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

Jet 1 Center, Inc., **COMPLAINANT** **v.** **Naples Airport Authority,** **RESPONDENT**	**Docket No. 16-04-03** ***Issued January 4, 2005***

DIRECTOR'S DETERMINATION

I. INTRODUCTION

This matter is before the Federal Aviation Administration (FAA), Director of the Office of Airport Safety and Standards, to investigate pursuant to the Rules of Practices for Federally-Assisted Airport Proceedings found in Title 14 Code of Federal Regulations (CFR), Part 16.

Jet 1 Center, Inc. (Complainant or Jet 1 Center) filed a formal Complaint pursuant to 14 CFR Part 16 against the Naples Airport Authority (Respondent or Authority), operator of the Naples Municipal Airport. Complainant alleges the Respondent violated Title 49 United States Code (U.S.C.) §§ 47107(a)(1), (4), and (6); 40103(e), and related Federal Grant Assurances 22, *Economic Nondiscrimination,* and 23, *Exclusive Rights*, by (A) improperly invoking the exclusive right to sell fuel, (B) preventing Complainant from selling fuel to its subtenants and others after having allowed this practice in the past, (C) revoking and denying Complainant a fueling permit, thereby preventing Complainant from self-fueling its own aircraft, (D) collecting a fuel flowage fee[1] when fuel is transferred from the Respondent to airport tenants, and (E) charging a lower fuel flowage fee to one airport tenant.[2]

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[1] The fuel flowage fee at Naples Municipal Airport is a variable fee per gallon of aviation fuel delivered to a permit holder and paid to the Naples Airport Authority by the permit holder. [FAA Exhibit 1, Item 9, tab 1, page 2.]

[2] The Complainant also presented allegations regarding antitrust laws, state contract law, and impairment of contract. [FAA Exhibit 1, Item 14, page 11; and Item 18, page 20.] The Director finds these claims to be outside the jurisdiction of Part 16.

Based on the Director's review and consideration of the evidence submitted, the administrative record designated at FAA Exhibit 1, the relevant facts, and the pertinent laws and policy, the Director concludes that the Respondent is not in violation of its obligations under the grant assurances regarding the first four issues, but is in violation of Federal Grant Assurance 22, *Economic Nondiscrimination*, on the fifth charge of allowing one airport tenant to pay a lower fuel flowage fee than the other tenants on the airport operating under the same type of fuel permit.

The basis for the Director's conclusion is set forth herein.

II. AIRPORT

The Naples Municipal Airport is a primary public-use commercial service airport owned by the City of Naples and operated by Naples Airport Authority, Naples, Florida.

In early 1942, the City of Naples and Collier County, which had purchased property for use as an airport, leased the property to the United States (U.S.) government for improvements and use as a training facility for the U.S. Army Air Corps. This took place under the auspices of an AP-4 Agreement[3], under the Development of Landing Areas National Defense (DLAND) Program. In 1948, the Air Force declared the facility to be surplus, cancelled the lease and quitclaim, and the facility was returned to civilian use.

Collier County and the City of Naples jointly operated the airport until the county sold its interests to the city in 1958. In 1969, the Naples City Council asked the Florida Legislature to create an independent authority whose members would be appointed by the City Council. Chapter 69-1326, Laws of Florida, as amended, created the City of Naples Airport Authority as an independent body for the purpose of operating and maintaining the airport. The management and operating power of the airport was transferred from the City of Naples to the Naples Airport Authority under lease for 99 years.

The lease between the City of Naples and the Naples Airport Authority shows that responsibility for, and control of, the airport was transferred to the Naples Airport Authority from the City of Naples. [FAA Exhibit 1, Item 6, exhibit B, tab 12.] The Naples Airport Authority has operational control of the airport and is a grant sponsor.

During the last reported twelve-month period ending September 30, 2003, there were 385 aircraft based at the airport with 112,308 operations annually, 72,583 of which were itinerant.[4]

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[3] This was an agreement between the U.S. Government and the airport sponsor under which the sponsor provided the land, and the U.S. Government planned and constructed the airport improvements. [See FAA Order 5190.6A, *Airport Compliance Requirements*, Section 2-18.]

[4] FAA Exhibit 1, Item 1 provides a copy of the most recent FAA Form 5010 for the Naples Municipal Airport, printed September 2, 2004.

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, (AAIA), as amended, 49 U.S.C. § 47101, *et seq*. Since 1982, the Naples Airport Authority has entered into grant agreements with the FAA totaling $15,332,031 in federal airport development assistance. The airport received its last AIP grants of $496,133 to rehabilitate runway lighting and $221,028 to modify the terminal building in 2002. [FAA Exhibit 1, Item 2.][5]

The Complainant, Jet 1 Center, is one of a number of fixed-base operators[6] at the Naples Municipal Airport. [FAA Exhibit 1, Item 9, tab 11, page 22.] Jet 1 Center provides hangar space, ramp space and certain services to its clients, who are private jet owners and operators. [FAA Exhibit 1, Item 14, tab 1.]

III. BACKGROUND

July 3, 1969 – The Naples Airport Authority was created to operate and maintain the airport facilities at the Naples Municipal Airport.

November 1, 1995 – Jet 1 Center (Complainant) and Naples Airport Authority (Respondent) entered into a lease agreement for the construction of a facility for aeronautical use.

February 17, 1997 – Jet 1 Center opened for business as a fixed-base operator.

February 17, 1997 – Naples Airport Authority issued a Nonpublic Aircraft Fuels Dispensing Permit (Independent Fuel Supplier) to Jet 1 Center. This permit allowed the Complainant to fuel its own aircraft (self-fuel) and to dispense fuel to its subtenants meeting certain sublease conditions.

August 1, 1997 – Jet 1 Center and Naples Airport Authority entered into a 30-year lease.

November 19, 1998 – The lease between Jet 1 Center and Naples Airport Authority was amended to add 5,000 sq. ft. to the leased area.

November 10, 1999 – Naples Airport Authority began a *Prepaid Fuel Program* allowing customers to purchase fuel at discounted rates directly from the Naples Airport Authority. Jet 1 Center participated in the *Prepaid Fuel Program* under its February 17, 1997 fueling permit.

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[5] In a final agency decision dated August 25, 2003, the FAA found the Naples Airport Authority in violation of its grant assurances on issues unrelated to the instant case and withheld new FAA grants. The matter is presently before the Court of Appeals. [See FAA Docket No. 16-01-15, *appeal docketed* No. 03-1308 (D.C. Cir. September 30, 2003).]

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

August 15, 2002 – Naples Airport Authority removed Jet 1 Center from the *Prepaid Fuel Program*. Naples Airport Authority also gave Jet 1 Center notice of default of the November 1, 1995, lease and the August 1, 1997, lease, and notice of revocation of its fuel permit.

August 19, 2002 – Jet 1 Center filed a complaint in the Circuit Court of Collier County, Florida, requesting a declaratory judgment that Jet 1 Center had not violated its lease or fuel permit. The Naples Airport Authority filed a counterclaim requesting that the court terminate Jet 1 Center's lease and evict Jet 1 Center from its facilities. The litigation is stayed by a bankruptcy petition filed by Jet 1 Center. [FAA Exhibit 1, Item 9, page 13.]

November 8, 2002 – Naples Airport Authority issued revised Rates and Charges, which included rules and regulations related to fueling rights.

December 21, 2002 – Jet 1 Center was responsible for a fuel spill resulting from defective fail-safe mechanisms. [FAA Exhibit 1, Item 9, page 13.]

December 2002 – Naples Airport Authority filed a complaint in the Circuit Court of Collier County seeking an injunction against Jet 1 Center. [FAA Exhibit 1, Item 9, page 14.]

December 3, 2003 – The Circuit Court for Collier County, Florida, issued an injunction (from the December 2002 court complaint) prohibiting Jet 1 Center from dispensing fuel [FAA Exhibit 1, Item 9, page 2], but acknowledged that self-fueling was a matter of Federal Law [FAA Exhibit 1, Item 6] .

December 5, 2003 – Naples Airport Authority placed locks on Jet 1 Center's fuel farm and three fuel trucks. [FAA Exhibit 1, Item 9, pages 15-16.]

March 10, 2004 – Jet 1 Center filed its Part 16 formal complaint pursuant to 14 CFR Part 16 with the FAA. This complaint was resubmitted March 24, 2004. [FAA Exhibit 1, Items 3 and 6.]

April 2, 2004 – FAA Office of the Chief Counsel docketed the Jet 1 Center complaint filed under the Rules of Practice for Federally Assisted Airport Proceedings, Title 14, Part 16 of the Code of Federal Regulations as Docket No. 16-03-10. (This docket number was subsequently corrected to Docket No. 16-04-03 on April 9, 2004.) [FAA Exhibit 1, Items 7 and 8.]

April 29, 2004 – Respondent, Naples Airport Authority, answered the complaint. [FAA Exhibit 1, Item 9.]

May 17, 2004 – Complainant submitted its Reply to Respondent's Answer. [FAA Exhibit 1, Item 14.]

May 19, 2004 – Complainant's motion to stay execution of Second State Court Action pending the FAA's determination in this matter was denied.

May 24, 2004 – Complainant filed a Motion for Leave to File Amended Reply and Additional Exhibits. [FAA Exhibit 1, Item 15.]

June 15, 2004 – Respondent submitted its Rebuttal of the City of Naples Airport Authority. [FAA Exhibit 1, Item 18.]

July 22, 2004 – Complainant submitted a Motion for Director's Determination on the Pleadings. [FAA Exhibit 1, Item 19.]

July 29, 2004 – Respondent submitted its Response of the City of Naples Airport Authority to the Complainant's Motion for Director's Determination on the Pleadings. [FAA Exhibit 1, Item 20.]

August 2, 2004 – Complainant submitted its Reply to Respondent's Response to Complainant's Motion for Director's Determination on the Pleadings. [FAA Exhibit 1, Item 21.]

August 3, 2004 – Complainant submitted a Notice of Filing Corrected Exhibits. [FAA Exhibit 1, Item 22.]

August 3, 2004 – Complainant submitted an Amended Notice of Filing Corrected Exhibits. [FAA Exhibit 1, Item 23.]

IV. ISSUES

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

A. *Issue 1:* Whether the Respondent, by invoking a propriety exclusive right to be the only fuel seller on the airport, is in violation of Federal Grant Assurance 23, *Exclusive Rights*.

B. *Issue 2:* Whether the Respondent, by invoking a propriety exclusive right to sell fuel after having allowed fixed-base operators to provide this service, is in violation of Federal Grant Assurance 22, *Economic Nondiscrimination*

C. *Issue 3:* Whether the Respondent, by denying the Complainant a fuel permit to self-fuel its own aircraft, is in violation of Federal Grant Assurance 22, *Economic Nondiscrimination*.

D. *Issue 4:* Whether the Respondent, by establishing a fuel flowage fee to be paid at the time of purchase, is in violation of Federal Grant Assurance 22, *Economic Nondiscrimination*.

E. *Issue 5:* Whether the Respondent, by charging a lower fuel flowage fee to one airport tenant, is in violation of Federal Grant Assurance 22, *Economic Nondiscrimination*.

Our determination in this matter is based on the applicable Federal law and FAA policy, review of the arguments and supporting documentation submitted by the parties, and the administrative record reflected in the attached FAA Exhibit 1.[7]

V. APPLICABLE FEDERAL LAW AND FAA POLICY

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

The following is a discussion pertaining to (A) the Airport Improvement Program, (B) Airport Sponsor Assurances, (C) the FAA Airport Compliance Program, and (D) Enforcement of Airport Sponsor Assurances.

A. Airport Improvement Program

Title 49 U.S.C. § 47101, *et seq*., provides for Federal airport financial assistance for the development of public-use airports under the Airport Improvement Program (AIP) established by the Airport and Airway Improvement Act of 1982, as amended. Title 49 U.S.C. § 47107, *et seq*., sets forth assurances to which an airport sponsor agrees as a condition of receiving Federal financial assistance. Upon acceptance of an AIP grant, the assurances become a binding contractual obligation between the airport sponsor and the Federal government. The assurances made by airport sponsors in AIP grant agreements are important factors in maintaining a viable national airport system.

B. Airport Sponsor Assurances

As a condition precedent to providing airport development assistance under the Airport Improvement Program, 49 U.S.C. § 47107, *et seq.*, the Secretary of Transportation and, by extension, the FAA must receive certain assurances from the airport sponsor. Title 49 U.S.C. § 47107(a) sets forth the statutory sponsorship requirements to which an airport sponsor receiving Federal financial assistance must agree.

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[7] The attached FAA Exhibit 1 provides the Index of the Administrative Record in this proceeding.

The FAA has a statutory mandate to ensure that airport owners comply with these sponsor assurances.[8] FAA Order 5190.6A, Airport Compliance Requirements (Order), issued on October 2, 1989, provides the 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. 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.

Two Federal grant assurances apply directly to the circumstances set forth in this complaint: (1) Federal Grant Assurance 22, *Economic Nondiscrimination,* and (2) Federal Grant Assurance 23, *Exclusive Rights*. Under the discussion on Exclusive Rights, it is necessary to cover the Propriety Exclusive as well. Federal Grant Assurance 24, *Fee and Rental Structure*, is also listed below. Assurance 24 obligates the airport sponsor to operate the airport in a manner that will enable it to be as financially self-sustaining as possible under the specific circumstances at that airport. Collecting fees for providing fueling operations to third parties on the airport is at the heart of the issues and allegations addressed in this complaint. Therefore, Assurance 24 is pertinent to the current complaint even though there is no current allegation that the Respondent violated this assurance.

1. Economic Nondiscrimination

The owner of any airport developed with Federal grant assistance is required to operate the airport for the use and benefit of the public. Federal Grant Assurance 22, *Economic Nondiscrimination*, (Assurance 22) deals with both the reasonableness of airport access and the prohibition of adopting unjustly discriminatory conditions as a potential for limiting access. Assurance 22 of the prescribed sponsor assurances implements the provisions of 49 U.S.C. § 47107(a)(1) through (6), and requires, in pertinent part:

> [The airport sponsor] will make the airport available as an airport for public use on reasonable terms and without unjust discrimination to all types, kinds and classes of aeronautical activities, including commercial aeronautical activities offering services to the public at the airport. [Assurance 22(a).]
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> Each fixed-base operator at the airport shall be subject to the same rates, fees, rentals, and other charges as are uniformly applicable to all other fixed-base operators making the same or similar uses of such airport and utilizing the same or similar facilities. [Assurance 22(c).]

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8 See, *e.g.*, the Federal Aviation Act of 1958, as amended and recodified, Title 49 U.S.C. §§ 40101, 40113, 40114, 46101, 46104, 46105, 46106, 46110; and the Airport and Airway Improvement Act of 1982, as amended and recodified, Title 49 U.S.C. §§ 47105(d), 47106(d), 47107(k), 47107(l), 47111(d), 47122.

> [The 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. [Assurance 22(f).]
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> In the event the sponsor itself exercises any of the rights and privileges referred to in the assurance, the services involved will be provided on the same conditions as would apply to the furnishing of such services by commercial aeronautical service providers authorized by the sponsor under these provisions. [Assurance 22(g).]
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> The sponsor 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).]
>
> The sponsor 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 that would be detrimental to the civil aviation needs of the public.

In all cases involving restrictions on airport use imposed by airport owners for safety and efficiency reasons, the FAA will make the final determination on the reasonableness of such restrictions when those restrictions deny or limit access to, or use of, the airport. [FAA Order 5190.6A, para. 4-8.]

2. Exclusive Rights

Title 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."

Title 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."

Federal Grant Assurance 23, *Exclusive Rights*, (Assurance 23) of the prescribed sponsor assurances implements both statutory provisions, and states in its entirety:

> [The airport sponsor] will permit no exclusive right for the use of the airport by any person providing, or intending to provide, aeronautical

> services to the public. For purposes of this paragraph, the providing of the services at an airport by a single fixed-base operator shall not be construed as an exclusive right if both of the following apply:
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> a. It would be unreasonably costly, burdensome, or impractical for more than one fixed-base operator to provide such services, and
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> b. If allowing more than one fixed-base operator to provide such services would require the reduction of space leased pursuant to an existing agreement between such single fixed-base operator and such airport.
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> [The airport sponsor] further agrees that it will not, either directly or indirectly, grant or permit any person, firm, or corporation, the exclusive right at the airport to conduct any aeronautical activities, including but not limited to, charter flights, pilot training, aircraft rental and sightseeing, aerial photography, crop dusting, aerial advertising and surveying, air carrier operations, aircraft sales and services, sale of aviation petroleum products whether or not conducted in conjunction with other aeronautical activity, repair and maintenance of aircraft, sale of aircraft parts, and any other activities which because of their direct relationship to the operation of aircraft can be regarded as an aeronautical activity, 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 Title 49, United States Code.

Proprietary Exclusive

Assurance 23 does not preclude the airport sponsor from retaining for itself a proprietary exclusive right to conduct any of the aeronautical services on the airport. FAA Order 5190.6A, *Airport Compliance Requirements*, discusses Propriety Exclusive and states,

> The owner of a public-use airport (public or private owner) may elect to provide any or all of the aeronautical services needed by the public at the airport. In fact, the statutory prohibition against exclusive rights does not apply to these owners and they may exercise, but not grant, the exclusive right to conduct any aeronautical activity. However, these owners must engage in such activities as principals using their own employees and resources. An independent commercial enterprise that has been designated as agent of the owner may not exercise nor be granted an exclusive right. [Order 5190.6A, 3-9d.]

3. Fee and Rental Structure

Federal Grant Assurance 24, *Fee and Rental Structure*, (Assurance 24) states in pertinent part:

> [The airport] will maintain a fee and rental structure for the facilities and services at the airport which will make the airport as self-sustaining as possible under the circumstances existing at the particular airport, taking into account such factors as the volume of traffic and economy of collection.

C. The FAA Airport Compliance Program

The FAA discharges its responsibilities for ensuring airport owners' compliance with their Federal obligations through its Airport Compliance Program. The FAA's airport compliance efforts are based on the contractual obligations 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 of receiving a grant of Federal funds or the conveyance of Federal property for airport purposes. The Order analyzes the various obligations set forth in the standard airport sponsor assurances, addresses the nature of those assurances, addresses the application of those assurances in the operation of public-use airports, and facilitates interpretation of the assurances by FAA personnel.

The FAA Compliance program is designed to achieve voluntary compliance with federal obligations accepted by owners and/or operators of public-use airports developed with FAA-administered assistance. Therefore, in addressing allegations of noncompliance, the FAA will make a determination as to whether an airport sponsor is *currently* in compliance with the applicable federal obligations. Consequently, the FAA will consider the successful action by the airport to cure any alleged or potential past violation of applicable federal obligation to be grounds for dismissal of such allegations. [See e.g. Wilson Air Center v. Memphis and Shelby County Airport Authority, FAA Docket No. 16-99-10, (8/30/01).]

D. Enforcement of Airport Sponsor Assurances

FAA Order 5190.6A covers all aspects of the airport compliance program except enforcement procedures.

Enforcement procedures regarding airport compliance matters may be found at *FAA Rules of Practice for Federally-Assisted Airport Proceedings* (14 CFR Part 16). These enforcement procedures were published in the Federal Register (61 FR 53998, October 16, 1996) and became effective on December 16, 1996.

VI. ANALYSIS, DISCUSSION, and FINDINGS

The Complainant alleges the Respondent violated its grant assurances by (A) improperly invoking the exclusive right to sell fuel, (B) preventing Complainant from selling fuel to its subtenants and others after having allowed this practice in the past, (C) revoking and denying Complainant a fueling permit, thereby preventing Complainant from self-fueling its own aircraft, (D) collecting a fuel flowage fee when fuel is transferred from the Respondent to airport tenants, and (E) charging a lower fuel flowage fee to one airport tenant. These five issues are discussed separately below.

We have conducted our review and analysis to determine whether the Respondent is currently in violation of its Federal obligations with respect to its fuel policies and practices.

A. *Issue 1*: Whether the Respondent, by invoking a propriety exclusive right to be the only fuel seller on the airport, is in violation of Federal Grant Assurance 23, *Exclusive Rights*.

Assurance 23, *Exclusive Rights*, expressly prohibits an airport sponsor from permitting or providing any person the exclusive right to conduct an aeronautical activity on the airport. However, Assurance 23 does not preclude the airport sponsor from exercising a propriety exclusive right to conduct any aeronautical service on the airport itself, including the sale of fuel. (See the discussion on *Exclusive Rights* in Section V, Applicable Law and FAA Policy, above.)

The Naples Airport Authority asserts its proprietary exclusive right to be the only provider of fuel on the airport. The Authority states it has been the sole provider of aviation fuel at Naples Municipal Airport since the Authority's inception in 1969. [FAA Exhibit 1, Item 9, page 4.] It further states that its Rules and Regulations and its Rates and Charges documents state explicitly that the Authority maintains the exclusive right to provide aviation fuel at the airport. [FAA Exhibit 1, Item 9, page 5.]

Jet 1 Center argues that the Authority is not entitled to claim this propriety exclusive right for three reasons: (1) Naples Airport Authority is not the owner of the airport and is, therefore, not eligible to invoke such a right; (2) Naples Airport Authority previously permitted tenants on the airport to provide fuel to their subtenants, thus negating the

Authority's claim to have retained the proprietary exclusive right for itself; and, (3) having once given up its proprietary exclusive right by allowing tenants to sell fuel to subtenants, the Authority is not now entitled to invoke a proprietary exclusive right to sell fuel itself.

1. Ownership of the Airport

The FAA permits the owner of a public-use airport to elect to provide any or all of the aeronautical services needed by the public at the airport, including fueling operations. FAA Order 5190.6A, *Airport Compliance Requirements*, expressly states that the prohibition against exclusive rights does not apply to airport owners. These owners may exercise, but not grant, the exclusive right to conduct any aeronautical activity. [FAA Order 5190.6A, 3-9d.]

Complainant argues that the Naples Airport Authority is not the *owner* of the airport and, therefore, is not eligible to claim a propriety exclusive right to sell fuel on the airport. [FAA Exhibit 1, Item 6, pages 10-11; Item 15, pages 6-8.] Complainant offers the December 3, 1969, lease between the City of Naples and the Naples Airport Authority as evidence that the City of Naples is the true owner of the airport, not the Naples Airport Authority. [FAA Exhibit 1, Item 6, exhibit B, tab 12.] This 99-year lease transfers the management and operating power of the airport from the City of Naples to the Naples Airport Authority.

It was not FAA's intention to define "owner" narrowly. The FAA Office of Airport Safety and Standards uses the terms "airport sponsor" and "airport owner" interchangeably in its policy documents when defining the responsibilities of airport owners, sponsors, and operators in meeting their grant assurance obligations. FAA defines an airport sponsor as a person or agency who has the legal authority to act on behalf of the airport. Unless the airport is owned and operated by a private entity, the airport sponsor is generally a public agency that owns and/or operates the airport. Here, the Naples Airport Authority is the sponsor of the airport for federal grant purposes.

FAA Advisory Circular 150/5190-5, *Exclusive Rights and Minimum Standards for Commercial Aeronautical Activities*, refers to the "airport sponsor" in the same manner as Order 5190.6A refers to "airport owner" when discussing the propriety exclusive. It covers owners as well as non-owner sponsors and operators and is consistent with 49 U.S.C. § 47102(19).[9] It is FAA's intent to allow the public entity having control and responsibility over the airport's operation to invoke a proprietary exclusive right to conduct any of the aeronautical services needed at the airport without violating Assurance 23, *Exclusive Rights*. This includes airport authorities that lease property for a term long enough to be considered having "good title" for purposes of AIP sponsorship.

The lease between the City of Naples and the Naples Airport Authority shows that responsibility for, and control of, the airport was transferred to the Naples Airport Authority from the City of Naples. [FAA Exhibit 1, Item 6, exhibit B, tab 12.] The Naples Airport Authority has operational control of the airport and is a grant sponsor.

[9] <u>See</u> section titles for FAA Order 5190.6A, 3-9d, and FAA Advisory Circular 150/5190-5, 1-3a.

The FAA acknowledged in a March 31, 1997, letter from John W. Reynolds, Jr., Assistant Manager of the FAA Orlando Airports District Office, to Mr. Ted Soliday, Executive Director of the Naples Airport Authority, that the Authority is eligible to invoke its propriety exclusive right to offer aeronautical services at the airport, including the sale of fuel. [FAA Exhibit 1, Item 9, tab 9.] The statutory prohibition against exclusive rights does not apply to airport owners or properly established authorities. The Naples Airport Authority is a properly established authority eligible to invoke its proprietary exclusive right to sell fuel.

2. Effect of Allowing Tenants to Provide Fuel to Subtenants

Naples Airport Authority, as the public agency responsible for the operation of the airport, is entitled to invoke the proprietary exclusive right to be the only provider of fuel on the airport. It must, however, use its own employees and resources in conducting such proprietary exclusive activity.

FAA Order 5190.6A, *Airport Compliance Requirements*, permits an airport to invoke its proprietary exclusive only when that airport sponsor, owner, or operator engages in the proprietary exclusive activity as a principal using its own employees and resources. The Order specifically states that an independent commercial enterprise designated as agent of the airport sponsor, owner, or operator may not exercise, nor be granted, an exclusive right. [Order 5190.6A, 3-9d.]

Jet 1 Center argues that the Authority's fuel policies in the past have allowed airport tenants to provide fuel to their subtenants without using the airport's own employees and resources for this fueling service. Jet 1 Center argues that these previous policies negate the Authority's claim that it has always retained a proprietary exclusive right to sell fuel.

The Naples Airport Authority admits that prior to November 2002, airport tenants were permitted to provide fuel at cost to their long-term subtenants. The Naples Airport Authority also admits that transient aircraft operators could purchase fuel through a fixed-base operator on the airport. [FAA Exhibit 1, Item 9, page 2.] The Naples Airport Authority authorized these fueling activities under two of its fuel programs: (a) the self-fueling program,[10] and (b) the prepaid fuel program.

[10] The Authority's 2004 Rates and Charges document identifies two self-fueling programs: Private Self-fueling Program and Public Self-fueling Program. Private self-fuelers must have a fuel permit and are authorized to store and pump fuel. Public self-fuelers use the airport's self-service fuel facilities. The discussion throughout this complaint refers to private self-fueling. [FAA Exhibit 1, Item 9, tab 2, pages 2 and 4.]

(a) Self-Fueling Program

The Naples Airport Authority permits airport users to fuel aircraft they own or which are under their "operational control."[11] The Authority made the decision that fueling aircraft directly leased or otherwise under a user's operational control should be considered a form of self-fueling. [FAA Exhibit 1, Item 9, page 5.]

Prior to its November 2002 Rates and Charges, the Authority included long-term subtenants within the scope of its self-fueling program. [FAA Exhibit 1, Item 9, page 6.] Tenants having a valid self-fueling permit were allowed to provide fuel to subtenants as a means of passing their own self-fueling rights on to their long-term subtenants. [FAA Exhibit 1, Item 9, tab 5, page 39.] Respondent admits that tenants – including Continental Aviation Services, Inc. (1994), Jet 1 Center (1997), and Naples Airport Properties – received permission to provide fuel to one or more of their long-term subtenants. [FAA Exhibit 1, Item 9, page 7.]

(i) Continental Aviation Services

The Naples Airport Authority authorized tenant Continental Aviation Services to fuel aircraft of its subtenant, Hat Brands, Inc. under its Nonpublic Fuel Dispensing Permit effective October 10, 1994. Continental Aviation Services was prohibited from making an operational profit on fueling its subtenant. [FAA Exhibit 1, Item 9, tab 7.]

On October 25, 1994, Continental Aviation Services wrote a clarifying letter to the Naples Airport Authority stating, "To offset some of the direct costs of providing the fuel, [Continental Aviation Services] intends to charge Hat Brands a monthly fee of $1,500. This fee is not intended to be profit but will allow [Continental Aviation Services] to recover some of the costs of ownership, land usage, electricity, liability insurance, upkeep and maintenance of the fuel farm, as well as the ordering, purchasing, testing, pumping and billing of the fuel." [FAA Exhibit 1, Item 9, tab 7.]

Naples Airport Authority accepted this explanation regarding the fee Continental Aviation Services would charge its subtenant without comment in a letter dated October 28, 2004.[12] [FAA Exhibit 1, Item 9, tab 7.]

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[11] Naples Airport Authority has defined "operational control" to mean the practical and legal authority to command an aircraft for an indefinite period and the power to determine the function and location of that aircraft. It does not include temporary custody for taxiing, fueling, maintenance, storage, or service. For purposes of demonstrating operational control, permit holder shall submit documentation to the Naples Airport Authority verifying the aircraft is the permit holder's aircraft. [FAA Exhibit 1, Item 9, tab 1, page 3.]

[12] The Authority states that Hat Brands' sublease with Continental Aviation Services expired in 1997 (the same year Jet 1 Center received its first fuel permit). By that time, the Authority was no longer allowing any tenant to charge subtenants more than the delivered cost for a gallon of fuel including taxes and the fuel flowage fee. The Authority states that its 1994 understanding with Continental Aviation Services regarding the monthly fee to Hat Brands has not been replicated with other tenants. [FAA Exhibit 1, Item 18, page 18.]

(ii) Jet 1 Center
The Naples Airport Authority granted a Nonpublic Aircraft Fuels Dispensing Permit to Jet 1 Center on February 17, 1997. The permit explicitly states, "Permittee shall be restricted from selling aircraft fuel to other airport users, including locally based and transient aircraft." [FAA Exhibit 1, Item 9, tab 8, page 1.]

Regardless of the restriction in the permit, the Naples Airport Authority authorized Jet 1 Center to fuel aircraft other than those Jet 1 Center owned if the aircraft belonged to a subtenant with a lease of at least six-months. Jet 1 Center was not allowed to provide fuel to transient aircraft or to short-term lessees.[13] In addition, Jet 1 Center was not permitted to make a profit on the fuel it provided to its long-term subtenants. [FAA Exhibit 1, Item 9, tab 11, page 22.]

(iii) Naples Airport Properties
Naples Airport Properties is a corporation formed to hold the lease and fuel permit for other interrelated companies, including Collier Flight Management and Pegasus Aviation. Naples Airport Properties held a fuel permit enabling it to provide fuel service to its subtenants prior to November 8, 2002. [FAA Exhibit 1, Item 9, tab 6, pages 42-43.]

The Naples Airport Authority argues that these fueling programs were an extension of the self-fueling right authorized by the FAA. Respondent provides a deposition in its answer that states,

> "[Naples Airport Authority has] an interpretation from both the FAA as well as our own attorneys saying that extending [self-fueling] to long-term subtenants is an extension of the self-fueling permit as long as they meet [Naples Airport Authority] requirements and they do it in accordance with the guidelines that the FAA establishes and puts on us." [FAA Exhibit 1, Item 9, tab 5, page 40.]

The pleadings to this complaint do not include clear evidence of that interpretation. Nonetheless, since the fuel was purchased from the Authority and dispensed without profit to the intermediaries, the Authority regarded this fueling as a service to the subtenants and not an infringement upon the Authority's proprietary exclusive right to provide fuel on the airport. [See FAA Exhibit 1, Item 9, tab 11, pages 24-25.]

We disagree. Allowing tenants to fuel subtenants does not meet the definition of using the sponsor's own employees in a proprietary exclusive arrangement. When the tenant purchased the fuel from the Authority, with the Authority using its own employees to transfer that fuel to the tenant, the propriety exclusive remained intact. However, when

[13] The Authority notes that on one occasion an Authority staff member gave permission for Jet 1 Center to fuel transients for a limited period due to Authority equipment difficulties. [FAA Exhibit 1, Item 9, page 9, footnote 2.]

that tenant subsequently transferred that same fuel to the end user subtenant using the tenant's employees and not Authority employees, the proprietary exclusive was not maintained. It is not sufficient that the Authority used its own employees to provide the fuel to the tenant initially. To maintain its proprietary exclusive, the Authority must provide the fuel to the end-users using the Authority's employees. This was not done. Therefore, we conclude that in the past the Naples Airport Authority had not effectively invoked its proprietary exclusive right regarding fuel sales.

(b) Prepaid Fuel Program

The *Prepaid Fuel Program* allowed airport users to purchase aviation fuel at advantageous bulk rates. [FAA Exhibit 1, Item 9, page 5.] The *Prepaid Fuel Program* guidelines state that customers must participate directly with the Naples Airport Authority.

There may have been some confusion, however, regarding how the program was intended to work. In a document presented by Jet 1 Center as the October 1999 fuel program guidance, the *Prepaid Fuel Program* allowed "subtenants with an approved sublease with a term of six months or longer [to] receive fuel into their aircraft through their landlord's participation in this program…."[14] [FAA Exhibit 1, Item 6, exhibit B, tab 8, page 2.]

Jet 1 Center states that the Authority's November 10, 1999, *Prepaid Fuel Program* permitted subtenants to benefit from the discount fuel program by purchasing fuel directly from the landlord if certain conditions were met. [FAA Exhibit 1, Item 6, pages 5-6.] In addition, transient aircraft operators were allowed to participate in a fixed-base operator's prepaid fuel account under the *Prepaid Fuel Program*. [FAA Exhibit 1, Item 9, page 6.] A November 16, 1999, letter from the Naples Airport Authority to Jet 1 Center confirms an agreement allowing Jet 1 Center to provide fuel to customers that did not have long-term subtenant agreements as long as those customers purchased other services in addition to fuel from Jet 1 Center at the same time. [FAA Exhibit 1, Item 14, tab 1, exhibit B.]

The Authority admits it allowed long-term subtenants to share the benefits of the lower prices of the prepaid fuel program. It argues, however, that only the Authority – not the permit-holding tenant – was authorized to physically pump the fuel that was prepaid by the tenant into the aircraft of that tenant's customers. The Authority also states that it pumped the fuel with its own personnel and equipment. [FAA Exhibit 1, Item 18, tab 26, page 5.]

Effect of these Fuel Programs

The Naples Airport Authority routinely included language in its leases and documents to state that it was retaining for itself the proprietary exclusive right to sell fuel. Its actions prior to November 2002, however, were inconsistent with that carefully crafted language. The Authority allowed tenants to sell fuel to their subtenants.

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[14] This language was not included in the fuel guidance effective October 2002. [FAA Exhibit 1, Item 6, exhibit B, tab 10, page 4.]

In an April 13, 1984, opinion memorandum, the FAA Assistant Chief Counsel for General Legal Services Division discusses propriety exclusive rights at airports. [FAA Exhibit 1, Item 6, exhibit B, tab 1.] That opinion memorandum states, "FAA policy currently permits proprietary exclusive rights at public airports (i.e., airports owned and operated by a public agency). This is limited to situations in which the public agency itself provides the aeronautical services, using its own employees and resources." [FAA Exhibit 1, Item 6, exhibit B, tab 1.]

Based on the record evidence, it does not appear that the Authority was effectively operating as the exclusive fuel seller under the definition of a proprietary exclusive right prior to the November 2002 revision of its Rules and Regulations and Rates and Charges. The Authority appears to have recognized this weakness in its fuel program; it revised its fueling policies to reassert its right to be the exclusive provider of fuel on the Naples Municipal Airport. [FAA Exhibit 1, Item 18, tab 30.]

3. Right to Invoke a Propriety Exclusive

In November 2002, the Naples Airport Authority amended its Rules and Regulations and Rates and Charges to eliminate the accommodation for direct fueling of long-term subtenants and to eliminate the availability of prepaid fueling rates for transient aircraft. [FAA Exhibit 1, Item 9, page 9.] Under these new terms, tenants could no longer provide fuel to subtenants or transients under the self-fueling or prepaid fuel programs. As of November 2002, all fuel purchased had to come directly from the Authority. This action resolved the inconsistencies in the Authority's claim to operate its fueling concession under a proprietary exclusive and its actions in allowing others to provide fuel to subtenants. The November 2002 Rules and Regulations and Rates and Charges cured the defect in the Authority's claim that it operated a proprietary exclusive fueling right on the airport.

Jet 1 Center argues that the Authority, by having allowed Jet 1 Center and others to sell fuel in the past, abandoned its proprietary exclusive right and lost whatever opportunity it had to be the only fuel seller on the airport. [FAA Exhibit 1, Item 6, page 6; Item 15, page 10.]

We do not agree.

An airport sponsor or owner does not lose its ability to invoke a proprietary exclusive right on its airport regardless of previous arrangements. So long as the airport owner or sponsor is not violating any of its grant obligations by doing so, it may invoke its proprietary exclusive right at any time.[15] The Naples Airport Authority is permitted to invoke its proprietary exclusive right to be the only provider of an aeronautical activity or service on the airport, including fuel sales.

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[15] This determination speaks only to the impact of invoking a proprietary exclusive right with respect to FAA regulations and policies. Tenant contractual obligations affected by invoking such a proprietary exclusive right may be enforceable in state court, not under Part 16.

Issue 1 Finding: The Authority is eligible to claim the exclusive right, it has revised its fueling policies to be consistent with that exclusive right, and it is not prevented from invoking such a right at any time with respect to FAA regulations and policies. Therefore, the Authority is not in violation of Federal Grant Assurance 23, *Exclusive Rights,* as a result of invoking its propriety exclusive right to be the only fuel seller on the airport.

B. *Issue 2:* Whether the Respondent, by invoking a propriety exclusive right to sell fuel after having allowed fixed-base operators to provide this service, is in violation of Federal Grant Assurance 22, *Economic Nondiscrimination*

Jet 1 Center argues that the Authority granted its tenants the right to sell fuel to their subtenants and then revoked that right, creating an economic disadvantage to the Complainant.

Although the Naples Airport Authority consistently claimed its proprietary exclusive right to sell fuel on the airport, it did not exercise that right effectively prior to November 2002. Until then, the Authority allowed – and even encouraged through its policies – its fixed-base operators to handle fueling services for airport users. The Authority controlled the circumstances under which fuel could be transferred from tenant to subtenant and stipulated that fixed-base operators could not earn a profit from their fueling operations.

The Authority was careful throughout its documents not to refer to these fueling operations as "fuel sales." Nonetheless, that is what they were. The fixed-base operator purchased fuel from the Authority, and then resold it to subtenants or others on the airport.

The Authority argues that fixed-base operators were not allowed to earn a profit from fueling operations; Jet 1 Center denies that it sold fuel at a profit or added a markup to its fuel sales. [FAA Exhibit 1, Item 15, page 13.] Still, there had to be some financial benefit to Jet 1 Center to provide the fueling operations for its subtenants or it would not have engaged in this activity initially and would not now be claiming an economic disadvantage as a result of losing this ability.

The administrative record reflects that (1) Jet 1 Center was, in fact, allowed to sell fuel to subtenants, (2) Jet 1 Center competed directly with the Authority in fuel sales, and (3) when the Authority effectively invoked it proprietary exclusive right to sell fuel, that action extinguished Jet 1 Center's ability to continue fuel sales on the airport.

Jet 1 Center states that since 1995 it has invested approximately $3 million constructing its on-airport facilities with the understanding that Jet 1 Center would be allowed to dispense aircraft fuel at its premises. [FAA Exhibit 1, Item 14, tab 1, page 2; and tab 7, page 4.] Jet 1 Center described itself as a fixed-base operator "engaged in the business

of, among other things, leasing hangar space to other individuals and/or groups and providing aircraft-related services, including but not limited to supplying fuel to aircraft at the airport." [FAA Exhibit 1, Item 14, tab 7, page 2.]

In February 1997, the Authority issued Jet 1 Center a fueling permit that allowed it to fuel aircraft it owned or leased *and* aircraft owned by subtenants that maintained a lease of at least six months with Jet 1 Center. [FAA Exhibit 1, Item 14, tab 1, exhibit A.] This fueling permit required Jet 1 Center to install a storage tank for each grade of fuel dispensed and to maintain the storage tank(s) at its sole cost and expense. [FAA Exhibit 1, Item 14, tab 1, exhibit A.] (These requirements were comparable to the requirements set forth in the 1993 Nonpublic Aircraft Fuels Dispensing Permit issued to Continental Aviation Services. [FAA Exhibit 1, Item 14, tab 10.])

Letters dated August 21, 1998, and November 16, 1999, confirm that Jet 1 Center was allowed to provide fuel to aircraft it did not directly own or control under the Authority's various fuel programs. [FAA Exhibit 1, Item 14, tab 7, exhibits F and H.]

Jet 1 Center states that it had been selling fuel to long-term tenants since 1997 under the rules of the airport [FAA Exhibit 1, Item 6, page 7] with fuel sales increasing from 170,000 gallons initially to 2,300,000 gallons in 2002. [FAA Exhibit 1, Item 14, tab 7, page 6.] Jet 1 Center describes itself as a "direct competitor" of the Authority for fuel sales. [FAA Exhibit 1, Item 14, tab 1, page 4.]

The Authority's goal to improve its competitive position is noted in a November 2003 Management Team Report. In that report, the Authority acknowledged that its primary purpose in attending an annual convention was to promote the Authority's own fixed-base operator services to the public, and specifically the Authority's fuel programs. The report notes that Flight Options (a long-term subtenant to whom Jet 1 Center sold 600,000 gallons of fuel in one year [FAA Exhibit 1, Item 14, tab 1, page 4]) appeared to be receptive to the Authority's new Annual Volume Fuel Purchase Program. [FAA Exhibit 1, Item 14, tab 1, exhibit C, page 2.]

Jet 1 Center argues that the Authority promulgated its new Rates and Charges on November 8, 2002, in direct response to competition in fuel sales from Jet 1 Center. [FAA Exhibit 1, Item 14, tab 1, page 5.] The 2002 Rates and Charges revoked Jet 1 Center's rights under its 1997 Fueling Permit and under the *Prepaid Fuel Program.* This action effectively eliminated Jet 1 Center as a competitor for fuel sales [FAA Exhibit 1, Item 14, tab1, page 5] and ultimately impacted Jet 1 Center's income and profitability.

Assurance 22, *Economic Nondiscrimination*, requires that aeronautical users engaged in comparable activities under similar conditions enjoy comparable treatment.

As discussed in <u>*Issue 1*</u> above, the Naples Airport Authority is permitted to invoke its proprietary exclusive right to be the only provider of an aeronautical activity or service on the airport, including fuel sales. It may do so at any time provided the implementation of such exclusive right is not unjustly discriminatory to one or more aeronautical users on

the airport. The Authority claimed this exclusive right all along, but did not effectively implement that right. In November 2002, the Authority revised its policies and practices to reflect its long-held intention to retain the exclusive right to sell fuel on the airport.

When the Authority issued the November 2002 Rules and Regulations and Rates and Charges to reflect its intent to retain a proprietary exclusive right over fuel sales on the airport, Jet 1 Center was obligated to cease its fuel sales and distribution. Under the same action, Continental Aviation Services was barred from dispensing fuel into subtenant aircraft, [FAA Exhibit 1, Item 9, tab 17, page 2] and Naples Airport Properties ceased subtenant fueling. [FAA Exhibit 1, Item 18, page 16.]

Even though Jet 1 Center may have suffered a negative financial impact from the change in policy, there is no indication in the record that the Complainant was treated dissimilarly from any other tenant in a comparable position.[16] The Circuit Court of Collier County, Florida, ruled on March 25, 2004, that the actions of the Authority in November 2002 were not discriminatory or retaliatory to Jet 1 Center. The policies were, in fact, applied across the board to all aeronautical users on the airport. [FAA Exhibit 1, Item 9, tab 12, page 568.] The record reflects that all tenants engaged in providing fuel to their subtenants were prohibited from continuing this activity as a result of the November 2002 changes.

Issue 2 Finding: Based on the record evidence, we find the Naples Airport Authority is not in violation of Assurance 22, *Economic Nondiscrimination*, as a result of having implemented policies and practices to invoke its proprietary exclusive right to sell fuel on the airport. The revised policies and practices reflect the Authority's stated intent to exercise its proprietary exclusive right to sell fuel, which it may do. The policies were uniformly applied to all aeronautical users affected by the changes.

C. *Issue 3:* Whether the Respondent, by denying the Complainant a fuel permit to self-fuel its own aircraft, is in violation of Federal Grant Assurance 22, *Economic Nondiscrimination*.

Assurance 22, *Economic Nondiscrimination*, protects an aircraft owner's right to self-fuel. Assurance 22 states in pertinent part,

> [The 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. [Assurance 22(f)]

Naples Airport Authority states that it has adopted fueling regulations that permit airport users to self-fuel aircraft they own or directly lease. [FAA Exhibit 1, Item 9, page 2.] The record shows that, effective October 1, 2003, Respondent offered five programs for

[16] Whether this change in policy violated any contractual provision between the parties is a matter for a state court to decide.

aviation fuel service at Naples Municipal Airport. Among these five programs is a Private Self-fueling Program. This program requires a one-year license, renewable annually. [FAA Exhibit 1, Item 6, exhibit B, tab 2.] An airport user wishing to self-fuel must obtain a fuel-dispensing permit from the Naples Airport Authority and dispense fuel only in accordance with the permit. [FAA Exhibit 1, Item 9, page 6.]

Jet 1 Center had previously held a fuel permit allowing it to self-fuel. Jet 1 Center argues that the Naples Airport Authority improperly revoked its permit on August 15, 2002. The Authority also padlocked Jet 1 Center's fuel farm, effectively preventing it from self-fueling its own aircraft. [FAA Exhibit 1, Item 6, pages 6-7, and 11; and Item 9, tab 14, August 15, 2002, letter.]

Naples Airport Authority states that Jet 1 Center lost the privilege to self-fuel when the Authority revoked Jet 1 Center's fuel permit for cause and the State Court issued a permanent injunction prohibiting Jet 1 Center from dispensing fuel at the airport. [FAA Exhibit 1, Item 9 page 3.] The Authority argues that Jet 1 Center is not permitted to self-fuel because it (1) lost its fueling permit for cause, (2) is subject to an injunction prohibiting all fueling, and (3) does not own any aircraft. [FAA Exhibit 1, Item 9, page 24.]

1. Revoked Fuel Permit

Both Jet 1 Center and the Authority agree Complainant no longer holds a valid fuel permit that would enable it to self-fuel any aircraft it may own.

Naples Airport Authority admits that it revoked Complainant's fuel permit, but argues it did so because Complainant violated fueling regulations at the airport by selling fuel to third parties at a profit. [FAA Exhibit 1, Item 9, pages 2-3.]

The Authority states that it discovered through a series of audits and investigations that Jet 1 Center sold fuel to aircraft operators that were not long-term subtenants and charged its long-term subtenants a fee for fueling. [FAA Exhibit 1, Item 9, page 11.] The Circuit Court of Collier County, Florida, ruled on March 25, 2004, that Jet 1 Center had, in fact, breached its contract with the Naples Airport Authority. [FAA Exhibit 1, Item 9, tab 12, page 569.] The court further noted "chronic violations" and "clear evidence to support that there was a subterfuge or deception" on the part of Jet 1 Center. [See Jet 1 Center Inc. v. Naples Airport Authority, Case No. 02-5010-CA-HDH, January 29, 2004, page 572.] [See also FAA Exhibit 1, Item 9, tab 12, page 572.]

Based on the record evidence, the fuel permit appears to have been revoked for cause. Jet 1 Center states that the revocation of its fuel permit is on appeal. [FAA Exhibit 1, Item 14, page 18.] Nonetheless, at the present time, Jet 1 Center does not hold a valid fuel permit.

2. Subject to Injunction Prohibiting all Fueling Operations

Both Jet 1 Center and the Authority agree that an injunction was issued prohibiting Jet 1 Center from conducting fueling operations on the airport, including self-fueling.

On March 25, 2004, the Circuit Court of Collier County, Florida, issued a permanent injunction prohibiting Jet 1 Center from conducting fueling activities at the airport. [FAA Exhibit 1, Item 9, page 15; and Item 9, tab 12.] The court ruled that the fueling permit for Jet 1 Center could be terminated "based on violations, based on this history of subterfuge, deceit, and actual admitted violations." [FAA Exhibit 1, Item 9, tab 12, pages 580-581.] (The Court noted it did not intend for its ruling to violate any FAA regulations, should such be the case. [FAA Exhibit 1, Item 9, tab 12, page 581.])

3. Owns No Aircraft

Both Jet 1 Center and the Authority agree that Jet 1 Center owns no aircraft at this time that it might wish to self-fuel.

Jet 1 Center does not argue that it has any aircraft. Rather, it insists that having aircraft or not is not the issue. Jet 1 Center argues that it is currently operating as a lessee at the Naples Municipal Airport offering various aeronautical services. It claims a right to self-fuel on the assumption that Jet 1 Center may own aircraft or have aircraft under its operational control that it wishes to self-fuel at some point in the future. [FAA Exhibit 1, Item 14, page 18.]

Assurance 22 affords an aeronautical user the opportunity to self-fuel its own aircraft. Naples Airport Authority acknowledges that its self-fueling permit also allows airport tenants to fuel their own aircraft and aircraft "under their operational control." The Authority argues that this privilege to fuel aircraft *under the tenants' operational control* arises only from the fuel permit and not from FAA regulations. Therefore, without the fuel permit, Jet 1 Center has no rights regarding fueling operations for aircraft it does not own. [FAA Exhibit 1, Item 14, tab3, page 14.]

Any unreasonable restriction imposed on the owners or operators of aircraft regarding the servicing of their own aircraft and equipment may be construed as a violation of this assurance.[17]

The Authority has provided a definition of aircraft under an individual's operational control in its November 2002 aviation fuel policy as:

> The practical and legal authority to command an aircraft for an indefinite period and the power to determine the function and location of that aircraft. It does not include temporary custody for taxiing, fueling, maintenance, storage, or service. [FAA Exhibit 1, Item 9, tab 1, page 3.]

[17] See FAA Order 5190.6A, 3-9e.

If Jet 1 Center meets the definition provided by the Naples Airport Authority for having operational control of an aircraft, then Jet 1 Center could possibly be covered by Assurance 22 regarding self-fueling.

The Authority requires aeronautical users claiming this operational control of an aircraft to provide sufficient documentation to support the claim. [FAA Exhibit 1, Item 9, tab 1, page 3.] The record evidence in this matter does not provide such documentation. Thus, it appears that Jet 1 Center had neither aircraft it owned nor aircraft under its operational control (as defined by the Authority) at the time this complaint was filed. As such, Assurance 22 is not applicable under these circumstances.

4. Right to Self-fuel

Airport sponsors are obligated to protect their airports from safety and environmental issues surrounding fueling operations. The sponsor must also protect the airport's financial solvency consistent with Assurance 24, which requires the airport to maintain a fee and rental structure that will make it as self-sustaining as possible under the existing circumstances.[18] This may be accomplished by establishing reasonable minimum standards and rules and regulations relevant to the proposed activity. Once established, the standards and regulations should be applied objectively and uniformly to all similarly situated on-airport aeronautical activities and services.[19] An aircraft owner that does not meet the standards and regulations for self-fueling may be prohibited from conducting that activity.

The Naples Airport Authority has established rules and regulations for self-fueling operations. These rules and regulations require any tenants participating in the self-fueling program to maintain a valid fuel permit and to abide by the requirements designated as part of that permit. [FAA Exhibit 1, Item 6, exhibit b, tab 2.] In addition, the permit holder must own aircraft or have aircraft under its operational control.

Jet 1 Center owns no aircraft and provides no evidence that it currently has aircraft under its operational control. While owning or operating aircraft might be a prerequisite to obtaining a fuel permit and conducting self-fueling operations, it does not guarantee the right to self-fuel if that aeronautical user does not meet the airport's minimum standards and rules and regulations for fueling operations.

Jet 1 Center does not meet the airport's rules and regulations for self-fueling; it does not possess a valid fuel permit. The permit it previously held was revoked, and the revocation was upheld in State Court. Even though Jet 1 Center argues that the revocation of its fuel permit is on appeal [FAA exhibit 1, Item 14, page 18], it currently holds no valid fuel permit.

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[18] The Naples Airport Authority states that it has elected to reserve for itself the exclusive right to sell fuel as a means for financing the operation, maintenance and development of the airport and to satisfy its obligation to be self-sustaining. [FAA Exhibit 1, Item 9, page 4.]

[19] FAA Advisory Circular No 150/5190-5, change 1, June 10, 2002, *Exclusive Rights and Minimum Standards for Commercial Aeronautical Activities*.

Jet 1 Center is currently under a permanent injunction prohibiting it from conducting any fueling activities on the airport, including self-fueling. In its ruling, the Court left open an opportunity to reconsider the scope of this permanent injunction should Jet 1 Center present evidence to prove it owns aircraft. [FAA Exhibit 1, Item 9, page 15; and Item 22, tab 3, page 26.] If Jet 1 Center procures aircraft or documents that it has aircraft under its operational control at some point in the future, it must still meet the minimum standards and rules and regulations established for that activity at the airport.

Issue 3 Finding: The Director finds the Naples Airport Authority has a self-fueling program that permits aircraft owners to self-fuel in compliance with Assurance 22. That assurance was never intended to provide an absolute right for aeronautical users to engage in fueling operations without meeting reasonable minimum standards and rules and regulations. Jet 1 Center, as evidenced in the record, violated the rules and regulations regarding fueling activities and had its fuel permit revoked. There is no indication in the record that the Authority's rules and regulations regarding fueling are applied in an unjust manner. Jet 1 Center currently has no valid fuel permit. It also owns no aircraft. The Naples Airport Authority is not currently in violation of Assurance 22 as a result of refusing to allow a tenant who does not meet the rules and regulations and owns no aircraft nor has aircraft under its operational control to conduct fueling operations on the airport.[20]

D. *Issue 4:* Whether the Respondent, by establishing a fuel flowage fee to be paid at the time of purchase, is in violation of Federal Grant Assurance 22, *Economic Nondiscrimination*.

In November 1995, the Naples Airport Authority installed and began operating a self-fueling facility. The Authority established a cost plus rate formula that included the fuel flowage fee. The fee included costs associated with self-fueling, such as the capital cost and depreciation of the equipment, equipment maintenance, insurance, and testing. [FAA Exhibit 1, Item 6, exhibit B, tab 8, page 3.] The amount of the fuel flowage fee is based on meeting airport costs for operating and maintaining the airport airfield. [FAA Exhibit 1, Item 6, exhibit B, tab 2 and tab 8.]

Mr. John W. Reynolds, Jr., Assistant Manager for the FAA Orlando Airports District Office confirmed in a March 31, 1997, letter to Mr. Ted Soliday, Executive Director of the Naples Airport Authority that the Authority could require aeronautical users that self-fuel to pay an appropriate fuel flowage fee. [FAA Exhibit 1, Item 9, tab 9.]

[20] The Director notes that the Respondent's Federal obligations may require the Respondent to provide a means whereby a previous permit holder whose fueling rights were terminated for cause may reapply for a fueling permit in the future. At such time as the tenant meets the requirements to obtain a fueling permit and presents a credible willingness to abide by the airport's rules and regulations, that tenant should be provided with a procedure to re-establish itself at the airport. The lack of such procedures providing a probationary period, or some other remedial status, may result in a future finding of noncompliance.

Jet 1 Center acknowledges that the Authority is permitted to charge a fuel flowage fee. [FAA Exhibit 1, Item 6, page 11.] In fact, Jet 1 Center's 1997 Nonpublic Aircraft Fuels Dispensing Permit states, "Permittee shall pay to the Authority a Fuel Flowage Fee based upon the then current rates and charges adopted by the Authority for each net gallon of fuel dispensed by the Permittee pursuant to this Permit." [FAA Exhibit 1, Item 9, tab 8, page 5.] Jet 1 Center objects, however, to being required to pay that fuel flowage fee when it purchases fuel from the Authority regardless of when Jet 1 Center later resells that fuel. [FAA Exhibit 1, Item 6, page 5.]

Documents dated October 1999 and October 2003 support that the Authority has consistently required a fuel flowage fee based on net gallons _**delivered**_. [FAA Exhibit 1, Item 6, exhibit B, tab 2 and tab 8.] Naples Airport Authority is permitted to charge a fuel flowage fee to aeronautical users that self-fuel. It is reasonable to collect that fuel flowage fee when the fuel is transferred from the Authority's control to the control of the aeronautical user.

As noted in _Issue 2_, above, Assurance 22, *Economic Nondiscrimination*, has its basis in ensuring aeronautical users engaged in comparable activities under similar conditions enjoy comparable treatment. Jet 1 Center does not allege that Naples Airport Authority allowed other aeronautical users purchasing fuel for self-fueling purposes to avoid or delay payment of the fuel flowage fee. In fact, Jet 1 Center states, "At all times, Jet 1 and all other operators and users of the airport have been paying the fuel flowage fee to the [Naples Airport Authority]." [FAA Exhibit 1, Item 6, page 11.]

Jet 1 Center argues that it should not be required to pay the fuel flowage fee to the Authority until Jet 1 Center has actually resold that fuel to a third party. Jet 1 Center's argument regarding the timing of the fuel flowage fee is moot since there is no longer an opportunity for Jet 1 Center to resell fuel to third parties. Since the Authority effectively invoked its proprietary exclusive right to sell fuel on the airport, neither Jet 1 Center nor any other fixed-base operator is in the position of purchasing fuel for resale. However, even if Jet 1 Center or other tenants were allowed to resell fuel, the FAA finds it to be a reasonable business decision for the Authority to collect the fuel flowage fee at the time the fuel is transferred from the Authority's control to the control of the tenant provided fees are collected in a like manner for all similarly situated tenants. The FAA does not normally intervene in the business decisions of the airport sponsors where grant assurance violations are not at issue.

Issue 4 Finding: We find Naples Airport Authority is not in violation of Assurance 22, *Economic Nondiscrimination*, as a result of assessing a fuel flowage fee for self-fueling operations or for collecting that fee at the time the fuel is transferred from the Authority to the aeronautical user.

E. _Issue 5:_ Whether the Respondent, by charging a lower fuel flowage fee to one airport tenant, is in violation of Federal Grant Assurance 22, *Economic Nondiscrimination*.

Jet 1 Center alleges that Naples Airport Authority limited the fuel flowage fee for Jet 1 Center's competitor, Continental Aviation Services, to 16 cents per gallon while Jet 1 Center and others were required to pay 40 cents per gallon. [FAA Exhibit 1, Item 15, page 17.]

The records submitted include a copy of the 1993 Nonpublic Aircraft Fuels Dispensing Permit for Continental Aviation Services. That permit includes a discussion of how the fuel flowage fee is set and states that for fiscal year 1993 it was set at 16 cents per gallon to cover the indirect airfield operating costs. The permit also states, "An updated fuel flowage fee will be issued in January of each year." [FAA Exhibit 1, Item 14, tab 10, page 8.]

The 1997 Nonpublic Aircraft Fuels Dispensing Permit for Jet 1 Center does not include a discussion on how fuel flowage fee rates are set. Rather, it states, "Permitee shall pay to the Authority a fuel flowage fee based upon the then current rates and charges adopted by the Authority for each net gallon of fuel dispensed by the permittee pursuant to this permit." [FAA Exhibit 1, Item 14, tab 1, exhibit A, page 5.]

The Authority's 1999 Rates and Charges for fuel states that the fuel flowage fee is based on meeting airport costs for operating and maintaining the airport airfield. A table included with this document identifies the fuel flowage fee at 25 cents per gallon effective November 10, 1999. [FAA Exhibit 1, Item 6, exhibit B, tab 8, pages 1 and 5.]

The Authority's 2002 Rates and Charges for fuel identifies the fuel flowage fee as a "variable fee per gallon of aviation fuel…" A table included with this document identifies the fuel flowage fee at 35 cents per gallon effective November 8, 2002. [FAA Exhibit 1, Item 6, exhibit B, tab 10, pages 2 and 7.] A table included in the Authority's 2004 Rates and Charges for fuel identifies the fuel flowage fee at 40 cents per gallon effective March 8, 2004. [FAA Exhibit 1, Item 9, tab 2, page 5.]

The administrative record documents that the fuel flowage fee has increased steadily from 16 cents per gallon in 1993 to 40 cents per gallon in 2004. The Authority admits that it placed a cap limiting the maximum fuel flowage fee charged to Continental Aviation Services to the 1993 rate of 16 cents per gallon without providing such a cap for subsequent airport tenants. [FAA Exhibit 1, Item 18, page 18.]

The Authority argues that the 1993 permit for Continental Aviation Services was the first self-fueling permit issued. At that time, the Authority was encouraging fixed-base operator development and hoped the incentive would lead to increased facility development. The Authority states that since 1994, the fuel permit has not contained a cap on fuel flowage fees. [FAA Exhibit 1, Item 18, page 18.] Indeed, the administrative record provides several examples of fuel permits stating that the fuel flowage fee will be adjusted from time to time [FAA Exhibit 1, Item 18, tab 29, exhibit B, page 4] or is based on the then-current rates and charges. [FAA Exhibit 1, Item 18, tab 29, exhibit C, page 5; and exhibit D, page 4.]

An airport sponsor is permitted to adjust its programs and pricing arrangements to recognize changes in the economy and the industry and to reflect knowledge gained from experience. The Naples Airport Authority states it initially offered a cap on the fuel flowage fee in 1993. It later revised its approach and eliminated any such cap on future permits. The Authority states that it eliminated the cap approach three years before Jet 1 Center obtained its first fuel permit. While the Authority revised its approach to eliminate *future* caps on fuel flowage fees, it did not eliminate the cap already in place for Continental Aviation Services. There is no evidence to suggest that other airport tenants enjoy the same cap or rate on fuel flowage fees. Jet 1 Center does not argue that the cap approach was in effect when Jet 1 Center obtained its first permit or that any tenant since Continental Aviations Services has received a cap.

Assurance 22, *Economic Nondiscrimination*, does not require that all aeronautical tenants be charged identical rates for every service. Rather, the assurance states that the airport will be available for public use on reasonable terms and without unjust discrimination. The terms imposed on those who use the airport and its services, including rates and charges, must be fair, reasonable, and applied without unjust discrimination. [FAA Order 5190.6A, 4-13b.]

Differences in rates may be justified based on many diverse factors, including but not limited to, location, length of lease term, financial commitment by the tenant, risks accepted by the tenant, and timing of the agreement. In this case, Continental Aviation Services represented the initial fixed-base operator on the airport. Its fuel permit was issued three years before Jet 1 Center obtained its own fuel permit. In the interim, the Authority revised its policies regarding establishing a cap on its fuel flowage fee. The record reflects that the revised policies have been uniformly applied to all tenants that were issued fuel permits since the policy was changed. The Authority also states that it has "no intent to renew the Continental [Aviations Services] permit with the cap on [fuel] flowage fees." [FAA Exhibit 1, Item 18, page 19.] The Authority does not state, however, when it may require Continental Aviation Services to obtain a new fuel permit recognizing the revised policy of adjusting the fuel flowage fee periodically.

Even though the Authority may reasonably charge different rates for various services justified by diverse factors, the Director does not agree that the fuel flowage fee in this case meets that criteria. The 1993 fuel permit for Continental Aviation Services does not describe a cap on fuel flowage fees, nor does the language in the permit prevent the Authority from adjusting the fuel flowage fee. In fact, the permit clearly states that the fuel flowage fee will be revised annually based on airfield costs. The section regarding the fuel flowage fee in the 1993 permit is stated in its entirety on the following page. [<u>See</u> FAA Exhibit 1, Item 18, tab 29, pages 7-8.]

VII. Fees

As consideration for this Permit for securing the right to dispense aircraft fuels, Permittee shall pay to the Naples Airport Authority a Fuel Flowage Fee based upon the following formula:

1. At the end of each budget year, the total cost of indirect airfield expenses shall be totaled. These expenses may include expenses for the operation of the Control Tower, Utilities, ARFF Operations, Engineering Services, Environmental Services, Security and Administrative Services.

2. A portion of each of these costs shall be allocated on a reasonable basis to the General Aviation Fuel Operations Cost Center. For Fiscal Year 1993, the allocation shall be as follows:

	Percentage Allocated to Fuel Operations	Percentage of Indirect	Percentage of Total Expenses Allocated
Tower	58%	100%	58%
AARF Operation	58%	100%	58%
Maintenance	58%	100%	58%
Utilities	25%	35%	9%
Engineering	58%	100%	58%
Environmental	60%	35%	21%
Security	5%	100%	5%
Administrative	68%	10%	7%

These allocations shall be reviewed not later than December of each year by the Airport Authority Board to determine whether such apportionment remains reasonable and appropriate as a means of distributing these costs among the Authority's various cost centers, i.e., Commercial Terminal, Hangars and Building/Land.

3. The total of indirect airfield costs calculated above, and apportioned to General Aviation Fuel Operations, shall be divided by the total number of General Aviation fuel pumped on the airport during the same year, including the self-fueling operations pumping fuel. This resulting figure will be a cost per gallon of the indirect airfield costs and shall be the fuel flowage fee for the following year. As an example, for FY 1993, the total of indirect airfield costs allocated to General Aviation operations based on the above ratios was $223,633. The total General Aviation fuel pumped in that year was 1,433,559. Therefore, indirect airfield operating costs per gallon is $ .16, which is hereby set as the Fuel Flowage Fee for FY 1993. An updated Fuel Flowage Fee will be issued in January of each year.

The language in this permit makes it very clear that the fuel flowage fee will be adjusted annually.

In addition, a 1994 fuel permit issued to Turley Enterprises includes the same language as the 1993 permit issued to Continental Aviation Services with the exclusion of the last sentence regarding an updated fee issued in January of each year. [FAA Exhibit 1, Item 18, tab 29, exhibit E, pages 7-8.] The Authority has not indicated that Turley Enterprises was eligible for a fuel flowage fee cap similar to that provided to Continental Aviation Services.

Both the Turley Enterprises' 1994 permit and the Continental Aviation Services' 1993 permit include a limiting clause related to the fuel flowage fee. That clause states,

> "This permit shall be subject to such additional rules, regulations, ordinances or amendments hereto as may be promulgated by the Naples Airport Authority from time to time; provided no such changes, additions or amendments by the Authority shall increase the requirements for physical facilities and equipment or the percentage of the fuel flowage fee beyond a maximum of 13%." [FAA Exhibit 1, Item 18, tab 29, exhibit A, page 11; and exhibit E, page 11.]

There is no written indication in the fuel permit of a cap on the fuel flowage fee at the 1993 rate. If such an agreement was reached between Continental Aviation Services and the Naples Airport Authority, it is not reflected in the 1993 fuel permit. In fact, no document has been provided evidencing a written agreement between Continental Aviation Services and the Naples Airport Authority regarding a limit on the amount of the fuel flowage fee Continental Aviation Services will pay. Even if such a document does exist, however, such an agreement would be contrary to the language contained in the fuel permit.

The 1993 fuel permit for Continental Aviation Services clearly states that the fuel flowage fee will be adjusted annually, just as it is for all other permit holders on the airport. Nonetheless, the Naples Airport Authority admits that Continental Aviation Services has enjoyed a reduced fuel flowage fee capped at the 1993 rate. [FAA Exhibit 1, Item 18, page 18.] All other similarly situated tenants operating under the same type of fuel permit have paid the adjusted rates. All fuel permits contain similar terms regarding the fuel flowage fee. Requiring some tenants to abide by the terms of their permits while allowing one tenant to avoid the same terms in its permit is unjustly discriminatory.

It appears that Continental Aviation Services is currently paying a fuel flowage fee of 16 cents per gallon while other similarly situated tenants operating under the same type of fuel permit may be paying a fuel flowage fee of 40 cents per gallon. The administrative record does not provide adequate justification for charging Continental Aviation Services a different fuel flowage fee from other similarly situated tenants operating under the same type of fuel permit. The Director finds, therefore, that charging different rates to Continental Aviation Services and other similarly situated airport tenants for the fuel flowage fees is unjustly discriminatory in current violation of Assurance 22, *Economic Nondiscrimination*. The matter of disparate fuel flowage fees is an on-going matter representing current noncompliance with Assurance 22.

In addition, if the Authority is losing potential revenue by not collecting the allowable fuel flowage fee from Continental Aviation Services, it could be in violation of Assurance 24, *Fee and Rental Structure*, which requires the airport to maintain a fee and rental structure for facilities and services that will make the airport as self-sustaining as possible under the existing circumstances. If, on the other hand, the Authority is making

up that lost revenue by spreading the associated cost among the remaining tenants, it could be in violation of the FAA's Policy Regarding Airport Rates and Charges, which states:

> "Common costs (costs not directly attributable to a specific user group or cost center) must be allocated according to a reasonable, transparent and not unjustly discriminatory cost allocation methodology that is applied consistently, *and does not require any aeronautical user or user group to pay costs properly allocable to other users or user groups*."[21] [Emphasis added.]

The administrative record in this matter does not indicate that potential revenue was lost or that such costs were improperly applied to other aeronautical users. The Director, therefore, is not making a finding on these two points. If either situation applies, its remedy will be found by taking corrective action to address the current violation of Assurance 22 regarding the disparity in fuel flowage fee rates.

Issue 5 Finding: The Naples Airport Authority is in violation of Federal Grant Assurance 22, *Economic Nondiscrimination*, by charging a lower fuel flowage fee to one airport tenant while charging similarly situated tenants operating under comparable fuel permits a higher fuel flowage fee.

VII. FINDINGS and CONCLUSIONS

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

A. The Respondent is not in violation of Title 49 U.S.C. §§ 47107(a)(1), (4), and (6); 40103(e) *Exclusive Rights*, or related Federal Grant Assurances 22, *Economic Nondiscrimination,* and 23, *Exclusive Rights*, as a result of (1) invoking the exclusive right to sell fuel, (2) preventing Complainant from selling fuel to its subtenants and others, (3) preventing Complainant from conducting fueling operations on the airport, and (4) collecting a fuel flowage fee when fuel is transferred from the Respondent to airport tenants.

> *Issues 1 and 2.* An airport sponsor or owner is permitted to invoke its proprietary exclusive right to provide any aeronautical service or activity on the airport. It may do so at any time provided the implementation of such exclusive right is not unjustly discriminatory to one or more aeronautical users on the airport.[22] The Naples Airport Authority had claimed the exclusive right to sell fuel on the airport all along but had not

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[21] See FAA *Policy Regarding Airport Rates and Charges*, 61 FR 31994 (June 21, 1996) § 3.4.1]. Sections of the policy, not applied herein, were vacated in Air Transport Association (ATA) v DOT, 119 F 3d. 38 (DC Cir. 1997), amended 129 F.3d 625.

[22] Any impact on a tenant's contractual rights is a matter for a state court, not Part 16.

acted to enforce that right. When it did take the appropriate steps to secure that right for itself, it did so in a uniform manner treating all affected aeronautical users in a like manner. .

Issue 3. The Naples Airport Authority maintains a fueling program that permits aeronautical users to self-fuel consistent with Assurance 22. The Complainant is not permitted to self-fuel because it owns no aircraft and currently has no fueling permit. All rights must be balanced by the Respondent's obligation to control and operate the airport is a safe and efficient manner. The Authority is encouraged, however, to develop a program by which a previous tenant whose fueling permit was revoked for cause may have its fueling rights reinstated through a probationary period or remedial program at such time as the tenant has demonstrated it has been rehabilitated and presents credible evidence of its willingness to abide by airport rules and regulations.

Issue 4. The Naples Airport Authority is permitted to assess a fuel flowage fee for aeronautical users that self-fuel. The Authority collects this fuel flowage fee at the time fuel is transferred from the Authority's control to the aeronautical users' control. The administrative record confirms that the timing of this permissible fee is consistently applied to all aeronautical users. There is no evidence to suggest the Authority has engaged in unjust discrimination regarding the timing of its fuel flowage fee.

B. The Respondent is in violation of Federal Grant Assurance 22, *Economic Nondiscrimination*, as a result of charging a lower fuel flowage fee to one airport tenant while charging similarly situated tenants operating under comparable fuel permits a higher fuel flowage fee.

Issue 5. The record shows that all fuel permits issued by the Naples Airport Authority provide for some type of periodic adjustment in the fuel flowage fee. The Authority has adjusted these fees based on escalating operating costs and applied them equally to all airport tenants except one. That one tenant was the initial fixed-base operator on the airport. The Naples Airport Authority states it agreed to place a cap limiting the amount of the fuel flowage fee charged to this first fixed-base operator in 1993 as an incentive to encourage development. However, the record does not provide written evidence of such an agreement.

The 1993 fuel permit issued to the initial fixed-base operator clearly states that the fuel flowage fee will be adjusted annually, just as it is for all other permit holders on the airport. Yet this one tenant has enjoyed a reduced fuel flowage fee capped at the 1993 rate while all other similarly situated tenants operating under the same type of permit have paid the higher rates. All fuel permits contain similar terms regarding the fuel flowage fee.

Requiring some tenants to abide by the terms of their permits while allowing one tenant to avoid the same terms in its permit is unjustly discriminatory.

ORDER

Accordingly, it is ordered that:

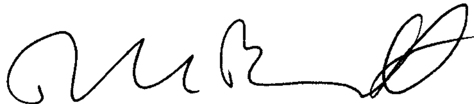
1. The Respondent, Naples Airport Authority, is required to submit a corrective action plan consistent with the principles discussed herein within 30 days from the date of this Order to the Director, Airport Safety and Standards, that explains how the Respondent intends to eliminate the current violation outlined in Issue 5 above within a reasonable timeframe.[23] Should the Respondent not submit a corrective action plan acceptable to the FAA, the Director reserves jurisdiction over Issue 5 to issue a further order that would provide an appropriate sanction for noncompliance. Such sanction may include the withholding of grant funds once the Respondent becomes eligible to receive grants again.

2. All Motions not expressly granted in this Determination are denied.

These Determinations are made under 49 U.S.C. §§ 40103(e), 44502, 40113, 40114, 46104, and 46110, respectively, and 49 U.S.C. §§ 47105(b), 47107(a)(1)(4)(5)(7)(13), 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. [Title 14 CFR 16.247(b)(2).] A 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.



January 4, 2005

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

Date: ____________

[23] As noted in Section III of this determination, the FAA Compliance program seeks voluntary current compliance with federal obligations accepted by owners and/or operators of public-use airports developed with FAA-administered assistance. Therefore, we would consider an action that equalizes fuel flowage fees for all similarly situated tenants from a reasonable future date certain to be responsive to this Order.