UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, D.C.

Aerodynamics of Reading, Inc **COMPLAINANT/AERODYNAMICS** **v.** **Reading Regional Airport Authority** **RESPONDENT/AUTHORITY**	**Docket No. 16-00-03**

FINAL DECISION AND ORDER

I. INTRODUCTION

This matter is before the Federal Aviation Administration (FAA) Associate Administrator for Airports on an appeal filed by Aerodynamics of Reading, Inc. (Complainant or Aerodynamics), from the Director's Determination of December 22, 2000, issued by the Director of the FAA Office of Airport Safety and Standards, pursuant to the Rules of Practice for Federally-Assisted Airport Proceedings found in Title 14 Code of Federal Regulations (CFR), Part 16. The Complainant argues on appeal to the Associate Administrator for Airports that the Director committed substantive errors in interpreting the evidence and making conclusions from the evidence. The Complainant also alleges the Director made procedural errors in conducting the investigation and weighing the facts presented. The Complainant alleges that these errors caused the FAA to erroneously dismiss the complaint.

In its formal complaint, the Complainant alleged that Reading Regional Airport Authority (Respondent or Authority) had violated Federal grant assurance 22 regarding unjust economic discrimination by: (1) charging higher rents to the Complainant than to

competitor Fixed Based Operators (FBOs)[1]; (2) requiring a substantial security deposit from the Complainant but not from other FBOs or tenants; and (3) engaging in discriminatory bidding for available hangars. In addition, the Complainant alleged in the formal complaint that the Respondent was in violation of Federal grant assurance 24, regarding airport fee and rental structure, by charging rents that resulted in a substantial surplus not required for operation, nor reinvested in the airport. [FAA Appeal Exhibit 1, Item 1, page 2]

The Complainant's appeal from the Director's Determination asserts that the issues listed above, with the exception of the allegation of discriminatory bidding for available hangars, were improperly resolved. The Complainant's appeal lists ten points for consideration covering the three challenged issues. [FAA Appeal Exhibit 1, Item 2] These ten points, which are discussed in detail in part VI, Analysis and Discussion, of this document, are raised for review and consideration by the Associate Administrator for Airports under the following two broad categories:

A. Whether the Director committed substantive errors in the interpretation of the evidence supporting two of the ten points, causing the FAA to erroneously dismiss the Complaint; and

B. Whether the Director committed procedural errors in the conduct of the investigation for the other eight points, causing the FAA to erroneously dismiss the Complaint.

II. SUMMARY OF FINAL DECISION

Upon an appeal of a Part 16 Director's Determination, the Associate Administrator must determine whether (1) the findings of fact made by the Director are supported by a preponderance of reliable, probative, and substantial evidence, and (2) each conclusion of law is made in accordance with applicable law, precedent, and public policy. [See e.g. Ricks v Millington Municipal Airport, FAA Docket No. 16-98-19, p.21 (12/30/99) and 14 CFR, Part 16, §16.227]

In arriving at a final decision on this appeal, the FAA has reexamined the entire record, including the Director's Determination, the Administrative Record supporting the Director's Determination, and the appeal and reply submitted by the parties in light of applicable law and policy.

Based on this reexamination, the FAA affirms the Director's Determination. The Director's Determination found the Respondent was not in violation of Federal grant assurance 22 regarding unjust economic discrimination with regard to (1) charging different rates to the Complainant from those rates charged to competitor Fixed Based

[1] A fixed-base operator (FBO) is a commercial entity providing aeronautical services such as fueling, maintenance, storage, ground and flight instruction, etc., to the public. (FAA Order 5190.6A, Appendix 5)

Operators (FBOs) and requiring a security deposit from the Complainant but not from other FBOs or tenants, and (2) allegedly engaging in discriminatory bidding for available hangars. The Director's Determination also found the Respondent was not in violation of Federal grant assurance 24 relating to airport fee and rental structure by allegedly charging rents that resulted in a substantial surplus not required for operation, nor reinvested in the airport. [FAA Appeal Exhibit 1, Item 1, page 23] 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 appeal did 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, Part 16, §16.33(a).

III. AIRPORT

The Reading Regional Airport (RDG) is a public-use airport operated by the Respondent Airport Authority. The Respondent maintains its principle offices at 2501 Bernville Road, Reading, Pennsylvania 19605. RDG is located in Reading, three miles north of the city center. RDG is an air carrier airport under Title 14 Code of Federal Regulations Part 139. At the time of the Director's Determination, RDG reported 102 based aircraft and 155,130 operations for the twelve-month period ending November 18, 1998. [FAA Appeal Exhibit 1, Item 1, page 3] The most recent record shows RDG reported 107 based aircraft and 139,440 operations for the twelve-month period ending December 31, 1999. [FAA Appeal Exhibit 1, Item 4]

The planning and development of RDG has been financed, in part, with funds provided by the FAA, under the Airport Improvement Program (AIP), authorized by the former Airport and Airway Improvement Act of 1982, as amended and recodified, 49 U.S.C. § 47101, et seq. At the time of the Director's Determination, the airport sponsor had received twenty-five AIP grants since 1982, totaling $12,498,321 in federal airport development assistance. [FAA Appeal Exhibit 1, Item 1, page 3] Since then, the Authority has received five additional AIP grants totaling $3,043,424. [FAA Appeal Exhibit 1, Item 5]

IV. BACKGROUND AND PROCEDURAL HISTORY

On July 9, 1991, the Complainant purchased the assets and airport lease of Aerodynamics, Inc., a separate unrelated corporation. On that date, the Complainant entered into a lease arrangement with the Respondent. The terms of the lease between the Complainant and Respondent were negotiated and agreed to by the parties involved. [FAA Appeal Exhibit 1, Item 1, page 3]

It appears that subsequent to entering into this lease arrangement with the Respondent, the Complainant became aware that other FBOs had different lease terms, which the Complainant considered to be preferential to competing FBOs. These different lease terms included differing lease rates, no requirement to pay a security deposit, and exemptions allowed for fuel flowage fees. [FAA Appeal Exhibit 1, Item 1, pages 4 and 5]

In March of 2000, the Complainant brought these issues, and others, forward in a formal complaint to the FAA. [FAA Appeal Exhibit 1, Item 6]

Aerodynamics in its formal complaint against the Respondent, docketed March 7, 2000, alleged that the Authority engaged in unjust economic discrimination among its FBOs and established a fee and rental structure that resulted in a substantial surplus not required for the operation of the airport nor reinvested in the airport. [FAA Appeal Exhibit 1, Item 6, page 3 and Item 1, page 2] Docket Number 16-00-03 was assigned to this complaint. [DD, FAA Exhibit 1, page 3, Item 7]

On May 11, 2000, the Respondent's answer to the Complainant's allegations was docketed. [DD, FAA Exhibit 1, page 2, Item 4]

On October 31, 2000, the Director of the FAA Office of Airport Safety and Standards issued a Notice of Extension of Time for the initial determination to ensure adequate time for a fair and complete hearing on this matter. [DD, FAA Exhibit 1, page 3, Item 10]

On December 22, 2000, the Director of the FAA Office of Airport Safety and Standards determined in a Director's Determination that the Authority was not in violation of its Federal obligations regarding unjust economic discrimination or airport fee and rental structure. [FAA Appeal Exhibit 1, Item 1]

On January 22, 2001, the Complainant filed an appeal of the Director's Determination to the FAA Associate Administrator for Airports. The Complainant argues on appeal that the Director made substantive errors in interpreting the evidence and making conclusions from the evidence. Specifically, the Complainant reasserts that differences in lease terms among the FBOs constitute unjust economic discrimination, and asserts that the Authority did not follow fair rental values in determining the rent for Aerodynamics. The Complainant also alleges the Director made procedural errors in conducting the investigation and weighing the facts presented. Specifically, Complainant objects to having the burden of proof in substantiating the allegations of unjust economic discrimination; asserts that it was placed in an unfair position holding it responsible for ensuring Federal grant assurances were honored, objects to FAA's acceptance of facts presented, objects to FAA's handling of the fuel flowage exemption, and asserts that the FAA could alter the contractual terms of the lease. [FAA Appeal Exhibit 1, Item 2]

On February 12, 2001, the Respondent filed a reply to the Complainant's Notice of Appeal of the Director's Determination. [FAA Appeal Exhibit 1, Item 3]

V. APPLICABLE LAW AND POLICY

The following is a discussion pertaining to the FAA's enforcement responsibilities; the FAA compliance program; statutes, sponsor assurances, and relevant policies; and the appeal process.

A. FAA Enforcement Responsibilities

The Federal Aviation Act of 1958, as amended, 49 U.S.C. Section 40101, et seq., assigns the FAA Administrator broad responsibilities for the regulation of air commerce in the interests of safety, security, and development of civil aeronautics. Various legislative actions augment the Federal role in encouraging and developing civil aviation. These actions 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, 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 reasonable access to the airport. Pursuant to 49 U.S.C. § 47122, the FAA has a statutory mandate to ensure that airport owners comply with their sponsor assurances.

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. Sponsor obligations are the basis for the FAA's airport compliance effort. 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 5190.6A 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. It

provides basic guidance for FAA personnel in interpreting and administering the various continuing commitments airport owners make to the United States 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 application of the assurances in the operation of public-use airports and facilitates interpretation of the assurances by FAA personnel.

C. Statutes, Sponsor Assurances, and Relevant Policies

As a condition precedent to providing airport development assistance under the Airport and Airway Improvement Act of 1982 (AAIA), the Secretary of Transportation receives certain assurances from the airport sponsor.

The AAIA, 49 U.S.C. § 47107(a), et seq., 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, 49 U.S.C. 47107(g)(1) and (i) as amended by Pub. L. No. 103-305 (August 23, 1994) authorizes the Secretary to prescribe project sponsorship requirements to ensure compliance with Sections 511(a), 49 U.S.C. 47107(a)(1)(2)(3)(5)(6) as amended by Pub. L. No. 103-305 (August 23, 1994). These sponsorship requirements are included in every AIP agreement as set forth in FAA Order 5100.38A, Airport Improvement Program Handbook, issued October 24, 1989, Ch. 15, "Sponsor Assurances and Certification" Sec. 1. Assurances-Airport Sponsors. Upon acceptance of an AIP grant by an airport sponsor, the assurances become a binding contractual obligation between the airport sponsor and the Federal government.

1. Use of Airport, and Not Unjustly Discriminatory Terms

Assurance 22, "Economic Nondiscrimination," of the prescribed sponsor assurances implements the provisions of 49 U.S.C. 47107(a)(1) through (6), and requires, in pertinent part, that the sponsor of a federally obligated airport

> will make its airport available for public use on reasonable terms, and without unjust discrimination, to all types, kinds, and classes of aeronautical activities. Assurance 22(a)
>
> may establish such reasonable, 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 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 is necessary to serve the civil aviation needs of the public. Assurance 22(i)

Subsection (h) qualifies subsection (a); subsection (i) represents an exception to subsection (a). The intent is to permit the sponsor sufficient control over the airport to

preclude unsafe and inefficient conditions, which would be detrimental to the civil aviation needs of the public.

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 reasonable terms without unjust discrimination. [See FAA Order 5190.6A, 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 FAA Order 5190.6A, 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 FAA Order 5190.6A, Sec. 4-13(a)]

2. Exclusive Rights

Title 49 U.S.C. §40103(e) provides, in relevant part, that "[a] person does not have an exclusive right to use an air navigation facility on which Government money has been expended." In accordance with 49 U.S.C. §40102(a)(4), (9), (28), an "air navigation facility" includes an "airport."

49 U.S.C. §47107(a)(4) similarly provides, in pertinent part, that "a person providing, or intending to provide, aeronautical services to the public will not be given an exclusive right to use the airport..."

Assurance 23, "Exclusive Rights," of the prescribed sponsor assurances implements the provisions of 49 U.S.C. §§40103(e) and 47107(a)(4), and 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, or intending to provide, aeronautical services to the public." The sponsor further agrees that it "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 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. 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 F.22 1529 (11th Cir, 1985)]

FAA Order 5190.6A provides additional 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]

3. Fee and Rental Structure

Assurance 24, "Fee and Rental Structure," of the prescribed sponsor assurances satisfies the requirements of 49 U.S.C. 47107(a)(13). It provides, in pertinent part, that the sponsor of a federally obligated airport "agrees that it will maintain a fee and rental structure consistent with Assurance 22 and 23, for the facilities and services being provided the airport users, which will make the airport as self-sustaining as possible under the circumstances existing at the particular airport."

FAA Order 5190.6A describes the responsibilities under Assurance 22, Economic Nondiscrimination, and Assurance 23, Exclusive Rights, 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 and without granting an exclusive right of use. [See FAA Order 5190.6A, Secs. 4-14(a)(2) and 3-1]

The obligation of airport management to make an airport available for public use does not preclude the owner from recovering the cost of providing the facility through fair and reasonable fees, rentals or other user charges which will make the airport as self-sustaining as possible under the circumstances existing at the particular airport. [See FAA Order 5190.6A, Sec. 4-14(a)]

Each commercial aeronautical activity at any airport shall be subject to the same rates, fees, rental and other charges as are uniformly applied to all other commercial aeronautical activities making the same or similar uses of such airport using the same or similar facilities. [See FAA Order 5190.6A, Sec. 4-14(a)(2)]

FAA policy provides that, at general aviation airports, variations in commercial aeronautical activities' leasehold locations, leasehold improvements, and the services provided from such leaseholds may be the basis for acceptable differences in rental rates, although the rates must be reasonable and equitable. [See FAA Order 5190.6A, Sec. 4-14(d)(2)(c)]

However, if the FAA determines that commercial aeronautical activities at an airport are making the same uses of identical airport facilities, then leases and contracts entered into by an airport owner subsequent to July 1, 1975, pursuant to the Airport and Airway Development Act of 1970, as amended, shall be subject to the same rates, fees, rentals and other charges. [See FAA Order 5190.6A, Sec. 4-14(d)(2)(d)]

FAA policy further provides that all leases with terms exceeding five years should provide for periodic review and adjustment of the rates and charges based on an acceptable index. This periodic lease review is expected to facilitate parity of rates and charges between new commercial aeronautical tenants and long-standing tenants making the same or similar use of airport facilities and to assist in making the airport as self-sustaining as possible under the circumstances existing at the airport. [See FAA Order 5190.6A, Sec. 4-14(d)(2)(f)]

D. The Complaint and Appeal Process

1. Right to File the Formal Complaint

Pursuant to 14 CFR, Part 16, §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, Part 16, §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, Part 16, §16.29]

The proponent of a motion, request, or order has the burden of proof. A party who has asserted an affirmative defense has the burden of proving the affirmative defense. This standard burden of proof is consistent with the Administrative Procedure Act (APA) and Federal case law. The APA provision states, "[e]xcept as otherwise provided by statute, the proponent of a rule or order has the burden of proof." 5 U.S.C. §556(d). See also, Director, Office of Worker's Compensation Programs, Department of Labor v. Greenwich Collieries, 512 US 267, 272 (1994); Air Canada et al. v. Department of Transportation, 148 F3d 1142, 1155 (DC Cir, 1998). 14 CFR §16.229(b) is consistent with 14 CFR §16.23, which requires that the complainant must submit all documents then available to support his or her complaint. Similarly, 14 CFR §16.29 states that "[e]ach party shall file documents that it considers sufficient to present all relevant facts and argument necessary for the FAA to determine whether the sponsor is in compliance."

2. Right to Appeal 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. If no appeal is filed within the time period specified, the Director's

Determination becomes the final decision and order of the FAA without further action. A Director's Determination that becomes final because there is no administrative appeal is not judicially reviewable. [14 CFR, Part 16, §16.33]

Part 16 requires all relevant facts to be presented in the complaint documents. [14 CFR, Part 16, §16.23(b)(3)] New allegations or issues should not be presented on appeal. 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. Under Part 16 complainants are required to provide with the complaint and reply all supporting documentation upon which it relied to substantiate its claims. Failure to raise all 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. This is consistent with the Supreme Court's recognition that courts may require administrative issue exhaustion as a general rule because it is usually appropriate under an [administrative] agency's practice for contestants in an adversary proceeding before it to develop fully all issues there. The Court concluded that where parties are expected to develop the issues in an adversarial administrative proceeding, the rationale for requiring issue exhaustion is at its greatest. See Sims v. Apfel, 530 US 103, 108-110 (2000) citing Hormel v. Helvering, 312 US 552 (1941) and US v. LA Tucker Truck Lines, 344 US 33, (1952).

3. FAA's Responsibility with Regard to an Appeal

Pursuant to 14 CFR, Part 16, §16.33, 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 each such case, it is the Associate Administrator's responsibility to determine whether (1) the findings of fact made by the Director are supported by a preponderance of reliable, probative, and substantial evidence, and (2) each conclusion of law is made in accordance with applicable law, precedent, and public policy. [See e.g. Ricks v Millington Municipal Airport, FAA Docket No. 16-98-19, p.21 (12/30/99) and 14 CFR, Part 16, §16.227]

VI. ANALYSIS AND DISCUSSION

Upon consideration of the complaint from Aerodynamics of Reading, Inc., filed with the FAA and docketed on March 27, 2000, the Director of the Office of Airport Safety and Standards determined that the Reading Regional Airport Authority is not currently in violation of its obligations regarding economic nondiscrimination under 47107(a)(1) and (5) and related grant assurance 22 regarding the issues argued in the complaint. Additionally, the Director found that the Reading Regional Airport Authority is not currently in violation of its obligations regarding airport fee and rental structure under 47107(a)(13)(A) and related grant assurance 24 regarding the issues alleged in the complaint. [FAA Appeal Exhibit 1, Item 1, page 23]

On appeal, the Complainant reiterates its contention that the Respondent violated grant assurance 22 regarding economic nondiscrimination and grant assurance 24 regarding airport fee and rental structure. The Complainant alleges the Director made substantive errors in interpreting the evidence and making conclusions from the evidence. The Complainant also alleges the Director made procedural errors in conducting the investigation and weighing the facts presented. The Complainant alleges that these errors caused the FAA to erroneously dismiss the complaint. In its appeal, Aerodynamics of Reading, Inc. presents ten points to support its position. Among the ten points is one new issue raised for the first time on appeal. [FAA Appeal Exhibit 1, Item 2]

A. Substantive Errors

The Complainant alleges that the Director made substantive errors in interpreting the evidence and making conclusions from the evidence. Specifically, the Complainant remains firm in asserting that differences in lease terms constitute unjust economic discrimination in violation of grant assurance 22. In addition, the Complainant asserts that the Authority did not follow fair rental values established in the appraisal. [FAA Appeal Exhibit 1, Item 2]

1. Differences in Lease Terms

In its Notice of Appeal, the Complainant stated,

> *The substantial, proven differences in lease terms, conditions and rates, specifically including rent and security deposit, between Aerodynamics and its FBO competitors, as established by the Authority, constitute unjust economic discrimination.* [FAA Appeal Exhibit 1, Item 2, #1]

The Associate Administrator is not persuaded that the differences in lease terms, specifically the rental rate and the security deposit requirement, between Aerodynamics and its FBO competitors, constitute unjust economic discrimination.

The prohibition against unjust economic discrimination does not prevent a sponsor from accepting different lease terms as a result of entering into leases in differing time frames. Specifically the sponsor is permitted to pursue agreements that more nearly serve the interests of the public with the more recent leaseholders. The Complainant compares lease terms entered into in July 1991 with lease terms entered into in 1978, 1983, and 1986. [FAA Appeal Exhibit 1, Item 1, pages 5-6] The FAA does not require a sponsor to maintain equal lease rates over time between competing FBOs. In addition, the sponsor does not have an obligation to equalize the terms of use among these different leases. [FAA Appeal Exhibit 1, Item 1, pages 16 and 19]

Further, two operators may not be considered essentially similar as to rates and charges even though they offer the same services to the public. For example, differences in lease terms are permitted where there is a difference in space, location, or facilities. [FAA

Order 5190.6A, Chapter 4, Sec. 4-14d(2)(a, b)] Both Complainant and Respondent have documented differences in space, location, and facilities between Aerodynamics and its competing FBOs. [FAA Appeal Exhibit 1, Item 6, page 9, #58, #59 and Item 7, page 11, #58]

In the Director's Determination, the FAA noted that the Complainant and Respondent negotiated the terms of the lease. In his affidavit, the Executive Director of the Authority stated that the Complainant's lease was negotiated at arm's length, and its terms and conditions were substantially similar to those the Complainant sought from the outset of the negotiations. In its Reply, the Complainant did not specifically challenge the Executive Director's conclusion. [FAA Appeal Exhibit 1, Item 1, page 19]

The purpose of the grant assurances is to protect the public interest in the operation of federally obligated airports. The purpose is not to provide alternative or supplemental rights to those normally available to commercial tenants in disputes with their landlords, i.e. negotiation or commercial litigation under applicable state and local laws. The FAA does not consider that Congress intended grant assurances and the FAA compliance process to provide a device by which a commercial aeronautical tenant can abrogate an otherwise valid commercial lease with a sponsor because the operations under the lease are less profitable than the tenant anticipated. [FAA Appeal Exhibit 1, Item 1 page 17]

In a separate matter, Aerodynamics alleged in its initial complaint that the Authority awarded a lease for an available hangar to a competing FBO without providing any other FBO the opportunity to bid on that hangar. [FAA Appeal Exhibit 1, Item 6, page 9, #65] This allegation could be construed as a violation of grant assurance 23. Grant assurance 23 covering exclusive rights states, in pertinent part, that the sponsor of a federally obligated airport will not permit the exclusive right for the use of the airport by any person providing, or intending to provide, aeronautical services to the public. When an airport owner grants special privileges or rights to one airport user, it places a significant burden on the other airport users and results in the airport sponsor granting a constructive exclusive right to the airport user receiving the benefits.

In his determination, the Director considered whether the Respondent, by allegedly engaging in discriminatory bidding for available hangars and awarding hangars without notice or opportunity to airport users was in violation of grant assurances. [FAA Appeal Exhibit 1, Item 1, page 22] Under the original lease agreement with the leaseholder of the subject hangar, the leaseholder retained the right to assign its lease, and Authority consent could not be unreasonably denied. [FAA Appeal Exhibit 1, Item 1, page 22] The Authority stated that Aerodynamics twice obtained sites without competitive bidding by purchasing existing leases in private transactions. [FAA Appeal Exhibit 1, Item 7, Affidavit #30] The Complainant did not dispute this statement in its reply. [FAA Appeal Exhibit 1, Item 8] Moreover, the Director concluded, and the Associate Administrator concurs, that there was no basis for the charge that the Authority practiced discriminatory bidding.

Further, the Complainant stated,

> *The Determination, while correctly observing that "none of the other FBO leases require a security deposit," then incorrectly concludes that there was "no unjust economic discrimination."* [FAA Appeal Exhibit 1, Item 2, #2]

The Associate Administrator is not persuaded the security deposit constitutes an unjust economic discrimination.

In order to establish a claim of unjust economic discrimination, the Complainant must establish that it requested similar terms and conditions as other similarly situated airport users and was denied for reasons that were unjustly discriminatory. [FAA Appeal Exhibit 1, Item 1, page 19] In addition, to prevail in a claim of unjust economic discrimination, the Complainant must demonstrate that it was "directly and substantially affected" by the alleged noncompliance. [14 CFR, Part 16, §16.23(b)(4)]

Complainant did not assert that it requested and was denied a waiver of a security deposit [FAA Appeal Exhibit 1, Item 1, page 19], nor did Complainant provide evidence to suggest the requirement of a security deposit directly and substantially affected its operations. [FAA Appeal Exhibit 1, Item 6, page 5, #24 and pages 11 and 12, #90-92] The amount of the security deposit was equal to slightly less than the first and last months' rent. [DD, FAA Exhibit 1, Item 3(c), "exhibit D"] In addition, Aerodynamics had been operating for nine years under the terms of the lease that included the security deposit prior to bringing the complaint forward.

In its reply to the appeal, the Respondent states that the Authority has a revised policy requiring security deposits in new leases. The Authority further states that this revised policy is now uniformly applied. [FAA Appeal Exhibit 1, Item 3, page 2, #2]

For these reasons, the Associate Administrator is not persuaded that the negotiated rental rates and the agreed-upon security deposit constitute unjust economic discrimination.

2. Fair Rental Values Established in Appraisal

In its appeal, Complainant states,

> *The Determination fails to observe that the Authority did not in fact follow the fair rental values established in its own Appraisals in determining the rent for Aerodynamics.* [FAA Appeal Exhibit 1, Item 2, #7]

This appears to be a reversal of the position taken by the Complainant in earlier documents, in which Aerodynamics stated the appraisal "addressed only the 'Fair Market Value' of the property, not the fair rental value." [FAA Appeal Exhibit 1, Item 8, #4] In its appeal, Aerodynamics does not specify the manner in which the Authority did not follow the fair rental values established in the appraisal in determining the rent for Aerodynamics. [FAA Appeal Exhibit 1, Item 2, #7] In addition, we did not find the

appraisal included fair rental values stated as such. Rather, we found the appraisal provided average hangar rental rates for comparable FBOs around the country [DD, FAA Exhibit 1, Item 4(a), pages 83-88] and a fair market value based on the income approach. [DD, FAA Exhibit 1, Item 4(a), page 105] The Authority stated that it used the appraised value to implement its policy of establishing fair rental value at 10-12% of fair market value. [FAA Appeal Exhibit 1, Item 9, #4]

The Complainant's line of argument in previous documents was focused on the comparison of rental payments between Aerodynamics and competing FBOs. [FAA Appeal Exhibit 1, Item 8, #27] That issue was addressed in item 1 above discussing differences in lease terms. The Complainant has not previously argued that rental value was not based on the appraisal or that the appraised value was not used in negotiating the rental value. This appears to be a new issue brought up for the first time on appeal. No new issues should be presented on appeal. Part 16 requires all relevant facts to be presented in the complaint documents. [See Sims v. Apfel, supra. and14 CFR, Part 16, §16.23(b)(3)] The FAA may, under 14 CFR §16.29(b)(1), rely entirely on the complaint and responsive pleadings provided by the parties in reaching its initial determination. Pursuant to 14 CFR §16.23(b)(2), Complainant was required to submit all of its pleadings and other documentation in support of its case so that in rendering the Director's Determination, the FAA would have the entire record before it. [See Section V. Applicable Law and Policy subsection D (2) Right to Appeal the Director's Determination, above.]

Accordingly, the Director could not have erred in failing to address an issue that was not raised or argued in the initial complaint, and the Associate Administrator will not consider this issue on appeal.

However, during the review proceedings for the appeal, the FAA became aware of certain discrepancies among documents presented during the initial complaint process. Specifically, the Authority stated that valuation reports prepared in connection with the negotiation of the Aerodynamics lease established a fair market value for the leased sites of $630,000 [FAA Appeal Exhibit 1, Item 7, #13], while the accompanying valuation reports did not substantiate this figure. [DD, FAA Exhibit 1, Items 4(a) and 4(b)] In addition, the amount of land, and the value attributed to the land, was assessed at different levels in the September 21, 1990, valuation report [DD, FAA Exhibit 1, Item 4(a), page 69] and in the April 2, 1991, appraisal letter. [DD, FAA Exhibit 1, Item 4(b)][2]

Even though there were discrepancies in the documents presented, having knowledge of these discrepancies would not have altered the correctness of the Director's Determination. In the Director's Determination, the FAA noted that the Complainant and Respondent negotiated the terms of the lease. In his affidavit, the Executive Director of

[2] Upon discovery of these discrepancies, the FAA requested additional documentation from the Respondent for review. The additional information provided to the FAA is part of the Administrative Record and is referenced in the Index to the Administrative Record as Item 10.

the Authority stated that the Complainant's lease was negotiated at arm's length, and its terms and conditions were substantially similar to those the Complainant sought from the outset of the negotiations. In its Reply, the Complainant did not specifically challenge the Executive Director's conclusion. [FAA Appeal Exhibit, Item 1, page 19] The FAA will not entertain a complaint about the reasonableness of a fee set by agreement when the complaint is filed by one of the parties setting the disputed fee. [Policy Regarding Airport Rates and Charges, 61 Fed. Reg. 31994, 30018 (June 21, 1996)][3]

Conclusion regarding Substantive Errors:
Based on the discussion of the three points covered in items 1 and 2 above, the Associate Administrator is not persuaded the Director made substantive errors in interpreting the evidence and making conclusions from the evidence.

B. Procedural Errors

On appeal, the Complainant alleges the Director made procedural errors in conducting the investigation and weighing the facts presented. Specifically, Complainant objects to having the burden of proof in substantiating the allegations of unjust economic discrimination; asserts that it was placed in an unfair position holding it responsible for ensuring Federal grant assurances were honored, objects to FAA's acceptance of facts presented, objects to FAA's handling of the fuel flowage exemption, and asserts that the FAA could alter the contractual terms of the lease. [FAA Appeal Exhibit 1, Item 2]

1. Burden of Proof

In its appeal, the Complainant states,

> *The Determination erroneously requires Aerodynamics to prove a negative, i.e. that it requested waivers of the discrimination, which were then denied by the Authority.* [FAA Appeal Exhibit 1, Item 2, #9]

The Complainant has not demonstrated how the Director erred in finding that Aerodynamics must establish that it requested terms and conditions similar to other similarly situated airport users and was denied for reasons that were unjustly discriminatory. Moreover, the Complainant has not provided sufficient evidence needed to meet the burden to show that the Authority violated its commitments to the Federal government as required under Part 16.

A basic requirement of Part 16 is that a complainant show with evidence that the sponsor is violating its commitments to the Federal government to serve the interests of the public by failing to adhere to its grant assurances. [14 CFR, Part 16, §16.23(b)(3, 4)] As explained in the Preamble to the Notice of Proposed Rulemaking (NPRM), 14 CFR Part

[3] Sections of the policy not applicable herein were vacated and remanded by the United States Court of Appeals for the District of Columbia in Air Transport Association of America v. Dept. of Transportation, 119 F.3d 38 (D.C. 1997), as modified on Rehearing, Order of October 15, 1997.)

16, the rule, "[c]learly establish the burden that each party must carry to make its case...In addition, it (§16.23) would shift to the complainant and the respondent the burden of providing all available supporting documents on which they rely and serving them upon all parties..." 59 Fed. Reg. 29880, 29882-29883 (June 9, 1994).

Aerodynamics alleged in its initial complaint that the Authority was in violation of Federal grant assurance 22 regarding unjust economic discrimination as a result of having differing lease terms and conditions for various FBOs. [FAA Appeal Exhibit 1, Item 6, page 3] However, differing lease terms, alone, does not constitute evidence of unjust economic discrimination. Likewise, differing lease terms, in and of themselves, are not evidence that the differences resulted from reasons that were unjustly discriminatory. [FAA Order 5190.6A, Chapter 4, Sec. 4-14d(2)(a, b)] As required by Part 16, the proponent of a motion, request, or order – in this case, the Complainant – has the burden of proof. [See Section V Applicable Law and Policy, Subsection D (1) Right to File the Formal Complaint, above and 14 CFR, Part 16, §16.229(b)] A complainant, as initiator of an action, becomes the proponent of an order from the FAA when he or she files the Part 16 complaint. Similarly, a complainant would become the proponent of an order when he or she files an appeal to the Director's Determination seeking final agency action. Therefore, it was incumbent upon the Complainant to prove its allegations of unjust discrimination by providing evidence that similar terms and conditions were requested and were subsequently denied without adequate justification.

The Complainant failed to meet this burden of proof. On the contrary, evidence provided by the Authority indicates the Complainant's lease was negotiated at arm's length, and its terms and conditions were substantially similar to those that Complainant sought from the outset of the negotiations. In its Reply, the Complainant did not specifically challenge this statement. The Complainant agreed to the terms and conditions in the lease. There is no indication that the Complainant objected to the terms and was denied an opportunity to continue negotiations, nor is there any indication that the terms and conditions were unjustly discriminatory. [FAA Appeal Exhibit 1, Item 1, page 19]

In addition, the Associate Administrator is not convinced that the Director's Determination required Aerodynamics to *prove* it requested waivers, which were then denied. For example, in the case of the security deposit, the Director noted that the Complainant *did not assert* that it requested and was denied a waiver of the security deposit. Rather, the Complainant negotiated the terms and conditions of the lease, including the security deposit, and agreed to those terms and conditions. [FAA Appeal Exhibit 1, Item 1, page 19] At any rate, requesting a waiver requires a positive action; providing evidence to support that action is not unreasonable.

2. Responsibility for Ensuring Federal Grant Assurances were Honored

In its appeal, Complainant stated,

> *Under the theory of "due diligence", the Determination attempts to shift the burden of nondiscrimination to the FBO, rather than the Airport, in*

contravention of Federal Law and the Federal grant assurance 22(a, c) and 24 made by the Airport Authority (not the FBO), erroneously holding that it was incumbent upon Aerodynamics to request terms and conditions similar to other FBOs, rather than upon the Authority to offer similar, nondiscriminatory terms and conditions. [FAA Appeal Exhibit 1, Item 2, #3]

As explained above, the Associate Administrator disagrees that the Director shifted the burden of nondiscrimination from the Authority to the FBO. Further, the Associate Administrator is not persuaded the Director acted erroneously in holding that it was incumbent on the FBO, as the Complainant in this case, to provide sufficient competent evidence to demonstrate that those assurances were violated. As the proponent of the motion, the Complainant has the burden of proof.

Complainant cites parts (a) and (c) of Federal grant assurance 22, economic nondiscrimination, which state:

> (a) It will make the 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.
>
> (c) Each fixed-base operator at the airport 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.

Complainant has not demonstrated that the Authority failed to make the airport available to it on reasonable terms and without unjust discrimination. Although the Complainant alleges economic discrimination as a result of differing lease terms, the FAA is not persuaded that the differences in lease terms cited constitute unjust discrimination. [See FAA Order 5190.6A, Chapter 4, Sec. 4-14d(2)(a, b)] The Complainant's lease terms were negotiated at arm's length. [FAA Appeal Exhibit 1, Item 1, page 19] In addition, Aerodynamics had the ability and opportunity to review the terms of existing FBO leases prior to executing its lease. [FAA Appeal Exhibit 1, Item 7, #4] The Director correctly held that the Authority is not required to offer lease rates and terms that are identical to other leases negotiated at different points in time, so long as there is no unjust discrimination. [FAA Order 5190.6A, Chapter 4, Sec. 4-14d(2)(a, b)]

In addition, the FAA does not require a sponsor to maintain equal lease rates over time between competing FBOs. Further, two operators may not be considered essentially similar as to rates and charges even though they offer the same services to the public. For example, differences in lease terms are permitted where there is a difference in space, location, or facilities. [FAA Order 5190.6A, Chapter 4, Sec. 4-14d(2)(a, b)] Both Complainant and Respondent have documented differences in space, location, and facilities between Aerodynamics and its competing FBOs. [FAA Appeal Exhibit 1, Item 6, page 9, #58, #59 and Item 7, page 11, #58]

In addition, Complainant cites Federal grant assurance 24, airport fee and rental structure, which states:

> It will maintain a fee and rental structure for the facilities and services at the airport which 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. No part of the Federal share of an airport development, airport planning or noise compatibility project for which a grant is made under Title 49, United States Code, the Airport and Airway Improvement Act of 1982, the Federal Airport Act or the Airport and Airway Development Act of 1970 shall be included in the rate basis in establishing fees, rates, and charges for uses of that airport.

Complainant has not demonstrated that the Authority was in violation of Federal grant assurance 24. In its initial complaint, Complainant alleged the Authority was in violation by charging rents over and above those required to make the airport self-sustaining, substantiating those allegation with figures reported in the Operating and Financial Summaries. [FAA Appeal Exhibit 1, Item 6, page 3] In its answer to the initial complaint, the Authority provided evidence documenting that the surplus reported in the Operating and Financial Summaries for 1998 and 1999 was necessary to cover long-term debt and restricted uses as well as providing a reserve for contingencies. [FAA Appeal Exhibit 1, Item 7, page 13-14, #74] Upon review of the facts presented, the Director determined, and the Associate Administrator agrees, that the reserve for contingencies is reasonable and does not constitute a violation of Federal grant assurance 24.

The Associate Administrator affirms that the Authority remains responsible for adhering to the applicable Federal grant assurances. The Complainant has not demonstrated that the Authority was in violation of Federal grant assurances 22 and 24.

Further, the Complainant states,

> *The Determination erroneously concludes that because Aerodynamics (as a brand-new FBO) did not cure or prevent the discrimination against it by the Airport Authority, the Authority's actions are somehow rendered legitimate, despite the unjust economic discrimination which resulted.* [FAA Appeal Exhibit 1, Item 2, #4]

The Director found the claim of unjust economic discrimination was not supported by the facts presented by the Complainant in this case. The Associate Administrator is not persuaded the Director erred in making this determination.

The Authority is responsible for adhering to the Federal grant assurances. The FAA has a statutory mandate to ensure that airport owners comply with these sponsor assurances. When an allegation of noncompliance is brought forward to the FAA, the Airport

Compliance Division reviews all relevant facts presented by both a complainant and a respondent and makes a determination based on those facts. The proponent of the motion has the burden of proof. As the Complainant in this case, it was incumbent upon Aerodynamics to provide sufficient competent evidence to demonstrate that the Authority violated grant assurance 22 regarding unjust economic discrimination. The evidence presented did not persuade the Director or the Associate Administrator that the Authority violated grant assurance 22 regarding unjust economic discrimination.

The purpose of the grant assurances is to protect the public interest in the operation of federally obligated airports. The purpose is not to provide alternative or supplemental rights to those normally available to commercial tenants in disputes with their landlords, i.e. negotiation or commercial litigation under applicable state and local laws. The FAA does not consider that Congress intended grant assurances and the FAA compliance process to provide a device by which a commercial aeronautical tenant could abrogate an otherwise valid commercial lease with a sponsor because the operations under the lease were less profitable than the tenant anticipated. [FAA Appeal Exhibit 1, Item 1 page 17]

Aerodynamics had a responsibility and an obligation to perform the necessary due diligence to determine the financial viability of its FBO operation before the lease was signed. The Authority contends, and the Complainant does not dispute, that the lease in this case was negotiated at arm's length, and its terms and conditions were substantially similar to those the Complainant sought from the outset of the negotiations. [FAA Appeal Exhibit 1, Item 1 page 19]

3. FAA's Acceptance of Facts Presented

In its appeal, Complainant stated,

> *The Determination erroneously accepts the Authority's explanation that since Aerodynamics proposed $274,000 of improvements during lease negotiations, and erroneously concludes that the Authority was therefore justified in NOT taking that fact into consideration while setting Aerodynamics' rent HIGHER than other FBOs who had not made such improvements at their expense.* [FAA Appeal Exhibit 1, Item 2, #5]

Aerodynamics has not demonstrated how the Director erred in accepting the evidence provided by both parties in this case. Nor has Aerodynamics demonstrated how the Director erred by not requiring the Authority to make specific adjustments to the lease based on proposed improvements. Aerodynamics has not provided evidence to support its allegation that the Authority did not, in fact, give consideration to these proposed improvements in negotiating the terms of the lease.

Accepting evidence provided: In rendering its initial determination, the FAA may rely entirely on the complaint and the responsive pleadings provided. Each party must file the documents that it considers sufficient to present all relevant facts and arguments necessary for the FAA to determine whether the sponsor is in compliance. The intent is

that the FAA will be able to decide the merits of the case by looking at the record solely. [14 CFR, Part 16, §16.29(b)(1)]

The Authority contends that during the course of the negotiations, the Complainant proposed to make $274,000 in leasehold improvements. As an addendum to its 1991 lease, the Complainant agreed to make these leasehold improvements at its own expense without Federal reimbursement. According to the Respondent, it did not demand or require any improvements to the property. The Authority further stated that the improvements were not eligible for Federal grant assistance because the premises were utilized exclusively by a single FBO. The Complainant offered no evidence to rebut the Authority's explanation. [FAA Appeal Exhibit 1, Item 1, pages 4, 20]

Requiring specific adjustments: In the Director's Determination, the FAA noted that the Complainant and Respondent negotiated the terms of the lease. In his affidavit, the Executive Director of the Authority stated that the Complainant's lease was negotiated at arm's length, and its terms and conditions were substantially similar to those the Complainant sought from the outset of the negotiations. In its Reply, the Complainant did not specifically challenge the Executive Director's conclusion. [FAA Appeal Exhibit 1, Item 1, page 19] The FAA is not normally involved with the establishment of rates and fees to be paid by a tenant or concessionaire to an airport owner. [FAA Order 5190.6A, Chapter 4, Sec. 4-14a(4)] In addition, the FAA will not entertain a complaint about the reasonableness of a fee set by agreement when the complaint is filed by one of the parties setting the disputed fee. [Policy Regarding Rates and Charges, 61 Fed. Reg. 31994, 32018 (June 21, 1996), see also Footnote 3 on page 15.]

Consideration in negotiating terms: Complainant has offered no evidence substantiating its contention that the Authority did not, in fact, take the leasehold improvements into consideration while negotiating its rent agreement. On the contrary, the Authority reported that it agreed to an escalating rent schedule, allowing Aerodynamics to make lower payments in the earlier years, specifically to afford Aerodynamics sufficient cash flow to finance the improvements. [FAA Appeal Exhibit 1, Item 7, #23]

Further, the Complainant states,

> *The Determination accepts the Authority's explanation of its large surplus without investigating or auditing the Authority's past and current practices, and without determining the actual future need for the surplus.* [FAA Appeal Exhibit 1, Item 2, #10]

The Associate Administrator is not persuaded that the Director's review was insufficient to render an appropriate decision regarding the Authority's surplus.

The basis for rates and charges is usually related to costs incurred by the airport owner. Rarely can it be established that an actual or proposed rate is so high that it would recover to the owner an amount unreasonable and in excess of costs. [FAA Order 5190.6A, Chapter 4, Sec. 4-14a (5)]

The Respondent provided evidence to demonstrate that as of 1999, the airport maintained an unrestricted cash balance of $462,000. Of this amount, $362,000 was considered to be a reserve account to protect itself against financial contingencies and future development. [FAA Appeal Exhibit 1, Item 7, Affidavit #33] The Respondent provided evidence to demonstrate that as of 1998, the airport had an unrestricted cash balance of $390,750. Of this amount, $280,000 was considered to be a reserve account to protect itself against financial contingencies and future development. [FAA Appeal Exhibit 1, Item 7, Affidavit #34] Based on the record of evidence, the FAA determined that the reserves maintained by the sponsor were within the bounds of reasonableness in the context of the airport's financial contingencies, debt service, and future development. [FAA Appeal Exhibit 1, Item 1, page 22] The Associate Administrator concurs with this determination.

4. FAA's Handling of Fuel Flowage Exemption

In its appeal, the Complainant states,

> *The Determination erroneously labels the flowage-exemption granted to other FBOs (but not to Aerodynamics) as de minimis, and dismisses it in a footnote, since the flowage amounted to only $39,871 in one of the almost 10 years under the lease.* [FAA Appeal Exhibit 1, Item 2, #8]

The Associate Administrator is not persuaded that the fuel flowage exemption was given inadequate consideration. In its Director's Determination on this matter, the FAA stated that the fuel flowage fee exemption enjoyed by FBOs executing leases prior to January 1991 appears to be *de minimis*. While the use of the term "de minimis" is subjective, it is sufficiently supported by the facts in this case. The fuel flowage fees collected by the Respondent from *all* sources, not just Aerodynamics, totaled $39,871 in fiscal year 1999. In addition, the fuel flowage exemption was limited to that fuel used in aircraft that the FBO owns or leases. All FBOs must pay the fuel flowage fee for fuel sales to third party aircraft owners and operators. Furthermore, while details of the fuel flowage exemption were relegated to a footnote in the Director's Determination, the Associate Administrator finds the issue was fully analyzed and discussed. [FAA Appeal Exhibit 1, Item 1 page 21]

In its initial complaint, Aerodynamics argued that it suffered from unjust economic discrimination because Aerodynamics was not exempt from paying fuel flowage fees while other FBOs were exempt. In reviewing this issue, the FAA explored the differences in lease agreements among the various FBOs with regard to the fuel flowage exemption. The Director's Determination reported (1) there was sufficient justification for dissimilar lease terms regarding the fuel flowage exemption, (2) the policy regarding the fuel flowage exemption was applied equally to all FBOs in similar circumstances, and (3) the economic burden to Aerodynamics was not quantified or substantiated. [FAA Appeal Exhibit 1, Item 1 page 21]

Justification for dissimilar lease terms: The justification for dissimilar lease terms with regard to the fuel flowage exemption was documented in a written policy change,

adopted in January 1991 by the Authority. Prior to January 1991, the Authority's policy was to exempt FBOs from the fuel flowage fee with respect to aircraft owned or leased by the FBO. In January 1991, the Authority changed this policy to remove the fuel flowage fee exemption for aircraft owned or leased by the FBO. In implementing the new policy, the Authority agreed that these exemptions would be removed at the time of lease renewal or when new leases were written. [FAA Appeal Exhibit 1, Item 1, page 21]

The FAA recognizes that differences in lease terms may exist between new FBOs and FBOs of long standing as a result of different economic values and circumstances at the time of lease execution. These differences are expected to dissipate over time through a system of periodic lease review and adjustment. FAA Order 5190.6A, Chapter 4, Sec 4-14,d(2)(f) states,

> All leases with a term exceeding 5 years shall provide for periodic review of the rates and charges for the purpose of any adjustments to reflect the then current values, based on an acceptable index. This periodic lease review procedure will facilitate parity of rates and charges between new FBO services coming on the airport and long-standing operators. It will also assist in making the airport as self-sustaining as possible under the circumstances existing at that particular airport.

It is appropriate that the fuel flowage rates and application be adjusted in leases as they are renewed.

Policy applied equally. The FAA found the Authority's policy regarding the fuel flowage exemption was applied equally to all FBOs in similar circumstances. FBOs entering into lease agreements with the Authority prior to January 1991 were given the fuel flowage exemption. FBOs entering into lease agreements with the Authority subsequent to the January 1991 policy change on fuel flowage exemptions were not permitted an exemption. The Respondent asserts, and the Complainant did not refute, that all new leases since the date of the policy change have included the identical provision that there shall be no exemption for fuel used by lessee on aircraft that is owned, leased or used by lessee. There is no evidence to suggest the policy was not applied equally. [FAA Appeal Exhibit 1, Item 7, Affidavit, #24]

Economic burden. The economic burden placed on Aerodynamics as a result of the differences in lease terms regarding the fuel flowage fees was not substantiated. The fuel flowage exemption was limited to that fuel used in aircraft that the FBO owns or leases. All FBOs must pay the fuel flowage fee for fuel sales to third party aircraft owners and operators. At the time of the Director's Determination, there were 102 based aircraft at RDG, most of which were not owned or leased by the FBOs. Therefore, a fuel flowage fee was incurred for most of the aircraft regardless of the fuel flowage exemption. [FAA Appeal Exhibit 1, Item 1, page 21]

The combined total from *all* fuel flowage fees collected by the Respondent for fiscal year 1999 totaled $39,871. [FAA Appeal Exhibit 1, Item 1, page 21] The amount of fuel

flowage fee revenue attributed to the Complainant is not identified by either the Complainant or Respondent. In addition, the amount saved by FBOs covered by the fuel flowage exemption is not identified. Specifically, the comparison would need to identify the fuel flowage fees paid by the Complainant for fuel used on aircraft it owned, leased or used compared with the fuel flowage fees saved by those FBOs enjoying the fuel flowage exemption. Neither Complainant nor Respondent provided those records. [FAA Appeal Exhibit 1, Item 3, page 3, #7]

5. Contractual Terms of the Lease

In its appeal, the Complainant states,

> *The Determination erroneously ignores the language in Aerodynamics' Lease subordinating the contract to Federal Law, the grant assurances made by the Authority, and to FAA Order 5190.6A in concluding that the FAA cannot alter the contractual terms of the Lease.* [FAA Appeal Exhibit 1, Item 2, #6]

The Associate Administrator agrees with the Director that the FAA cannot ordinarily alter the contractual terms of the lease. The lease contract is between the Authority and the FBO.

The FAA is not normally involved with the establishment of rates and fees to be paid by a tenant or concessionaire to an airport owner. In addition, the FAA will not normally question the fairness of rates and charges established by the owner or the comparability of the rates, fees, rentals, and other charges as applied to and among air carriers, FBOs and other tenants for the same or similar space and/or services unless complaints have been made alleging that specific practices are unfair or unreasonable. [FAA Order 51.90.6A, Sec. 4-14 (a)(4)]

When a dispute does arise between the airport owner and airport tenants or users regarding issues such as economic discrimination, exclusive rights, or similar complaints, the FAA works to resolve these complaints. The FAA's role is to ensure appropriate assurances are followed under various grant agreements and to bring the sponsor into a state of compliance when appropriate. [FAA Order 5190.6A, Chapter 5, Sec. 5-1b] It is not the FAA's role to make a complainant whole, award damages, or to engage in contract negotiations between the airport and its tenants.

In this case, the FAA determined that the terms of the lease questioned between Aerodynamics and the Authority did not contravene Federal Law, appropriate grant assurances, or FAA Order 5190.6A.

Conclusion regarding Procedural Errors:

Based on the discussion of the seven points covered in items 1 through 5 above, the Associate Administrator is not persuaded the Director made procedural errors in conducting the investigation and weighing the facts presented.

VII. CONCLUSION

Based on the foregoing discussion and analysis, 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 as described above. The appeal does not provide a sufficient basis for reversing the Director's Determination with regard to alleged violations of Federal grant assurance 22, regarding unjust economic discrimination, and Federal grant assurance 24, regarding airport fee and rental structure.

VIII. ORDER

The FAA dismisses this Appeal and affirms the Director's Determination pursuant to 14 CFR Part 16, §16.33.

APPEAL RIGHTS

A person 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. Section 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 place of business. The petition must be filed not later than 60 days after a Final Decision and Order has been served on the party. [14 CFR, Part 16, §16.247(a)]

for: Woodie Woodward
Acting Associate Administrator for
Airports.

Date:
JUL 23 2001