UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC

Jet 1 Center, Inc.,

COMPLAINANT

v.

Naples Airport Authority

RESPONDENT

Docket No. 16-04-03
FINAL July 15, 2005

FINAL AGENCY DECISION

I. INTRODUCTION

This matter is before the Federal Aviation Administration (FAA) Associate Administrator for Airports on appeal of the Director's Determination regarding the complaint in the above-referenced proceeding by Jet 1 Center, Inc., (Complainant) pursuant to the *FAA Rules of Practice for Federally-Assisted Airport Enforcement Proceedings*, 14 CFR Part 16 (FAA Rules of Practice).

On March 10, 2004, Jet 1 Center, Inc. filed a formal complaint pursuant to 14 CFR Part 16 against the Naples Airport Authority (Respondent), operator of the Naples Municipal Airport (Airport). Complainant alleged that 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

[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]

transferred from the Respondent to airport tenants, and (E) charging a lower fuel flowage fee to one airport tenant.[2]

On January 24, 2005, the Director, FAA Office of Airport Safety and Standards, issued his determination on the Complaint. With respect to the allegations presented in the Complaint and the issues examined by the Director, under the specific circumstances at the Airport, and based on the evidence of record in this proceeding, the Director found 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.[3]

The Director's Determination [FAA Exhibit 1, Item 24], in accordance with 14 CFR §16.247(b) (2), is an initial agency determination, rather than a final FAA action. Pursuant to 14 CFR §16.33(b), a party adversely affected by a Director's Determination may appeal the initial determination to the FAA Associate Administrator for Airports. The Associate Administrator's decision on appeal constitutes the final FAA action on the matter and, pursuant to 14 CFR §16.247(a), is subject to judicial review.

On February 17, 2005, the Complainant filed an appeal to the Associate Administrator of the Director's Determination in the above-referenced docket. The Complainant only appeals the Director's use of the concept of the airport's proprietor's right to hold an exclusive concession on fuel sales at the Airport. [FAA Exhibit 1, Item 25]

Complainant's appeal solely challenges the legal validity of the FAA interpretation of an airport's exercise of a proprietary exclusive right, and raises arguments that it first made by motion after the pleadings had closed but before the Director's Determination was issued. Specifically, Complainant filed a Motion for Director's Determination on the Pleadings. [FAA Exhibit 1, Item 19] Respondent filed a response to the Motion (FAA Exhibit 1, Item 20) and Complainant filed a Reply to Respondent's Response (FAA Exhibit 1, Item 21). The Director's Determination did not specifically address the argument raised by the Motion but dismissed it generally in the second point of the Order. [FAA Exhibit 1, Item 24 page 32).

Generally, upon appeal of a Director's Determination, pursuant to 14 CFR §16.33, the FAA Associate Administrator for Airports must determine whether the findings of fact made by the Director are supported by a preponderance of reliable, probative, and substantial evidence, and whether each conclusion of law is made in accordance with

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[2] 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 found these claims to be outside the jurisdiction of Part 16, and Complainant does not appeal from that finding.

[3] On March 18, 2005 Respondent submitted a corrective action plan to remedy the violation (fifth charge) found in the Director's Determination. By letter dated May 2, 2005, the Director found the corrective action plan to be responsive.

applicable law, precedent, and public policy. Because this appeal raises solely issues of law, the appeal is limited to determining a question of law, namely whether the FAA's interpretation of an airport's exercise of a proprietary exclusive right is legally valid. Therefore this appeal will be limited to determining said legal issues[4] --whether each conclusion of law is made in accordance with applicable law, precedent, and public policy.

The FAA affirms the Director's decision. The FAA finds, as discussed in detail below, that the FAA interpretation on an airport's exercise of a proprietary exclusive right is a valid interpretative rule and statutory interpretation, and was properly applied in this case. We further find that conclusions of law contained in the Director's Determination as to this issue are made in accordance with applicable law, precedent and public policy; that the Director's Determination is neither unreasonable, arbitrary nor capricious; and that the appeal does not provide arguments sufficiently persuasive to support reversal of any portion of the Director's Determination.

The Airport

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

The Naples Airport Authority is the airport owner and operator responsible for compliance with all Federal grant assurances. The Airport is a primary, public-use commercial service airport and is certificated under Part 139.

In 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[5], 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 for the purpose of operating and maintaining the airport. The

[4] Because the issues raised in this appeal are issues of law, not fact, and were briefed by the parties, and decided by the Director in the determination, admittedly without analysis, and then briefed by the parties in this appeal, we find that the issues of law are properly before the Associate Administrator. To remand to the Director for his analysis would further delay this decision, and is unnecessary since the parties had the opportunity to present arguments in the prior and present proceeding.

[5] 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]

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. [FAA Exhibit 1, Item 1][6]

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][7]

Complainant on Appeal

The Complainant, Jet 1 Center, is one of a number of fixed-base operators[8] 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.]

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.

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[6] The Director's Determination included a copy of the most recent FAA Form 5010 for the Naples Municipal Airport, printed September 2, 2004.

[7] 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 was decided in City of Naples Airport Authority v. FAA, No, 03-1308 (DC Cir 2005). The Court of Appeals for the District of Columbia vacated the FAA decision and remanded the matter back to the FAA.

[8] 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)

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.

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 Enforcement 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] [9]

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]

[9] As explained above Complainant first raised the arguments now before us on appeal in this Motion brought under 14 CFR § 16.19. The Director's Determination did not expressly address the arguments in Complainant's Motion . Rather the Motion was dismissed in the Order to the Director's Determination which dismissed all motions not expressly granted. [FAA Exhibit 1, Item 24, page 32]

January 4, 2005 – The FAA issues the Director's Determination. [FAA Exhibit 1, Item 24]

February 17, 2005 – The FAA receives the Complainant's Appeal of the Director's Determination. The Appeal appeals the Director's use of the concept of the proprietor's right to hold an exclusive concession on fuel sales at the Airport (Issues 1 and 2 of the Determination). [FAA Exhibit 1, Item 25]

March 2, 2005 - The FAA receives the Sponsor's Reply to the Appeal. [FAA Exhibit 1, Item 26]

II. APPLICABLE FEDERAL LAW AND POLICY

The Federal Aviation Act of 1958, as amended (FAAct), 49 U.S.C. § 40101, et seq., assigns the FAA Administrator broad responsibilities for the regulation of air commerce in the interests of safety, security, and development of civil aeronautics. The Federal role in developing civil aviation has been augmented by various legislative actions that authorize programs for providing funds and other assistance to local communities for the development of airport facilities. In each such program, the airport sponsor assumes certain obligations, either by contract or by restrictive covenants in property deeds and conveyance instruments, to maintain and operate its airport facilities safely, efficiently, and in accordance with specified conditions.

The planning and development of the Airport has been financed, in part, with funds provided by the FAA under the Airport Improvement Program, authorized by the Airport and Airway Improvement Act of 1982, (AAIA), 49 U.S.C. § 47101 *et seq*. This program provides financial assistance to an airport sponsor for airport development in exchange for binding commitments designed to assure that the public interest will be served. These commitments are set forth in the sponsor's applications for Federal assistance and in the grant agreement as sponsor assurances, *i.e.*, a list of applicable Federal laws, regulations, executive orders, statute-based assurances, and other requirements, binding the sponsor upon acceptance of the Federal assistance. Pursuant to 49 U.S.C. § 47122, the FAA has a statutory mandate to ensure that airport owners comply with their sponsor assurances.

FAA Order 5190.6A, *Airport Compliance Requirements*, (Order) provides policies and procedures to be followed by the FAA in carrying out its legislatively mandated functions related to federally obligated airport owners' compliance with their sponsor assurances.

The Airport Sponsor Assurances

The AAIA, 49 U.S.C. § 47107(a), *et seq*., sets forth assurances to which an airport sponsor receiving Federal financial assistance must agree as a condition precedent to receipt of such assistance. Title 49 U.S.C. § 47107(g) (1) and (i) authorizes the Secretary

to prescribe project sponsorship requirements to insure compliance Title 49 U.S.C. §§ 47107(a) (1) (2) (3) (5) (6). These sponsorship requirements are included in every AIP agreement. Upon acceptance of an AIP grant by an airport sponsor, the assurances become a binding obligation between the airport sponsor and the Federal government.

Use on Reasonable and Not Unjustly Discriminatory Terms

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)]

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)]

[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)]

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)]

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]

The Prohibition Against the Granting of an Exclusive Right

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

"... will permit no exclusive right for the use of the airport by any persons providing, or intending to provide, aeronautical services to the public... It further agrees that it will not, either directly or indirectly, grant or permit any person, firm, or corporation, the exclusive right at the airport to conduct any aeronautical activities..."

Title 49 U.S.C. § 40103(e), provides:

(e) No exclusive rights at certain facilities.--A person does not have an exclusive right to use an air navigation facility on which Government money has been expended. However, providing services at an airport by only one fixed-based operator is not an exclusive right if--
(1) it is unreasonably costly, burdensome, or impractical for more than one fixed-based operator to provide the services; and
(2) allowing more than one fixed-based operator to provide the services requires a reduction in space leased under an agreement existing on September 3, 1982, between the operator and the airport.

An "air navigation facility" includes an "airport." [49 U.S.C. §§ 40102(a) (4), (9), (28)]

Title 49 U.S.C. § 47107(a)(4), provides, a) General written assurances.--The Secretary of Transportation may approve a project grant application under this subchapter for an airport development project only if the Secretary receives written assurances, satisfactory to the Secretary, that--
(4) a person providing, or intending to provide, aeronautical services to the public will not be given an exclusive right to use the airport, with a right given to only one fixed-base operator to provide services at an airport deemed not to be an exclusive right if--
(A) the right would be unreasonably costly, burdensome, or impractical for more than one fixed-base operator to provide the services; and
(B) allowing more than one fixed-base operator to provide the services would require reducing the space leased under an existing agreement between the one fixed-base operator and the airport owner or operator;

FAA policy on exclusive rights broadly identifies aeronautical activities as subject to the statutory prohibition against exclusive rights. While public use airports may impose qualifications and minimum standards upon those who engage in aeronautical activities, we have taken the position that the application of any unreasonable requirement or

standard that is applied in an unjustly discriminatory manner may constitute a constructive grant of an exclusive right. Courts have found the grant of an exclusive right when one competitor is subject to a significant burden that is not imposed on other businesses similarly situated. [*See* e.g. Pompano Beach v FAA, 774 F.22 1529 (11th Cir, 1985).]

An Airport's Proprietary Exclusive Right

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 rights 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.]
See also: FAA Advisory Circular 150/5190-2A, section 10, Exclusive Rights at Airports (1972), and FAA advisory Circular 150/5190-5, section 1-3 (a) Exclusive Rights and Minimum Standards for Commercial Aeronautical Activities (2002).

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.

The FAA Airport Compliance Program

The FAA discharges its responsibility for ensuring that airport sponsors comply with their Federal obligations through its Airport Compliance Program. Sponsor obligations are the basis for the FAA's airport compliance effort. The airport owner accepts these obligations when receiving Federal grant funds or accepts the transfer of Federal property for airport purposes. These obligations are incorporated into grant agreements and instruments of conveyance to protect the public's interest in civil aviation.

The FAA designed the Airport Compliance Program to ensure the availability of a national system of safe and properly maintained public-use airports which airport sponsors operate in a manner consistent with their Federal obligations and the public's investment. The Airport Compliance Program does not control or direct the operation of

airports. Rather, it monitors the administration of the valuable rights, which airport sponsors pledge to the people of the United States in exchange for monetary grants and donations of Federal property to ensure that airport sponsors serve the public interest.

The Order sets forth policies and procedures for the FAA Airport Compliance Program. The Order is not regulatory and is not controlling with regard to airport sponsor conduct; rather it establishes the policies and procedures for FAA personnel to follow in carrying out the FAA's responsibilities for ensuring airport compliance. It provides basic guidance for FAA personnel in interpreting and administering the various continuing commitments airport owners make to the United States as a condition for the grant of Federal funds or the conveyance of Federal property for airport purposes. The Order, *inter alia*, analyzes the various obligations set forth in the standard airport sponsor assurances, addresses the application of the assurances in the operation of public-use airports and facilitates interpretation of the assurances by FAA personnel.

FAA Rules of Practice for Federally-Assisted Airport Enforcement Proceedings, 14 CFR Part 16, provides detailed procedures for investigating and adjudicating exclusively airport-related complaints under the applicable federal statutes and the obligations imposed on the FAA-Airport Sponsor relationship by those statutes.

Appeal to the Associate Administrator

Pursuant to 14 CFR, Part 16, §16.33, the Associate Administrator will issue a final decision on appeal from the Director's Determination, without a hearing, where a hearing is not required by statute and is not otherwise made available by the FAA.

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

III. ANALYSIS AND DISCUSSION

Based on his review and consideration of the administrative record in the context of applicable Federal law and FAA policy, the Director found that the Respondent is not in violation of Title 49 U.S.C. §§ 47107(a) (1), (4), and (6); 40103(e) *Exclusive Rights*, or Federal Grant Assurances 22, *Economic Nondiscrimination*, and 23, *Exclusive Rights*, as a result of exercising its proprietary right to hold an exclusive concession on aircraft fuel.

On appeal Complainant does not argue that the Director erred by misapplying the concept of 'proprietary exclusive rights,' as described in the Order,[10] to the circumstances of this case. The Complainant does not dispute any finding of fact, or interpretation of circumstance. The Complainant does not claim unique circumstance or an issue of first impression. In fact, the Complainant, in the Complaint, argued the reasons why the Respondent is not eligible to claim its proprietary rights to exercise an exclusive commercial activity at the Airport, implicitly acknowledging the validity of the concept. [FAA Exhibit 1, Item 6, pp. 10-11; Item 15, pp. 6-8; Item 6, p. 6; Item15, p. 10]

Complainant however, limits his appeal to raising an issue of law. Complainant argues on appeal that the FAA's interpretation on an airport's exercise of a proprietary exclusive right has no basis in law. Complainant requests that the FAA determine that the Respondent may not exercise a proprietary exclusive right to sell aircraft fuel at the airport because it violates the exclusive rights prohibitions in the statutes and grant agreements. Complainant cites no case law in support of its appeal, relying instead on Complainant's own interpretation of the relevant statutes.

The Associate Administrator finds, as detailed in this decision, that the Director properly applied the law and the grant assurances regarding the exercise of the Respondent's proprietary rights in its sale of aircraft fuel at the Airport. The Associate Administrator agrees with the Complainant that the concept of the 'proprietary exclusive' has existed in FAA policy and documents, including the Order, several advisory circulars, and numerous final agency decisions, for decades. To be clear, the Associate Administrator concurs with the Director's long-standing interpretation of Federal law with regard to exclusive rights. Specifically, as stated in the Order, in the Director's Determination and above in the Applicable Law and Policy section of this Decision:

> 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

[10] The Order (FAA Order 5190.6a) is the Compliance Handbook, written by the Director, instructing his subordinates in how to interpret and enforce Federal obligations, such as grant assurances 22 and 23 and other Federal obligations resulting from the receipt by an airport owner and operator of Federal assistance. As discussed in the Director's Determination and herein,, these instructions in the Order describe the application of the concept discussed herein as "proprietary exclusive rights."

> 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]

Beyond restating the Associate Administrator's support for the Director's proper application of the well-established and long-enforced interpretation of Federal law and grant assurances, this Decision will discuss the points raised on appeal. The Associate Administrator finds that the Director did not err in dismissing the Complainant's Motion for Judgment on the Pleadings which raised the issue now before the Associate Administrator.

Complainant's desire for greater explication of the concept of proprietary exclusive rights does not add up to an allegation of error amounting to non-compliance by the Respondent. In fact, the Associate Administrator would find it improper to place any airport sponsor in non-compliance for operating an otherwise validly exercised proprietary exclusive concession on the sale of fuel at its own airport, with its own equipment and own employees, since the FAA has found and advised that such an exercise of proprietary rights is compliant with Federal law and sponsor obligations for decades.

Many Federally-funded airports choose to provide some or all aeronautical services on the airport with its own equipment and own employees under the proprietary exclusive rights interpretation provided by the FAA. These proprietary exclusive aeronautical concessions help finance airport operations in a manner compliant with the Federal requirement that a Federally-funded airport be as self-sustaining as possible. See 49 U.S.C. § 47107(a)(13)(A).

Issues on Appeal

The Complainant states:

> In this Appeal, Complainant challenges the origin, concept and application of a "Proprietary Exclusive Right" (PER) policy and requests that the Associate Administrator reverse the Director's Determination and find that the Respondent was and is in violation of the laws and regulations because of its claim and exercise of an exclusive right to sell petroleum products at Naples Airport. [FAA Exhibit 1, Item 25, p. 3]

Specifically, the Complainant states the issues on Appeal as:

1) The FAA never properly created the policy of a PROPRIETARY EXCLUSIVE RIGHT and no document or publication showing its rationale or birth has been introduced or cited in this proceeding.
2) Assuming that the FAA has a policy of a PROPRIETARY EXCLUSIVE RIGHT, it is not law and can not amend a statute of Congress. The PROPRIETARY

EXCLUSIVE RIGHT mentioned in FAA publications is not a valid interpretation of the statutes and assurances in agreements, but an attempted amendment.

3) The specific language of the statutes and agreements are controlling over any "policy" even if it were properly promulgated. [FAA Exhibit 1, Item 25, p. 4]

In its reply, the Respondent argues, "FAA's guidance regarding the proprietary exclusive right, as described in FAA Order 5190.6A and other documents is an interpretive rule that is binding on FAA, has reasonably been relied upon by the airport industry for the past thirty years, and would be owed considerable respect by any reviewing court." [FAA Exhibit X, Item 26, p. 1]

We construe the issues on appeal to be as follows:

1. Is the airport proprietary exclusive right interpretation a valid interpretative rule?
2. Is the airport proprietary exclusive right interpretation a valid interpretation of statute?
3. Was the airport proprietary exclusive right interpretation correctly applied in this case?

1. Is the airport proprietary exclusive right interpretation a valid interpretative rule?

For over 30 years the FAA has consistently interpreted in advisory circulars, an order, and administrative decisions the right of the airport owner as proprietor to exercise the exclusive right to provide any and all of the aeronautical services needed by the public at the airport, including fueling operations. [See e.g., Advisory Circular No. 150/5190-2A, Exclusive Rights at Airports, Section 10, April 4, 1972,[11] FAA Order 5196A, Airport Compliance Requirements, Section 3-9(d), October 2, 1989,[12] and Advisory Circular 150/5190-5, Exclusive Rights and Minimum Standards, Section 1-3, June 10, 2002.[13]

[11] Proprietary Exclusive. The public agency that owns and operates a public airport may engage in any proprietary aeronautical activity and deny the same right to others without violating this policy. This means that the public agency may provide aeronautical services on an exclusive basis, but only if it does so as a principal, using its own employees and resources. This exemption is not effective where an independent commercial enterprise is designated an "agent" of the airport owner.

[12] See above and Section II of this decision, Applicable Federal Law and Policy, the Prohibition Against the Granting of an Exclusive Right for text of section 3-9(d).

[13] Exceptions to the General Rule. The following paragraph addresses those situations where an arrangement tantamount to an exclusive rights situation exists but does not violate agency policy due to the surrounding circumstances that make such arrangement necessary.

a. Aeronautical Activities Conducted by the Airport Sponsor (Proprietary Exclusive Right). The owner of a public use airport (public or private owner) may elect to provide any or all of the aeronautical activities needed by the public at the airport. As a practical matter, most public agencies recognize that these activities are best provided by profit-motivated private enterprise. The exceptions are usually those instances in which a municipality or other public agency elects to provide fuel service or aircraft parking. (Appendix 1, Definition l. Proprietary Exclusive). 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, the sponsor that elects to engage in a proprietary exclusive must use its own employees and resources to carry out its

See also Scott Aviation, Inc. v. Dupage Airport Authority, Docket No. 16-00-19, Directors Determination at 34 (July 19, 2002); John C. Roberts v. Daviess County, Indiana Board of Aviation Commissioners, FAA Docket No. 16-00-06, Final Decision and Order, at 13, December 13, 2001).

In the Director's Determination appealed herein, the Director quoted from Section 3-9(d) of the Order as support for the proposition that the Respondent could exercise its right as proprietor to sell fuel exclusively on the airport with its own employees and equipment. As noted above, the Complainant, during that proceeding, never challenged the validity of the interpretation, but unsuccessfully sought to show that it was inapplicable to the case.
On appeal Complainant argues that "since 3-9d is obviously not a law of Congress or even a regulation promulgated by the FAA under the provisions of the Administrative Procedures Act, classifying 3-9d as an 'interpretation' is Respondent's only choice." [FAA Exhibit 1, Item 25, p. 7]

Respondent on appeal argues, "… FAA's guidance on the proprietary exclusive right, reflected in FAA Order 5190.6A and elsewhere, is an interpretive rule that is not subject to notice and comment procedure. [citations omitted]…. An interpretive rule does not create new rights or duties, it simply supplies the agency's interpretation of what the statute means." [citations omitted]. [FAA Exhibit 1, Item 26, pp. 4-5] In support of its argument, the Respondent observes that the section of the Order that discusses the concept of proprietary exclusive rights is subtitled "Interpretation." [FAA Exhibit 1, Item 26, p. 5] This is correct. [See FAA Order 5190.6A, Section 3-9(d)]

The Respondent also argues that the interpretive rule is proper and effective in this case, stating, "given the FAA's consistent application of this interpretation over time, the proprietary exclusive right legitimately can be viewed as administrative common law, upon which airport proprietors can and should rely." [FAA Exhibit 1, Item 26, p.9]

Section 553 (b) of the Administrative Procedures Act (APA) provides that the requirement for notice and comment rulemaking does not apply to "interpretative rules, but does not define the term "interpretative rule". The Attorney General's Manual on the Administrative Procedure Act (1947) defines interpretative rules as rules or statements issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers.[14]

During the last 30 years FAA has issued several advisory circulars, administrative decisions (including the decision under appeal), and the section of the compliance order referenced herein, advising the public that the FAA interprets the statutory prohibitions on granting exclusive rights do not apply to airport proprietors exercising (but not

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venture. An independent commercial enterprise that has been designated as agent of the owner may not exercise nor be granted an exclusive right.

[14] See e.g., American Mining Congress v Mine Safety and Health Administration, 995 F. 2d 1106, 1109 (D.C. Cir 1993) (citing Attorney General's Manual on the Administrative Procedure Act, at 30 (1947)).
.

granting) their proprietary right to provide all or some of the aeronautical services on the airport with their own employees and equipment. [See footnotes 9 through 11] The FAA's airport proprietary exclusive right interpretation is a valid interpretative rule under section 553(b) of the APA.

2 Is the airport proprietary exclusive right interpretation a valid interpretation of statute?

The Complainant argues that the proprietary exclusive rights concept is inconsistent with the plain meaning of the statutes. The Complainant states, "the 'plain language' of the law [49 U.S.C. § 40103(e)] clearly shows that its prohibition applies to the Naples Airport Authority. There are no words in the statute that provide a germ, basis, or support for Sec. 40103(e) being interpreted as containing a 'proprietary exclusive right,' and removing a class of persons from the coverage of the statute, nor can it be inferred or trace its origin from Section 40103(e)." [FAA Exhibit 1, Item 25, p. 8]

The Respondent disagrees with the Complainant's allegation that the proprietary exclusive rights concept is contrary to the language of Federal law, stating that "FAA's interpretation is supported by the plain meaning of the statutes." [FAA Exhibit 1, Item 26, p. 10]

We agree with the Respondent. At the outset it is important to note the relationship between an airport proprietor and the Federal government. Airport owners possess the rights of proprietors under state and local law. [See e.g., section 41713(b)(3)] In return for receiving Federal grants for airport development the proprietor must conform its conduct to meet the Federal requirements of the national airport and airway system. [See e.g. 49 U.S.C. § 47107(a)] One of these requirements is that the proprietor not grant an exclusive right to use an air navigation facility [section 40103(e)] or to use the airport [section 47107(a)(4)].

As stated above, 49 U.S.C. § 40103(e) prohibits an airport sponsor from granting any person the exclusive right to conduct an aeronautical activity on the airport. However, 49 U.S.C. § 40103(e) does not preclude the airport sponsor from exercising a propriety exclusive right to conduct any commercial aeronautical service on the airport itself, including the sale of fuel as the airport proprietor. Title 49 U.S.C. § 40103(e) provides, that "[a] person does not have an exclusive right to use an air navigation facility on which Government money has been expended." Complainant is correct that the term "person" includes governmental authorities. However, we do not find that term controlling here because the entire provision on its face shows that the prohibition is from granting an exclusive right to airport users. The very next sentence in section 40103(e) explains how having only one fixed based operator provide services is not an exclusive right, and then distinguishes between a "(fixed-based) operator and the airport (proprietor)." The statute should be read to prohibit the airport owner from granting an exclusive right, for example, to a fixed based operator or an air carrier to use an air navigation facility.

Similarly, under section 47107(a)(4) the airport proprietor provides the Secretary (in return for Federal funds) the binding assurance that "..a person providing, or intending to provide, aeronautical services to the public will not be given an exclusive right to use the airport. The prohibition applies to the granting of an exclusive right by the owner of the airport, not to the exercise of its rights as the proprietor to provide some or all aeronautical services as the airport proprietor.

The FAA's application of the proprietary exclusive right arises solely from its interpretation of Federal law as cited in the Director's Determination, namely, 49 U.S.C §§ 40103(e) and 47107(a)(4). Elemental to this interpretation are two concepts:

> 1. Airport owners hold proprietary rights that are not restricted by the exclusive rights prohibitions, and
>
> 2 the provisions of 49 U.S.C. §§ 40103(e) and 47107(a)(4), are intended to prevent monopolies by airport users.

The concept of the airport owner's proprietary exclusive right to operate a commercial aeronautical service on its property is a function of the rights of the proprietor, in this case a municipality. The sale of fuel and aeronautical products by a municipality at its airport is allied to and part of the purposes of operating an airport and therefore is within the functions authorized to municipal owners of airports.

The Attorney General of the United States provided an interpretation of section 303 of the Civil Aeronautics Act of 1938 (June 23, 1938, c. 601, 52 Stat. 973, 986), the predecessor of section 40103(e). [See e,g., Pompano Beach v FAA, 774 F.2d 1529, (11 Cir 1985 citing 40 Op. Att'y Gen 71 , 72 (1941)] The Attorney General stated that the legislative history of the "Act "shows that the purpose of the (exclusive rights) provision is to prohibit monopolies and combinations in restraint of trade or commerce and to promote and encourage competition in civil aeronautics.[15] The Attorney General

[15] Another basis for the non-application of the exclusive rights prohibition to a public airport proprietor could be the analogous principle that states and political subdivisions of a state are not subject to the Federal antitrust laws. It is well-established that states are exempt from Federal antitrust statutes. Parker v. Brown, 317 U.S. 341 (1943). A municipality has the burden of showing that it is acting "pursuant to state policy" in order for it to enjoy the benefits of immunity from antitrust statutes. *See, e.g.*, City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 413 (1978). In a February 15, 2005, Order Granting in Part and Denying in Part Motion for Summary Judgment, of the Bankruptcy Court for the Middle District of Florida, submitted by Respondent on appeal, the Court first acknowledged, *as did Jet 1*, that the NAA is a political subdivision of the state of Florida. *In re Jet 1 Center, Inc.*, 322 B.R. 182, 195 (2005). The Court pointed to cases that decided that the airport authority involved was not subject to federal antitrust claims. For example in *Golta, Inc. v. Greater Orlando Aviation Authority*, the Court stated that although the "'[p]arty seeking the protection of state action immunity from federal antitrust claims has the burden of proving elements of the doctrine, [it] does not have to point to a specific legislation authorizing its anticompetitive conduct to prove that it acted in accordance with explicit state policy…." 322 B.R. at 196, citing, *Golta, Inc. v. Greater Orlando Aviation Authority*, 761 F.Supp 778 (M.D. Fla.1991). The airport authority in Golta was created by the Florida Legislature with a broad law not dissimilar from the law that created NAA. After reviewing the authority and the language of the law that created NAA, the Court held that it was evident that when Florida created the NAA that it foresaw the possibility that the NAA might

used the example of the grant to an air carrier of an exclusive right to use the airport as being prohibited by the statute. As noted above the prohibition applies to airport users being granted an exclusive right to use the airport by the airport proprietor.

The FAA has interpreted Federal law as not extending to the prohibition of exclusive rights to the point of extinguishing the proprietary rights of the municipal airport owner. Furthermore, the FAA has consistently applied this interpretation over time.

Specifically, the FAA has never determined that the plain language of the statutes in question extinguishes a sponsor's proprietary rights to exercise an exclusive concession of aviation fuel, for the reasons discussed above. The sale of fuel at a municipal airport is an implied power related to the operation of an airport. The FAA interprets, and has interpreted for decades, that the language of 49 U.S.C. § 40103(e) and 49 U.S.C. § 47107(a)(4) does not apply to public airport proprietors such as Naples Airport Authority.[16] As stated here, the FAA has not interpreted the statute to extend to the point of limiting the implied powers of a municipality exclusively operating its airport, including operating an exclusive concession on the commercial dispensing of fuel. Likewise, the FAA has also interpreted the statutes strictly. The implied power to exclusively dispense fuel does not extend to the point where the sponsor can contract the dispensing to a third party. Therefore, the interpretation requires the sponsor to operate the proprietary exclusive concession with its own equipment and own employees.

3. Was the airport proprietary exclusive right interpretation correctly applied in this case?

The Director found that the Respondent is not in violation of Title 49 U.S.C. §§ 47107(a)(4) and 40103(e) *Exclusive Rights*, or Federal Grant Assurances 23, *Exclusive Rights*, as a result of exercising its proprietary right to hold an exclusive concession on aircraft fuel. The Director was bound to follow the FAA guidance in the Order and advisory circulars on the airport's proprietary exclusive rights, which has been consistently applied by FAA for many years. We find that the proprietary exclusive right interpretation has been properly applied in this case.

Complainant's argument that grant agreements and assurances therein, containing exclusive rights prohibitions, are binding and supercede the FAA proprietary exclusive rights interpretation, is addressed by the discussion contained in Issues 1 and 2 above. The statutes at issue are interpreted by the FAA as not restricting the exercise of a proprietary exclusive concession, as described in this decision. The FAA does not interpret the statutorily-based grant agreements to reflect a different interpretation. While an airport proprietor must comply with its grant assurances as a binding agreement, the FAA's interpretation of the exclusive rights prohibition in the grant assurances is the same, allowing a proprietary exclusive right. Additionally the airport proprietor must

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use anticompetitive measures to support airport operations. Therefore, the court concluded that the NAA was immune from federal antitrust claims since the legislature had clearly articulated this intention. 322 B.R. at 196.

[16] The issue of private airport proprietors is not at issue in this case.

comply with section 40103(e) exclusive rights prohibition whether or not it is bound by grant agreement.[17]

Conclusion

The FAA finds, as discussed in detail in this decision that the FAA interpretation on an airport's exercise of a proprietary exclusive right is a valid interpretative rule, a valid interpretation of statute, and was correctly applied in this case. We further find that conclusions of law contained in the Director's Determination were made in accordance with applicable law, precedent and public policy; that the Director's Determination is neither unreasonable, arbitrary nor capricious; and that the Appeal does not provide arguments sufficiently persuasive to support reversal of any portion of the Director's Determination.

Complainant on appeal only raised the issue of the legal validity of the concept of the 'proprietary exclusive right.' As stated by the Director and the Order, an airport sponsor or owner is permitted to invoke its proprietary exclusive right to provide any aeronautical service or activity on the airport. The Appeal does not provide a basis sufficient in law that would merit reversing the Director's Determination.

ORDER

ACCORDINGLY, it is hereby ORDERED that:

(1) The Director's Determination is affirmed; and

(2) The Appeal is dismissed, pursuant to 14 CFR § 16.33.

This Decision by the FAA Associate Administrator for Airports constitutes the final FAA action in this proceeding, pursuant to 14 CFR §16.33(a), as authorized under 49 U.S.C. §§ 40103(e), 40113, 40114, 46104, 46110, 47105(b), 47107(a), 47107(g)(1), 47111(d) and 47122.

RIGHT OF APPEAL

[17] The same conclusion applies to AP-4 agreements raised by Complainant. AP-4 agreements were vehicles for airport development before 1944, and, like surplus property deeds and the grant assurances, contain exclusive rights prohibitions based on the section 40103(e) and its predecessors, which the FAA interprets not to prohibit proprietary exclusives by airport proprietors. Furthermore AP-4 agreements have expired. See Order section 2-19, at 6 (1989).

A person in this proceeding disclosing a substantial interest in this final agency decision and order of the Federal Aviation Administration may file a petition for review, pursuant to 49 U.S.C. § 46110, in the United States Court of Appeals for the District of Columbia Circuit or in the Court of Appeals of the United States for the Circuit in which the person resides or has its principal place of business. The petition must be filed not later than 60 days after the order is issued.

July 15, 2005

Woodie Woodward
Associate Administrator
for Airports

Date

FAA Exhibit 1

Final Agency Decision
INDEX OF ADMINISTRATIVE RECORD
Docket No. 16-04-03

Item 1 FAA Form 5010

Item 2 Grant History

Item 3 Complainant's Complaint, received March 10, 2004.

Item 4 Complainant's Motion for Expedited Handling, received March 10, 2004.

Item 5 Complainant's Motion for Expedited Handling, received March 24, 2004.

Item 6 Complainant's Complaint, received March 24, 2004.

Exhibit A Pre-complaint Resolution Efforts

Exhibit B Documents Filed with Complaint

Tab 1 FAA Chief Counsel Opinion, April 13, 1984.

Tab 2 Rates and Charges Fiscal Year 2004 *(Fuel Program Summary).*

Tab 3 Excerpts from transcript of proceeding in state court on Dec. 4, 2004. *(Document is undated; speaker is not identified.)*

Tab 4 Pages 31-32, Part 161 study, June 30, 2000
(Page 31 shows "2000 Average Daily Operations With No New Restrictions; Page 32 shows 2005 Average Daily Operations With No New Restrictions. Pages are not dated.)

Tab 5 FAA Advisory Circular, June 2002, page 3
(AC 150/5190-5; page is undated).

Tab 6 Chapter 69-1326, Laws of Florida, 1969
(House Bill No. 2582, August 7, 1970).

Tab 7 November 2003 Management Team Report of Naples Airport Authority.

Tab 8 November 10, 1999, Rates and Charges for Fuel of the Naples Airport Authority.

Tab 9 AP-4 Agreement between Collier County, the City of Naples and the FAA.

Tab 10 November 8, 2002, Rates & Charges for Fuel of the Naples Airport Authority.

Tab 11 Order 5190.6A, dated October 2, 1989, page 9
(Page number does not show on copy presented.)

Tab 12 Lease between City of Naples and Naples Airport Authority *(December 3, 1969).*

Tab 13 Terms and Conditions of Accepting AIP Grants (October 1, 1996) *(Page 13 of 15 presented; source documents not identified.)*

Item 7 April 2, 2004, FAA Notice of Docketing.

Item 8 April 9, 2004, FAA Revised Notice of Docketing.

Item 9 Respondent's Answer of the City of Naples Airport Authority, received April 29, 2004.

Exhibits

Tab 1 Naples Municipal Airport Rules and Regulations, Part II, Aviation Fuel (Nov. 8, 2002).

Tab 2 Naples Municipal Airport Rules and Regulations, Airport Rates and Charges for Fiscal Year 2004 (Sept. 18, 2003).

Tab 3 Letter from Susan A. Moore, Program Manager, FAA, to Craig Periera, Director of Operations, Continental Aviation Services, Inc. (Dec. 19, 2002).

Tab 4 Naples Municipal Airport Rules and Regulations, Airport Rates and Charges for Fiscal Year 2002 (March 22, 2002).

Tab 5 Deposition Transcript of Theodore Soliday, City of Naples Airport Authority v. Jet 1 Center, Inc., No. 02-5010-CA-HDH (Fla. Cir. Ct. March 25, 2004).

Tab 6 Deposition Transcript of Sheila Dugan, City of Naples Airport Authority v. Jet 1 Center, Inc., No. 02-5010-CA-HDH (Fla. Cir. Ct. March 25, 2004).

Tab 7 Letter from Theodore Soliday, Executive Director, Naples Airport Authority, to Ross B. Lewis, Director of Operations, Continental Aviation Services (Oct. 10, 1994).

Tab 8 City of Naples Airport Authority, Naples Municipal Airport, Nonpublic Aircraft Fuels dispensing permit (Independent Fuel Supplier), *issued to* Jet 1 Center, Inc. (Feb. 17, 1997).

Tab 9 Letter from John W. Reynolds, Jr., Assistant Manager, FAA, to Ted Soliday, Executive Director, Naples Airport Authority (March 31, 1997).

Tab 10 Letter from Illia A. Quinones, Program Manager, FAA, to J. Scott Phillips, President & C.E.O., Jet 1 Center (Feb. 11, 2004).

Tab 11 Deposition Transcript of the Honorable Richard Cobb, City of Naples Airport Authority v. Jet 1 Center, Inc., No. 02-5010-CA-HDH (Fla. Cir. Ct. March 25, 2004).

Tab 12 Court's Final Judgment, City of Naples Airport Authority v. Jet 1 Center, Inc., No. 02-5010-CA-HDH (Fla. Cir. Ct. March 25, 2004).

Tab 13 City of Naples Airport Authority Leasehold Agreement, North Quadrant, Jet 1 Center, Inc. (Nov 1, 1995).

Tab 14 City of Naples Airport Authority's Amended Answer, Affirmative Defenses, Counterclaim and Third Party Complaint, Jet 1 Center, Inc. v. City of Naples Airport authority, No. 02-3331-CA-HDH (Fla. Cir. Ct. filed Aug. 19, 2002).

Tab 15 City of Naples Airport Authority Verified Complaint for Injunctive Relief, City of Naples Airport Authority v. Jet 1 Center, Inc., Case No. 02-5010-CA-HDH (Fla. Cir. Ct. March 25, 2004).

Tab 16 Letter from Theodore Soliday, Executive Director, City of Naples Airport Authority, to Susan Moore, Program Manager, FAA (Nov. 13, 2002).

Tab 17 Letter from Craig A. Pereira, Director of Operations, City of Naples Airport Authority, to Susan Moore Program Manager, FAA (Nov. 13, 2002).

Tab 18 Letter from Philip Snyderburn, Senior Environmental Specialist, Collier County Government, to Jeff Ellston, Jet 1 Center, Inc. (Dec. 30, 2002).

Tab 19 City of Naples Airport Authority Act, 1969 Fla. Ch. 69 (as amended).

Tab 20 Jet 1 Center, Inc.'s Amended Voluntary Petition, In re Jet 1 Center, Inc., No. 03-26514-9P1 (Bankr. M.D. Fla. Filed Dec. 2003).

Item 10 Complainant's Motion for Brief Extension of Time to File Reply, received April 30, 2004.

Item 11 May 4, 2004, letter from Daniel S. Reimer (representing the Respondent) to James M. Landis and Jon P. Tasso (representing the Complainant) re: Complainant's Motion for Brief Extension of Time to File Reply.

Item 12 May 4, 2004, letter from Jon P. Tasso (representing Complainant) to Daniel S. Reimer (representing Respondent) in response to letter listed in Item 11.

Item 13 May 4, 2004, letter from FAA attorney Elizabeth J. Weir, granting Complainant Jet 1 Center, Inc., request for an extension of time to file Complainant's Reply to Respondent's Answer. Complainant's Reply is now due on or before May 15, 2004.

Item 14 Complainant's Reply to Respondent's Answer, received May 17, 2004.

Exhibits

Tab 1 Affidavit of Scott Phillips in Case No. 03-26514-9P1

exhibit A City of Naples Airport Authority, Naples Municipal Airport, *Nonpublic Aircraft Fuels Dispensing Permit (Independent fuel Supplier)*, dated February 17, 1997.

exhibit B November 16, 1999, letter to Jeff Ellston, General Manager, Jet 1 Center, from Mary Jane Klein, Director of Administration, Financing & Human Resources, Naples, Airport Authority.

exhibit C November 2003 Management Team Report

exhibit D Photographs taken January 30, 2004, of Jet 1 Center's fuel tank with Authority's lock attached.

Tab 2 City of Naples Airport Authority, Naples Municipal Airport, Rates and Charges for Fiscal Year 2002 (October 1, 2001 – September 30,

2002). *A portion of the Table of Contents and pages 2, 4, and 6 are the only pages under this tab.*

Tab 3 Transcript of Proceedings, Case No. 02-5010-CA-HDH. *Pages 1, 2, 13, and 14 are the only pages under this tab.*

Tab 4 June 17, 1947, letter from the War Assets Administration to Senator Gurney re: disposal of surplus airport property.

exhibit G	Standard reservations, restrictions, and conditions under which disposal of airport is effected.
exhibit unnumbered	Feb. 9, 1942, letter from the Supervisor of Airports
exhibit unnumbered	Physical Progress Report, March 17, 1942
exhibit unnumbered	Project Authorization Order, March 23, 1945

Tab 5 February 11, 2004, letter from Ilia A. Quinones, Program Manager, Orlando Airports District Officer, to Scott Phillips, President and CEO of Jet 1.

Tab 6 March 25, 2004, letter from Theodore D. Soliday, Executive Director, City of Naples Airport Authority, to William E. Barnett, Mayor, City of Naples, re: the financial condition of the City of Naples Airport Authority.

Tab 7 Second Amended Complaint, Case No. 03-26514-9P1

exhibit A	November 2, 1995, Leasehold Agreement between the City of Naples Airport Authority, North Quadrant, and Jet 1 Center, Inc.
exhibit B	Leasehold Agreement between the City of Naples Airport Authority, North Quadrant, and Jet 1 Center, Inc. (Standard Lease Revised July 9, 1997)
exhibit C	November 19, 1998, Amendment to Leasehold Agreement between the City of Naples Airport Authority and Jet 1 Center.
exhibit D	December 6, 2001, letter from Thomas G. Wright, A.A.E., Manager, Operations, City of Naples Airport Authority, to Jeff Ellston, General Manager,

Jet 1 Center, re: lease agreements for subleasing of Jet 1 Center's ramp, hangar and office space.

exhibit E February 17, 1997 *Nonpublic Aircraft Fuels Dispensing Permit (Independent Fuel Supplier)*

exhibit F August 21, 1998, letter from Lisa BeLanc-Hutchings, Director, Airport Operations, City of Naples Airport Authority, to Jeff Ellston, General Manager, Jet 1 Center, re: rules and regulations concerning fueling permit.

exhibit G *none under this tab*

exhibit H November 16, 1999, letter agreement.

Tab 8 October 17, 2002, Regular Meeting Minutes from the City of Naples Airport Authority.

Tab 9 March 4, 2004, deposition of Theodore D. Soliday in Case No. 03-26514-9P1.

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Tab 10 June 21, 1993, *Nonpublic Aircraft Fuels Dispensing Permit (Independent Fuel Supplier).*

Tab 11 March 2004 affidavit from Thomas P. Guenther regarding using Jet 1 Center's services.

Tab 12 February 20, 2004, affidavit from Fred Thompson regarding using Jet 1 Center's services.

Item 15 Complainant's Motion for Leave to File Amended Reply and Additional Exhibits, received May 24, 2004.

Tab 13 Advisory Circular (AC) 150/5190-5, appendix 1, page A-2.

Tab 14 July 28, 1999, Grant Agreement between the City of Naples Authority and FAA regarding Naples Municipal Airport.

Item 16 Respondent City of Naples Airport Authority's Unopposed Motion for Extension of Time to File Rebuttal, received May 26, 2004.

Item 17 June 8, 2004, letter from FAA attorney Elizabeth J. Weir to Daniel S. Reimer granting an extension of time for receipt of Respondent's rebuttal to June 11, 2004.

Item 18 Respondent's Rebuttal of the City of Naples Airport Authority, received June 15, 2004.

Exhibits

Tab 21 Deposition Transcript of Scott Phillips, Jet 1 Center, Inc. v. City of Naples Airport Authority, No. 0-3331-CA-HDH (Fla. Cir. Ct. July 8, 2003).

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Tab 22 Transcript of Hearing, City of Naples Airport Authority v. Jet 1 Center, Inc., No. 02-5010-CA-HDH (Fla. Cir. Ct. April 21, 2004).

Tab 23 Transcript of Proceedings, City of Naples Airport Authority v. Jet 1 Center, Inc., No. 02-5010-CA-HDH (Fla. Cir. Ct. May 19, 2004).

Tab 24 Lease agreement between City of Naples and City of Naples Airport Authority (Dec. 3, 1969).

Tab 25 Transcript of Proceedings, city of Naples Airport Authority v. Jet 1 Center, Inc., No. 02-5010-CA-HDH (Fla. Cir. Ct. Dec. 2, 2003).

Tab 26 Affidavit of Theodore D. Soliday in Support of Plaintiff's Motion for Summary Judgment, City of Naples Airport Authority v. Jet 1 Center, Inc., No. 02-5010-CA-HDH (Fla. Cir. Ct. March 12, 2003).

Tab 27 Deposition Transcript of Alice Carlson, City of Naples Airport Authority v. Jet 1 Center, Inc., No. 02-5010-CA-HDH (Fla. Cir. Ct. Aug. 6, 2003).

Tab 28 Sublease between Continental Aviation Services, Inc. and Hat Brands, Inc. (June 1, 1994).

Tab 29 Examples of Fuel permits issued by the City of Naples Authority.

exhibit A: 1993 fuel permit for Continental Aviation Services

exhibit B: 1994 fuel permit for Collier County Helicopter Operations

exhibit C: 2000 fuel permit for Cablevision Air Facility, LLC

exhibit D: 2001 fuel permit for Naples Airport Properties, LLC

exhibit E: 1994 fuel permit for Turley Enterprises

Tab 30 Regular Meeting Minutes, City of Naples Airport Authority (Oct 17, 2002).

Tab 31 Information/Workshop Conference, City of Naples Airport Authority (Oct. 29, 2002).

Tab 32 Regular Meeting Minutes, City of Naples Airport Authority (Nov. 21, 2002).

Tab 33 Motion to Dismiss Second Amended Complaint and Memorandum of Law in Support Thereof, In re Jet 1 Center., Inc., No. 03-26514-9P1 (Fla. Bankr. Ct. May 27, 2004).

Tab 34 Stipulation, City of Naples Airport Authority v. Jet 1 Center, Inc., No. 02-5010-CA-HDH (Fla. Cir. Ct. Dec. 20, 2002).

Tab 35 Verified Complaint for Injunctive Relief, City of Naples Airport Authority v. Jet 1 Center, Inc., No. 02-5010-CA-HDH (Fla. Cir. Ct. Dec. 9, 2002); Defendant, Jet 1 Center, Inc.'s Amended Answer and Affirmative Defenses to Plaintiff's Verified Complaint, City of Naples Airport Authority v. Jet 1 Center, Inc., No. 02-5010-CA0-HDH (Fla. Cir. Ct. Sept. 30, 2003.)

Item 19 Complainant's Motion for Director's Determination on the Pleadings, received July 22, 2004.

Item 20 Respondent's Response of the City of Naples Airport Authority to the Complainant's Motion for Director's Determination on the Pleadings, received July 29, 2004.

Item 21 Complainant's Reply to Respondent's Response to Complainant's Motion for Director's Determination on the Pleadings, received August 2, 2004.

Item 22 Complainant's Notice of Filing Corrected Exhibits, received August 3, 2004.

Tab 2 City of Naples Airport Authority, Naples Municipal Airport, Rates and Charges, for fiscal year 2002.
(1 October 2001 – 30 September 2002), revised March 22, 2002.

Tab 3 Transcript of Proceedings, Circuit Court of the Twentieth Judicial Circuit, Collier County, Florida; Case No. 02-5010-CA-HDH, April 21, 2004.

Tab 9 Deposition of Theodore D. Soliday, March 4, 2004, for the United States Bankruptcy Court, Middle District of Florida, Fort Myers Division, and Case NO. 03-26514-9P1.

Item 23 Complainant's Amended Notice of Filing Corrected Exhibit, received August 3, 2004.

Tab 2 City of Naples Airport Authority, Naples Municipal Airport, Rates and Charges, for fiscal year 2001
(1 October 2000 – 30 September 2001).

Item 24 Director's Determination, issued January 4, 2005.

Item 25 Complainant's Appeal of Director's Determination, received February 17, 2005.

Item 26 Reply of Respondent, received March 2, 2005.