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

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| **Maxim United, LLC**<br><br>**v.**<br><br>**Board of County Commissioners of Jefferson County, Colorado** | **Docket No. 16-01-10** |

# DIRECTOR'S DETERMINATION

## I. INTRODUCTION

This matter is before the Federal Aviation Administration (FAA) based on the formal complaint filed in accordance with the FAA Rules of Practice for Federally Assisted Airport Proceedings (FAA Rules of Practice), Title 14 Code of Federal Regulations (CFR) Part 16.

Maxim United LLC, (herein after Maxim or Complainant) has filed a formal complaint, pursuant to 14 CFR Part 16 against the Board of County Commissioners of Jefferson County (County/Respondent), operator of the Jefferson County Airport (Airport) alleging that the County has engaged in economic discrimination and failed to comply with 49 U.S.C. 47107(a)(1) and related Grant Assurances 22(a) and (f), and has violated the prohibition on Exclusive Rights, 49 U.S.C 40103(e) and Grant Assurance 23.[1]

In its answer to the Complaint, the County asserts that Maxim's Complaint fails to state a claim upon which relief can be granted under CFR Part 16, and Maxim's Complaint fails due to Maxim's failure to allege or prove facts sufficient to establish a violation of applicable law or Grant Assurance.[2]

With respect to the allegations presented in this Complaint, under the specific circumstances at the Jefferson County Airport as discussed below, and based on the evidence of record in this proceeding, we find that Jefferson County is currently in violation of its Federal obligations. Accordingly, the County is ordered to submit a corrective action plan to the FAA that details a practical plan that would allow Maxim to self-fuel its aircraft at the Jefferson County Airport pending the implementation of revised airport minimum standards.

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[1] FAA Exhibit 1, Item 3
[2] FAA Exhibit 1, Item 4

## II. THE AIRPORT

The planning and development of the airport has been financed, in part, with funds provided by the FAA under the Airport Improvement Program (AIP), authorized by the Airport and Airway Improvement Act of 1982, as amended, 49 U.S.C. § 47101, *et seq.*

The Airport is a public-use general aviation airport located in Jefferson County, Colorado. The Airport is owned by Jefferson County (the County) and governed by the Board of County Commissioners, which currently operates the Airport. Prior to November 9, 1998, the Jefferson County Airport Authority operated the airport. However, on that date, the Board of County Commissioners passed a Resolution (No.CC98) that abolished the Jefferson County Airport Board but ratified all existing contracts and leases of the Jefferson County Airport Authority (with the exception of the employment contact with the then Airport Manager.[3]

The Airport Sponsor, Jefferson County, has entered into 28 AIP grant agreements with the FAA and has received a total of $27,034,204 in federal airport development assistance since 1982.[4] In 2001, the Airport Sponsor received its most recent AIP grant for $500,000 to construct a service road. During a twelve-month period ending in April 1997, there were 444-based aircraft and 156,864 operations annually at the airport. [5]

## III. BACKGROUND

Complainant Maxim is a Colorado limited liability company that owns and operates aircraft based at the Jefferson County Airport (Airport) located in Jefferson County, Colorado. Maxim does business with the County inasmuch as it is leasing land on the Airport for a hangar facility, and paying fees and rentals to the County.

In October 1999, Maxim asserts that it began negotiating with the County for the lease of land at the Airport for construction of a large hangar and self-fuel facility. Maxim states that during these negotiations, it proposed to construct and operate its hangar and self-fuel facility in full compliance with federal law and the current Airport minimum standards. Maxim alleges that the County refused to enter into a lease with Maxim under terms and conditions similar to those enjoyed by other like operators on the Airport, or in compliance with the Airport's current minimum standards. Instead, as a condition of entering into the lease, the County required Maxim to agree to the following:

> 2.3 - Self-fuel Facility. Lessee understands that the County is currently revising its minimum standards for Self (i.e. Non-Public) Fuel Facilities. Lessee shall not build a Non-Public Fuel Facility until such minimum standards have been completed. Lessee specifically agrees that if Lessee builds a Non-Public Fuel Facility, its Facility will be in accordance with such revised minimum standards,

[3] FAA Exhibit 1, Item 4, Ex. B
[4] FAA Exhibit 1, Item 2, Grant History
[5] FAA Exhibit 1, Item 1 provides copy of the most recent FAA Form 5010 for the Airport.

and that approval for such a facility will not be granted until such time as the revised standards are in place.[6]

Maxim apparently raised an objection to this language in a letter dated June 29, 2000.[7] On August 11, 2000, the County responded to that letter (via Facsimile) The County's response stated in pertinent part: "This letter is in response to your letter of June 29, 2000, regarding the proposed Maxim Lease with the Airport...." The letter addresses several issues apparently raised by Maxim and reads, "The Lessee will be required to comply with all Minimum Standards, as they are amended from time to time, and this Lease will at all times be subordinate to the Minimum Standards, not vice versa..." Additionally, in regards to the self-fuel regulations, the letter states:

> 7. The self-fuel regulations have not been completed. Maxim will not be able to self-fuel until the minimum standards are completed; and Maxim will be required to be in compliance with them if it wants to self-fuel. If Maxim needs to see the adopted self-fuel minimum standards before it goes forward, it can wait [to sign the lease], but we will not guarantee adoption of the minimum standards by any particular date, nor will we guarantee that the site will still be available at that time."[8]

On August 15, 2000, Maxim signed a Hangar Lease Agreement with the County. That Lease contained the restrictive clause identified above as 2.3. -Self-fuel Facility.

An April 26, 2001, letter to Lloyd Claycomb, Manager of Maxim, from Jean L. Ayers, Assistant County Attorney, states that the Airport had recently become aware that Maxim intended to operate a fuel farm on its Leased Premises. The letter pointed out that a fuel farm was not a permitted use under the Lease. The letter stated that it served as notice that the County would consider Maxim in breach of its Lease if it installed or operated a fuel farm in violation of Section 2.3 of the Lease. The County also stated that it would take action to terminate the Lease and remove the fuel farm.[9]

On June 5, 2001, a letter was sent to H. Steven Gray, Assistant County Attorney for the Jefferson County Airport, from J. Michael Morgan, counsel for Maxim. The letter states that Maxim entered into a 40-year Lease in good faith with the understanding that the revised minimum standards would be out "shortly." The letter also notes, "Maxim then caused detailed plans and specifications to be prepared, which showed the location of its proposed self-fuel facility on the lease premises, directly adjacent to its hangar. Maxim obtained County approval of these plans and specifications as required by the Lease, and commenced construction." Additionally, the letter argues, "Installation of a self-fuel facility in connection with its hangar was always part of Maxim's proposed plan, and the location was part of the approved plans and specifications."

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[6] FAA Exhibit 1, Item 3, page 3

[7] This letter was not included in the administrative record.

[8] FAA Exhibit 1, Item 4, Ex. C. This letter appears to be incomplete and is lacking a signature page.

[9] FAA Exhibit 1, Item 3, Ex. 3

The letter also said "Accordingly, in connection with construction of its hangar, and with the County's knowledge, Maxim has installed necessary electric power and a concrete substructure necessary to handle the proposed fuel facility...Maxim is now ready, willing and able to install its fuel facility on the prepared substructure in accordance with the County's minimum standards." Further, Maxim argued, "Though over 19 months have passed since lease negotiations began, and over 10 months have passed since the Lease was entered into, the County has not revised its Minimum Standards for Self-Fuel Facilities. In fact, the County has not even published a notice of rulemaking or distributed a draft of such revised Minimum Standards for public comment. Despite demand, the County has refused to give Maxim a copy of any such draft. In the meantime, others similarly situated on the Airport continue to operate self-fuel facilities in accordance with the County's current Minimum Standards. Maxim remains willing, and continues to request the opportunity, to construct and operate a similar facility in full compliance with all applicable laws and those same current Minimum Standards. With completion of its hangar only a few weeks away, Maxim will be actually prejudiced and suffer significant economic harm if it is not permitted to go forward with installation of a fuel facility."[10]

On June 22, 2001, counsel for Maxim sent a letter to the County that stated, "In our letter to you of June 5, 2001, on behalf of our client...we attempted to resolve a dispute with respect to the County's obligations to operate...the Airport in accordance with federal law and FAA Grant Assurance. Our letter noted that Jefferson County was prohibiting Maxim from operating at the Airport under Minimum Standards now in effect, and prohibiting Maxim from self-fueling."

The letter went on to say "You responded by telephone, indicating that the County would not negotiate with Maxim under your Airport's current minimum standards, nor permit Maxim to self-fuel at this time. Instead, you advised that revised minimum standards would be proposed later this summer, and that Maxim would be considered under those standards, if and when adopted. Though Maxim has been constructing its hangar at the Airport for almost a year, and a Certificate of Occupancy has now been issued, no draft of the minimum standards has yet been released. Despite requests, the County has refused to release a draft of any such proposed new minimum standards. "

The letter also states, "Now that a Certificate of Occupancy has been issued, Maxim is in real and immediate financial harm as a result of the County's discrimination in refusal to permit self-fueling.[11]"

On July 3, 2001, Maxim filed a formal complaint with the FAA against the Jefferson County Board of County Commissioners, alleging that it was being unjustly discriminated against because it was not allowed to engage in self-fueling activities on its leasehold. Maxim asserts that it proposed to operate within the parameters of the existing minimum standards and that land was available for this purpose, and the hangar and self-fuel facility proposed by Maxim were substantially identical to several other facilities,

[10] FAA Exhibit 1, Item 3, Ex. 4
[11] FAA Exhibit 1, Item 3, Ex. 5

which were then, and are now operating on the Airport. Maxim alleges in its complaint that the County refused to enter into a lease with Maxim under terms and conditions similar to those enjoyed by other like operators on the Airport, or in compliance with its then-current minimum standards. Instead, as a condition of entering into the lease, the County required Maxim to agree to restrictive lease provisions.[12]

Maxim states that because the County refused to allow Maxim to operate at the Airport under the current minimum standards, Maxim was forced to accept the restriction on self-fueling when it entered into a Hangar Ground Lease on August 15, 2000. Maxim avers that it entered into the Lease with the understanding that revised minimum standards would be out soon thereafter, during the period of Maxim's hangar design and construction, and Maxim would later be permitted to construct its self-fuel facility in accordance with the revised minimum standards as part of its hangar project.

Maxim also argues in its Complaint that in connection with construction of its hangar, and with the County's knowledge and approval, Maxim has installed electric power and a concrete substructure necessary to handle the proposed self-fuel facility.

On July 31, 2001, the County answered Maxim's complaint and stated, "The County will not agree to amend the lease to permit the construction or operation of a fuel farm by Maxim prior to the adoption of the new minimum standards. The County denies that it 'refuses to negotiate.' The parties have already negotiated the terms of the lease to the satisfaction of Maxim, as noted by the execution of said lease by Maxim." The letter goes on to state, "In any event, the County denies that there is no reasonable prospect for timely resolution of the dispute, inasmuch as the revised minimum standards referenced in Maxim's Complaint are scheduled for public release (for public comment purposes) on or about August 3, 2001." [13]

In its Answer, the County also argues that, "Maxim is not restricted to a greater extent than any other similarly situated entity under a contemporaneous lease with the County. There are other entities on the Airport that have fueling operations under the existing minimum standards, but the leases of those entities were signed prior to Maxim's lease, and were agreed to by the Jefferson County Airport Authority, the County's predecessor at the Airport ([which was]... abolished by resolution of the Board of County Commissioners on November 9, 1998...)." The County also argued that, "With regard to Maxim's 'understanding' at the time of execution, the County would refer all parties to Paragraph 9.12 of the lease, which reads, in pertinent part, as follows:

> Entire Lease. This lease embodies the entire agreement between the parties hereto concerning the subject matter hereof and supersedes all prior conversations, proposals, negotiations, understandings and agreements, whether written or oral.

[12] FAA Exhibit 1, Item 3
[13] FAA Exhibit 1, Item 4

The County also acknowledges that it approved Maxim's construction plans, with regards to Maxim's hangar. However, "to the extent that [the Complaint] alleges the County approved the plans for Maxim's fuel facility, it is denied."

In its Answer, the County acknowledged "it has not and will not release a draft copy to any specific member of the public, including Maxim, until the Minimum Standards are available to the public in general."

The County also notes, "it would make little sense, from a practical standpoint, for Maxim to construct a fuel facility under the old minimum standards, and, within a short time thereafter, to reconstruct the same to comply with the new minimum standards." The County also affirms, "any action taken by Maxim to construct a fuel farm prior to the adoption of the new minimum standards would constitute a breach of the lease. The County's remedy for breach is termination of the lease."

The County also cites *Penobscot Air Services, Inc., v. Federal Aviation Administration* 164 F.3d 713 (1st Circuit, 1999), stating that "*Penobscot* was decided in the context of differing fees and charges, but the rationale applies equally under the circumstances of this case." The County goes on to state that "in *Penobscot*...the court set forth a two-step process to be followed in determining whether an 'exclusive right' or 'unjust discrimination' exists. First, there must be some contemporaneous disparity in treatment between the claimant and other similarly situated operations. The fact that only two entities are not treated identically does not *per se* constitute a grant of an exclusive right, nor is it *per se* unjustly discriminatory. Rather, if such a disparity exists, the second factor is triggered, which requires that the differing standard "must rise to some level of 'unreasonableness' before a violation may be found. The Court found that there, as here, the airport had taken no action to prevent the claimant from operating on the airport, or from providing any service that it was permitted to provide under its lease. It therefore found no exclusive right and no unjust discrimination."

The County continues this argument by stating, "...the FAA argued and the Court agreed that a claimant should not be permitted to claim unjust discrimination with regard to the terms of the lease to which it has agreed. The Court stated that (a) commercial enterprise...cannot negotiate a rental agreement...and then...complain that the deal was unfair at its inception."

In conclusion, the County states that, "Maxim voluntarily signed a lease containing the exact language about which it now complains, and with knowledge that there was no guarantee that the new minimum standards would be completed at any given time. Now that the lease terms have become inconvenient, Maxim asks the FAA to intervene and force the County to amend those terms. Such a challenge to the propriety of the County's requirements, if ever appropriate, should have been brought prior to signing the lease."[14]

On August 10, 2001, Maxim replied to the County's answer and noted that "The County asserts that Maxim has waived its right and is barred from bringing its complaint, because

[14] FAA Exhibit 1, Item 4

it entered into a Lease which prohibits it from constructing a self-fuel facility on the Airport, in accordance with current minimum standards and similar to those currently operated by other Airport tenants. The County bases this argument solely upon *Penobscot Air Services, Inc. v. Federal Aviation Administration.* This case does not excuse the County from compliance with Grant Assurances or federal law, with respect to either self-fueling or the uniform application of minimum standards."[15]

Maxim further argues that "...entering into the County's 'take it or leave it' lease does not bar Maxim from asserting violations of federal law and the Grant Assurances." Maxim goes on to say "*Penobscot* has no relevance to this case. Here we are dealing with an airport sponsor's refusal to permit self-fueling under established Minimum Standards (rather than rates and charges); with fairly contemporaneous disparate treatment (rather than a gap of seven years); and, with the airport's refusal to amend a lease to permit self-fueling under the Minimum Standards in effect now and at the time of the lease signing (as opposed to *Penobscot* where the airport amended the lease to address the FBO's concern)." Maxim also argues that," if Maxim wished to construct its *hangar* on available land on the Airport, in accordance with established standards, it was forced to accept an unlawfully restrictive and discriminatory lease term regarding *self-fuel facilities,* on a 'take it or leave it' basis. We are aware of no FAA guidance or court decision which would bar Maxim, under these circumstances, from now asserting a violation of Grant Assurances and federal law."

Maxim also alleges that "other operators entered into leases authorizing construction of self-fuel facilities on the Airport under the current minimum standards, at the time or shortly before Maxim applied for similar right. For instance, Level 3 Communications, LLC, entered into a lease with the County in January 1999, (after Maxim had applied for authority) [sic], and Mountain Aviation, Inc. entered into a lease in March 1998. Both leases authorized the construction of a self-fuel facility, on the leased hangar premises, in accordance with current minimum standards." Maxim goes on to respond to the County's argument that those leases were approved by the previous Board by stating, "The only changed circumstance mentioned by the County is that it did not take over direct management of the Airport until November 1998, when it disbanded the Jefferson County Airport Authority. This is not correct. The Level 3 Communications lease was clearly entered into by the County itself. In any event, since the previous Airport Authority was simply a subordinate unit of government created by the County to operate the Airport, the County itself is considered 'airport sponsor' and was subject to the Grant Assurances and applicable federal law, both before and after the termination of the Airport Authority."

Maxim also asserts that "...the County's proposed new minimum standards, which were released for comment on August 6, 2001, would prohibit Maxim from constructing a self-fueling facility at the previously approved location on its leased premises, and would also require it to purchase, at great cost, a refueling vehicle having a minimum capacity of 750 gallons. The seven tenants operating on the Airport under the current minimum standards are not subject to these requirements." Maxim also argues that "The County asserts that

[15] FAA Exhibit 1, Item 5

other tenants operating self-fuel facilities on the Airport under the current Minimum Standards will be required to comply with the new Minimum Standards and Maxim will then be treated equally...But the proposed Minimum Standards would only have prospective application unless a lease provision provides otherwise...the County's leases with similar operators, entered into under the current Minimum Standards, contain no such clear requirement. It does not appear from the leases that these operators may be required to comply with the new Minimum Standards, if adopted, by relocating their established fuel facilities to a central location and purchasing a fuel truck, or in the alternative, that they abandon their fuel facilities and deal exclusively with an on-Airport FBO."[16]

On August 17, 2001, the County responded to Maxim's reply and argued that whereas Maxim asserts that the County has admitted facts sufficient to establish a finding of a violation of the County's Grant Assurances and federal law "...in reality, the undisputed facts, and all other factual allegations made by Maxim in its Complaint and Reply, do not establish, and cannot support such a finding." The County also argues that "Maxim alleges simply that the terms of its lease are different from those of other tenants at the Airport, and that the difference in treatment constitutes *per se* unjust discrimination and the *per se* grant of an exclusive right. The FAA and the courts have previously rejected that argument."[17]

Additionally, the County argues that "Maxim has not alleged that the fuel facility restriction in its lease makes it impossible for Maxim to operate at the Airport, or that the restriction is unreasonable, or even that it constitutes more than a *de minimis* difference in treatment." Moreover, the County holds that "execution of the lease" by Maxim bars Maxim from asserting that the terms of the lease constitute unjust discrimination or the granting of an exclusive right.

The County argues in its rebuttal, "...the *Penobscot* court recognized that the protections against unjust discrimination and exclusive rights could be waived by agreement on the part of an airport tenant. The operative facts of that case are identical to those here. The tenant signed a lease. The tenant then claimed that a provision of the lease was discriminatory. The objection of the tenant in that case was precisely the same as the objection here: that it would be more costly for it to operate at the airport than it was for other tenants. The FAA and the court took the position that by signing the lease, the tenant waived its ability to object to that higher cost. The rationale of the FAA and the court in *Penobscot* applies in the context of fuel facilities as well as it does in the context of rent charges."

Furthermore, the County states that, "Maxim asserts that it did not waive its objection to the terms of its lease by agreeing to, and executing the same. In reality, Maxim did precisely that, and now looks to the FAA to invalidate the waiver."

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[16] Fixed Base Operator
[17] FAA Exhibit 1, Item 6

The County argues that, "In addition to the applicable legal authority, Maxim 's position is negated from a practical business perspective. The fallacy of Maxim's argument that agreement does not constitute waiver is demonstrated by the repeatedly referenced fiction of being 'forced to agree.' Whether or not, in retrospect, it is satisfied with its decision, Maxim agreed not to build a fuel facility until the County adopted new minimum standards. It did so with notice from the County that: 1) the minimum standards would not be adopted by any guaranteed date; and 2) it had the option to wait until the minimum standards were adopted prior to signing the lease...Maxim knowingly and voluntarily agreed to its lease with the County. It thereby waived any objection to the terms of the lease."

The County also defends the allegation that no similarly situated entities on the Airport receive similar treatment by arguing, "Following service of the County's answer in this matter, Maxim requested copies of all leases under which operators operate self-fuel facilities. The County provided copies of seven such existing leases.[18] The leases to which Maxim does not specifically refer are dated August 1980, April 1981, June 1981, February 1991, and August 1991. The Mountain Aviation lease was signed on March 31, 1998. The Level 3 [Communications] lease was signed on December 8, 1998. While the County concedes that the Level 3 [Communications] lease was executed by the County 29 days after the dissolution of the Airport Authority, that lease was negotiated and agreed to prior to the November 9, 1998 dissolution."

The County concludes this argument by stating, "In any event, Paragraph 2.3 of the Level 3 [Communications] lease requires Level 3 [Communications] to construct, maintain, and when appropriate, remove the fuel facility in accordance with the County's minimum standards, as the same may be amended. Likewise, Paragraph 3C of the Mountain Aviation lease requires Mountain Aviation to operate its facility in conformance with the County's 'then current' minimum standards. The County will take reasonable measures to ensure the uniform application of the new minimum standards. At least with regard to the specifically referenced leases (the leases deemed by Maxim to be comparable), the County believes that it has that ability. Those tenants will therefore be subject to the same standards as Maxim."

On September 17, 2001, Maxim filed a Supplemental Reply to the County's rebuttal. Maxim contends that, "On August 30, 2001, the County held a 'Public Forum' on its proposed minimum standards, including those related to self-fueling. In addition to the Airport Manager and consultants, the entire Board of County Commissioners was present. At the Public Forum, the Airport Manager estimated that the County was 'two or three years away' from establishing the 'centrally located fuel storage area' to be required under the proposed minimum standards."[19]

Additionally, Maxim states, "Maxim's Complaint herein is based upon the County's refusal to permit Maxim any opportunity to self-fuel its aircraft, and its discriminatory treatment of Maxim in relation to others on the Airport who are permitted to self-fuel.

[18] In the pleadings, the number of lessees self fueling has been cited at seven (7) and nine (9).
[19] FAA Exhibit 1, Item 7

The County asserts that Maxim will be permitted to self-fuel under new proposed minimum standards, which would permit Maxim to self-fuel only if it is willing to install large fuel tanks, at an undisclosed 'centrally located fuel storage area,' and purchase a 750 gallon fuel truck to haul fuel back and forth to its aircraft."

Maxim concludes by stating, "The County's new admission that it is 'two or three years away' from establishment of a centrally located fuel storage area indicates that the County is not only violating its Grant Assurance now, but proposes to continue its discrimination and deny Maxim any right to [self] fuel *for an additional two or three year period.*"

On September 24, 2001, The County filed a Motion to Strike the Supplemental Reply filed by Maxim and argued "Maxim was aware, as early as August 1, 2001, that a public forum would be held during the month of August, and was notified on August 8, 2001, that the public forum would be held on August 31, 2001...Maxim did not request an extension of time to file its Reply, nor did it request information from the County as to when the central storage area would be established. Instead, Maxim chose to file its final pleading prior to requesting that information...To the extent that the Director is inclined to consider Maxim's Supplemental Reply, the County would submit that it is exploring possible methods of mitigating any impact that the delay associated with the proposed centralized fuel storage system may have."[20]

On December 11, 2001, the FAA issued a Notice of Extension of Time, extending the date of the Director's Determination to January 31, 2002.

On January 22, 2002, the County filed Supplemental Disclosure of Information pursuant to 14 CFR Part 16.29(b)(1) providing additional information that had been requested by the Denver Airports District Office (ADO)[21] in furthering this instant investigation. The ADO asked the County for more information on how the County contemplated mitigating the impact to Maxim as referenced in the County's September 24, 2001, Motion.[22]

The information provided by the County identified specific steps it was willing to take to allow Maxim to begin self-fueling operations on its leasehold. Specifically, the County stated, "The County submits that it will permit Maxim ...to construct and operate, at Maxim's sole expense, a self (non-public) fuel facility in compliance with the County's current regulatory scheme, including, without limitation, the current Minimum Standards, until such time as the proposed Minimum Standards are adopted." This plan referred to by the County was termed "Temporary Permitting."

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[20] FAA Exhibit 1, Item 9. Respondent's Motion to Strike the Supplemental Reply by Maxim is denied. Although Maxim's Supplemental Reply should have been submitted in the form of a Motion pursuant to Section 16.19(a), the information contained in Maxim's Reply was new evidence not previously available and thus could be submitted before the Director's Determination. See, eg., Ricks v. Millington Municipal Airport Authority, Final Decision, n.3 (12/20/99).

[21] The Denver Airports District Office requested that the County provide additional information to supplement its Motion to Strike the Supplemental Reply.

[22] FAA Exhibit 1, Item 10

The County goes on to explain that "as a condition of such Temporary Permitting, Maxim must agree to comply, at its sole expense, with the proposed Primary Guiding Documents, including, without limitation, the proposed Minimum Standards, upon adoption of same by the County. The County wishes to emphasize that, as currently written, the proposed Minimum Standards will require the relocation of Maxim's fuel facility to a centralized fuel storage facility, and that such relocation must be achieved by Maxim, at Maxim's expense, within a reasonable time, as determined by the County, after notice to that effect from the County to Maxim."

On January 24, 2002, Maxim responded to the County's Supplemental Disclosure and argued that "In essence, the County expresses a willingness to permit Maxim to construct and operate a temporary self-fuel facility in compliance with the County's current Minimum Standards...if and only if, Maxim agrees to comply with future Minimum Standards, and waive its right to challenge their reasonableness, in general and as applied to Maxim; Maxim agrees to waive its right to assert, in court or before the FAA, that the County has already approved its fuel facility adjacent to Maxim's hangar location; and Maxim agrees to waive its right, in court and before FAA, to assert that of all operators of self-fuel facilities on the Jefferson County Airport, Maxim alone is being discriminated against and will be required to immediately move its facility to another site when and as determined by the County."[23]

Maxim concludes by stating, "The County's 'offer' would continue rather than cure the discriminatory treatment to which Maxim has been subject for the past year and one-half. Maxim would agree to construct a temporary self-fuel facility on its hangar site, but will not agree to waive any of its legal rights and remedies to do so."

On January 30, 2002, the Director issued a Notice of Extension of Time. This Notice extended the date that the Director's initial determination will be issued to March 31, 2002.[24]

On February 6, 2002, Maxim filed an Objection to Notice of Extension of Time.[25]

## IV. APPLICABLE LAW AND POLICY

The Federal Aviation Act of 1958, as amended (FAAct), Title 49 U.S.C. Section 40101, et seq., assigns the FAA Administrator broad responsibilities for the regulation of air commerce in the interests of safety, security, and development of civil aeronautics. 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

[23] FAA Exhibit 1, Item 11
[24] FAA Exhibit 1, Item 12
[25] FAA Exhibit 1, Item 13

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 Grant Assurances.

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 Grant Assurances.

A. The Airport Grant Assurances

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

The AAIA, 49 U.S.C. § 47107(a), *et seq.*, sets forth 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. Three Grant Assurances apply directly to this complaint. These assurances relate to 1. Airport Owner Rights and Responsibilities, 2. Use on Reasonable and Not Unjustly Discriminatory Term, and 3. The Prohibition of the Establishment of an Exclusive Right

**1. Airport Owner Rights and Responsibilities**

Assurance 5, "Preserving Rights and Powers," of the prescribed Grant Assurances implements the provisions of the AAIA, 49 U.S.C. Section 47107(a), et seq., and requires, in pertinent part, that the sponsor of a federally obligated airport "...will not take or permit any action which would operate to deprive it of any of the rights and powers necessary to perform any or all of the terms, conditions, and assurances in the grant agreement without the written approval of the Secretary, and will act promptly to acquire, extinguish or modify any outstanding rights or claims of right of others which would interfere with such performance by the sponsor."

FAA Order 5190.6A, *Airport Compliance Requirements*, (Order) describes the responsibilities under Assurance 5 assumed by the owners of public-use airports developed with Federal assistance. Among these is the responsibility for enforcing adequate rules, regulations, or ordinances as are necessary to ensure the safe and efficient operation of the airport. [See Order, Secs. 4-7 and 4-8.]

## 2. Use on Reasonable and Not Unjustly Discriminatory Terms

Assurance 22, "Economic Nondiscrimination," of the prescribed Grant 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 activities, including commercial aeronautical activities offering services to the public at the airport. [Assurance 22(a)]
>
> ...will not exercise or grant any right or privilege which operates to prevent any person, firm, or corporation operating aircraft on the airport from performing any services on its own aircraft with its own employees[including, but not limited to maintenance, repair and fueling] that it may choose to perform.[Assurance 22(f)]
>
> ...may establish such reasonable, and not unjustly discriminatory, conditions to be met by all users of the airport as may be necessary for the safe and efficient operation of the airport. [Assurance 22(h)]
>
> ...may prohibit or limit any given type, kind or class of aeronautical use of the airport if such action is necessary for the safe operation of the airport or necessary to serve the civil aviation needs of the public. [Assurance 22(i)]

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

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

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

The Order also provides that "...an aircraft operator, otherwise entitled to use the landing area, may tiedown, adjust, repair, refuel, clean and otherwise services its own aircraft, provided it does so with its own employees in accordance with reasonable rules or standards of the sponsor relating to such work." [See Order, Sec 4-15(a).]

### 3. The Prohibition of the Establishment of an Exclusive Right

Section 308(a) of the FAAct, 49 U.S.C. § 40103(e), provides, in relevant part, that "there shall be no exclusive right for the use of any landing area or air navigation facility upon which Federal funds have been expended."

Section 511(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 Grant 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...and that it will terminate any exclusive right to conduct an aeronautical activity now existing at such an airport before the grant of any assistance under the Airport and Airway Improvement Act of 1982.

In 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 to the entity or entities not subject to the same requirements or standards. However, a sponsor is under no obligation to permit aircraft owners to introduce onto 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 leasing to one enterprise of all available airport land and improvements planned for aeronautical activities will be construed as evidence of an intent to exclude others unless it can be demonstrated that the entire leased area is presently required and will be immediately used to conduct the activities contemplated by the lease. [See Order, Sec. 3-9(c).]

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).]

## B. THE FAA AIRPORT COMPLIANCE PROGRAM

The FAA discharges its responsibility for ensuring airport sponsor compliance with Federal obligations through its Airport Compliance Program. The FAA's airport

compliance efforts are based on the 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.

FAA Order 5190.6A sets forth policies and procedures for the FAA Airport Compliance Program. The Order is not regulatory and is not controlling with regard to airport sponsor conduct; rather it establishes the policies and procedures 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 for the granting 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 Grant Assurances, addresses the nature of these assurances, addresses the application of these assurances in the operation of public-use airports, and facilitates interpretation of the assurances by FAA personnel.

## VI. ISSUES

Upon review of these allegations and the relevant airport-specific circumstances, summarized above in the Background Section, the FAA has determined that the following issues require analysis in order to provide a complete review of the Sponsor's compliance with applicable Federal law and FAA policy:

A. Whether the actions of the Respondent regarding its treatment of the Complainant and other similarly situated airport tenants constitute unjust economic discrimination in violation of Federal grant assurance #22. Specifically:

    1. Whether the Respondent, by allegedly requiring the Complainant to agree to abide by a restrictive lease term that precludes the Complainant from self-fueling at the Airport until the Respondent adopts and implements revised minimum standards for self-fueling, is in violation of Federal Grant Assurance 22(f) regarding an aircraft owners right to self-service its own aircraft.

2. Whether the Respondent, by allegedly permitting two similarly situated entities (Level 3 Communications and Mountain Aviation), but not the Complainant, to self-fuel pending the adoption and implementation of revised minimum standards is in violation of Title 49 U.S.C. 47107(a)(1) and related Federal Grant Assurance 22(a) regarding unjust economic activity.

3. Whether the Respondent, by allegedly requiring the Complainant to agree to revised minimum standards while not requiring all other similarly situated tenants to comply with the same revised minimum standards within the same timeframe is in violation of Title 49 U.S.C. 47107(a)(1) and related Federal Grant Assurance 22(a) regarding unjust economic discrimination.

B. Whether any of the above-alleged actions, individually or cumulatively, have resulted in the Respondent having granted an exclusive right to conduct an aeronautical activity at the Airport in violation of Title 49 U.S.C. 47107(a)(4) and 40103(e) and related Federal Grant Assurance 23.

## V. ANALYSIS

### A. Unjust Economic Discrimination

Federal Grant Assurance 22 only provides protection from economic discrimination to aeronautical activities. Federal Grant Assurance 22(f) requires that an airport sponsor:

> ...will not exercise or grant any right or privilege which operates to prevent any person, firm, or corporation operating aircraft on the airport from performing any services on its own aircraft with its own employees [including, but not limited to maintenance, repair, and fueling] that it may choose to perform.

The owner of any airport developed with Federal grant assistance is required to operate the airport for the use and benefit of the public and to make it available to all types, kinds, and classes of aeronautical activity on reasonable terms, and without unjust discrimination. [See Order, Sec. 4-13(a)] The Sponsor is expected to manage the airport efficiently and safely at all times. As such, the Sponsor may find it necessary to amend the airport's minimum standards from time to time to increase efficiency or safety, provided the amended minimum standards do not result in unjust discrimination for a particular type, kind, or class of aeronautical activity.

In this case, the Sponsor intends to change the configuration of the airfield by establishing one central area where non-public fuel may be stored. Further, the airport intends to require tenants to use this central fuel area for self-fueling purposes. This reconfiguration is reflected in the airport's draft of its revised minimum standards. Those

standards, which are not yet in effect, will require all self-fueling operations to be conducted from this central location. The Sponsor is not prohibited by FAA policy or regulation from making these changes.

The conflict occurs because not all tenants at the airport who self-fuel will be required to convert their fueling operations to the new centralized location at the same time. The Sponsor has determined that tenants who signed lease agreements with the airport prior to the contemplation of this centralized fueling plan will not be subject to the new minimum standards immediately after those standards become effective. On the other hand, tenants who signed lease agreements after the plan was formulated, even though that plan was not defined or described, will be required to move their self-fueling operations to the new central location within a period of time defined as "reasonable" by the airport. The Complainant is one of the tenants who will be subject to the revised minimum standards once they take effect. The airport has also denied the Complainant an opportunity to establish a self-fueling operation under the current minimum standards while waiting for the revised minimum standards to be developed and implemented. The Sponsor included the restriction on self-fueling and requirement to adhere to the new minimum standards, once developed, in the lease agreement signed by the Complainant.

Against this background, the FAA considers the issues presented in the Issues Section above:

1. **Whether the Respondent, by allegedly requiring the Complainant to agree to and abide by a restrictive lease term that precludes the Complainant from self-fueling at the Airport until the Respondent adopts and implements revised minimum standards for self-fueling, is in violation of Federal Grant Assurance 22(f) regarding an aircraft owners right to self-service its own aircraft.**

As discussed above, grant assurance 22(f) provides that the sponsor will not exercise or grant any right or privilege which operates to prevent any person, firm, or corporation operating aircraft on the airport from performing any services on its own aircraft with its own employees including, but not limited to maintenance, repair, and fueling, that it may choose to perform. Consistent with this grant assurance, FAA policy provides, in relevant part, that "...an aircraft operator, otherwise entitled to use the landing area, may tie down, adjust, repair, refuel, clean and otherwise service its own aircraft, provided it does so with its own employees in accordance with reasonable rules or standards of the sponsor relating to such work."[26]

The Complainant alleges that the County refused to allow Maxim to operate initially under the minimum standards in effect at the time its lease was executed (current minimum standards).[27] Maxim contends that it was forced to accept a lease provision that effectively prohibited Maxim from self-fueling from any location on the Airport pending the County's adoption and implementation of revised minimum standards.[28]

[26] FAA Order 5190.6A, Sec. 4-15(a).
[27] FAA Exhibit 1, Item 3 ¶8
[28] FAA Exhibit 1, Item 3 ¶10

Maxim argues that the County has failed to revise its minimum standards since Maxim signed its lease in August 2000.[29]

The Respondent's current minimum standards permit an aircraft owner to fuel its own aircraft if specific conditions are met.[30] The Complainant does not challenge the reasonableness of the current minimum standards.[31] The record reflects that the Complainant agreed to lease terms that effectively prohibit the Complainant from self-fueling pending the adoption of "revised" minimum standards.[32]

The Respondent does not deny the Complainant's contention that the "revised" minimum standards may not be implemented for another two to three years. Rather, the County argues that it is well within its rights to deny the Complainant the right to engage in self-fueling activities on its leasehold, or at any location on the Airport at this time, because the Complainant has agreed to a restriction in its Lease that would prevent it from self-fueling until the "revised" minimum standards are in place. We disagree with the County's argument.[33]

Even though the record supports that the Complainant may have agreed to lease terms restricting self-fueling until such time as the revised minimum standards are adopted and implemented, we cannot support the County's position. The lease terms in question are inconsistent with the Respondent's grant assurance 22(f), which provides that the owner shall have the right to self-service its own aircraft. The lease agreement does not supersede the Respondent's Federal obligation to permit self-fueling. The Respondent cannot avoid its Federal obligation by securing an agreement to the contrary from the tenant, when that agreement is required as a condition of reasonable access to the airport.

We are not persuaded by the Respondent's contention that Penobscot Air Services, Inc. v. Federal Aviation Administration, 164 F.3d 713 (1st Circuit, 1999) supports its claim that there can be no violation of the Respondent's Federal obligations. As argued by the Respondent, Penobscot was decided in the context of differing fees and charges.[34] However, this case is not about fees and charges but about the Airport's Federal obligation to permit self-service, specifically, self-fueling. While fees and charges are best addressed by agreement between users and airports, the Airport has no choice but to permit self-fueling as part of its Federal obligations. For these reasons, the rational in Penobscot is inapplicable to this case.

We understand that the County did not permit Maxim to construct a fuel farm on its leasehold in accordance with the current minimum standards because the County believed it would not be practical for Maxim to do so knowing that, in a "short time" after signing the lease, the fuel facility would have to be moved once the revised

[29] FAA Exhibit 1, Item 3 ¶32
[30] FAA Exhibit 1, Item 3, exhibit 1
[31] The Complainant affirmatively states that it is and has been fully prepared to comply with the Airport's existing and established self fueling standards. FAA Exhibit 1, Item 3 ¶33
[32] FAA Exhibit 1, Item 3, exhibit 2, pg. 7
[33] FAA Exhibit 1, Item 3, exhibit 2, pg. 7
[34] FAA Exhibit 1, Item 4, ¶20

minimum standards were implemented.[35] However, the fact remains that the Respondent effectively enforced the restrictive lease-term and prohibited Maxim from conducting self-fueling at any location on the airport for approximately one and a half years. We find the Respondent's failure to allow Maxim to self-fuel for such a lengthy period of time to be inconsistent with its Federal obligations to permit an aircraft owner to service its own aircraft at the Airport.

In the absence of the County's timely adoption and implementation of the revised minimum standards, the FAA finds that grant assurance 22(f) requires the County to offer Maxim reasonable standards under which it can self-fuel until such time as the revised minimum standards are adopted and implemented. To this end, the County did submit an interim self-fueling plan. On January 24, 2002, the Respondent submitted a pleading that sets forth a plan that would allow the Complainant to self-fuel by constructing and operating a self-fuel facility in compliance with the Respondent's current minimum standards until such time as the proposed minimum standards are adopted. The Respondent's offer was conditioned on the Complainant's agreement that it would comply with, at its sole expense and "without limitation," the proposed Minimum Standards, upon adoption of the same by the Respondent.[36] The Complainant objects to these conditions and argues that the County's offer would continue, rather than cure the discriminatory treatment to which Maxim has been subject to for the past year and one half.[37]

The record reflects that Maxim has begun construction of a fuel farm on its leasehold in order to self-fuel under the current minimum standards.[38] The record is not clear on the additional cost that Maxim would have to incur to complete this construction. It is possible that allowing Maxim to self-fuel from its leasehold under the current minimum standards on an interim basis pending adoption and implementation of the revised minimum standards may be a practical interim plan. However, should Maxim establish that the cost of completing the fuel farm on its leasehold is not cost-effective on an interim basis, and is therefore impractical, the County is obligated by Federal grant assurance 22(f) to offer Maxim a practical alternative. One such practical alternative may be to allow the Complainant to transport fuel onto the Airport from an outside source using a fuel truck. This proposal should require no unnecessary expense by the Complainant in order to self-fuel pending the adoption of "revised" minimum standards since the proposed minimum standards also require the use of a fuel truck.

The FAA notes that Maxim argues it has already invested substantial amounts in construction of the fuel farm on its leasehold upon the belief that the County approved a

[35] FAA Exhibit 1, Item 4, ¶14

[36] The Complainant objects to the fact that it would have to agree with revised minimum standards that have not yet been implemented by the County [FAA Exhibit 1, Item 11]. The FAA notes that an agreement to abide by those minimum standards in this case, would not prohibit Maxim from challenging the reasonableness of those standards under the grant assurances if or when the County adopts and implements the revised minimum standards.

[37] FAA Exhibit 1, Item 11, pg. 2

[38] FAA Exhibit 1, Item 3, ¶12

site plan of the same[39]. The County denies this allegation[40]. This issue is a contractual matter to be addressed under State law. We decline to address this matter because it is not relevant to our review of the County's Federal obligations. Our decision in this matter is unaffected by the parties' beliefs as to whether or not the County approved Maxim's site plan for a fuel farm on its leasehold.

2. **Whether the Respondent, by allegedly permitting two similarly situated entities (Level 3 Communications and Mountain Aviation), but not the Complainant, to self-fuel pending the adoption and implementation of revised minimum standards, is in violation of Federal Grant Assurance 22(a) regarding unjust economic activity.**

According to Maxim, other similarly situated users of the Airport continue to operate self-fuel facilities on their leaseholds in accordance with the current minimum standards.[41] In its pleadings, Maxim provided examples of the two Airport leases that it argues were signed relatively close to when Maxim signed its Lease: Level 3 Communications, signed January 1, 1999; and Mountain Aviation, signed March 31, 1998.

The record reflects that both Level 3 Communications and Mountain Aviation have clauses in their leases that allow self-fueling under the current minimum standards. The County believes that the terms of the Level 3 Communications and Mountain Aviation leases will permit the County to require both lessees to comply with the revised minimum standards upon adoption and implementation of the same by the County.[42] Consequently, the County asserts that Level 3 Communications and Mountain Aviation "will therefore be subject to the same standards as Maxim."[43] Nonetheless, the FAA finds that the record establishes that Level 3 Communications and Mountain Aviation are permitted to self-fuel pending the adoption of revised minimum standards, but not Maxim.

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[39] FAA Exhibit 1, Item 3 ¶12

[40] FAA Exhibit 1, Item 4 ¶11

[41] FAA Exhibit 1, Item 3, page 3

[42] Level 3 Communications signed its Hangar Ground Lease on January 1, 1999. Section II, 2-3, Self-fuel Facility reads, "Lessee shall have the option of installing and operating an above-ground aviation fuel storage facility a "Fuel Facility" on the Premises. If Lessee elects to install a Fuel Facility on the Premises, it shall be installed and operated in strict compliance with the requirements and covenants contained in a Fuel Facility Addendum signed by the parties, which will be annexed to this Lease. Any such Fuel Facility shall be constructed, maintained and operated, and when appropriate removed, in accordance with all applicable Federal, State, and Local laws and regulations, including the County's then current minimum standards and Non-Public Fuel Dispensing Permit, as the same now exists or may hereafter be amended."

Mountain Aviation signed its hangar lease on March 31, 1998. Section 3-C of this Lease reads as follows, "Lessee is hereby given the option to install, own and operate a self-fuel storage tank facility. This fuel storage tank must be constructed and operated in accordance with all applicable Federal, State and local laws and regulations including the then current minimum standards established by the Lessor for Non-Public Fuel Dispensing."

[43] FAA Exhibit 1, Item 6

To this end, the County argues that Maxim is not restricted to a greater extent than any other similarly situated entity under a contemporaneous lease with the County. While the County admits that there are other entities on the Airport that have fueling operations under the existing minimum standards, it contends that the leases of those entities were signed prior to Maxim's lease. The County asserts that those leases were agreed to by the Jefferson County Airport Authority, and not by the Board of County Commissioners. The County explains that the Jefferson County Airport Authority was abolished by resolution of the Board of County Commissioners on November 9, 1998.[44]

Maxim argues that the Level 3 Communications lease, allowing Level 3 Communications to self-fuel on its leasehold, was executed prior to the dissolution of the Authority. To support this position, Maxim cites the Level 3 Communications lease, signed on January 1, 1999, and executed by the County. Additionally, Maxim argues that the Authority was simply a subordinate unit of government created by the County to operate the Airport. Maxim argues that the County, itself, was considered the airport sponsor and was subject to the grant assurances and applicable Federal law both before and after termination of the Authority[45].

The County concedes that the Level 3 Communications lease was executed by the County after the dissolution of the Authority, but states that the lease was negotiated and agreed to prior to the November 9, 1998, dissolution.[46]

We agree with Maxim's assertion that the County was, and is, responsible for compliance with the grant assurances both before and after the dissolution of the Authority. FAA records indicate that the County was the airport sponsor prior to November 8, 1999, and remains the airport sponsor today. While the predecessor board may have been charged with managing the Airport, the County always was, and continues to be, the entity responsible for compliance with its Federal grant assurances. Furthermore, we find record evidence documents that the County executed the Level 3 Communications lease subsequent to the dissolution of the Authority.[47]

Furthermore, we find that the facts in this case establish a *per se* violation of the County's Federal obligation prohibiting it from unjustly discriminating against users of the Airport. The record supports that some entities are permitted to self-fuel pending adoption of revised minimum standards, and that Maxim was prohibited from doing the same.[48] The County's admission establishes that there is discrimination among airport users. As discussed above, the County improperly denied Maxim the right to self-fuel its aircraft at the Airport for approximately one and a half years in violation of grant assurance 22(f). The County's denial of Maxim's right to self-fuel establishes that the discrimination experienced by Maxim was unjust.

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[44] FAA Exhibit 1, Item 4
[45] FAA Exhibit 1, Item 5, pg. 6
[46] FAA Exhibit 1, Item 6, page 6
[47] FAA Exhibit 1, Item 5, Exhibit 6
[48] FAA Exhibit 1, Item 6, page 4

3. **Whether the Respondent, by allegedly requiring the Complainant to agree to revised minimum standards while not requiring all other similarly situated tenants to comply with the same revised minimum standards within the same timeframe is in violation of Federal Grant Assurance 22(a) regarding unjust economic discrimination.**

As a practical matter, an airport owner may quite properly increase the minimum standards from time to time in order to ensure a higher quality of service, or to better serve the public interest. However, such conditions must not be unreasonably discriminatory. That is to say, the minimum standards must be reasonable, they must be relevant to the proposed activity, they must be reasonably attainable, and they must be uniformly applied.

While a minimum standard, which a tenant operator is required to meet, must be uniformly applied to all operators seeking the same privileges, the timing of when each tenant must meet the revised minimum standard could vary. [See e.g., FAA Advisory Circular 150/5190-5, "Exclusive Rights and Minimum Standards for Commercial Aeronautical Activities" ("Arguably, a certain amount of flexibility exists in the timing of implementation of minimum standards. The standards can be raised or lowered as new tenants arrive or existing tenants leave.")] When an airport sponsor signs a lease with a tenant, the sponsor agrees to certain conditions over the life of the lease. Unless the lease requires the tenant to be in compliance with evolving minimum standards at all times, it may be unreasonable to require tenants to change their business operations immediately each time the standards are revised.

While the FAA recommends that airport sponsors include in their lease agreements a requirement for tenants to comply with future minimum standards, this is a recommendation only. The airport sponsor is not obligated to include such a provision. By making this a recommendation only, the FAA recognizes that such a requirement may be unworkable for some business arrangements at individual airports. Nonetheless, FAA policy makes it clear that an airport sponsor cannot manipulate the standards solely to protect the interests of an existing tenant. [FAA Order 5196A, section 3-17(c)]

The owner of any airport developed with Federal airport grant assistance is required to operate the airport for the use and benefit of the public and to make it available to all types, kinds, and classes of aeronautical activity on reasonable terms and without unjust discrimination. However, no Federal obligation requires a sponsor to forgo improved business practices or efficient allocation of airport property in order to avoid differing terms and conditions among users of the airport. The airport sponsor can pursue agreements that more nearly serve the changing interests of the public with the more recent leaseholders. [*Wilson Air Center, LLC v. Memphis and Shelby County Airport Authority, No. 16-99-10, 2001 FAA Lexis 567, at * 30-31 (FAA Aug. 30, 2001)]*

This may create a timing difference when the various tenants are required to adhere to evolving minimum standards. It does not, however, excuse tenants from complying with revised standards in perpetuity. If the lease does not provide for earlier adaptation to

revised minimum standards, the airport sponsor is obligated to ensure tenants upgrade to the new standards at the time of lease renewal or during modification of the lease.

Based on a review of the Airport's draft revised minimum standards, dated August 6, 2001, we find the County is aware of this timing difference:

*1.2.1* **"These minimum standards shall apply to any new agreement or any extension of the term of an existing agreement relating to the occupancy or use of airport land or improvements for aeronautical activities. If an entity desires, under the terms of an existing agreement, to materially change its aeronautically activities, the airport shall, as a condition of its approval of such change, require the entity to comply with these minimum standards.**

1.2.2 **These minimum standards do not affect any agreement or amendment to such agreement properly executed prior to the date of the date of promulgation of these minimum standards except as provided for in such agreement, in which case these minimum standards shall apply to the extent permitted by such agreement.**

Based on these draft standards and on statements by the County, it appears that the Airport does not intend to require all tenants to abide by the revised standards simultaneously. The County has argued that it intends to implement the revised standards *to the extent permissible under existing leases* (emphasis ours).

However, since the revised minimum standards at Jefferson County Airport have not yet been implemented, we cannot determine whether timing differences, if any, will result in unjust economic discrimination.[49] As such, this issue is not ripe for review.

If, for the purpose of argument, we were to accept the Respondent's statement that Maxim, Level 3 Communications, and Mountain Aviation will all be required to comply with the revised minimum standards when implemented,[50] we do not conclude that allowing other tenants to continue to self-fuel from their leaseholds would be tantamount to unjust discrimination.

The record reflects that the leases with Maxim, Level 3 Communications, and Mountain Aviation were executed with the Airport during a three-year period that followed seven years of limited tenant development. Leases executed during the initial development period were signed anywhere from eight to seventeen years prior to the leases with Maxim, Level 3 Communications, and Mountain Aviation.[51] The County does not argue that it will require tenants other than Maxim, Level 3 Communications and Mountain

[49] The Complainant does not provide sufficient information regarding the lengths of terms for the various leases on the airport. As such, we are unable determine which tenants may be impacted by the timing differences, and we cannot estimate how long these timing differences might continue, if or when the revised minimum standards are implemented.

[50] FAA Exhibit 1, Item 6, Section III

[51] FAA Exhibit 1, Item 6, Section III

Aviation to move to the central fuel storage area upon implementation of the revised minimum standards.[52]

Given the length of time between the leases executed during the initial development period and those executed with Maxim, Level 3 Communications, and Mountain Aviation, we cannot find, based on the record evidence before us, that it would be unjustly discriminatory to require Maxim, Level 3 Communications, and Mountain Aviation to comply with the revised minimum standards and not require the same of the other tenants prior to lease renegotiation. As discussed above, no Federal obligation requires a sponsor to forgo improved business practices to equalize terms and conditions among tenants.

In any case, the FAA expects that when the Airport does implement its revised minimum standards, it will give careful consideration to the issues discussed in this determination and will weigh the reasonableness of any potential discrimination that may occur as a result of staggered implementation. We also expect that all tenants will upgrade to the revised minimum standards at the time of lease renewal or during a lease modification *at the latest*.

B. Exclusive Rights

While public use airports may impose qualifications and minimum standards upon those who engage in aeronautical activities, the FAA has taken the position that the application of any unreasonable requirement or any standard that is applied in an unjustly discriminatory manner may constitute the constructive grant of an exclusive right to the entity or entities not subject to the same requirements or standards.

As defined in Maxim's Complaint, "[the] Complaint herein is based upon the County's refusal to permit Maxim any opportunity to self-fuel its aircraft, and its discriminatory treatment of Maxim in relation to others on the Airport who are permitted to self-fuel."

For the reasons discussed in the issues above, we found the Airport did discriminate unjustly against the Complainant by denying Maxim a reasonable opportunity to self-fuel for a prolonged period of time pending the adoption and implementation of revised minimum standards. Since Maxim, alone, was denied the right to self-fuel, we find a constructive exclusive right was granted to the group of other tenants who were allowed to self-fuel during this same period.

## VI. FINDINGS AND CONCLUSIONS

Upon consideration of the pleadings and other submissions by the parties, the entire record herein, and the applicable law and policy and for the reasons stated above, the FAA Office of Airport Safety and Standards has determined the following:

[52]The County maintains that Level 3 Communications and Mountain Aviation "will be subject to the same standards as Maxim" See, FAA Exhibit 1, Item 6, Section III

1. The Respondent, by requiring the Complainant to agree to and abide by a restrictive lease term that precludes the Complainant from self-fueling at the Airport until the Respondent adopts and implements revised minimum standards for self-fueling, is in violation of Federal Grant Assurance 22(f) regarding an aircraft owners right to self-service its own aircraft.

2. The Respondent, by permitting two similarly situated entities (Level 3 Communications and Mountain Aviation), but not the Complainant, to self-fuel pending the adoption and implementation of revised minimum standards is in violation of Title 49 U.S.C. 47107(a)(1) and related Federal Grant Assurance 22(a) regarding unjust economic discrimination.

3. The Respondent, by acting in an unjustly discriminatory manner, has constructively granted an exclusive right to conduct an aeronautical activity at the Jefferson County Airport in violation of Title 49 U.S.C. 47107 (a)(4) and 40103(e) and related Federal Grant Assurance 23.

These Determinations are made under Sections 313(a), 1002(a) and 1006(a) of the Federal Aviation Act of 1958, as amended, 49 U.S.C. §§ 10103(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)(1) and (4), 47107(g)(1), 47110, 4711(d), and 47122, respectively.

## ORDER

ACCORDINGLY, it is ordered that:

(1) The Respondent provide a corrective action plan to the FAA's Denver Airports District Office within 30 days, and without undue delay, that details a practical plan that would allow Maxim to self-fuel its aircraft at the Jefferson County Airport pending the implementation of revised airport minimum standards. This plan should include consideration of the cost to Maxim to engage in interim self-fueling as discussed more fully above in Section V, "Analysis and Discussion."

(2) All motions not expressly granted herein are denied.

Furthermore, the FAA may withhold approval of any application by Jefferson County, Colorado for grants authorized under Title 49 U.S.C. §§47114(d), 47115 or 47116 if the County does not submit a corrective action plan to the FAA's Denver Airports District Office within 30 days.

## 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 under Title14 CFR 16.247(b)(2). Any party to this proceeding 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.

April 2, 2002

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

Date