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

Vortex Aviation Services, LLC	)	
	)	
COMPLAINANT	)	
	)	
v.	)	**Docket No. 16-00-18**
	)	
Jackson Hole Airport Board	)	
	)	
RESPONDENT	)	
	)	

DIRECTOR'S DETERMINATION

I. 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).

The Complainant, Vortex Aviation Services, LLC (Vortex) has filed a complaint against the Respondent, Jackson Hole Airport Board, (JHAB/Board). Vortex alleges that the Respondent, as the sponsor Jackson Hole Airport, (JRA/ Airport), has engaged in activity contrary to its Federal obligations. Specifically, Vortex contends that JHAB imposed a moratorium on scenic flights from JHA on Vortex that is discriminatory and in violation of its grant assurances and Federal law; that JHAB discriminated against Vortex by, among other things, denying it the right to operate under the provisions of its air carrier certificate; and that JHAB's actions constitute a flagrant abuse of its agreements with the FAA in the assurances agreement. According to Vortex, JHAB agreed that it would not economically discriminate against an operator or grant exclusive rights to others, but has done both. Vortex maintains that JHAB did not have the authority to impose any restrictions upon Vortex pursuant to the National Parks Air Tour Management Act of 2000 (NPATMA)[1].

Vortex presents evidence and argument to support its allegation of violations of grant assurances #22 and #23. These Federal obligations concern the prohibitions on a sponsor's unreasonable denial of access, unjust economic discrimination and the granting of an exclusive right. The pro se Complainant raised additional issues in its Reply. In its Reply, the Complainant asserts that JHAB is attempting to further limit Vortex under the proposed language contained in the direct contract by requiring new restrictions and conditions of Vortex that were not required at the May 17th approval and are not required of any other operator; and JHAB clearly attempts to have

[1] Also referred to as the Air Tour Act.

Vortex 'waive certain rights' under the proposed direct contract. [FAA Exhibit 1, Item 9, page 26]

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 assurances #22 and #23 (and under 49 U.S.C. § 47107(a) and 49 U.S.C. §40103(e)) and 49 U.S.C. 41713, review of the arguments and supporting documentation submitted by the parties in their pleadings, and the administrative record in this proceeding. An 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 the Airport as discussed below and based on the evidence of record in this proceeding, the FAA finds that the Respondent is not currently in violation of its Federal obligations.

II. THE AIRPORT

Jackson Hole Airport (JHA) is a public-use, commercial service airport located approximately seven miles north of Jackson, Wyoming. The airport is owned and operated by the Jackson Hole Airport Board. As of 1999, JHA had approximately 32,770 annual operations. 3,300 of these were classified as air carrier operations; 5,590 were commuter operations and 2,200 were air taxi operations. At the time of inspection, June 23, 1999, JHA reported 53 based aircraft and no helicopters. [FAA Exhibit 2, attached] JHA is located within the boundaries of Grand Teton National Park.

The planning and development of (JHA) 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 *et seq.* Specifically, since 1983, the JHAB has entered into numerous AIP grant agreements with the FAA and has received a total of $20,376,602 through Fiscal Year 2001. [FAA Exhibit 3, attached]

III. BACKGROUND

As stated by the Complainant, "Vortex is a Part 135 Operator which also holds Part 133 and 137 operating certificates." [FAA Exhibit 1, Item 1, page 1]

As stated by the Respondent, the JHAB

> is a joint powers Board formed by the Town of Jackson and County of Teton... [T]he Board is authorized to "prescribe and enforce rules and regulations" and to take other actions necessary to manage the Jackson Hole Airport The Board operates the Airport within the Grand Teton National Park (the "Park") pursuant to an agreement with the u.s. Department of the Interior (the "Use Agreement") entered into in 1983 …
> The Use Agreement requires the Board to adopt, implement and periodically revise a Noise Control Plan designed to ensure that aircraft noise exposure "will remain compatible with the purposes of Grand Teton National Park," and "will be

reasonably compatible with other adjacent land uses." [FAA Exhibit **1,** Item 3, pages 2-3]

As stated by the Complainant and not disputed by the Respondent:

The JHA has one fixed base operator, Jackson Hole Aviation, at least 3 major airlines providing scheduled airline service, and several Part 1352 operators on the field. Scenic air tour and Part 135[2] operators have operated on the field for many years going back to, at least, 1972. [FAA Exhibit 1, Item 1, pages 1-2]

Congress enacted the National Parks Air Tour Management Act of 2000, in April 2000. Codified at 49 USC §40128, the statute states, "a commercial air tour operator may not conduct commercial air tour operations over a national park or tribal lands." It defines a commercial air tour operation as

> any flight, conducted for compensation or hire in a powered aircraft where a purpose of the flight is sightseeing over a national park, within 1/2 mile outside the boundary of any national park, or over tribal lands, during which the aircraft flies- (i) below a minimum altitude, determined by the Administrator in cooperation with the Director, above ground level (except solely for purposes of takeoff or landing, or necessary for safe operation of an aircraft as determined under the rules and regulations of the FAA requiring the PIC [pilot-in-command] to take action to ensure the safe operation of the aircraft); or (ii) less than I mile laterally from any geographic feature within the park (unless more than 1/2 mile outside the boundary).

On May 10, 2000, Vortex submitted a request to the JHAB to "take the necessary action to approve our operations located at the Jackson Hole Airport." This letter included information regarding Vortex's proposed operations and its cooperative agreement with Jackson Hole Aviation (the fixed-base operator at the Airport). The necessary action for the JHAB was the approval of a form of subcontract between Vortex and Jackson Hole Aviation. [FAA exhibit 1, Item 1, exhibit E]

On May 17, 2000, JHAB did approve the subcontract. The minutes state that a board member "made a motion to approve the subcontract contingent upon the approval of the subcontract with Jackson Hole Aviation's attorney." The motion carried. [FAA Exhibit 1, Item 1, exhibit C]

The Respondent states, "Numerous residents in Jackson Hole subsequently complained to the Board concerning the adverse noise effects of scenic helicopter tours over the Park and in the valley. They also questioned whether such operations, based at an airport located entirely within a national park, violated the Air Tour Act, in the absence of prior FAA approval. The Board had been unaware of the Act when it initially approved the form of subcontract" on May 17, 2000. [FAA Exhibit 1, Item 3, page 4]

On June 12,2000, the JHAB considered the passage of the Air Tour Act and the implications of Vortex's proposed operations, the plans for which had yet to be completed. The JHAB meeting minutes state that a Board member "clarified the motion that he made by saying that the motion

[2] Part 135 governs the operations of air taxi services.

would rescind our approval subject to full compliance with the National Park Air Tour Act 2000. The motion carried." [FAA Exhibit 1, Item 1, exhibit b, page 5] This rescission prevented Vortex from executing its pending sublease with Jackson Hole Aviation, and thus was prevented from initiating operations from the Airport for which it had made investments and plans. [FAA Exhibit 1, Item 1, page 8]

In June and July, the JHAB received public comment raising questions regarding the applicability of the Air Tour Act to Vortex's proposed operations at the Airport. The Respondent characterizes them as follows:

> At a special public hearing on June 30, 2000, the Board took testimony from Vortex, and from numerous individuals and groups who opposed scenic helicopter operations, many on the basis of the Air Tour Act. At its July 17,2000, meeting, the Board again took testimony from Vortex and many others who had not testified at the June 30th hearing. ...Vortex had not applied to FAA under the Air Tour Act for authority to conduct scenic tours over Grand Teton National Park. Instead, Vortex asserted that its scenic operations would be conducted outside the boundaries of the Park and would not be subject to the Air Tour Act. However, because the Airport is entirely within the Park, Vortex could not deny that a portion of its proposed scenic flights would in fact be "over" the Park. An unanswered question was how Vortex's proposed operations would be exempt fro the "geographic feature" prohibition of the Air Tour Act. [FAA Exhibit 1, Item 3, page 5]

The Complainant points out instances in the record where individuals express the opinion that Vortex's proposed operations would be exempt from the Air Tour Act requirements, because it did not propose to conduct scenic flights within the National park, except for taking off and landing at the Airport. 3 Various meeting minutes also present evidence of opinions of the public in opposition to Vortex's proposed operations. [FAA Exhibit 1, Item 1, exhibits I & K]

On July 17, 2000, after receiving public comment regarding the applicability of the Air Tour Act, including comment from Vortex, the JHAB instituted "a motion to impose a moratorium on the approval of new applications for contract or subcontract for scenic tour operations until a conclusive determination has been received, stating that such operations are lawful in the Air Tour Act." [FAA Exhibit 1, Item 1, exhibit K, page 3] However, the JHAB approved the subcontract between Vortex and Jackson Hole Aviation, permitting Vortex to conduct non- scenic, charter operations, depending on its arrangements with Jackson Hole Aviation. [FAA Exhibit 1, Item 3, page 6]

In July and August, the Complainant pursued clarification from the FAA regarding specific

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[3] The Complainant presents a transcript, apparently prepared by the Complainant from a tape of the Special Meeting of June 30, 2000, that documents the comments of Mike Morgan, Airport Attorney. It quotes Mr. Morgan as saying, "Based on what we understand, ah, with Vortex, ah, it doesn't appear, Vortex believes, certainly, that its proposed operation will not violate that act." [FAA Exhibit 1, Item **1,** exhibit J, page 6] The June 30th Special Meeting Minutes, summarize the comments of a man identified by the Complainant as George Helfrich, Grand Teton National Park Assistant Superintendent. The Minutes read, "Helfrich explained that the Air Tour Act 2000 would restrict Kauffinan (Vortex) from flying over the Park, however he would be allowed to fly in the Park when entering and exiting the Airport. Helfrich explained to the Public that the Park cannot stop air tours and stated that the Park believes that Kauffinan's proposal is legal." [FAA Exhibit I, Item 1, exhibit I]

questions about the applicability of the Air Tour Act to the Complainant's proposed operation. Earlier, on June 22,2000, the Complainant had written the FAA's Denver Flight Standards District Office to ask four specific questions. [FAA Exhibit 1, Item 1, exhibit L]

On August 9,2000, the Complainant (and the Respondent, who was carbon-copied) received a partial response to the Complainant's questions of June 22, 2000, from the FAA's Assistant Chief Counsel, Regulations Division. The letter stated, "it is clear that the National Park Air Tour Management Act does not prohibit or limit Vortex Aviation's operations as long as Vortex Aviation conducts its sightseeing flights outside of Grand Teton National Park and more than 1/2 mile outside the Park boundary." The letter also stated, "the Act specifically excepts operators from the definition of commercial air tour operation when they descend below the minimum altitude ~ [sic] for the purpose of takeoff or landing. ..Therefore, Vortex would not be considered a commercial air tour operation, for the purposes of this Act, as long as it descends below the minimum altitude for the sole purpose of takeoff and landing." [FAA Exhibit 1, Item 1, exhibit M] The letter did not address the "geographic feature" provision of the Act. As stated above, this provision defines a commercial air tour operation as one that operates "less than 1 mile laterally from any geographic feature within the park (unless more than 1/2 mile outside the boundary)."

On August 31, 2000, the JHAB requested guidance from the FAA to satisfy its concerns regarding specific aspects of the Air Tour Act as applied to the circumstances at the Airport. This was within 75 days of their withdrawal of approval for Vortex, and after public comment on the issue. One of the three questions asked was, "How are 'geographic feature' and 'laterally' defined by FAA under the Act?" [FAA Exhibit 1, Item 3, exhibit 7] According to the Respondent, "Depending on how the term is defined, a portion of all such flights [from the Airport] must occur within one mile laterally from a "geographic feature" within the Park." [FAA Exhibit 1 Item 3, page 2]

On September 7, 2000, the Complainant (and the Respondent, who was carbon-copied) received a letter from FAA's Assistant Chief Counsel for Airports & Environmental Law addressing remaining questions asked in Complainant's June 22 letter and deferred in the FAA's August 9 letter. Based upon Federal law and an airport proprietor's limited proprietary powers to restrict airport access, the letter expressed serious concerns "about the Board's proposal to impose a moratorium on commercial sightseeing flights." It also stated that "... because Vortex is not proposing to initiate flights over Grand Teton National Park (other than those necessary to land and takeoff), it is unnecessary for the FAA to issue an advisory opinion concerning the authority of the Board to regulate commercial sightseeing overflights." [FAA Exhibit 1, Item 1, exhibit 0, pages 1-2]

The Complainant filed this Complaint on October 20,2000. [FAA Exhibit 1, Item 1]

On October 27,2000, the FAA responded to the JHAB's letter of August 31,2000, by issuing a seven-page joint letter addressed to the Complainant and Respondent. This letter was a comprehensive response to the inquiries discussed above, including those of the Complainant, Respondent and citizens opposing Vortex's operating at the Airport. The letter expounded on the FAA's September 7th letter, stating, "... airport proprietors have limited authority to adopt reasonable, nonarbitrary, nondiscriminatory regulations that establish acceptable levels of noise

for the airport environs to minimize their liability for noise.damages."[4] [FAA Exhibit **1,** Item 9, exhibit V, page 3]

It also specifically answered the question of the "geographic feature" provision of the Act. It stated, "aircraft may land and depart from Jackson Hole Airport and come less than one mile laterally from a geographic feature within the Park without being considered a commercial air tour operation (or requiring authority to operate commercial air tour operations) and thus without coming under any provisions of the Act." [FAA Exhibit 1, Item 9, exhibit V, page 6] The letter also defines the terms "geographic feature" and "laterally," using hypothetical examples on pages 4-6. [FAA Exhibit 1, Item 9, exhibit V, pages 4-6]

Upon receipt of the FAA's October 27 letter, the JHAB considered the information in the letter and concluded that it constituted a "conclusive determination" called for in its moratorium. As a result, the JHAB lifted the moratorium on November 15,2000, and resumed negotiations with Vortex. [FAA Exhibit **1,** Item 3, page 8] Subsequently, in response to a request from the Complainant, the JHAB provided additional infoffi1ation to the Complainant. On March 1, 2001, the Complainant and Respondent JHAB reached an accord and both signed a non-tenant use agreement[5] providing Vortex with the right to conduct commercial activity, including scenic and charter flights, at the Airport over a three-year period. [FAA Exhibit 1, Item 11]

IV. ISSUES

The principal matter to be determined by the FAA is whether or not the Sponsor is in compliance with its Federal obligations as embodied in its Federal grant agreements listed in 14 CFR 16.1.[6] Upon review of the parties' pleadings and the entire record, the FAA has determined that the following issues require consideration and analysis in order to provide an adequate review of this sponsor's compliance with applicable Federal law and FAA policy:

1. Whether JHAB, by denying Vortex the ability to conduct scenic air tour operations from the Airport and other actions, has violated its Federal obligations regarding reasonable access and unjust economic discrimination as set forth in 49 V.S.C. 47107(a)(1) and its Federal grant agreements (Assurance No. 22).

2. Whether JHAB's implementation of the moratorium granted an exclusive right to competing aeronautical service providers at the Airport in violation of 49 USC 40103(e), 49 U.S.C. §47107(a)(4), and Assurance No. 23.

3. Whether JHAB, by denying Vortex the ability to conduct scenic air tour operations from the Airport through its moratorium on approving applications for authority to conduct such operations, has violated the Federal preemption provision, 49 USC 41713.

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[4] See, *City of Burbank v. Lockheed Air Terminal,* 411 U.S. 624 (1973); *British Airways Board v. Port Authority of NY and NJ;* 558 F.2d 75,84 (2nd Cir. 1977).

[5] The FAA accepted this post-pleading documentation because it was necessary for a complete review of the facts. It consists of the New Tenant Use Agreement, agreed to between the parties and executed on March 1,2001.

[6] The relationship between alleged violations of grant assurances through unreasonable terms or unreasonable restrictions on access and 49 USC §41713 are discussed in the "Federal Preemption" subsection, under Section V.

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, *ie.,* 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 AAIA, the Secretary of Transportation must receive certain assurances from the airport sponsor.

The AAIA 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 AlP 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 to be followed by the FAA in carrying out its legislatively mandated functions related to federally obligated airport owners' compliance with their sponsor assurances; it does not create those obligations. The relevant Federal obligations and the basis for those obligations upon the Respondent are discussed below.

Assurance #22: *Use on Reasonable 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 as an airport for public use on reasonable terms, and without unjust discrimination, to all types, kinds, and classes of aeronautical uses." 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 (t), and subsection (i) represents an exception to subsection (a) to permit the sponsor to exercise control of the airport sufficient to preclude unsafe and inefficient conditions, which would be detrimental to the civil aviation needs of the public.

Assurance 22(e) relates to air carrier use of the Airport, implementing the provisions of 49 USC §§ 47107(a)(2) and (3). It states:

> Each air carrier using such airport (whether as a tenant, nontenant, or subtenant of another air carrier tenant) shall be subject to such nondiscriminatory and substantially comparable rules, regulations, conditions, rates, fees, rentals, and other charges with respect to facilities directly and substantially related to providing air transportation as are applicable to all such air carriers which make similar use of such airport and utilize similar facilities, subject to reasonable classifications such as tenants or nontenants and signatory carriers and nonsignatory carriers. Classification or status as tenant or signatory shall not be unreasonably withheld by any airport provided an air carrier assumes obligations substantially similar to those already imposed on air carriers in such classification or status [Assurance 22(e)]

Subsection (e) specifies the application of subsection (a) to the treatment of air carriers, 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 inherent restrictions on aeronautical activities. See Order, Sec. 3-8(a). Consequently, the owner of any airport developed with Federal grant assistance is required to operate the airport for the use and benefit of the public.

Assurance #23: *The Prohibition Against the Granting of an Exclusive Right*

Section 308(a) of the FAAct, 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." See 49 U.S.C. §§ 40102(a)(4), (9), (28).

Section 51 1 (a)(2) of the AAIA, 49 U.S.C. §47107(a)(4), similarly provides, in pertinent part, that "there will be no exclusive right for the use of the airport by any person providing, or intending to provide, aeronautical services to the public."

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

> "... will permit no exclusive right for the use of the airport by any persons providing, 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).

Federal Preemption Over Prices, Routes, and Service of Air Carriers

State and local governments are expressly prohibited by 49 USC §41713 (the former section 105 of the Airline Deregulation Act of 1978), from regulating the prices, routes or services of a Federally authorized air carrier. Title 49 of the United States Code § 41713(b)(1), provides in relevant part that "a State, political subdivision of a State, or political authority of at least 2 States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier that may provide air transportation under [49 USC §§ 41101 through 42112]." However, under an exception (49 USC §41713(b)(3)), State and local governments that own or operate an airport served by an air carrier may still act through their proprietary powers and rights. A sponsor could be in violation of the grant assurances by enforcing a term in a contract or refusing a term in a contract with an air carrier, if the effect of doing so resulted in State or local regulation of air carrier prices, routes and services.

Airport sponsors acting under their proprietary powers are limited to adopting restrictions that are reasonable, non-arbitrary and non-discriminatory. *See, British Airways Board* v. *Port Authority of New York and New Jersey,* 558 F.2d 75 (2d Cir. 1977), aff'd. as modified. 564 F.2d

1002 (2d Cir. 1977). The FAA has authority to consider preemption issues under Section 1002 of the FAAct, 49 U.S.C., §46l0l, and §46l05. These provisions grant the FAA the authority to investigate compliance with provisions of the FAAct, as recodified, in part A of subtitle VII of Title 49 of the United States Code, including section 4l7l3(b). While the preemption provision, 49 U.S.C. § 4l7l3(b), is not one of the express authorities listed under 14 CFR § 16.1 for Part 16 jurisdiction, the FAA may investigate an alleged violations in conjunction with an allegation of violation of an authority expressly listed under 14 CFR § 16.1 jurisdiction, such as the alleged violations of a sponsor's grant assurances.

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 contractual 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 to assist FAA personnel in carrying out the agency's responsibility relating to airport compliance. The Order 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.

Notably, the Order states that the compliance program is primarily centered on achieving voluntary compliance and mutual resolution of issues, including a program to:

> investigate and pursue resolution when complaints about potential violations are registered. Ultimately, when mutual resolution cannot be obtained voluntarily, we must be prepared to resort to enforcement procedures..." [Order, page 35]

> Regarding the standard for a finding of noncompliance, the Order states:

The judgment to be made in all cases is whether the airport owner is reasonably meeting the Federal commitments. It is the FAA's position that the airport owner meets commitments when: (a) the obligations are fully understood, (b) a program

(preventative maintenance, leasing policies, operating regulations, etc.) is in place which in FAA's judgment is adequate to reasonably carry out these commitments, and (c) the owner satisfactorily demonstrates that such a program is being carried- out. [Order, page 37]

VI. DISCUSSION AND ANALYSIS

Generally, the Complainant alleges that it was denied access to the Airport by the Respondent on the Respondent's pretext of requiring clarification of new Federal law regarding aeronautical operation over National Parks (Air Tour Act), and that it was otherwise unjustly discriminated against. The Respondent argues that it has provided access to the Complainant in response to FAA guidance received after the filing of this Complaint and that whatever issues there may have been have been rendered moot by the March 1, 2001, agreement.

The Complainant's arguments regard the denial of access to operate scenic flights. Vortex cites the Respondent for alleged, "denial of Vortex to conduct 'scenic' flights by passing a 'moratorium' and attempting to usurp authority over federal airspace that Congress has clearly mandated to the FAA as the sole authority." [FAA Exhibit 1, Item 1, page 15] The Complainant further characterizes the motivations of the Sponsor:

> JHAB has attempted to convolute and confuse the issues involved in the NP A TMA (Air Tour Act) as an instrument of delay for Vortex and to attempt to make it economically unviable to operate at JHA. It is solely on the basis of the NP A TMA (Air Tour Act) that the JHAB has denied Vortex its right to operate scenic flights on the airport. [FAA Exhibit 1, Item 1, page 16]

However, as noted by the Respondent in its Answer, JHAB lifted its moratorium upon its receipt of guidance from the FAA regarding the applicability of the Air Tour Act. [FAA Exhibit **1,** Item 3, page 9] Specifically, the JHAB states:

> Upon receipt of FAA's response,[7] the Board (JHAB) promptly scheduled a special meeting for November 15,2000. At that meeting the Board considered and discussed FAA's response, concluded that it constituted a "conclusive determination" called for in the Moratorium, and accordingly, announced that the Moratorium was no longer in effect. The Board directed its staff to work with Vortex on the terms of a contract under which Vortex would be authorized to provide both charter and scenic operations from the Airport, and to present that contract for the Board's consideration. At it's meeting of November 27, 2000, the Board approved and offered to Vortex a proposed contract containing the same terms it offers to other non-tenant Part 135 operators at the Airport. [FAA Exhibit 1, Item 3, pages 8-9][8]

[7] FAA's letter dated October 27, 2000 to JHAB responding to specific questions asked by JHAB, summarized in the Background section.

[8] On March I, 200 I, the parties entered into a Non-Tenant Use Agreement [FAA Exhibit I, Item 11] resulting from further negotiations between the parties and including alterations from the document presented on November 27, 2000. This Non-Tenant Use Agreement was accepted to the record as probative and relevant.

The Complainant does not dispute that the Moratorium was lifted, but continues to dispute the Respondent's motives in its alleged confusion over the Air Tour Act, thus delaying Vortex's ability to conduct commercial scenic air tour operations:

> the time JHAB alleges was reasonable to do its investigation was not in reality time for investigation but, an orchestrated, intentional, and malicious scheme on the part of JHAB to financially exhaust Vortex so Vortex would pack up and leave Jackson. Over and over again JHAB alleged that the NP A TMA (Air Tour Act) was unclear and inconclusive. The fact is that the Board did not take one action to resolve any 'uncertainty' until after Vortex brought federal court and Part 16 actions against it, AND after the summer tourist season was over." [FAA Exhibit **1,** Item 9, page 2]

In its Rebuttal, the Respondent argues that the issue is moot since the moratorium was rescinded, that its review of the legal questions surrounding the Air Tour Act was reasonable, that the resulting delay of access was reasonable, and that its actions were proprietary, and therefore did not intrude into the federal government's sovereignty over the navigable airspace. The Respondent states:

> Vortex's Complaint asserts that the Board is impermissibly discriminating against it and usurping federal airspace jurisdiction through enforcement of the temporary Moratorium, and by approving a contract having only a seasonal term. These matters are no longer at issue. The complaint of a Moratorium is no longer in existence. [FAA Exhibit 1, Item 3, page 9]...
>
> The Board's imposition of a temporary Moratorium, and seeking of administrative clarification, was therefore a reasonable and limited response to new federal legislation. [FAA Exhibit 1, Item 9, pages 10-11]
>
> The Moratorium was an exercise of the Board's duty as Airport proprietor to regulate the commercial use of the Airport in accordance with law. [FAA Exhibit 13, Item 9, page 13]

In a March 8, 2001 letter to the FAA, Respondent advised that on March 1, negotiations between JHAB and Vortex were successfully concluded and the parties had entered into a Non-Tenant Use Agreement providing Vortex with authorization to conduct commercial scenic air tour operations. [FAA Exhibit 1, Item 11.]

A. <u>Unjust Economic Discrimination</u>

- Whether JHAB, by denying Vortex the ability to conduct scenic air tour operations from the Airport and other actions, has violated its Federal obligations regarding reasonable access and unjust economic discrimination as set forth in 49 V.S.C. 47107(a)(l) and its Federal grant agreements (Assurance No. 22).

The Complainant alleges that the Respondent unjustly discriminated against and unreasonably denied it access to the Airport by (1) imposing a moratorium for the conduct of scenic air tour operations from the airport, (2) placing restrictions on its ability to operate as an air charter while being denied the ability to conduct scenic tour operations (i.e., during the period of the

moratorium), (3) requiring new restrictions and conditions not required earlier and not required of other operators at the Airport in a new direct contract.

1. The Moratorium

Complainant alleges that it has been the subject of unreasonable and unjust discrimination by the JHAB as a result of the prohibition on Complainant's access to JHA for the purposes of conducting scenic air tour operations. Complainant alleges that Jackson Hole Aviation could operate scenic air tour flights (the record does not provide conclusive evidence on this point) and Vortex could not. This issue is moot because as of March 1,2001**,** Vortex has the authority to conduct not only scenic air tour operations but other types of operations as well.

As indicated above, after JHAB rescinded its moratorium on approving applications for authority to conduct scenic air tour operations on November 15, 2000, it entered into negotiations with Vortex on providing the Complainant's desired access. The negotiations proved successful. On March 1,2001, Vortex Aviation Services, LLC and JHAB entered into an operating agreement (Non-Tenant Use Agreement) with a three-year term permitting Vortex "to operate upon the Jackson Hole Airport, a commercial aeronautical business ..." under Federal Aviation Regulations Parts 91,133, 135 (Commuter and On Demand Operations), and 137, "... including but not limited to the provision of scenic and charter flights to the public." [Item 11, page 1, paragraph 1.1.] Thus, according to the record, the Complainant has obtained the desired access - an agreement to operate scenic and charter flights from the Airport.

Complainant also alleges that JHAB's actions were designed to obstruct Vortex from taking advantage of the short summer season and as a result Vortex has suffered financial hann in excess of $100,000. Complainant argues that the complaint should not be dismissed because the discrimination has stopped; FAA should rule on the merits of the case. However, the purpose of the FAA Airport Compliance Program is to ensure that sponsors comply with their federal obligations under grant assurances in order to maintain a national system of airports; the program does not provide a means for restitution and the award of financial damages to complainants. Consequently, the FAA seeks current compliance by airport sponsors and generally does not take punitive action for past behavior but for some very limited circumstances (such as unlawful diversion of airport revenue). The FAA also strongly encourages negotiations between the parties, which did occur in this case and which resulted in Vortex signing the March I, 2001, agreement providing it with the desired access.

2. Air Charter Restrictions

The Complainant alleges that its operations as a charter operator were restricted unreasonably and in an unjustly discriminatory manner as a result of the short-term agreement offered. According to Vortex, on May 17,2000, JHAB only gave Vortex approval to operate on the JHA until November 1,2000 ...to delay and frustrate Vortex's ability to implement long term planing (sic) and business decision making. [FAA Exhibit 1, Item 1, p. 19] The Respondent admits that on May 17 it "approved the form of Vortex's subcontract, 'to be renewed annually on November 1st,' insofar as it permitted Vortex to conduct a *charter* and not a *scenic* flight business from the Airport." [FAA Exhibit **1,** Item 3, p. 6] However, this issue has been resolved because Vortex has been granted a three-year term in the March 1,2001 agreement discussed above.

3. Direct Contract

On the issue of the direct contract, the Complainant brings up new issues in its Reply, under the heading "New Matler."[9] [FAA Exhibit 1, Item 9, page 24] It states:

> JHAB attempts to further limit Vortex under the proposed language contained in the direct contract by requiring new restrictions and conditions of Vortex that were not required at the May 17th approval and are not required of ANY other operator. What's more, JHAB clearly attempts to have Vortex 'waive certain rights' under the proposed direct contract
>
> For these reasons Vortex reserves the right to append to its Complaint new allegations of violations of the Assurance Agreement since all acts of potential discrimination against Vortex have not produced a conclusive end. [FAA Exhibit 1, Item 9, page 26]

The Complainant highlights certain terms in the proposed direct contract, objecting to some of the terms. The JHAB had offered this draft document to Vortex. The Complainant does not present any specific arguments other than that described, below. [FAA Exhibit 1, Item 9 exhibit AQ] At section 1.1, the Complainant objects to a draft term that grants Vortex the right to operate at the Airport under Part 135. Complainant asks about its ability to operate under other Parts of the FAR At section 1.2, the Complainant objects to a provision that stated, "Operator is prohibited from conducting any other commercial activity upon or from the Airport other than that expressly set forth above, without the express written consent of the Board." At section 2, the Complainant objects to a provision that stated:

> Nothing in this Agreement shall create any vested right beyond the termination date of this Agreement, and the parties agree that it is not intended to be construed to create any grand-fathered rights under the National Parks Air Tour Management Act of 2000 or any subsequent legislation regulating the conduct of scenic air tours over federal lands.

At section 3.3, the Complainant makes an observation without expressing an objection. At section 5.4, the Complainant alleges that the requirement that the "Operator's pilot(s) shall hold a commercial pilot certificate" is "unreasonably restrictive." The Complainant characterizes section 5.6 as onerous and alleges that it is not applied to other operators. It stated, "Operator's advertising shall not, either expressly or implacably, indicate that Operator is engaged in providing scenic flights over noise-sensitive areas of Grand Teton National Park." The Complainant objects to section 6.4, which states

> Operator acknowledges that the Airport is located entirely within a unit of the national park system, and that all flight operations which take off or land at the Airport occur, at least in part, over a national park. Operator shall comply with the National Parks Air Tour Management Act of 2000, and any regulations or

[9] The Complainant also raises the issue of the Sponsor's delay in producing documents related to the Complainant's actions against the sponsor. The Complainant does not allege a specific violation of a grant assurance. None is evident to the Director.

management plans adopted there under, to the maximum extent that Operator's business conducted from the Airport requires such compliance.

The Respondent argues that the Complainant cannot raise issues for the first time in a Reply and that no opportunity for good faith efforts toward informal resolution had been available to the Respondent. [FAA Exhibit 1, Item 10, page 3]

The record does not support that the proposed direct contract containing the provisions challenged by the Complainant, as discussed above, was ever executed by the parties. Rather, it appears that a new Non-Tenant Use Agreement was negotiated by the parties over several months and was executed on March 1, 2000. [FAA Exhibit 1, Item 11]

Upon review of the executed Non-Tenant Use Agreement, we determined that JHAB acceded to the Complainant's objections to section 1.1. Section 1.2 was altered to list as included, the specific activities of "poison applications, flight training, and skydiving." Section 2 was altered to delete reference to any "grand fathered rights." No substantive changes were made to section 3.3; however, the Complainant's notation was a comment, rather than an objection. At section 5.5, the sentence to which the Complainant objected has been altered to read, "Operator's pilot(s) shall hold such certificates as are required by applicable regulations for the type of operation conducted." Section 5.6 was altered to read, "Operator shall not advertise that Operator is engaged in providing scenic flights, to and from the Airport, over noise-sensitive areas of Grand Teton National Park." Section 6.4 was altered by adding at the end, "as determined by the federal agency having jurisdiction." ~ also Item 10, p. 4, fn 2.

Consequently, we find that the terms of the March 1,2001, Non-Tenant Use Agreement sufficiently respond to the concerns raised by Vortex in its Reply and the issue is moot. We also note that the FAA relies on direct negotiation between the sponsor and the airport user to effect a mutual beneficial business arrangement for the conduct of a commercial aeronautical activity on the airport. As discussed more fully above, the purpose of the grant assurances is to protect the public interest in the operation of Federally obligated airports. Commercial tenants in disputes with their landlords, i.e. negotiation or commercial litigation under applicable state and local laws, have other forums in which to address their complaints.

B. Exclusive Rights

- Whether JHAB's implementation of the moratorium granted an exclusive right to competing aeronautical service providers at the Airport in violation of 49 USC 40103(e), 49 U.S.C. §47107(a)(4), and Assurance No. 23?

In accordance with Federal law, the JHAB is prohibited from permitting any exclusive right for the use of the airport by any persons providing, or intending to provide, aeronautical services to the public. The lliAB also agreed that it would not, either directly or indirectly, grant or permit any person, firm, or corporation, the exclusive right at the airport to conduct any aeronautical activities. 49 USC 40103(e), 49 U.S.C. §47107(a)(4), and Assurance No. 23.

As discussed above, the Director did not find a current state of denial of access or unjust economic discrimination towards Complainant Vortex. The record does not demonstrate that an

explicit exclusive right has been granted to a specific entity or entities. In any event, the record indicates that as of March 1,2001, the Complainant was provided with a three-year, negotiated access agreement permitting it "to operate upon the Jackson Hole Airport, a commercial aeronautical business ..." under Federal Aviation Regulations Parts 91, 133, 135 (Commuter and On Demand Operations), and 137, "... including but not limited to the provision of scenic and charter flights to the public." [Item 11, page 1, paragraph 1.1.] Thus, according to the record, the Complainant has obtained the desired access to the Airport and an agreement permitting Vortex to operate the desired types of operations (scenic and charter flights to the public). No allegations have been presented that the March 1 agreement's terms are inconsistent with the exclusive rights prohibition.

Therefore, the record does not support that the Sponsor is currently providing an exclusive right at the Airport.

C. <u>Federal Preemption</u>

- Whether JHAB, by denying Vortex the ability to conduct scenic air tour operations from the Airport through its moratorium on approving applications for authority to conduct such operations, has violated the Federal preemption provision, 49 USC 41713.

Regarding the issue of Federal Preemption, Vortex alleges that it was unreasonably denied access to the Airport as a certified air carrier in violation of Federal law prohibiting local and state governments, or political subdivisions thereof, from regulating the price, route or service of an air carrier. [Item 9, p. 20 & 29] To the extent Vortex was and is an air carrier within the meaning of 49 USC § 41713, which is not clear from the record, this would normally raise the issue of whether JHAB was, during the period of the moratorium, unlawfully regulating the prices, routes, or services of an air carrier in violation of this preemption statute. However, as noted, the moratorium that delayed Vortex's obtaining the right to conduct scenic air tour operations at the Airport was rescinded on November 15, 2000, and as of March 1,2001, Vortex obtained its desired authority to conduct scenic air tour operations. This renders the preemption issue moot (and also its remedy, the seeking of an injunction of the moratorium in Federal district court).

The record is consistent with the allegation that the Respondent delayed entering into a business relationship with the Complainant on the basis of its alleged confusion over the applicability of the Air Tour Act. The Director notes that the Respondent argues that the proprietor's exception to Federal preemption applies to its enacting of the moratorium. [FAA Exhibit 1, Item 3, page 13]

While the FAA is making no findings in this decision on the legality of JHAB's moratorium because of its November 15,2000 rescission, the FAA's position on such moratoriums bears repeating here. In a September 7, 2000, letter from the FAA's Assistant Chief Counsel for Airports and Environmental Law to Vortex (carbon-copied to JHAB), the FAA expressed its "serious concerns" about JHAB's proposal to adopt its moratorium on commercial sightseeing flights. Citing Federal case law, the letter stated that airport proprietors who are recipients of FAA grants such as JHAB have only limited authority to adopt reasonable, nonarbitrary, and nondiscriminatory regulations that establish acceptable levels of noise for the airport environs to

minimize their liability for noise damages. The letter further noted JHAB's grant obligations to provide fair and reasonable access and the likely application of the Airport Noise and Capacity Act of 1990 and its regulations, 14 CFR Part 161, to operating restrictions affecting Stage 2 aircraft. Although not addressed in the September 7 letter, 49 USC § 41713, as discussed above, prohibits States and local governments from regulating the prices, routes, or services of air carriers.

As stated, the FAA only reviews current compliance with Federal obligations. The FAA understands from Vortex's pleadings (see, e.g., Item 9, pages 16-17) that it is seeking from the FAA a finding of past discrimination for use in civil court proceedings against the JHAB. In its December 21 Response, Vortex states that " Any remedy that Vortex would seek in civil court is impaired by the FAA 's failure to rule... If the FAA rules that matters are moot as a result of JHAB correcting a past wrong, without ruling on the merits of Vortex's claim of discrimination is to prevent Vortex's civil matter to go forward." [FAA Exhibit 1, Item 9, page 17.] However, the FAA makes no such findings in cases such as this. The FAA's determination of whether or not to take enforcement action is dependent on protecting the public's interest in civil aviation generally. Any remedy for alleged damages would lie in the Courts.

Considering the above, the FAA need not determine whether the prior temporary denial of access through the issuance of the moratorium constituted unreasonable denial of access in violation of its grant assurances. This Determination, however, acknowledges the previously issued FAA guidance on the subject of the Air Tour Act. [FAA Exhibit 1, Item 9, exhibit V]

Accordingly, the record does not support the allegation that the Sponsor is currently denying access to Vortex for the provision of an aeronautical service by force of unreasonably restrictive terms or actions. Also, for the same reasons, the record does not support the allegation that the Sponsor is currently unjustly discriminating against Vortex, in favor of another similarly situated entity. That said, should the Respondent abrogate or amend the agreement based on future interpretations of the Air Tour Act, the Part 16 process would be the appropriate forum to address any disagreements as to the appropriateness of any airport access restrictions imposed by the Respondent.

VII. 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. Based on the March 1,2001 agreement executed between Respondent and Complainant, we find that the Respondent is currently in compliance with its sponsor assurances and applicable Federal law regarding reasonable access and unjust economic discrimination as set forth in 49 V.S.C. § 47107(a)(1), Assurance No. 22.

2. The Respondent is currently in compliance with the exclusive rights prohibition, 49 USC § 40103(e), 49 U.S.C. § 47107(a)(4), and Assurance No. 23.

3. The Respondent is not currently violating the Federal Preemption provision, 49 U.S.C. § 41713.

ORDER

Accordingly, it is ordered that:

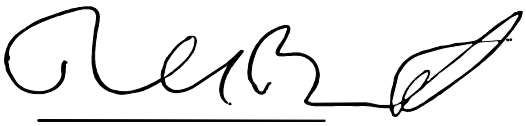
1. The Complaint is dismissed.

2. 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 V.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 V.S.C. §§47105(b), 47107(a)(4), 47107(g)(1), 47110, 47111(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 CFR 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 CFR 16.33(b) within thirty (30) days after service of the Director's determination.



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

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