

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

<hr style="border: 0.5px solid black;"/>)	
Northern Michigan Aviation, Inc.)	
)	
COMPLAINANT)	<hr style="border: 0.5px solid black;"/> Docket No. 16-00-08
)	
V)	
County of Marquette, MI)	
RESPONDENT		

DIRECTOR'S DETERMINATION

1. INTRODUCTION

This matter is before the Federal Aviation Administration (FAA) based on a complaint filed in accordance with the Rules of Practice for Federally-Assisted Airport Proceedings, 14 C.F.R. Part 16 (Part 16). —

Northern Michigan Aviation, Inc. (NMA)/(Complainant) has filed a complaint against the **County** of Marquette, Michigan, (County)/(Respondent). NMA alleges that the Respondent, as the sponsor of Sawyer International Airport, has engaged in activity contrary to their Federal obligations. Specifically, NMA alleges that:

an exclusive right to operate an FBO¹ at Sawyer International Airport was granted to Boreal Aviation on three occasions.

The first grant of an exclusive right occurred by the K.I. Sawyer Conversion Authority's refusal to negotiate with NMA and instead granting an FBO lease only to Boreal.

The second grant of an exclusive right occurred by Marquette County's subsequent perversion of the RFP process which again granted an FBO lease only to Boreal.

The third grant of an exclusive right occurred by the County's failure to negotiate in good faith with NMA for an FBO lease at Sawyer International which it had already given to Boreal. [FAA Exhibit 1, Item 8, page 8]²

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

² FAA Exhibit I (attached) is the Index of Administrative Record.

Specifically, NMA states that the Respondent's actions constitute "the grant of an exclusive right contrary to the restrictive covenants in the Airport Property deed of conveyance;..., contrary to the Respondent's Grant Assurances;.. in violation of Section 308 of the Federal Aviation Act of 1958 (49 U.S.C. App. § 1349(a), recodified at 49 U.S.C. § 40103(e)). [FAA Exhibit 1, Item 3, pages 12-13]

The decision in this matter is based on applicable law and FAA policy regarding the Respondent's Federal obligations as imposed upon it by its grant assurance No. 23 (under 49 U.S.C. §47107(a)(4) and 49 U.S.C. §40103(e)), review of the arguments and supporting documentation submitted by the parties, and the Administrative Record in this proceeding. The Index of the Administrative Record is attached as FAA Exhibit 1.

With respect to the allegations presented in this Complaint, under the specific circumstances at these Airports as discussed below and based on the evidence of record in this proceeding, the Director³ finds that the Respondent is not in violation of its Federal obligations and that NMA is not entitled to an evidentiary hearing of this matter.

II. THE AIRPORTS

Sawyer International Airport (SIA) is a public-use airport located approximately 15 miles south of Marquette, Michigan. The airport is owned and operated by the County of Marquette. As of 1998, SIA had approximately 38 based aircraft with 39,390 annual operations. [FAA Exhibit 2, attached] AMR American Eagle (AMR) operates its Regional Aircraft Maintenance Center (RAMC) at the Airport. [FAA Exhibit 1, Item 7, Exhibit I]

The planning and development of SIA has been financed, in part, with funds provided by the FAA under the Airport Improvement Plan (AIP), authorized by the Airport and Airway Improvement Act of 1982, as amended, recodified at 49 U.S.C. § 47101 *e tseq*. Specifically, since 1997, the County has entered into numerous AIP grant agreements with the FAA and has received a total of \$10,760,842 through Fiscal Year 1999 in federal airport development assistance directly from the FAA. [FAA Exhibit 3, attached] The County obtained the Airport from the Federal government, accepting deed covenants that are similar to certain provisions in the grant agreements, discussed in the Applicable Law and Policy Section below.

The County of Marquette has been operating SIA under agreement with the Federal government since 1997. Subsequently, the County obtained title to the property. Prior to 1997, the Airport was operated by an interim state agency, the K.I. Sawyer Air Force Base Conversion Authority (Conversion Authority).

³The Director of FAA's Office of Airport Safety and Standards issues determinations in Part 16 proceedings.

III. BACKGROUND

Prior Circumstances at SIA

In its Answer, the County summarizes some relevant facts about the transition of airport operations from Marquette County Airport (MCA) to SIA and the establishment of SIA as the public-use airport sponsored by the County. It is presented here to provide a backdrop to the establishment of the County's sponsorship of SIA.⁴

The decision to close Sawyer Air Force Base was made under the Defense Closure and Realignment Act of 1990. An agency of the state of Michigan, the K.I. Sawyer Air Force Base Conversion Authority [Conversion Authority], was created by the state legislature.... The ultimate decision to transfer the property to Marquette County was considered in the summer of 1996, in part as a means of retaining AMR American Eagle's Regional Aircraft Maintenance Center ("RAMC")....

AMR had ceased commercial passenger flights to the old Marquette County Airport, but it continued operation of the RAMC which had by then exceeded its capacity.... Moving the RAMC to Sawyer would satisfy AMR's needs. [FAA Exhibit 1, Item 6, page 2]...

The Complainant, NMA, was a fixed base operator (FBO) and Part 135 commercial service operator at MCA, having established its business there in 1992. [FAA Exhibit 1, Item 3, page 2] During the transition time between opening SIA and closing MCA, NMA continued its FBO business at MCA. [FAA Exhibit 1, Item 6, page 3]

On May 31, 1994, NMA applied to the Conversion Authority to become a fixed-base operator at SIA. [FAA Exhibit 1, Item 3, exhibit 3] On December 19, 1994, NMA again proposed to provide FBO services at SIA. [FAA Exhibit 1, Item 3, exhibit 4] On January 9, 1995, NMA supplemented its December 19, 1994 proposal. [FAA Exhibit 1, Item 3, exhibit 5] On May 19, 1995, the Conversion Authority declined to take action on NMA's proposals, suggesting that NMA should consider entering into a "joint venture" with Boreal Aviation.⁵ [FAA Exhibit 1, Item 3, exhibit 6] On June 1, 1995, Brian Rochon of NMA⁶ expressed his concern that NMA "would be required to enter into a 'Co-operative Approach' with a potential competitor, and that such an approach is a 'prerequisite.'" [FAA Exhibit 1, Item 3, exhibit 7]

According to the record, Boreal Aviation was established in 1994, for the purpose of providing FBO services at SIA during its time of transition from a military base to a public-use airport. FAA Exhibit 1, Item 3, exhibit 2, page 22] The Conversion Authority and Boreal Aviation had entered into a sublease at SIA. This document appears to have been effective as of August 14,

⁴The establishment of sponsorship in military airport base closings is often a complicated procedure, involving infrastructure development, environmental re-mediation, legal and political procedures, the details of which are not relevant to the allegation of the current establishment of an exclusive right. Determining what entity would become the sponsor of the closed Air Force Base developed over the course of several months.

⁵Boreal Aviation was the existing FBO at SIA, under agreement with the Conversion Authority described below.

⁶Brian Rochon is identified as the President of NMA in NMA's instant Complaint.

1995, but signed in February 1996. In any case, the document stated that “that any Sublease shall terminate upon final disposition of the sublet premises by the Government.” [FAA Exhibit 1, Item 7, exhibit D, page 1] The Respondent characterizes this document as “an interim agreement, pending final disposition of the subleased property.” [FAA Exhibit 1, Item 7, page 3]

Boreal has provided fuel services to AMR’s RAMC operations at SIA. [FAA Exhibit 1, Item 3, exhibit 2, page 8] It is unclear, by the record, when AMR first procured fueling services from Boreal.⁷ The Complainant characterizes this as an “exclusive contract.” [FAA Exhibit 1, Item 3, pages 3-4]; however, Boreal and the Respondent deny that Boreal’s arrangement with AMR is an exclusive contract. See FAA Exhibit 1, Item 3, exhibit 2, page 8 and page 20.

The Respondent’s Actions at SIA

As stated by the Respondent, “The date that Marquette County decided to accept local control was beginning in about August 1996.” [FAA Exhibit 1, Item 7, page 3] The Respondent states that “on September 1, 1996, Marquette County entered into a Memorandum of Understanding with AMR⁸.... Among the county’s inducements was the assurance in paragraph 13 of Exhibit I that fuel and other essential aeronautical services would be available to AMR.” [FAA Exhibit 1, Item 6, page 2]

However, the County did not become the Local Reuse Authority (LRA)⁹ until April 17, 1997, around the time it received its first ALP grant for improvements at SIA. [FAA Exhibit 1, Item 7, page 3 and FAA Exhibit 3] For the purposes of this analysis, the Director assumes that the County’s obligations at SIA were initiated in the spring of 1997, when it became the LRA for the Sawyer conversion and sponsored an ALP grant for improvements to SIA. [FAA Exhibit 3]

Therefore, according to the record, at the beginning of 1997, the County encountered certain circumstances at SIA. Boreal Aviation was the only fuel service provider at SIA. AMR’s RAMC operation had either commenced operations or was planning to commence operations at SIA, requiring the procurement of fuel services. The record does not establish under what agreement Boreal Aviation continued to operate at SIA subsequent to April 1997, or when the agreement with the Conversion Authority officially expired. The Respondent does state about this time period, “Any lingering rights Boreal had in being the transit alert services provider¹⁰ at the old Air Force Base continued only under sublease from the unrelated Conversion Authority on an interim basis only, pending final disposition of the base.” [FAA Exhibit 1, Item 6, page 5]

⁷In Boreal Aviation General Manager Nolan Duquette’s deposition of June 8, 1998, he states that Boreal had a verbal arrangement with AMR to provide fuel that does not go back as far as 1994. [FAA Exhibit 1, Item 3, exhibit 2, page 9] Also, the County’s Memorandum of Understanding with AMR, dated September 1996, lists a target date of beneficial occupancy as December 1996. [FAA Exhibit 1, Item 7, exhibit I, Para 6]

⁸ This memorandum is set out in FAA Exhibit 1, Item 7, exhibit I.

⁹The Local Reuse Authority is the local entity that takes on the responsibility for planning for and determining the use of closed military bases. It is not necessarily the ultimate sponsor of a military base that is eventually converted to an airport.

¹⁰This is a military term roughly synonymous with FBO.

The facts regarding the creation of the minimum standards for SIA are under dispute between the parties.

The Complainant discusses the County's creation of the minimum standards in the context of an alleged "perversion of the RFP process which again granted an FBO lease only to Boreal."

I:AA Exhibit 1, Item 8, page 8] Upon reviewing the record, the Director construes that the Complainant refers to the authoring of the minimum standards as this "perversion of the RFP process." The Complainant relies on two documents generally, a deposition of Mr. Nolan Duquette, of Boreal [FAA Exhibit 1, Item 3, exhibit 2] and an affidavit of Mr. James Dehlin."

IFAA Exhibit 1, Item 8, exhibit A] The Complainant does not cite Mr. Duquette's 68-page deposition specifically to support its allegations; however, the Director notes the following excerpts as relevant to the allegations:

Q.... did you have any discussions with Mr. Pawley¹² concerning minimum standards or requirements?

A. I would not categorize them as discussions. They were more or less questions.

Q. Well, questions bearing on what?

A. Our operations as far as what commitment we had to American Eagle and how we met that commitment, what-... what type of storage facility I had and the type of vehicles I had to provide that.

Q. Okay. What was American Eagle's demands and when was that?

A. Well, their demands were to move an approximate amount of fuel, an unknown amount of fuel. The first truck that we bought to do this operation was not of significant size. We had to return that truck to the company, and we ordered a bigger truck so that we could move the amount of fuel that was anticipated by American Eagle....

Q. And what specifically did American Eagle demand in terms of movement of fuel?

A. American Eagle did not demand us to do anything. They had a program. They told us that they were going to move a certain amount of fuel. Based on what they had told us, we had purchased equipment to move that amount of fuel. As they grew and found out that they had a larger requirement, it, in a sense, forced us to get updated equipment to meet that demand... [FAA Exhibit 1, Item 3, exhibit 2, pages 31-32]

Q And that's all I'm trying to get at is what adjustment did you have to make then in terms of equipment to meet that whether it's demand or requirement or anything else?

A. I originally purchased a 2,000 gallon truck. I exchanged it for a 3,000 gallon truck. [FAA Exhibit 1, Item 3, exhibit 2, page 34]

¹¹James Dehlin is a Professor of Aviation Maintenance Technology at Northern Michigan University, who recounts a conversation between himself and Nolan Duquette in an affidavit. [FAA Exhibit 1, Item 8, exhibit A]

¹²Marquette County Airport Manager

The Duquette Deposition also contains this exchange:

Q. Did you have a hand in developing any of the minimum standards and requirements that ended up in this bid document that-

A. No.

Q. - is called Exhibit Number 1? “

A. No, sir.

Q. Did you ever discuss with anybody formulating or drafting minimum standards and requirements for the bid document?

A. Not for this document, no. [FAA Exhibit 1, Item 3, exhibit 2, page 39]

The Complainant does highlight this section of the Duquette Deposition:

Q. Is it true that you told Mr. Dehlin that you were preparing to pass on to Mr. Pawley minimum standards and requirements that would be used in the bid document based on Boreal’s equipment? Is that true or isn’t it true?

A. I may have made that statement. I did make that statement. But I think at the time that I made that statement, the reference to Mr. Pawley was he had no knowledge of that. It was my statement saying that, if I had this put together, that I may pass it on to him. But it was not- I had not spoken to Mr. Pawley about this at all.

Q. Did you have an arrangement with Mr. Pawley that you would prepare minimum standards and requirements based on the equipment that Boreal had?

A. No. [FAA Exhibit 1, Item 3, exhibit 2, page 46]

The Complainant also submits an affidavit of Mr. James Dehlin, who recounts a conversation with Mr. Duquette, regarding the drafting and use of minimum standards:

...Mr. Duquette referred to Brian Rochon as being a potential competitor for business at K.I. Sawyer. Duquette explained that he had had a conversation with Mr. Hal Pawley, the Airport Manager, about how to keep Rochon from moving his FBO business to K.I. Sawyer and competing for aviation fuel sales. According to Duquette, Pawley asked Duquette about how Rochon could be kept from moving his business to K.I. Sawyer. Duquette stated that he told Pawley that it could be done by “writing him [Rochon] out of the specs.” [FAA Exhibit 1, Item 8, exhibit A]

The Complainant does not argue or point to evidence that Mr. Pawley of the County included unreasonable standards that excluded NMA, other than specific references to AMR, discussed below.

¹³Complainant’s Exhibit I refers to the RFP for FBO’s published by the County that includes minimum standards.

The Respondent states, “It is categorically denied that Marquette County Airport Manager Harold Pawley conspired with Boreal to use Mr. Duquette’s draft standards or to ‘freeze out’ NMA.” [FAA Exhibit 1, Item 7, page 5] In support of this statement, the Respondent points out Mr. Pawley’s deposition, dated June 8, 1998:

Q. Outside of contacting approximately five airports and obtaining a copy of their minimum standards, did you review any other documentation in formulating what’s contained in Plaintiff’s Exhibit Number 1 with reference to the minimum standards and requirements?

A. No. I think for the minimum standards and requirements that’s basically what I used.

Q. Did you essentially write or edit the document that you have in front of you, this Plaintiff’s-

A. Yes, I did.

Q. — Exhibit 1-

A. Yes.

Q. —or did you have someone else do it?

A. I wrote it myself.

Q. Did you receive any part of that document from any other person and incorporate it therein?

A. No. [FAA Exhibit 1, Item 3, exhibit 12, pages 3 3-34]

Features of Minimum Standards (issue #2, below)

The Minimum Standards & Requirements for Limited Service Fixed Base Operator For Aircraft Fueling & Line Services was included with the Request for Proposals issued by the County for SIA in March 1998. It contained the following significant requirements:

A. Fuel Storage: Provide fuel storage tanks for Jet A and 100 octane low lead (100LL) of sufficient size to meet fueling needs. Initial minimum storage requirements are 10,000 gallons for jet fuel and 5,000 gallons for 100LL. When scheduled passenger airlines begin operation at Sawyer, storage shall be increased to 20,000 gallons for jet fuel...

B. Fuel Trucks: Provide and have available at all times a minimum of one fuel truck with capacity of at least 3,000 gallons of jet fuel, and one fuel truck with capacity of at least 750 gallons of 100LL aviation gasoline....

C. Fueling Services:

1. Provide into-plane refueling, and defueling, as required for aircraft operation at the airport. These services shall be provided in accordance with applicable state and local laws and regulations, and the standard requirements of the airlines operation at the airport

D. Line Services: Associated aviation line (ramp) services including, but not limited to, the following:

1. Aircraft deicing- Provide and maintain one vehicle or towed equipment capable of applying heated Type I or II propylene glycol for deicing general aviation and American Eagle regional aircraft maintenance center aircraft operating at the airport....

H. Hours of Operation:

I. During the interim period of operation, the FBO shall provide for AMR Eagle maintenance center aircraft and general aviation fueling and line services needs during hours mutually agreeable to the FBO and airport management. [FAA Exhibit 1, Item 3, exhibit 11]

FBO Selection Process (Issue #3 below)

On January 15, 1998, NMA's counsel wrote counsel for Marquette County regarding "some comprehensive settlement," including an agreement resolving pending litigation between the parties at MCA and a threatened Complaint that NMA would present to the FAA. The letter also proposed negotiation of a long-term "arrangement involving the contract issues with the County, whether or not the Airport is located in Negaunee or K I Sawyer AFB" [FAA Exhibit 1, Item 3, exhibit 9]. On February 26, 1998, NMA counsel wrote counsel for Marquette County, stating

I... informed [Rochon] of at least the tenor and broad outlines of your solicitation of interest along the lines suggested. It contained nothing of great appeal, and I am providing you a simple counter proposal. With the exception of perhaps minor details, this is the final proffer of an arrangement that would conclude all of the pending issues between the parties. [FAA Exhibit 1, Item 3, exhibit 10]

On March 19, 1998, the County requested that its Request for Proposals for an FBO at SIA be published. [FAA Exhibit 1, Item 7, exhibit G] Specifically, this document is titled, "Request for Proposals for Limited Service Fixed Base Operator for Aircraft Fueling & Line Services at Sawyer Airport." (RFP) and includes as an attachment a document titled "Minimum Standards & Requirements For Limited Service Fixed Base Operator For Aircraft Fueling & Line Services" (Minimum Standards). The Minimum Standards are excerpted above. The RFP and Minimum Standards are the items discussed in the Duquette and Pawley depositions above and referred therein as Plaintiff's Exhibit 1. [FAA Exhibit 1, 'Item 3, exhibit 11] Specifically, the RFP stated, "The proposals being sought are for an FBO to provide fuel storage, trucks, fueling services and line services in accordance with the minimum standards and requirements for these services, a copy of which is enclosed with this request for proposal (RFP)." [FAA Exhibit 1, Item 3, exhibit

11] The portions deemed relevant of the Minimum Standards are summarized in the subsection above.

NMA did not respond to the RFP. [FAA Exhibit 1, Item 3 exhibit 17, page 2 and Item 7, page 8]

The only responding proposer was Boreal. [FAA Exhibit 1, Item 7, pages 8] The County and Boreal did enter into a Fixed Base Operator Limited Services Agreement with the County, dated July 7, 1998, under which Boreal currently operates at SIA. [FAA Exhibit 1, Item 7, exhibit E] This Agreement provided for the payment of fuel flowage fees, as follows, at paragraph 3.1:

Fuel Flowage Fees

The FBO shall pay to the Sponsor a fuel flowage fee in accordance with the following schedule

- 1 \$0.080 per gallon of fuel stored for, sold to or pumped into scheduled airlines.
- 2 \$0.075 per gallon of fuel stored for, sold to or pumped into AMR Eagle regional maintenance center aircraft; except the fee for defueling and replacement of fuel in these aircraft shall be \$0.020 per gallon.
3. \$0.250 per gallon of fuel stored for, sold to or pumped into non-scheduled

airline, charter, cargo, corporate and general aviation aircraft.

The Sponsor may consider intermediate fuel flowage fees for high volume purchasers of fact or special category purchasers. Such fees would be established by negotiation between the FBO and Sponsor. [FAA Exhibit 1, Item 7, exhibit E]

Almost a year passed without documentation in the record of any discussion between NMA and the County regarding establishing an FBO at SIA.

On July 9, 1999, Brian Rochon of NMA wrote a letter to Hal Pawley, Airport Manager, seeking to open negotiations for NMA's lease and operation at SIA. The letter cites the September 26, 1999, opening date for SIA. [FAA Exhibit 1, Item 3, exhibit 13] The Respondent characterizes this as the first proposal from NMA. [FAA Exhibit 1, Item 7, page 9] In this proposal, NMA stated,

Northern Michigan Aviation will enter into a contract with Marquette County for on-site FBO services which, for the most, are identical with that currently provided at the Marquette County Airport....

In consideration of the fueling operation, Northern Michigan Aviation will provide the County a \$.25 per gallon fuel flowage fee for all retail and general aviation fuel sales, as well as a \$.075 fuel flowage fee for all "into-plane" fueling. This is being proposed as an initial agreed rate matching the current fuel flowage charge on aviation fuel at the Sawyer site. It is Northern Michigan Aviation's position that the fee is excessive and does not reflect the market, comparable rates, nor reasonable County cost recovery....

The determination of reasonable fees and any adjustment, however, can be held in abeyance until the parties have an opportunity to present their bargaining positions in the future and, if necessary, a determination or judgment in an appropriate forum. NMA also believes that the differential in the two rates or charges, that is, to retail fuel customers versus airline customers are not supportable variances allowed under FAA regulations. The rates, nonetheless, will be complied with for the time being. Northern Michigan Aviation will provide fueling services by equipment meeting the marketing needs and minimum standards in conformity with FAA regulations for both aviation jet and aviation low lead gasoline. [FAA Exhibit 1, Item 3, exhibit 13]

On August 3, 1999, the County responded, through each party's counsel, to the NMA proposal, dated July 9, 1999. County's counsel, Harley N. Andrews stated that the County was very busy with the final transition of operations to SIA, that having anticipated this situation the County issued its RFP for FBOs in March of 1998 and that "NMA, for whatever reasons, chose not to submit a proposal." [FAA Exhibit 1, Item 3, exhibit 17] Andrews also stated:

In his proposal letter, your client has raised several legal challenges to the content and terms of the July 7, 1998, FBO Agreement between the County and Boreal, as well as to positions he anticipates that the County may take in response to his proposal... I am not going to advise the County to enter into any Agreement upon terms over which litigation has already been explicitly or impliedly threatened. ... I am not going to advise the County to enter into any contract which would allegedly violate [FAA]

regulations. It is my intention to conduct or secure a review of the Boreal Agreement to determine whether the legal questions raised by your client as to its terms have merit.... I expect that this will cause your client, and probably you, to allege that I am deliberately dragging my feet in an effort to freeze your client out of the Sawyer airport scene I can only assure you that this is not the case [FAA Exhibit 1, Item 3, exhibit 17]

On August 13, 1999, Brian Rochon of NMA wrote Hal Pawley, Airport Manager, requesting a response to the July 9, 1999 proposal and protesting any delay [FAA Exhibit 1, Item 3, exhibit 18]

On August 23, 1999, counsel for NMA wrote the County's counsel and stated that "NMA's proposal is nothing more than a request for continuation of the contractual arrangement which already exists with the County but at the new site." The letter protests the alleged delay and questions the motivations of the County's counsel. [FAA Exhibit 1, Item 3, exhibit 19]

On August 24, 1999, counsel to the County; via fax to NMA counsel Mike Summers, responded to NMA's objections to the rates and standards, stating,

If, on the other hand, the Boreal Agreement is in violation of any of those requirements and regulations as your client has alleged, then the County will not enter into a second "illegal" Agreement with another party, but will instead revise the Agreement so as to comply, then make it available to both parties. It is that simple. I expect to receive an opinion from our consulting attorney either today or tomorrow... [FAA Exhibit 1, Item 3, exhibit 20]

On August 26, 1999, County's counsel received a letter from Larry A. Salstrom, regarding "Marquette County Fixed-Base Operator (FBO) Legal Issues." Mr. Salstrom makes various conclusions regarding the County's Federal obligations, its application of the Airport's minimum standards and its agreement with Boreal in relation to possible agreements with other FBO's, specifically NMA. [FAA Exhibit 1, Item 7, exhibit K]

On September 3, 1999, County's counsel wrote NMA's counsel, via a fax memo mentioning a prior telephone conversation, otherwise not in the record. It reflected continued negotiating and planning for the accommodation of NMA at SIA, including discussion of the use of fuel tanks. Counsel stated, "Mike, I can now provide the following partial answers to the questions you and Mr. Rochon raised in our telephone conversation last week." [FAA Exhibit 1, Item 7, exhibit L]

On September 3, 1999, Mike Summers, NMA's counsel, responded to the fax memo of the same date as follows:

As we informed you last week, the last possibility of financial viability in order for NMA to relocate, was lost when we were notified by Northwest that they have entered into a fueling contract with Boreal. There is no business opportunity' any longer at the KI Sawyer site without one or both of the commercial carrier fueling contracts. Even if

all of the other problems, including capitalization, cost of the move, available business space, and a score of other issues that we've discussed in the past could somehow be solved in the next two weeks, the fueling contracts essentially kill the business prospects. [FAA Exhibit 1, Item 7, exhibit M]

Almost one year later, on August 17, 2000, NMA filed the present formal complaint under 14 C.F.R. Part 16 alleging the County violated its federal obligations and grant assurances by granting an exclusive right. NMA also requested an evidentiary hearing on the matter. The County submitted an answer denying the allegations and indicated a willingness to entertain a proposal from NMA to become an FBO at SIA. The parties have submitted their respective reply and rebuttal in accordance with 14 C.F.R. §16.23¹⁴

IV. ISSUES

The principal matter to be determined by the Director is whether or not the County as the sponsor of SIA¹⁵ is in compliance with its Federal obligations as embodied in its Federal grant agreements and conveyances of Federal land, listed in 14 C.F.R. § 16.1. Upon review of the Complainant's allegations and the record summarized in Section III Background, the Director has determined that the following issues require consideration and analysis in order to provide a complete determination of the County's compliance with applicable Federal law and FAA policy, discussed below:

1. Whether the County's creation of its minimum standards has explicitly granted an exclusive right in violation of Federal grant assurance No. 23, the County's deed covenants and 49 U.S.C §40103(e).
- 2 Whether the County's alleged unreasonable or discriminatory application of its minimum standards has constructively granted an exclusive right in violation of Federal grant assurance No. 23, the County's deed covenants and 49 U.S.C. §40103(e).
3. Whether the County's alleged failure to negotiate in good faith with NMA for its use of SIA for FBO operations has had the effect of explicitly granting an exclusive right in violation of Federal grant assurance No. 23, the County's deed covenants and 49 U.S.C. §40103(e).

¹⁴The parties have also attempted to file additional pleadings, namely Complainant submitted a Complaint's (sic) Supplement to Reply to Answer and Motion to Dismiss and Respondent submitted a Respondent's Response to Supplemental Reply. 14 C.F.R. § 16.23 sets out the authorized pleadings for federally-assisted airport enforcement proceedings. There is no authority for any additional pleadings. Neither party in this matter presented a motion pursuant to 14 C.F.R. § 16.19 applying for permission to submit supplemental filings. These supplemental filings, listed in the index, are therefore stricken and have not been considered.

¹⁵The County of Marquette is the only named Respondent to the Complaint.

V. APPLICABLE FEDERAL LAW AND FAA POLICY

The Federal Aviation Act of 1958, as amended (FAAct), 49 U.S.C. § 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. The Federal role in encouraging and developing 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, 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.

The planning and development of the Airport has been financed, in part, with funds provided by the FAA under the Airport Improvement Program, authorized by the Airport and Airway Improvement Act of 1982, (AAIA), 49 U.S.C. § 47101 *et seq.* This program provides 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 Airport Sponsor Assurances

As a condition precedent to providing airport development assistance under the AMA, the Secretary of Transportation must receive certain assurances from the airport sponsor. The AMA sets forth requirements to which an airport sponsor receiving Federal financial assistance must agree as a condition precedent to receipt of such assistance. These sponsorship requirements are included as assurances in every airport improvement grant agreement. Upon acceptance **of an** AIP grant by an airport sponsor, the assurances become a binding obligation between the airport sponsor and the Federal government. FAA Order 5190.6A, *Airport Compliance Requirements*, (hereinafter Order) provides policies and procedures for the FAA Airport Compliance Program related to federally obligated airport owner's compliance with their sponsor assurances, including Assurance No. 22 (Economic Discrimination), Assurance No. 23 (Exclusive Rights) and Assurance No. 24 (Fee and Rental Structure).

Assurance No. 22: Use on Reasonable and Not Unjustly Discriminatory Terms

Assurance No. 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 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 at the airport.” 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...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.” Assurance 22(i).

Subsection (h) qualifies sub-sections (a) and (f), 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.

The grant assurance specifically addresses the issue of the treatment of fixed-based operators (FBOs), stating that “Each fixed-based 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.” Assurance 22(c). Subsection (c) specifies the application of subsection (a) to the treatment of FBOs, providing additional specific guidance as to the sponsor obligations.

The Order 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 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 the inherent restrictions of an exclusive monopoly on aeronautical activities. [See Order, Sec. 3-8(a)]

Assurance No. 23: The Prohibition Against the Granting of an Exclusive Right

Section 308(a) of the FAA Act, 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.” 49 U.S.C. § 40103(e). An “air navigation facility” includes an “airport.” Sec 49 U S C §§ 40102(a)(4), (9), (28).

Section 511 (a)(2) of the AIA, 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 ~in exclusive right to use the airport”.

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 person providing, or intending to provide, aeronautical services to the public... It 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 the Order, the FAA discusses 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 any standard that is applied in an unjustly discriminatory manner may constitute the constructive grant of an exclusive right. However, a sponsor is under no obligation to permit aircraft owners to introduce on the airport equipment, personnel, or practices which would be unsafe, unsightly, detrimental to the public welfare, or which would affect the efficient use of airport facilities. [See Order, Sec.3-9(e)]

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 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)]

Assurance No. 24: Airport Fee and Rental Structure

Section 47107 (a)(13) of 49 U.S.C. requires, in pertinent part, that the sponsor of a Federally obligated airport “will maintain a schedule of charges for use of facilities and services at the airport that will make the airport as self-sustaining as possible under the circumstances existing at the airport.” In addition, under § 47 107(a), fees must be reasonable and not unjustly discriminatory.

Assurance 24, “Fee and Rental Structure,” of the prescribed sponsor assurances satisfies the requirements of § 47107(a)(13). It provides, in pertinent part, that the sponsor of a Federally obligated airport “will maintain a fee and rental structure 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, taking into account such factors as the volume of traffic and economy of collection.”

The Order states that the sponsor’s obligation 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 Order, § 4-14(a)]

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 consensual obligations, which an airport owner accepts when receiving Federal grant funds or the transfer of Federal property for airport purposes. These obligations are incorporated in grant agreements and instruments of conveyance in order to protect the public's interest in civil aviation and to ensure compliance with Federal laws.

The FAA 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. The Airport Compliance Program does not control or direct the operation of airports; rather, it monitors the administration of the valuable rights pledged by airport sponsors to the people of the United States in exchange for monetary grants and donations of Federal property to ensure that the public interest is being served.

The Order sets forth policies and procedures for the FAA Airport Compliance Program. The Order is not regulatory and is not controlling with regard to airport sponsor conduct; rather it establishes the policies and procedures to be followed by FAA personnel 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 made to the United States by airport owners as a condition to 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.

VI. ANALYSIS

Summary of Issues and Arguments

NMA alleges that the County is engaged in granting an exclusive right by (1) refusing to negotiate with NMA for FBO service at SIA and contracting solely with Boreal and (2) "perverting" the request for proposal process. NMA has also contended that the Conversion Authority refused to negotiate with NMA for FBO service at SIA.

The Director has determined that the County of Marquette is the only respondent in this Complaint. Prior relationships between the Conversion Authority and Boreal and NMA are not relevant to these proceedings. The Conversion Authority is not a party to the Complaint. The

Conversion Authority no longer operates SIA. The Director notes that Boreal's lease with the Conversion Authority is no longer in effect. Furthermore, if in fact the Conversion Authority managed to establish an exclusive right, that right could not have survived the County's RFP procedures described below, unless we find that those procedures were faulty. Also, the Complaint only raises issues regarding SIA, mentioning prior issues between the parties at MCA. This Analysis only deals with the three issues at SIA as outlined in Section IV, above.

ISSUE ONE

Whether the County's creation of its minimum standards has explicitly granted an exclusive right in violation of Federal grant assurance No. 23, the County's deed covenants and 49 U.S.C. §40103(e).

The Complainant alleges in its Complaint:

In the spring of 1997, the General Manager of Boreal Aviation, Mr. Nolan Duquette, drafted "Minimum Standards & Requirements for Limited Service Fixed Base Operator for Aircraft Fueling and Line Services" to be implemented at Sawyer International. (See Exhibits 2 and 8) [FAA Exhibit 1, Item 3, exhibits 2 and 8]... Prior to drafting these minimum standards, Mr. Duquette had a conversation with the Marquette County Airport Manager, Mr. Harold Pawley, on how NMA could be written out of the minimum standards. (See Exhibits 2 and 8) [FAA Exhibit 1, Item 3, exhibits 2 and 8]... Mr. Duquette provided Mr. Pawley with a copy of these minimum standards. (See Exhibit 2).¹⁶ [FAA Exhibit I, Item 3, page 5]

The Respondent states:

It is categorically denied that Marquette County Airport Manager Harold Pawley conspired with Boreal to use Mr. Duquette's draft standards or to 'freeze out' NMA. Mr. Pawley's testimony beginning on page 32 (attached to the complaint as Exhibit 12) clearly establishes that he alone was the author of the Minimum Standards and Requirements incorporated in the Request for Proposals for Fixed Base Operator, that he obtained samples from approximately five other airports and incorporated ideas from a number of them in the final version. [FAA Exhibit 1, Item 7, page 5]

Therefore, the record contains conflicting evidence. On the one hand, the County has the deposition of its Airport Manager, stating that he wrote the minimum standards on his own, relying on examples from other airports. [FAA Exhibit 1, Item 3, exhibit 12, page 32] On the other hand, the Complainant points to the deposition of Nolan Duquette, in which he admits to making the statement to Mr. Dehlin that he was preparing to pass on to Mr. Pawley minimum standards and requirements that would be used in the bid document based on Boreal's equipment. [FAA Exhibit 1, Item 3, exhibit 2, page 46] Duquette further admitted that he did have a

¹⁶ As is discussed below, the Complainant's allegation that Mr. Duquette provided Mr. Pawley with a copy of these minimum standards is not supported by Mr. Duquette's deposition included at FAA Exhibit I Item 3 exhibit 2.

conversation with Mr. Pawley on how NMA Northern Michigan Aviation or Mr. Rochon could be written out on the specs. [FAA Exhibit 1, Item 3, exhibit 2, page 47] Also, the Complainant points to the affidavit of James Dehlin, stating that Duquette told him that he had already discussed ways by which “NMA could be written out of the minimum standards” and had “provided Mr. Pawley with a copy of these minimum standards.” [FAA Exhibit 1, Item 8, page 4]

There is no Federal obligation prohibiting competitors themselves from attempting to influence the drafting of airport minimum standards. The only relevant question concerns whether or not the County created minimum standards that included an unreasonable or discriminatory term that resulted in the establishment of an exclusive right.

The evidence does not persuade the Director that the County, through the actions of the Airport Manager, worked with Boreal to fashion the minimum standards to disadvantage NMA.¹⁷ Furthermore, any such cooperation, alone, could not create an exclusive right, without creating a specific term of the minimum standards that was unreasonable or discriminatory. As discussed in the following subsection, the Complainant fails to show that a term of the minimum standards was unreasonable. The Director is unconvinced that any term was discriminatory.¹⁸

The Complaint cites the FAA Advisory Circular (AC) on Exclusive Rights and Minimum Standards¹⁹:

The use of minimum standards as a vehicle to effect an exclusive business operation is prohibited. The FAA recognizes that some sponsors might attempt to design their minimum standards to protect only the interests of one business operator, which can be interpreted as the grant of an exclusive right and a potential violation of FAA policy. See FAA AC No. 150/5190-4, page 4.

However, the Director notes that the observation in the AC states that the establishment of an exclusive right is prohibited, even if it is effectuated through a “vehicle” of the minimum standards. It does not mean to say that any minimum standard that is not to the liking of a potential competitor or that is easier for one competitor to meet than another, automatically, creates a prohibited exclusive right. In fact, AC No. 150/5190-4 also states:

The FAA suggests that airport sponsors establish reasonable minimum standards that are relevant to the proposed aeronautical activity with the goal of protecting the level and quality of services offered to the public. Once the airport sponsor has established minimum standards, it should apply them objectively and uniformly to all similarly-situated on-airport aeronautical activities and services... [p. 3]

The FAA policy for recommending the development of minimum standards serves the

¹⁷As will be discussed below, the Director is not persuaded that NMA could not meet the minimum standards.

¹⁸Fuel trucks, rates and charges, and the provisions for servicing AMR will be discussed below.

¹⁹As stated on the AC, itself, “Advice made with respect to minimum standards is optional but highly recommended.” Advisory Circulars are not regulatory.

objective *of.* enhancing the availability of adequate services for all airport users.

When developing minimum standards, the most critical consideration is the particular nature of the activity and operating environment at the airport. Minimum standards should be tailored to the airport to which they will apply. [p. 4]

A sponsor may be properly concerned about the needs of a specific large aeronautical user of an airport. It is appropriate for a sponsor to ask an FBO about the type of equipment needed to effectively service a major aeronautical user, in order to include standards that meet the needs of the users of a specific airport, such as AMR at SIA.

The record reflects that the County drafted minimum standards to meet the needs of AMR. Both the Airport Manager and the representative of Boreal deny that they conspired to create unreasonable or discriminatory terms.²⁰ Furthermore, the record lacks persuasive evidence, as is discussed below, that any unreasonable or discriminatory term was actually effectuated. While it is clear in Duquette's deposition that Duquette did provide information to Hal Pawley relative to Boreal's equipment and AMR's aeronautical service needs, the deposition does not show that Duquette actually gave a copy of his draft minimum standards to Mr. Pawley as alleged by the Complainant, or more importantly, that Mr. Pawley incorporated that draft into the published minimum standards. This limited information exchange, described in the Duquette deposition, is not sufficient to establish that the RFP process was flawed or written in such a manner to exclude other potential responders. The Director does not find that the evidence in the record reflects improper manipulation of the standards, as discussed in the Order at Sec. 3-17(c). Therefore, the Director does not find that the County "perverted" the RFP process in order to create a prohibited exclusive right at SIA.

Complainant has failed to submit sufficient evidence to establish that the County's creation of minimum standards for SIA established an exclusive use of the airport.

ISSUE TWO

Whether the County's alleged unreasonable or discriminatory application of its minimum standards has constructively granted an exclusive right in violation of Federal grant assurance No. 23, the County's deed covenants and 49 U.S.C. §40103(e).

The Complainant does not point out what aspect of the Minimum Standards it could not meet or how the Minimum Standards were discriminatorily more burdensome on it than on its competitor, Boreal, other than the AMR provisions. However, the Respondent raises the issue of fuel truck capacity standards. The Director's review of the Minimum Standards has failed to identify any other term that appears to be discriminatory or unreasonable, as is relevant to the

²⁰ The Director finds these depositions to be more persuasive than the contradictory affidavit of Mr. Dehlin. [FAA Exhibit I, Item 8, exhibit A] Furthermore, Mr. Dehlin's account is of his recollection of Mr. Duquette's admissions. Mr. Duquette, himself, states what he said and did in his deposition. [FAA Exhibit 1, Item 3, exhibit 2]

Furthermore, the actions described by Mr. Dehlin are not sufficient to establish a violation of the exclusive rights prohibition. [FAA Exhibit 1, Item 3, exhibit 12]

potential granting of an exclusive right. Consequently, the AMR issues and the fuel truck requirements will be examined to determine if they constructively grant an exclusive right to Roreal by excluding NMA.

The Complainant states:

Among the minimum standards and requirements were provisions that the proposed FBO must provide deicing, fueling and line services to AMR American Eagle regional maintenance center aircraft (See Exhibit 11).

In view of Boreal Aviation's exclusive contract with AMR American Eagle, Boreal Aviation was the only business entity that could meet these AMR American Eagle specific provisions of the RFP's minimum standards and requirements. (See Exhibit 12) [FAA Exhibit 1, Item 3, page 6 and exhibits 11 and 12]

In his affidavit, Mr. Rochon of NMA, alleges that the County "wrote NMA out of the RFP process stating, "the minimum standards required the successful bidder to use equipment that Boreal Aviation had but NMA did not." [FAA Exhibit 1, Item 8, exhibit B]

The Complainant does not cite these circumstances as the reasons for its failure to submit a proposal in response to the County's RFP.

The Respondent states:

The minimum standards do not require the proposer to actually provide those deicing services to AMR or general aviation aircraft, nor do the minimum standards require a proposer to provide fuel, or any other service, to AMR or anyone else.

...Respondent is not privy to the details of Boreal's business arrangements with its customers; however, based upon the testimony of Mr. Duquette (Exhibit 2 to the complaint), Boreal has no formal written agreement with AMR granting any exclusive business relationship. NMA could at any time have been in full compliance with the minimum standards even if it had no business with AMR. [FAA Exhibit 1, Item 7, pages 7 and 8]

The Respondent speculates in its Rebuttal [FAA Exhibit 1, Item 9, page 4] that the "equipment that Boreal Aviation had but NMA did not" referenced in the Rochon affidavit quoted above referred to a 3,000 gallon fuel truck required by the minimum standards for FBO operation at SIA. The Minimum Standards state, "B. Fuel Trucks: Provide and have available at all times a minimum of one fuel truck with capacity of at least 3,000 gallons of jet fuel, and one fuel truck with capacity of at least 750 gallons of 100LL aviation gasoline." [FAA Exhibit 1, Item 3, exhibit 11]

'The director determines that the Minimum Standards as written do not require the successful bidder to have an agreement with AMR. The Minimum Standards require:

A.. Fuel Storage: Provide fuel storage tanks for Jet A and 100 octane low lead (100LL)

of sufficient size to meet fueling needs. Initial minimum storage requirements are 10,000 gallons for jet fuel and 5,000 gallons for 100LL. When scheduled passenger airlines begin operation at Sawyer, storage shall be increased to 20,000 gallons for jet fuel...

E. Fueling Services: 1. Provide into-plane refueling, and defueling, as required for aircraft operation at the airport. These services shall be provided in accordance with applicable state and local laws and regulations, and the standard requirements of the airlines operation at the airport....

F. Line Services: Associated aviation line (ramp) services including, but not limited to, the following:

1. Aircraft deicing- Provide and maintain one vehicle or towed equipment capable of applying heated Type I or II propylene glycol for deicing general aviation and American Eagle regional aircraft maintenance center aircraft operating at the airport.

I. Hours of Operation: 1. During the interim period of operation, the FBO shall provide for AMR Eagle maintenance center aircraft and general aviation fueling and line services needs during hours mutually agreeable to the FBO and airport management. [FAA Exhibit 1, Item 3, exhibit 11]

The Director determines that a reasonable reading of these Minimum Standards does not preclude an entity without a service agreement with AMR from meeting the Minimum Standards. These Minimum Standards state that the requirements will be the needs and potential needs of the users of the Airport. There is not persuasive evidence in the record that Boreal has an exclusive arrangement with AMR.²¹ Although not cited by the Complainant as an unreasonable or discriminatory term, the Complainant states that the County ~wrote NMA out of the RFP.” However, requiring fueling equipment at the new airport to meet the expected increased needs of the users is not discriminatory. In fact, the deposition of Mr. Duquette of Boreal states that Boreal enhanced its equipment by replacing a smaller fuel truck with a larger one. [FAA Exhibit 1, Item 3, exhibit 2, page 34] The FAA suggests that airport sponsors establish reasonable minimum standards that are relevant to the proposed aeronautical activity with the goal of protecting the level and quality of services offered to the public. Drafting minimum standards to meet the equipment of an operator at a different airport would not appear to be a suitable means to achieve these goals. Also, the record does not demonstrate that NMA challenged or objected to this provision or attempted to show how its existing equipment would be an acceptable alternative.

Furthermore, the Complainant bears the responsibility for showing that any term is unreasonable The County does not have to prove that the term is reasonable Considering the fact that the Complainant has not explicitly cited any term other than the references to AMR, the Director cannot conclude that any of the terms of the Minimum Standards are unreasonable Without an unreasonable or discriminatory term, there can be no constructive granting of an exclusive right to Boreal The Director is not persuaded that NMA was prevented by any action or inaction of the County from submitting a proposal to the RFP, or becoming an FBO at SIA through the reasonable selection procedures of the County

²¹ The existence of such an arrangement could be evidence that Boreal competed for this business more effectively than did NMA It would not be evidence that the County has granted an exclusive right to Boreal

ISSUE THREE

Whether the County~ alleged failure to negotiate in good faith with NMA for the establishment of FBO operations at SIA has had the effect of explicitly granting an exclusive right in violation of Federal grant assurance No. 23, the County's deed covenants and 49 U.S.C. §40103(e).

The Complainant reports that in January and February of 1998, NMA discussed operations at SIA, acknowledging that it was aware of the transition to the new Airport. However, these discussions were not within the County's RFP process, but instead appear to be entangled with prior disputes at MCA. In any case, these negotiations appear to have ceased with NMA's February 26, 1998. [FAA Exhibit 1, Item 3, exhibits 9 & 10] The Complainant acknowledges that in March of 1998, the County published its RFP for an FBO at SIA. [FAA Exhibit 1, Item 8, pages 5] NMA does not state why it did not respond. Boreal did respond and was selected to be an FBO and entered into an agreement in July 1998. [FAA Exhibit 1, Item 7, exhibit E]

Almost a year passes without documentation in the record of any discussion between NMA and the County regarding establishing an FBO at SIA.

Complainant states:

On July 9, 1999, noting that it was currently operating as an FBO at Marquette County Airport that was scheduled to be closed on September 26, 1999, NMA again sought to negotiate with Marquette County for an FBO lease at Sawyer International Airport. NMA explained that it currently had fueling contracts with several commercial air carriers to service their aircraft at Marquette County Airport, and, in order to fulfill these contracts after Marquette County Airport was closed, NMA would need an FBO leasehold at Sawyer International Airport upon which to construct aviation and jet fuel tanks. NMA explained that time was of the essence in obtaining this FBO leasehold. NMA also opined that by granting Boreal Aviation an FBO lease that was predicated upon its exclusive contract with AMR American Eagle, Marquette County had granted an exclusive right to Boreal Aviation contrary to federal law. [FAA Exhibit 1, Item 3, pages 6-7 and exhibit 13]

The Director notes that the letter quoted above and included as exhibit 13 contained a proposal that NMA continue services at SIA that are identical to those it currently offered at MCA²² As reference in Section III Background, NMA proposed a fuel flowage rate that appears to be different from the agreement between the County and Boreal. However, NMA characterized its own proposal as excessive and stated its inclination to challenge the reasonableness of these fees for "a determination or judgment in an appropriate forum" Also, it is not entirely clear whether

²²It is not clear from the letter whether NMA intended to adhere to the Airport's rate schedule or not. The letter stated, "NMA also believes that the differential in the two rates or charges that is to retail fuel customers versus airline customers are not supportable variances allowed under FAA regulations The rates nonetheless will be compiled with for the time being However NMA s rate proposal itself appears to be inconsistent with this differential with which NMA claims it will comply [FAA Exhibit I Item 3 exhibit 13]

NMA intended to comply with the technical aspects of the Minimum Standards. They state that NMA “will provide fueling services by equipment meeting the marketing needs and minimum standards in conformity with FAA regulations.” [FAA Exhibit 1, Item 3, exhibit 13]

The Respondent characterizes NMA’s proposal as follows:

It proposes an FBO agreement with lesser standards and at lesser rates than what Boreal had already agreed to, except under threat of litigation. For example, Boreal’s agreement (Exhibit E) provides for a fuel flowage fee of \$.08 per gallon for scheduled airlines (Paragraph 3.1), whereas, NMA proposed to pay \$.075 across the board for all “into-plane” fueling. [FAA Exhibit 1, Item 7, page 9]

Furthermore, the County stated its need to examine the proposal, especially in light of the objections to the County’s current rate base and other requirements and NMA’s apparent desire to not adhere to the same standards that Boreal accepted which were included in the Airport’s Minimum Standards. As stated by the County’s counsel, NMA’s comments, “suggest that if the County enters into an FBO agreement with your client similar to the current FBO Agreement with Boreal, challenges and litigation will follow. On the other hand, if the County enters into an FBO Agreement with your client on more favorable terms than those agreed to by Boreal, challenges and litigation will also most assuredly ensue.” [FAA Exhibit 1, Item 3, exhibit 17, page 3] The County did pursue a legal opinion about its Federal obligations regarding equal treatment of potential FBO competitors. The opinion of Larry A. Salstrom, PC. was received by the County on August 26, 1999. [FAA Exhibit 1, Item 7, exhibit K]

The Director notes that the record reflects verbal and written exchanges between the parties. **On** August 24, 1999, counsel to the County responded to NMA’s counsel stating, “The County is prepared to enter into another FBO Agreement, identical to the Boreal Agreement, with any other party who meets the qualifications set forth in the RFP upon which that Agreement was based, assuming that the Agreement is not violative of FAA requirements and regulations.” [FAA Exhibit 1, Item 3, exhibit 20]

On September 3, 1999, County’s counsel wrote NMA’s counsel via fax memo mentioning a prior telephone conversation, otherwise not in the record. The fax reflects continued negotiating and planning for the accommodation of NMA at SIA, including discussion of the use of fuel tanks. The County’s counsel stated, “Mike, I can now provide the following partial answers to the questions you and Mr. Rochon raised in our telephone conversation last week.” [FAA Exhibit I, Item 7, exhibit L]

On September 3, NMA’s counsel responded to the memo of the same date stating:

As we informed you last week, the last possibility of financial viability in order for NMA to relocate, was lost when we were notified by Northwest that they have entered into a fueling contract with Boreal. There is no business opportunity’ any longer at the KI Sawyer site without one or both of the commercial carrier fueling contracts. Even if all of the other problems, including capitalization, cost of the move, available business

space, and a score of other issues that we've discussed in the past could somehow be solved in the next two weeks, the fueling contracts essentially kill the business prospects. [FAA Exhibit 1, Item 7, exhibit M]

The Director notes the main conflict here is that NMA wanted an agreement and standards identical to that which it had at MCA,²³ while the County proposed new standards and rates appropriate to the new Airport and consistent with that applied to the existing FBO, Boreal. (FAA Exhibit 1, Item 3, exhibit 20) The Director also notes that, as summarized in NMA's last correspondence (dated September 3, 1999) on record, there were numerous issues to work out related to NMA relocating to SIA, including "all the other problems, including capitalization, cost of the move, available business space, and a score of other issues." [FAA Exhibit I, Item 7, exhibit M] Finally the Director notes that it was NMA that submitted a written proposal on July 9, 1999, that appears to be inconsistent with the Minimum Standards and more favorable than that agreed to by Boreal; AND it was NMA that declined to continue negotiations beyond September 3, 1999 (other than to file this Complaint).

The Director determines that the County's actions in regard to the NMA's proposal of July 1999 were not unreasonable. Fifty-seven (57) days is not an unreasonable amount of time to consider the establishment of FBO operations at a new site, even under less contested circumstances. The issues raised by the Complainant regarding the County's alleged noncompliance and the proposal itself reasonably inspired caution in the County. Furthermore, it is not the County's responsibility to ensure that business opportunities are available to potential FBOs. If NMA was concerned about retaining its contracts with customers upon its move to SIA, it would have been well advised to have submitted a proposal earlier or during the RFP process. The question is not whether or not NMA was qualified to be a tenant at the new Airport, but rather, whether or not it was willing to agree to reasonable, nondiscriminatory terms set by the County.²⁴ The County offered to enter into an agreement with NMA on terms consistent with that to which Boreal had agreed. NMA did not agree to these terms. Finally, the Director notes that the County has not turned NMA down; it appears that the County is prepared to negotiate with NMA for FBO service at SIA on suitable terms and conditions meeting SIA's Minimum Standards.²⁵

²³On August 23 1999 counsel for NMA wrote the County's counsel The letter stated that 'NMA's proposal is nothing more than a request for continuation of the contractual arrangement which already exists with the County hut At the new site.' [FAA Exhibit 1, Item 3, exhibit 19]

²⁴ Again the FAA has determined that the mention of AMR in the Minimum Standards was not unreasonable or discriminatory The Complainant does not present sufficient argument or supportive documentation regarding the unreasonableness of any other term.

²⁵The FAA notes that both parties have attempted to file additional pleadings. While these pleadings were stricken horn the record because they were inconsistent with 14 C F R § 16 23 we note that they concern the Complainant's attempt to reopen negotiations with the Respondent through this formal complaint procedure The FAA would not expect a party to engage in negotiations through pleadings in a Part 16 Compliance investigation However the parties can continue discussions in pursuit of a use agreement outside of this formal investigation.

Evidentiary Hearing

Complainant requests that an evidentiary hearing be held in this matter. As explained in the preamble to the FAA Rules of Practice, 14 C F R Part 16, “While complainants are entitled to have their complaints investigated, they do not have a property interest sufficient to require an oral evidentiary hearing as part of that investigation, even when the investigation leads to a dismissal of a complaint” (61 Fed Reg 53998, 53999 (December 16, 1996)). The FAA Rules of Practice, 14 C F R Part 16 apply the procedural structure of 49 U S C §46101(a) to complaints filed with the FAA under 14 C F R Part 16. As in this case, once the complaint was filed, it was investigated by the FAA under 14 C F R § 16.29. Subsequently, this initial determination is issued under 14 C.F.R. § 16.31 by the Director, FAA Office of Safety and Standards, containing a “concise explanation of the factual and legal basis for the Director’s Determination on each claim made by the complainant.” [See 14 C.F.R. § 16.31]. If the Director’s Determination finds no violations, the complaint is dismissed without the opportunity for hearing. If the Director’s Determination proposes to withhold approval of an application for a grant apportioned under 49 U.S.C. §47114 (c) and (e) then the respondent will have the opportunity for a hearing at which the complainant will be a party. [See 49 U.S.C. §47106(d)]. The Director’s Determination may be appealed to the Associate Administrator for Airports under 14 C.F.R. § 16.31(c), whose final decision may be appealed to the United States Court of Appeals. [See 14 C.F.R. § 16.247]. Courts have held that the Part 16 hearing rules are consistent with 49 U.S.C. §46101. [See e.g., Penobscot Air Services LTD v FAA, 164 F 3d 713, 720 (1st Cir., 1999) and Lange v FAA, 208 F3d 389, 391 (2nd Cir., 2000)].

FINDINGS AND CONCLUSIONS

Upon consideration of the submissions by the parties, relying on the record herein and the applicable law, and for the reasons stated above, the FAA Office of Airport Safety and Standards finds and concludes as follows:

1. The County’s creation of its minimum standards for FBOs has not granted an exclusive right in violation of Federal grant assurance No. 23, or the County’s restrictive covenants in the deed of conveyance or 49 U.S.C. §40103 (e).
2. The County’s application of its minimum standards for FBOs has not constructively granted an exclusive right in violation of Federal grant assurance No. 23, or the County’s restrictive covenants in the deed of conveyance or 49 U.S.C. §40103 (e).
3. The actions of the County regarding its treatment of NMA and Boreal Aviation’s respective interest in becoming an FBO at SIA, as described above, do not constitute the granting of an exclusive right in violation of the County’s Federal grant assurance No. 23, or its restrictive covenants in the deed of conveyance or 49 U.S.C. §40 103 (e).

ORDER

Accordingly, it is ordered that:

1. The Complaint is dismissed.
2. The Motion for Hearing is denied
3. All Motions not expressly granted in this Determination are denied.

These Determinations are made under Sections 308(a), 313(a), 1002(a) and 1006(a) of the Federal Aviation Act of 1958, as amended, 49 U.S.C. §40103(e), 44502, 40113, 40114, 46104, and 46110, respectively, and Sections 511(a), 511(b), and 519 of the Airport and Airway improvement Act of 1982, as amended, 49 U.S.C. 47105(b), 47107(a)(4), 47107(g)(1), 47110, 4711 1(d), 47122, respectively.

RIGHT OF APPEAL

This Director's Determination is an initial agency determination and does not constitute a final agency decision and order subject to judicial review. 14 C.F.R. § 16.247(b)(2). A party adversely affected by the Director's Determination may appeal the initial determination to the FAA Associate Administrator for Airports pursuant to 14 C.F.R. § 16.33(b) within thirty (30) days after service of the Director's Determination.

Signed,

David L. Bennett
Director, Office of Airport
Safety and Standards

APR 19 2001
Date