit ExecAir to service itself with petroleum products and thereby violating the right of each air carrier using an airport to service itself set forth in Section 511(a)(1)(C) of the AAIA and the city's Federal grant agreements;

(d) that the city, by imposing restrictions on ExecAir's aviation fueling business different from those conditions applied to the city's own aviation fueling business, did not violate the provisions regarding economic nondiscrimination set forth in Section 511(a)(1)(B) of the AAIA and the city's Federal grant agreements;

(e) that the city, by imposing fuel flowage fees on ExecAir's fuel sales and associated services in the same manner as it charges itself for the same or similar sales and services, did not violate the provisions regarding economic nondiscrimination set forth in Section 511(a)(2) of the AAIA and the city's Federal grant agreements;

(f) that the city, by imposing fuel flowage fees on ExecAir's fuel sales and associated services, did not establish an exclusive right in violation of Section 308(a) of the FAA Act and the city's Federal grant agreements; and

(g) that the city, by refusing to permit ExecAir to use rapid refueling procedures on its emergency helicopters, did not violate the provisions with regard to economic nondiscrimination set forth in Section 511(a)(1) of the AAIA and the city's Federal grant agreements.

Accordingly, we dismiss the complaints in FAA Dockets 13-91-5 and 13-92-4.

We have determined, however, that certain further action in this matter is warranted.

In order to ensure continued compliance with its grant assurances, we request that the city, with the assistance of the FAA Airports Division, Great Lakes Region, review its commercial aeronautical activity leases to identify those terms and conditions, if any, which may be inconsistent with the city's Federal grant assurances. We further request that the city remove from its leases those obsolete terms and conditions inconsistent with its Federal grant assurances and offer to the affected individual lessees an amended contract with any such terms and conditions removed.

We also request that the city furnish to the FAA Airports Division, Great Lakes Region, an annual special financial report for its "Airport Flightline Account" depicting all income and expenses associated with the City's sale of aviation fuel at Bismarck Municipal Airport. This report shall be in sufficient detail as to identify, at a minimum, the income sources and amounts and the expense items and amounts. This report shall be filed, on an annual basis covering the city's

previous fiscal year, with the FAA Airports Division, Great Lakes Region, no later than January 31 of each year until further notice.

These determinations are made under Sections 105, 307, 308(a), 313(a), and 1006(a) of the Federal Aviation Act of 1958, as amended, 49 U.S.C. App. Sec. 1305, 1347, 1348, 1354, and 1486, respectively, and Sections 511 and 519 of the Airport and Airway Improvement Act of 1982, as amended, 49 U.S.C. App. Sections 2210 and 2218, respectively.

RIGHT OF APPEAL

This order constitutes final agency action under Section 1006(a) of the Federal Aviation Act of 1958, as amended, 49 U.S.C. App. Section 1486. Any party to this proceeding having a substantial interest in this order may appeal the order to the courts of appeals of the United States or the United States Court of Appeals for the District of Columbia upon petition, filed within 60 days after entry of this order.

Leonard E. Mudd
Director, Office of Airport Safety
and Standards