UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC

SANFORD AIR, INCORPORATED **COMPLAINANT** **V.** **TOWN OF SANFORD, MAINE** **RESPONDENT**	**Docket No. 16-05-04** *Final May 22, 2006*

DIRECTOR'S DETERMINATION

I. INTRODUCTION

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

Sanford Air, Incorporated (Complainant) has filed a formal complaint pursuant to Title 14 CFR Part 16 against the Town of Sanford, Maine, (Town/Respondent) owner, sponsor and operator of Sanford Airport (Airport). Complainant alleges that the Town is engaged in economic discrimination and has granted another fixed-base operator[1], who is also a "through-the-fence operator[2], an exclusive right in violation of Title 49 United States Code (U.S.C.) §§47107(a) and 40103(e) and the respective Federal Grant Assurance 22 *Economic Nondiscrimination* and 23, *Exclusive Rights*.

Complainant is a Maine corporation, and a fixed-base operator on the Airport. According to the Complainant, the issues to be resolved are:

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[1] A fixed-base operator (FBO) is a commercial entity, providing aeronautical services, such as maintenance, storage, ground and flight instruction, etc. to the public. [FAA Order 5190.6A, Appendix 5] Sanford Municipal Airport's *Minimum Standards and Procedures for the Lease and/or Use of Property and Facilities for Aeronautical Activities* defines a fixed-base operator as "…any person(s), firm or legal entity located on the Airport, or on privately owned property contiguous to the Airport runway-taxiway system to which access may be granted by the Owner under the terms of these Standards and Procedures…" See FAA Exhibit 1, Item 10, exhibit 6.

[2] An operator, on land adjacent to the airport, who is granted access to the airport by means of an arrangement or an agreement with the airport owner. See FAA Order 5190.6A, Para.6-6.

- Whether the Town has discriminated against the Complainant by charging the Complainant a higher operating fee and by requiring the Complainant to assume the cost of auditing its gross receipts constitutes unreasonable denial of access and unjust discrimination in violation of Title 49 U.S.C. § 47107(a)(1)(4)(5), and related Federal Grant Assurance 22, *Economic Nondiscrimination*.
- Whether the Town, through its policies and practices, has granted an exclusive right, constructively or directly, to Presidential Aviation, the Complainant's primary competitor and a "through-the-fence" operator, by virtue of having granted Presidential Aviation a more favorable rate on its annual operating fee in violation of Title 49 U.S.C. § 40103(e), and related Federal Grant Assurance 23, *Exclusive Rights*.

Summary of Issues and Findings

The Complainant alleges that the Town of Sanford violated Federal law and policy when the Town granted Presidential Aviation, Complainant's primary competitor and a "through-the-fence" operator, a more favorable operating fee rate; assessed Presidential Aviation a different fuel flowage fee; and permitted other operators to conduct business on the Airport without an agreement or paying the required rates and charges. Complainant also alleges that the Town has engaged in discriminatory practices by proposing that the Complainant conduct an audit of its gross receipts, at Complainant's expense, to resolve a contract dispute, while not imposing the same condition on other commercial operators.

The Town argues that it has not granted Presidential Aviation an exclusive right nor discriminated against the Complainant. The Town argues that the Complainant, by executing a1988 lease extension, agreed to pay a higher operating fee in recognition that no operating fee was assessed for the first five years of the lease (1983-1988), and because of the favorable location of the Complainant's leased premises on the Airport. The term of the Complainant's lease on the Airport is for twenty-three years with the right to negotiate additional lease term extensions.[3] Presidential Aviation's agreement is limited to a ten-year term with no extension rights. The Town argues that the Complainant's prime location on the Airport also justifies a higher operating fee. The Town has dropped its request for the Complainant to pay for an audit of its financial records to verify its gross receipts and it has offered the Complainant the same fuel flowage fee as assessed Presidential Aviation.

Under the particular circumstances existing at the Airport and the evidence of record, as discussed below, the FAA concludes that:

[3] The Town has decided to let the Complainant's lease expire on its own terms and issue a competitive solicitation for a new fixed-base operator contract.

- The Town is not in violation of Title 49 U.S.C. §47107(a)(1)(4)(5), and related Federal Grant Assurance 22, *Economic Nondiscrimination*, as it has not denied the Complainant reasonable use and access to the Airport on reasonable terms and conditions for the purpose of conducting a commercial aeronautical activity, and the Town's actions in this regard do not constitute an unreasonable denial of access and unjust discrimination.
- The Town is not in violation of Title 49 U.S.C. § 40103(e), and the related Federal Grant Assurance 23, *Exclusive Rights*, as it has not granted an exclusive right, constructively or directly, when it executed an agreement with Presidential Aviation to conduct a commercial aeronautical activity on Sanford Airport.

The FAA's decision in this matter is based on applicable Federal law and policy, review of the pleadings and supporting documentation submitted by the parties, reviewed by the FAA, which comprises the administrative record reflected in the attached FAA Exhibit 1.

II. THE AIRPORT

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

The Town of Sanford is the airport owner, sponsor, and operator responsible for compliance with all Federal grant assurances. Sanford Airport is a general aviation airport. Sanford Airport is obligated under Surplus Property Agreement under Public Law 80-289 (real property only) and Regulation 16 War Assets Administration Act. Federal surplus property was conveyed for aeronautical use and revenue production. Land was also conveyed under an expired AP-4 Agreement, however statutory obligations under Title 49 U.S.C. § 40103(e), Exclusive Rights, remain in force for as long as the property is used as an airport.

During the last reported twelve-month period ending in 1997, there were 167-based aircraft and 65,800 annual operations at the Airport.[4] Since 1982, the Town of Sanford, the airport sponsor, has received $7,514,566 in federal airport development assistance for airfield improvements.[5]

[4] FAA Exhibit 1, Item 1 provides a copy of the most recent FAA Form 5010 for the Airport.

[5] FAA Exhibit 1, Item 2 provides the Airport Sponsor's AIP Grant History listing the federal airport improvement assistance provided by the FAA to the Airport Sponsor from 2001to the date of this decision.

III. BACKGROUND

Sanford Air

Since September 21, 1983, the Complainant has been a fixed-base operator on Sanford Regional Airport under a lease with the Town of Sanford, Maine. The lease entitled *Fixed-Base Operators Lease, Town of Sanford Municipal Airport, Agreement between Town of Sanford and Sanford Air* (Lease) authorizes Sanford Air to provide the following commercial aeronautical services:

- Fuel Sales
- Flight Instruction
- Aircraft Charter and Air Taxi
- Aircraft Sales
- Aircraft Rentals
- Aircraft Airframe and Power plant Repair and Maintenance
- FAA Authorized Repair Station for Avionic Sales and Services
- Aircraft Tie-downs and Storage

The Lease was for an initial five-year period beginning September 21, 1983 and ending on September 30, 1988, with a renewal option for another 5-year period. Following the renewal option period, the Lease states:

> *Lessee shall have a further option to renew this lease upon such terms and conditions and provide for the rent in such amounts as are mutually agreed upon between the Lessor and Lessee and accepted by the Town Administrator and Board of Selectmen.*
>
> (FAA Exhibit 1, Item 3, exhibit1)

The Complainant signed *Fixed-Base Operator's Lease Extension #1* on October 18, 1988. It appears that the parties agreed to Lease Extension #1 in 1988, instead of exercising the 5-year renewal option. Lease Extension #1 includes a provision to provide for a 15-year extension instead of a 10-year extension if the Tenant and Landlord construct an expansion to the fixed-base operator facilities. This appears to be the basis for the lease extension until December 31, 2006.
(FAA Exhibit 1, Item 3, exhibits 1 and 2.)

The Complainant pays a number of charges to the Town under the Lease for the right to conduct business on the Airport; these charges include a facilities lease fee, a fuel flowage fee, and an operating fee.[6] (FAA Exhibit 1, Item 3.)

[6] What is an Airport Operating Fee? Airport Operating Fees are a form of percentage rent and normally derived as a percentage of a business's annual sales volume. FAA understands a common industry practice at airports is to use a combination of market base rents for the land occupied and a percentage of rent tied to volume of business generated at the airport. Percentages often vary from 2 to 5 percent of gross

Sanford Air's Rates and Charges

	1983 Lease	1988 Extension #1	Lease Terms after 1998 [7]
Facility Lease Fee	$600 monthly	600.16 monthly	**1,275 monthly**
Fuel Flowage Fee	**3.0%** [8]	**3.5% (1994)**[9]	**3.5%** [10]
Operating Fee			
Up to $300,000	**0%**	**.5%**	**.5% plus .25% for each year after 1998**
Excess over $300,000	**0%**	**1%**	**1%**
Excess over $500,000	**0%**	**2%**	**2%**

(FAA Exhibit 1, Item 3, exhibits 1 and 2.)

The operating fee was assessed at 0% during the initial term of the Lease, 1983 to 1988, and in 1988 the operating fee was raised to .5% of the company's gross receipts up to $300,000, 1% in excess of $300,000 and up to $500,000 and 2% over $500,000 (excluding revenue from fuel, hangar and aircraft sales). After 1998 and until the expiration of the Lease in 2006, Complainant was to pay an increased facility lease fee and an increased operating fee of .5% plus .25% for the first $300,000 in gross receipts for each year after 1998.

The Lease agreement gives the Town access to Complainant's aviation business related financial records and the right to audit those records at its own expense. If an audit discloses an understatement of fees payable to the Town by 5% or more, the Complainant is required to pay the difference in the fees due plus the cost of the audit.

Presidential Aviation

Presidential Aviation (hereinafter referred to as Presidential) is the Complainant's primary competitor. From 1987 until May 2002, Presidential has provided commercial aeronautical services to the flying public as a "through-the-fence" operator without a written agreement. Presidential is not an airport tenant; it operates from property

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revenues generated by the FBO. This arrangement enables the airport sponsor to participate in the growth and success of the business operation. As an operator becomes successful and generates higher revenues, the airport owner shares in the growth. Business owners generally don't favor this type of arrangement because they believe it is a penalty for success; the more sales volume they generate; the more percentage of rent they must pay.

[7] Provision of Lease Extension #1 because of fixed investments made to the fixed-base operator facilities. The operating fee calculation is a subject of dispute between Complainant and the town.

[8] The Lessee shall pay 3.0% of the per gallon retail price for each gallon of fuel pumped during each quarter of the term of the agreement. The charge will be against all fuel pumped and payable monthly. (See FAA Exhibit 1, Item 3, exhibit 1.)

[9] Fuel flowage fee increased from 3.0% to 3.5% in 1994.

[10] In 2004, the Town proposed to change the Complainant's flowage fee to $.07; the Complainant has been paying the new fee pending formal acceptance by both parties in an agreement. (FAA Exhibit 1, Item 1.)

adjacent to the Airport. On May 15, 2002, the Town signed an access and operating rights agreement with Presidential. (FAA Exhibit 1, Item 3, exhibit 5.) The term of the agreement is for a period of ten years ending December 31, 2012, with no extensions specified.[11]

Presidential Aviation's Rates and Charges

Rates	2002 Agreement
Facility Access Fee	**$150 monthly**
Fuel flowage Fee	**$.07 per gallon**
Operating Fee[12]	
Up to $300,000	**.5%**
Excess over $300,000	**1%**
Excess over $500,000	**2%**

(FAA Exhibit 1, Item 3, exhibits 5.)

According to the Town, Presidential Aviation's rates and charges are subject to increase every three years reflecting increases in the Consumer Price Index (CPI). This was later changed to CPI adjustments every five years after the Town revised its minimum standards. (FAA Exhibit 1, Items 9a and 16.) The rates and charges for Presidential are shown above.

Under Presidential's agreement, the Town has the right to audit the company's financial records at its own expense. If the audit discloses an understatement of fees payable to the Town by 5% or more, Presidential is required to pay the difference in the fees due plus the cost of the audit. (FAA Exhibit 1, Item 3, exhibit 5.)

Complainant's Allegations

The Town and the Complainant dispute an interpretation of the Lease terms regarding the operating fee due the Town. The Complainant objects to the percentage amount of the

[11] Southern Maine Aviation, LLC later assumed Presidential Aviation's Access and Operating Rights Agreement, on or about November 9, 2005. (FAA Exhibit 1, Item 15.)

[12] Presidential's lease states: *"Covered gross receipts" shall mean and include such receipts as are collected by Corporation in payment for covered activities conducted on the Premises. Covered activities include the following: aircraft maintenance, flight instruction, aircraft tie-down, aircraft storage, scenic flights, sale of concessions, sale of aeronautical products, avionics shop, aircraft paint shop, banner towing, aerial photography, scheduled or on-demand/chartered air freight, charter operations conducted at the Sanford Regional Airport, scheduled or on demand/chartered courier, on-premises restaurant, rent and gross receipts from tenants. "Covered gross receipts" shall not include uncollected bills nor any receipts collected in payment for the following non-covered activities: sale of all or any part of the premises, sale of aircraft, fuel sales, aircraft charter activities of any kind conducted outside the premises. (FAA Exhibit 1, Item 3, Section 5.)*

operating fee that is assessed against its operation after 1998. The Lease Extension addresses the operating fee in paragraph 4.E. It states:

> *Operating Fee (Percentage Gross Revenue Exclusive of fuel, Hangar Sales and Aircraft Sales) (to be paid annually, in arrears, within ninety (90) calendar days of the end of the calendar year): Same as above plus .25% for each year after 1998.*
> (FAA Exhibit 1, Item 3, exhibit 2.)

The Town interprets the Lease to increase the operating fee percentage by .25% annually. In 1999, Complainant's base fee of .50% would increase to .75%. In each subsequent year, the Complainant's operating fee percentage would increase .25% annually:

Calendar Year	Town's interpretation	Complainant Interpretation
1999	**.75%**	**.75%**
2000	**1.00%**	**.75%**
2001	**1.25%**	**.75%**
2002	**1.50%**	**.75%**
2003	**1.75%**	**.75%**
2004	**2.00%**	**.75%**
2005	**2.25%**	**.75%**
2006	**2.50%**	**.75%**

(FAA Exhibit 1, Item 3**.)**

The Complainant disagrees and construes the Lease to increase the operating fee to .75% after 1998. The Complainant believes the .75% operating fee would remain in effect until the end of the Lease term in 2006. (FAA Exhibit 1, Item 3.)

The Complainant objects to paying an operating fee with an annual increasing rate when Presidential Aviation, its primary competitor, is only required to pay .5%.[13]

Complainant also alleges rate disparity in the Town's administration of the airport fuel flowage fee. The Complainant was assessed 3% of the retail price for each gallon of fuel pumped during its initial term; the rate increased to 3.5% after Complainant's 1988 Lease Extension #1. [14]

[13] Neither the Town nor the Complainant disputes the operating fees of 1% in excess of $300,000 gross receipts or the 2% in excess of $500,000. The lease is silent on whether these charges would increase by .25% each year. Furthermore, there is no evidence in the record that the Complainant or its competitor are paying these additional fees.

[14] Presidential Aviation's fuel flowage fee is $.07 per gallon under their lease. After discussion with the Complainant, the Town changed Complainant's 3.5% flowage fee to match Presidential Aviation's fuel flowage fee of $.07 per gallon. (FAA Exhibit 1, Item 10, exhibit 20.) The Complainant is paying the new rate but refuses to sign an amendment to the Lease and wants the new fuel flowage fee recognized as part

Complainant alleges that the Town engaged in discriminatory practices by requiring Complainant to conduct an audit of its financial records for the years 1999 to 2003, at its own expense while not imposing the same financial condition on other commercial operators at the Airport[15]. The Complainant's Lease states:

> *The landlord may, at its own expense, have conducted its own audit of the records of the tenant as they pertain to this agreement. If such audit shall disclose an understatement of fees payable to landlord by five percent (5%) or more, tenant shall pay such difference to the landlord as well as the cost of the audit.*
> (FAA Exhibit 1, Item 3, exhibit 2.)

Complainant alleges that by being assessed a higher operating fee, a different fuel flowage fee and being forced to pay for the cost of the audit of his financial records, constitutes unjust economic discrimination in violation of the Federal grant assurances.

Pre-Complaint Resolution

On May 23, 2003, the Complainant filed an informal complaint with the FAA New England Regional Headquarters (ANE) alleging that the Town engaged in discriminatory practices involving charges and the collection of fees dating to 1988. ANE declined to investigate. (FAA Exhibit 1, Item 3, exhibit 6). In a letter dated December 31, 2003 to the Complainant, the ANE stated:

> *"The issues you (the Complainant) are pursuing are contained in your current lease, even though it [the lease] was signed in 1988. Since the parties mutually entered into the lease, it would be difficult to prove that refusal to renegotiate would amount to a violation of the Town's obligation against economic nondiscrimination".*
> (FAA Exhibit 1, Item 3, exhibit 7.)

On May 7, 2004, the Complainant filed another informal complaint with the ANE, citing unjust economic discrimination. The Complainant alleged that Presidential Aviation, its competitor, had been granted more favorable terms than the Complainant. Complainant was being assessed a different fuel flowage fee, and other fixed base operators and commercial aeronautical operators were permitted to operate on the Airport without an agreement or paying required fees. (FAA Exhibit 1, Item 3, exhibit 8.) On December 29, 2004, the ANE issued its informal finding, concluding that the Town of Sanford had not violated its Federal obligations. The ANE's investigation found:

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of a negotiated extension to the Lease. (FAA Exhibit 1, Item 14**.)** The Town does not want to grant the Complainant such an extension; it wants to amend the Complainant's Lease with its existing term. (FAA Exhibit 1, Item 14.)

[15] Complainant indicates that the cost of the audit is estimated between $2,000 and $3,000 for each year or $10,000 to $15,000 total.

- The Complainant and Presidential Aviation's utilization of the Airport were not the same; consequently the Town is not required to charge both operators identical rates.
- The Town and the Complainant both recognized that the 3.5% fuel flowage fee was too difficult to calculate and the Town offered to amend the Lease to change the fuel flowage fee to 7 cents per gallon. In the interim, both the Complainant and Presidential Aviation were paying 7 cents a gallon.

- AirTech Management did not have a lease with the Town permitting it to provide commercial aeronautical services. AirTech closed its operation and leased its facilities to other operators. Warren AeroMarine, another operator, has never provided commercial aeronautical services and is not subject to the same standards, rates and charges as the Complainant and other fixed-base operators.

ANE determined that the Complainant and Presidential are not similarly situated operators that require identical rates. The complaint was subsequently dismissed. (FAA Exhibit 1, Item 3, exhibit 12.)

Complainant argues that the Regional Office erred when it relied on FAA Order 5190.6A, paragraph 4-14(d)(2)(a) to justify the disparate fee structure imposed on the Complainant, an airport tenant in competition with Presidential Aviation, a "through-the-fence" operator. Complainant argues that paragraph 4-14 applies only to airport tenants and is not an appropriate analysis for comparison between the Complainant and Presidential Aviation, a "through-the-fence" operator.

Town's Answer to Complainant's Allegations

Complainant and the Town disagree as to whether the .25% increase in the operating fee is a one-time increase for the lease term or whether it is cumulative and increases each year for the remainder of the lease term after 1998. Both parties recognize that the fee would increase at least .25% after 1998; the dispute is over whether the fee continues to escalate each year thereafter by .25%.

The Town argues that the Complainant, after 1988, agreed to pay a higher operating fee percentage. (FAA Exhibit 1, Item 10.) The Complainant paid no operating fee during its initial five-year period ending in 1988; during the next ten years, its operating fee was .5% of the company's covered gross receipts up to $300,000. After 1998, its operating fee was to increase .25% each year. Furthermore, the Town argues that the Complainant has a prime location on the Airport justifying a higher operating fee.

The Town points out Presidential Aviation's agreement is limited to ten years with no explicit extension right. Its operating fee of .5% is identical to that enjoyed by the Complainant from 1988 to 1998. (FAA Exhibit 1, Item 3, exhibit 5**.)** Presidential's rates and fees are subject to an increase every three years to reflect increases in the Consumer Price Index. Changes to the airport minimum standards increase this period from three to five years. (FAA Exhibit 1, Item 9b.) The Town claims it charges Presidential Aviation

fair market value for the right of access to the Airport by charging Presidential a $150 monthly access fee along with its operating and fuel flowage fees.
(FAA Exhibit 1, Item 14.)

While the Complainant alleges that the Town has engaged in discriminatory practices by requiring the Complainant to conduct an audit at its own expense. The Town's request for an audit arose out of a dispute with the Complainant over the amount of operating fee revenue due the Town under the 1988 Lease Extension #1. [16]
(FAA Exhibit 1, Item 9b and c.)

Initially, the Town requested the Complainant to submit all financial records, including tax returns, to verify that Complainant was paying the correct fees as required by paragraph 5E of Complainant's Lease, which states:

> *Tenant [defined to include (and any sub-tenants or lessees)] agrees that it will keep accurate records, books and accounts on all matters pertaining to its (or their) aviation-related business(es). The tenant shall provide the landlord with access to all of its financial records as related to any and all aviation-related matters, and provide an annual written summary thereof attested to by an officer of the tenant, within ninety (90) days of the close of each calendar year, showing a all of the tenant's gross receipts or gross revenue from all aviation-related activities and showing sufficient detail to permit the landlord to determine compliance with the rental obligations imposed under the lease extension.*
>
> (FAA Exhibit 1, Item 3, exhibit 2.)

Complainant expressed concern about confidentiality and refused to comply with the Town's request for access to its financial records and would only provide limited access to the records. The Town believed it was therefore denied the ability of verifying that the Complainant was accurately paying the required operating fee due under the lease.
(FAA Exhibit 1, Item 9b.)

On June 2, 2004, The Town of Sanford offered to amend Complainant's Lease to incorporate the following provisions:

1. The Town will impose an operating fee of .75% of the first $300,000 of gross receipts, Complainant's current rate, until the expiration of the Lease in 2006;
2. The Town agrees to set Complainant's fuel flowage fee at $0.07 per gallon of fuel consistent with the charge imposed on Presidential.
3. Complainant must hire an auditor to review its financial records between 1999 and 2003.

(FAA Exhibit 1, Item 3, exhibit 9.)

Complainant agreed to all three of the provisions on the condition that they be applied to all operators and made retroactive through the term of the lease for all operators and that

[16] The Town has not imposed the same condition on other commercial operators.

these new terms offered to the Complainant be incorporated in a lease extension rather than an amendment to its Lease. (FAA Exhibit 1, Item 3, exhibit 10.)

The Town withdrew its June 2, 2004 offer to amend the Lease on May 18, 2005. (FAA Exhibit 1, Item 11.) The Town's concern is:

> *Sanford Air has continuously tried to leverage its claim of disparate treatment in order to negotiate more favorable lease terms for itself in a lease extension, which in the Town's opinion, has been absolutely inappropriate.*
>
> (FAA Exhibit 1, Item 14.)

On March 28, 2005, the FAA docketed the Complainant's formal complaint under 14 CFR Part 16 for resolution.

IV. ISSUES

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

- Whether the Town has discriminated against the Complainant by imposing disparate fees between Complainant and Presidential Aviation and, whether the disparity in fees charged constitute unreasonable denial of access and unjust discrimination in violation of Title 49 U.S.C. § 47107(a)(1)(4)(5), and the instruments of surplus property conveyance pursuant to Title 49 United States Code (U.S.C.) § 47152 and related Federal Grant Assurance 22, *Economic Nondiscrimination.*

- Whether the Town, through its policies and practices, has granted an exclusive right, constructively or directly, to Presidential Aviation, a competing fixed base operator and a "through-the-fence" operator by virtue of having permitted Presidential Aviation to operate on the Airport in violation of Title 49 U.S.C. § 40103(e), and related Federal Grant Assurance 23, Exclusive Rights.

FAA's decision 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 other interested persons, interviews with the parties and other interested persons, and the Administrative Record reflected in the attached FAA Exhibit 1.

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 the Airport Improvement Program, Airport Sponsor Assurances, the FAA Airport Compliance Program, and enforcement of Airport Sponsor Assurances.

A. The 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.

The FAA has a statutory mandate to ensure that airport owners comply with these sponsor assurances.[16] 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.

Three Federal grant assurances apply to the circumstances set forth in this Complaint: (1) Grant Assurance 22, *Economic Nondiscrimination;* (2) Grant Assurance 23, *Exclusive Rights;* (3) Grant Assurance 29, *Airport Layout Plan.*

[16] *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.

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 and to make it available to all types, kinds, and classes of aeronautical activity on fair and reasonable terms, and without unjust discrimination. Federal Grant Assurance 22, *Economic Nondiscrimination*, deals with both the reasonableness of airport access and the prohibition of adopting unjustly discriminatory conditions as a potential for limiting access. Grant 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, that the sponsor of a federally-obligated airport

> …will make its airport available as an airport for public use on reasonable terms, and without unjust discrimination, to all types, kinds, and classes of aeronautical activities, including commercial aeronautical activities offering services to the public at the airport. [Assurance 22(a)].
>
> …will not exercise or grant any right or privilege which operates to prevent any person, firm, or corporation operating aircraft on the airport from performing any services on its own aircraft with its own employees [including, but not limited to maintenance, repair, and fueling] that it may choose to perform. [Assurance 22(f)].
>
> …may establish such fair, equal, and not unjustly discriminatory conditions to be met by all users of the airport as may be necessary for the safe and efficient operation of the airport. [Assurance 22(h)].
>
> …may...limit any given type, kind, or class of aeronautical use of the airport if such action is necessary for the safe operation of the airport or necessary to serve the civil aviation needs of the public. [Assurance 22(i)].

Subsection (h) qualifies 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 6A, para. 4-8].

The owner of an airport developed with Federal assistance is responsible for operating the aeronautical facilities for the benefit of the public. [*See* FAA Order 5190.6A, Sec. 4-7(a).] This means, for example, that the owner should adopt and enforce adequate rules, regulations, or ordinances as necessary to ensure the safe and efficient operation of the airport. [*See* Order, Secs. 4-7 and 4-8].

Federal Grant Assurance 22, *Economic Nondiscrimination*, also satisfies the requirements of Title 49 U.S.C. § 47107 (a)(5), which requires that fixed-base operators similarly using the airport must be subject to the same charges. Assurance 22 provides, in pertinent part, that the sponsor of a federally obligated airport will ensure that:

> "…each fixed-base operator at any airport owned by the sponsor 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)].

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

The FAA considers it inappropriate to provide Federal assistance for improvements to airports where the benefits of such improvements will not be fully realized due to inherent restrictions on aeronautical activities. [*See* Order, Sec. 3-8(a)].

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."

Grant Assurance 23, *Exclusive Rights*, of the prescribed sponsor assurances implements both statutory provisions requiring, in pertinent part, that the sponsor of a federally obligated airport

> "...will permit no exclusive right for the use of the airport by any persons providing, or intending to provide, aeronautical services to the public...and that it will terminate any exclusive right to conduct an aeronautical activity now existing at such an airport before the grant of any assistance under the Airport and Airway Improvement Act of 1982."

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 where a significant burden has been placed on one competitor that is not placed on another. [*See* e.g. Pompano Beach v FAA, 774 F.22 1529 (11th Cir, 1985)].

FAA Order 5190.6A (Order) provides additional guidance on the application of the statutory prohibition against exclusive rights and FAA policy regarding exclusive rights at public-use airports. [*See* Order, Ch. 3].

3. Airport Layout Plan

Assurance 29, "Airport Layout Plan,

> " implements 49 U.S.C Section 47107(16) and, in pertinent part, requires the airport owner to "keep up to date at all times an airport layout plan of the airport showing (1) boundaries of the airport and all proposed additions thereto, together with the boundaries of all offsite areas owned or controlled by the sponsor for airport purposes and proposed additions thereto; (2) the location and nature of all existing and proposed airport facilities and structures (such as runways, taxiways, aprons, terminal buildings, hangars and roads), including all proposed extensions and reductions of existing airport facilities; and (3) the location of all existing and proposed non-aviation areas and of all existing improvements thereon. Such airport layout plan and each amendment, revision, or modification thereof, shall be subject to the approval of the Secretary which approval shall be evidenced by the signature of a duly authorized representative of the Secretary on the face of the airport layout plan. The sponsor will not make or permit any changes or alterations in the airport or in any of the facilities which are not in conformity with the airport layout plan as approved by the Secretary and which might, in the opinion of the Secretary, adversely affect the safety, utility, or efficiency of the airport."

An airport layout plan (ALP) depicts the entire property, current facilities, and plans for future development of the airport. The FAA requires an approved ALP as a prerequisite to the grant of Federal funds for airport development. FAA approval of the ALP represents the concurrence of the FAA in the conformity of the plan to all-applicable airport design standards and criteria. Any construction, modification, or improvement that is inconsistent with the ALP requires FAA approval of a revision to the ALP. [See Order, Sec. 4-17(a)].

4. Access from Adjacent Property (Through-the-Fence Operations)

The obligation to make an airport available for public use does not impose any requirement to permit access by aircraft from adjacent property. As a general principle, FAA recommends that airport sponsors refrain from entering into any agreement which grants access to the public landing area by aircraft normally stored and serviced on adjacent property. Arrangements that permit aircraft to gain access to a public landing area from off-site properties complicate the control of vehicular and aircraft traffic on the

airport. This type of arrangement has frequently been referred to as a "through-the-fence" operation. FAA recognizes that airport sponsors often enter into leases or contracts that propose this type of arrangement and that these agreements do exist.

An airport sponsor, interested in entering into a contract or lease with a through-the–fence operator, should require that the sponsor's rights and powers are protected and that it retains the legal right to manage and develop the airport, and comply with any existing or proposed grant agreement. Second, the airport must be compensated a fair return to equalize any imbalance or competitive advantage that may result from a "through-the-fence" operator conducting business to the detriment of an on airport operator. Third, special safety and security operational requirements may need to be incorporated in the contract or lease to provide for adequate property protection.

Exceptions may be granted on a case-by-case basis where operating restrictions ensure safety and equitable compensation for use of the airport. In any such arrangement the airport owner should obtain a fair return for the use of the landing area by an off-airport commercial enterprise.

The existence of arrangements granting access to a public landing area from off-site locations contrary to FAA recommendations shall be reported to the regional Airports Division with a full statement of the circumstances. If the Regional Airports Division determines that the existence of such an arrangement circumvents the attainment of the public benefit for which the airport was developed, the airport owner will be notified that the airport may be in violation of its Federal obligations. [*See* FAA Order 5190.6A, parag. 6-6].

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 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) Wilson Air Center, LLC v FAA, 372 F.3d 807 (6th Cir. 2004).

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 are contained in the *FAA Rules of Practice for Federally-Assisted Airport Proceedings* 14 CFR Part 16. *FAA Rules of Practice for Federally Assisted Airport Proceedings* 14 CFR Part 16 were published in the Federal Register (61 FR 53998, October 16, 1996) and were effective on December 16, 1996.

VI. ANALYSIS AND DISCUSSION

The Complainant alleges the Town violated Title 49 U.S.C. §47107 (a)(1)(4)(5), and the instruments of surplus property conveyance pursuant to Title 49 United States Code (U.S.C.) § 47152 Federal Grant Assurance 22, *Economic Nondiscrimination* and Title 49 U.S.C. § 40103(e), and Federal Grant Assurance 23, *Exclusive Rights* by (i) charging the Complainant a higher operating fee than Presidential Aviation, its primary competitor and, (ii) requiring the Complainant to assume the cost of auditing fees for its financial records while not imposing the same requirement on other operators.

Complainant argues that the FAA New England Regional Office erred in its determination that the Complainant and Presidential Aviation are not similarly situated operators requiring the same rates, when it used FAA Order 5190.6A, paragraph 4-14(d)(2)(a) to define the classes of operators. The pertinent part states:

> *If one operator rents office and/or hangar space and another builds its own facilities, this would provide justification for different rental and fee structures.*

These two operators would not be considered essentially similar as to rates and charges even though they offer the same services to the public.

Furthermore, Complainant argues that the FAA New England Regional Office should have relied on FAA Order 5190.6A; Paragraph 6-6 to make its determination; Paragraph 6-6 states:

The owner of an airport is entitled to seek recovery of initial and continuing costs of providing a public use landing area. The development of aeronautical enterprises on land uncontrolled by the owner of the public airport can result in a competitive advantage for the "through- the- fence" operator to the detriment of on airport operators…

Complainant alleges that the Town's actions have placed the Complainant at a competitive disadvantage to Presidential Aviation as defined above in Paragraph 6-6.

The Town argues that it did not engage in discriminatory practices toward the Complainant, it did not grant Presidential Aviation an exclusive right.

These issues are analyzed and discussed separately below.

A. Through the Fence Operations

Complainant argues that the requirement for comparison between similarly situated tenants should not apply in this instance; Complainant admits that its operation is different because it is an airport tenant and Presidential Aviation is a through-the fence operator. (FAA Exhibit 1, Item 3).

FAA policy recommends that airport sponsors refrain from entering into any agreement that grants access to the public landing area by aircraft normally stored and serviced on adjacent property. While the FAA discourages such activity, it does not prohibit "through-the-fence" operations or does the FAA restrict commercial aeronautical operations from privately owned land adjacent to an airport. Airport sponsors seeking to enter into arrangements with a "through-the-fence" operator bear the burden of ensuring that such arrangements do not violate their Federal grant obligations.

Complainant argues that the Town is obligated not to grant access to an off-airport fixed-base operator in a manner that could result in a competitive disadvantage to the Complainant. FAA Order 5190.6A; Paragraph 6-6 addresses this imbalance or competitive advantage of "through-the-fence" operators over on-airport operators, by requiring airport sponsors:

…To equalize this imbalance, the airport owner should obtain from any off-base enterprise a fair return for its use of the landing area.

If the FAA determines that the existence of such an agreement circumvents the attainment of the public benefit for which the airport was developed, the owner of

the airport will be notified that the airport may be in violation of his agreement with the Government. (FAA Order 5190.6A para.6-6 (e).)

The Airport must be compensated a fair return to equalize any imbalance or competitive advantage that may result from a "through-the-fence" operator conducting business to the detriment of an on-airport operator. The Town took appropriate steps to equalize this imbalance by:

1) bringing Presidential Aviation under a use and access agreement with a definitive term; and

2) requiring Presidential Aviation to contribute to the Airport's self-sustainability by paying an access fee and percentage rent.

Presidential Aviation had operated for a number of years without an agreement and not subject to the same requirements as other airport users. Presidential Aviation's agreement with the Town requires it to pay airport fees including flowage fee, operating fee, and an access fee that the Town identifies as fair market value for the right to use the Airport. An airport access fee charged in lieu of rent is a common method of cost recovery from permitted operators.

Complainant believes that Presidential Aviation should not be afforded the same status as an airport tenant contributing to make the airport a self-sustaining enterprise. Complainant believes that "through-the fence" operators should not be permitted to provide commercial aeronautical services. In cases where off-airport commercial aeronautical operators are permitted, the Complainant believes that they should be charged fair market value rates, at least in conformity with rates charged to an FBO tenant operator. Complainant argues pursuant to FAA Order 5190.6A, section 6-6, the Town is obligated not to grant access to an off-airport FBO in a manner that could result in a competitive disadvantage to the Complainant as the on-airport FBO or the guarantee set forth in paragraph 8-9 of the Complainant's 1983 Lease.

The Town's agreement with Presidential Aviation does not circumvent the Airport's public benefit purpose. The purpose of the agreement is to regulate the activity of Presidential Aviation similar to the other classes of on-airport users. Permitted "through-the-fence" operators are a separate class of aeronautical users subject to the same minimum standards, airport rules and regulations, and pay appropriate airport fees as other commercial operators located on-Airport. It appears the airport fees paid by Presidential Aviation diminish any economic or competitive advantage of not being physically located on the Airport. Under a permitted agreement, the Town can regulate a "through-the-fence" operator to the benefit of the flying public, all commercial operators and ensure that the "through-the-fence" operator contributes its fair share toward making the airport a self-sustaining entity.

It should also be noted that the FAA's role is not to protect commercial aeronautical operators from competition. In *United Aircraft Services, Inc. v. Hancock County Port*

and Harbor Commission and Hancock Board of Supervisors, Docket Number 16-00-04, (March 15, 2000) the FAA said:

> *A sponsor's Federal obligations do not relieve aeronautical businesses on the sponsor's airport from their assumption of standard business risk. This risk includes the risk of competition, present and future, anticipated and unanticipated. Economic advantage being held by one competitor, alone, is not sufficient evidence of a sponsor's violation of its Federal commitments. Airport businesses frequently pursue business strategies designed to disadvantage their competition. The existence of a competitive advantage can be considered supporting evidence to other evidence regarding the sponsor's actions; however, the FAA's requirement in analyzing the allegation of noncompliance is to review the sponsor's actions and omissions to determine if they have violated their Federal obligations.*

Complainant contends that this case differs from *Penobscot Air Services Ltd. v FAA, 164 F.3 713 (1st Cir. 1999)* decision because the Complainant's case involves a "through-the-fence" operator and an on-airport fixed base operator as opposed to two on-airport fixed base operators in the *Penobscot* decision. (FAA Exhibit 1, Item 3.) The difference is immaterial. The Town has licensed both operators to conduct business on the Airport. The Complainant is paying rent for leased facilities on the Airport, an airport flowage fee and an operating fee representing a percentage of covered gross receipts of all the business conducted on the Airport. Presidential Aviation, a "through-the-fence" fixed-base operator, has an agreement to provide an on and off-airport service. It is paying all appropriate airport fees including an airport flowage fee, an access fee valued at fair market by the Town and an operating fee representing a percentage of covered gross receipts of all the business conducted on and off-airport. Presidential Aviation seemingly contributes its fair share toward making the Airport a self-sustaining entity.

B. Discriminatory Practices

Reasonable Access and Not Unjustly Discriminatory Terms

Title 49 U.S.C. § 47107(1) (5) and Grant Assurance 22, *Economic Nondiscrimination* provides in pertinent part, that the sponsor of a federally obligated airport will ensure that

> …the airport will be available for public use on reasonable conditions and without unjust discrimination. [Assurance 22(a)].
>
> Each fixed-base operator at a federally-obligated 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)].

Here the primary issue is whether the Complainant and Presidential Aviation, Complainant's primary competitor, are similarly situated and whether the differences in airport fees agreed to by the Complainant and Presidential Aviation in their agreements

with the Town constitute unjust discrimination by the Town in violation of Federal Grant Assurance 22.

Rate Disparity Involving Fuel Flowage Fee

The Town and the Complainant both recognize that the 3.5% fuel flowage fee was too cumbersome to calculate, particularly with continuous changes to fuel prices. The Town offered to convert the Complainant's fuel flowage fee to 7 cents per gallon after offering Presidential Aviation the 7 cents per gallon rate. Both the Complainant and Presidential Aviation are currently paying 7 cents per gallon. The Town is willing to offer the Complainant a lease amendment reflecting the new rate. The Complainant has rejected this offer and wants a retroactive adjustment for all operators and the new rate reflected in a lease extension instead of an amendment to the existing Lease.

The Town's position is that until the Complainant executes a new lease amendment, it is responsible for the 3.5% fuel flowage fee, even though it is currently paying the new rate of 7 cents per gallon.

Complainant has made a choice not to amend its Lease for the new fuel flowage fee rate offered by the Town but to instead bargain for a lease extension incorporating the new fuel flowage fee rate. Actions for breach of contract between the parties are matters of state law and thus beyond the FAA's jurisdiction under Part 16. `The Town has offered the Complainant the same rate as Presidential Aviation. The Town's actions are consistent with its Federal grant obligations. Moreover, the Town's Federal obligations do not compel it to make retroactive rate adjustments.

FAA finds that the Town is not in violation of its grant obligations in the administration of its fuel flowage fee program.

Cost of Auditing Fees

Complainant alleges that the Town engaged in discriminatory practices by attempting to require the Complainant to conduct an audit of its own expenses while not imposing the same financial condition on other commercial operators.

The Town initially requested the Complainant submit financial records, including tax returns to verify that Complainant was paying the required fees as specified in the Complainant's Lease Extension #1. Paragraph 5E of the Lease states:

> *Tenant agrees that it (and any sub-tenants or lessees) will keep accurate records, books and accounts on all matters pertaining to its (or their) aviation-related business(es).* ***The tenant shall provide the landlord with access to all of its financial records and records as relate to any and all aviation-related matters,*** *and provide an annual written summary thereof attested to by an officer of the tenant, within ninety (90) days of the close of each calendar year, showing a all of the tenant's gross receipts or gross revenue from all aviation-related activities*

and showing sufficient detail to permit the landlord to determine compliance with the rental obligations imposed under the lease extension. [emphasis added].

The landlord may, at its own expense, have conducted its own audit of the records of the tenant as they pertain to this agreement. *If such audit shall disclose an understatement of fees payable to landlord by five percent (5%) or more, tenant shall pay such difference to the landlord as well as the cost of the audit.* [emphasis added].

The Complainant refused to comply with the Town's request, in contravention of its Lease expressing concern about confidentiality. The Town Countered by offering an alternative proposal that the Complainant, instead conduct an audit at its own expense. The Complainant rejected the offer.

FAA fails to see how the Town's request for an audit under these circumstances discriminated against the Complainant or denied the Complainant reasonable access to the Airport. This offer was part of a negotiation to enforce a provision of the Complainant's Lease, which the Complainant rejected. It is true that based on the record, it appears that this offer was not extended to other commercial operators. However, there is nothing in the record to suggest that any other commercial operator, under a similar situation, refused to submit financial records in response to the Town's request. Consequently, it appears that the Complainant was in a circumstance of its own making created by not complying with the terms of its Lease, specifically, by denying the Town full access to its financial records. The Town's offer was an attempt to get a third party verification of the amount due the Town under its Lease with the Complainant. It appears the Complainant became a tenant in default, in violation of its Lease, by not giving the Town full access to the financial records it requested.

An action for breach of a contract between these parties is a matter of state law, and thus beyond the jurisdiction of Part 16.

It should also be mentioned that the Town withdrew the offer, and dropped its requirement for an audit of the Complainant's financial records. FAA finds that the Town's request for an audit was not unreasonable under the circumstances and consistent with its Federal grant obligations.

Rate Disparity Involving Airport Operating Fees

The Complainant alleges the Town violated Title 49 U.S.C. § 47107 (a)(1)(5), and Federal Grant Assurance 22, Economic Nondiscrimination by charging the Complainant a higher operating fee than Presidential Aviation, its primary competitor.

Complainant alleges that the Town is unjustly discriminating against it because Presidential Aviation, by virtue of its agreement with the Town, is paying a lower rate than the Complainant. Presidential Aviation's operating fee rate is .5% for the initial five years of its agreement, while the Complainant is required to pay 2.25% for calendar year 2006.

FAA finds that the Complainant and Presidential Aviation were not similarly situated under Grant Assurance 22, *Economic Nondiscrimination*. Grant Assurance 22 provides in pertinent part that the sponsor of a Federally-obligated airport will ensure that:

> …the airport will be available for public use on reasonable conditions and without unjust discrimination. [Assurance 22(a)].
>
> Each fixed-base operator at any airport owned by the sponsor 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)].

In this case the operators are not similarly situated.

Furthermore, Complainant's Lease has a term of 23 years beginning in 1983 and expiring in 2006. Complainant voluntarily renegotiated the terms of its Lease and agreed to a schedule of fee increases as part of the consideration for extending the Lease until 2006.

Both the Complainant's Lease and Presidential's agreement specify different starting points in time for these fixed-base operators in their agreements with the Town. Complainant's Lease began in 1983 and expires in 2006. Presidential Aviation's agreement started in 2002 and expires in 2012.

Complainant's Lease is at the end of its term. During the Complainant's initial 5-year lease period, 1983 to 1988, the Town did not charge the Complainant an operating fee. From 1988 until 1998, the Complainant paid a .5% operating fee for the first $300,000 in covered gross receipts. After 1998, the Complainant and the Town negotiated an operating fee of .5% plus .25% each year thereafter until the expiration of the Lease. The interpretation of this provision is in dispute between the Complainant and the Town. [17]

[17] Complainant refused an offer by the Town to freeze the .75% operating fee at .75% (.5% plus .25%) until the expiration of the Lease in 2006. The Complainant rejected the offer. Complainant also wants a retroactive adjustment for all operators subject to an operating fee and wants the rate reflected in an extension rather than an amendment to its existing Lease that expires in 2006. This dispute is a matter of contract and thus a matter of state law. The FAA will not comment on the parties' interpretation beyond stating the relevant facts.

Operating Fee Comparison

Time Periods	Sanford Air	Presidential Aviation
1983	**0%**	
1984	**0%**	
1985	**0%**	
1986	**0%**	
1987	**0%**	
1988	**.5%**	
1989	**.5%**	
1990	**.5%**	
1991	**.5%**	
1992	**.5%**	
1993	**.5%**	
1994	**.5%**	
1995	**.5%**	
1996	**.5%**	
1997	**.5%**	
1998	**.5%**	
1999	**.75%**[18]	
2000	**1.00%**	
2001	**1.25%**	
2002	**1.50%**	**.5%**
2003	**1.75%**	**.5%**
2004	**2.00%**	**.5%**
2005	**2.25%**	**.5%**
2006	**2.50%**	**.5%**
2007	**TERM ENDS**	**.5%+CPI**[19]
2008		**.5%+CPI**
2009		**.5%+CPI**
2010		**.5%+CPI**
2011		**.5%+CPI**
2012		**TERM ENDS**

(FAA Exhibit 1, Item 3, exhibits 1, 2, 5.)

Presidential Aviation is in at the middle of its agreement with the Town. Presidential Aviation's agreement began in 2002 and expires in 2012. Presidential Aviation is paying a .5% operating fee and its fee increases are subject to a rate increase adjustment by the Consumer Price Index every 5 years.

The Complainant has enjoyed an advantage by not paying an operating fee during the first five years of its Lease and .5% from 1988 to 1998. While the Complainant and Town disagree with the amount of the annual increase in the operating fee from 1998 through 2006, the fact remains that the Complainant and the Town negotiated an agreement that offered the Complainant an extension for the Lease until 2006 in return for paying a

[18] Notwithstanding the operating fee rate increases depicted on the chart, the Complainant has and is currently paying the Town an operating fee of .75%

[19] Presidential Aviation's rates are adjusted according to the consumer price index every 5 years

higher operating fee. During those 15 years, Complainant was afforded the opportunity to recapture some of its investment in exchange for the lower rate.

The FAA notes that an airport sponsor is not required to charge the same amount for competing fixed-base operators using the airport from dissimilar facilities and at different points in time. In this regard, Presidential Aviation's cost of constructing its off-airport facilities is irrelevant and not a consideration in this finding.

The Town's Federal obligations do not compel it to make retroactive rate adjustments to rates of competing fixed-base operators. As we have indicated in *Penobscot Air Services Ltd. v FAA, 164 F.3 713 (1st Cir. 1999),* the purpose of the FAA Airport Compliance program is not to resolve landlord-tenant disputes; it is to ensure that an airport sponsor operates and manages the airport in a manner consistent with its Federal obligations. A Complainant's failure to strike a good deal or conduct due diligence in negotiating the terms of its Lease is not a basis for unjust economic discrimination by an airport sponsor under the FAA Grant Assurances.

Here, the operators are not similarly situated, and the rate disparity is justified. Thus, FAA finds no basis for the Complainant's allegations and finds that the Town's actions are consistent with its Federal obligations.

C. Exclusive Rights

The Complainant does not expand or explain its allegation that the Town has created an exclusive right. Furthermore, the presence of two competing FBOs would negate such a contention unless there was documentation to support that one FBO received rights not granted the other.

Here, the Administrative Record does not support the Complainant's allegation that Presidential Aviation was granted an exclusive right. thus, there was no direct or constructive grant of an exclusive right.

VI. FINDINGS AND CONCLUSIONS

Upon consideration of the submissions and responses by the parties, and the entire record herein, and the 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:

- The Town is not in violation of Title 49 U.S.C. § 47107(a)(1)(4)(5), and the instruments of surplus property conveyance pursuant to Title 49 U.S.C. § 47152 and related Federal Grant Assurance 22, *Economic Nondiscrimination,* since it has not denied the Complainant access to the Airport on reasonable terms, for the purpose of conducting a commercial aeronautical activity, and the Town's actions are not unjustly discriminatory.

- The Town is not in violation of Title 49 U.S.C. § 40103(e), and the related Federal Grant Assurance 23, *Exclusive Rights,* since it has not granted an

exclusive right, constructively or directly, when it executed an agreement with Presidential Aviation to conduct a commercial aeronautical activity on Sanford Airport.

ORDER

ACCORDINGLY, the FAA does not find the Town of Sanford to be in violation of Federal law or its Federal grant obligations. The Complaint is dismissed.

All Motions not expressly granted in this Determination are denied.

These Determinations are made under 49 U.S.C. § 40103(e), and 49 U.S.C. § 47107(a)(1)(4)(5) and the instruments of surplus property conveyance pursuant to Title 49 U.S.C. § 47152 and related Federal Grant Assurance 22, *Economic Nondiscrimination.*

RIGHT OF APPEAL

This Director's Determination is an initial agency determination and does not constitute a final agency action and order subject to judicial review. [14 CFR 16.247(b)(2)]. A party to this Complaint 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.

J.R. White for

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

May 22, 2006

Date: _____

FAA Exhibit 1

Docket No. 16-05-04

Director's Determination
INDEX OF ADMINISTRATIVE RECORD
Docket No. 16-05-04

Sanford Air, Incorporated
V.
The Town of Sanford, Maine

The following documents (items) constitute the administrative record in this proceeding:

Item 1. FAA Form 5010 for the Airport last inspected 16 February 2000.

Item 2. Airport Sponsor AIP Grant History listing the federal airport improvement assistance provided by the FAA to the Airport Sponsor since fiscal year 1982, report date 26 October 2005

Item 3. Formal Complaint 28 March 2005. List of Exhibits includes:

(1.) Original Fixed-base Operator airport tenant lease between Sanford Air, Inc., and the Town of Sanford, dated September 21, 1983.
(2.) Lease extension between Sanford, Inc., and Town of Sanford, dated 1 October 1988.
(3.) Excerpt page 11 from the *Sanford Regional Airport Master Plan Update*, by Hoyle, Tanner and Associates, Inc., December 2003
(4.) Correspondence from Town Attorney to Presidential Aviation, Inc., as successor to Presidential Aviation of Sanford, LLC regarding the Town's intent to collect rental fees dated 9 April 1997.
(5.) Access and Operating Rights Agreement between Presidential Aviation of Sanford, LLC and the Town of Sanford, dated 15 May 2002.
(6.) Complaint letter from Sanford Air, Inc. to FAA New England Region, dated 23 May 2003
(7.) Response letter FAA New England Region to Sanford Air, Inc. dated 31 December 2003.
(8.) Complaint letter from Sanford Air, Inc. to FAA New England Region dated 7 May 2004.

(9.) Correspondence from Town Manager to Sanford Air, Inc. with offer to amend rental fees upon condition of shifting burden of auditing costs for prior submissions dated 2 June 2004.
(10.) Response letter from Sanford Air, Inc. to Town Manager rejecting new auditing terms, dated 10 July 2004.
(11.) Response letter from Town Manager to FAA New England Region dated 5 August 2004.
(12.) Response letter from FAA New England Region to Sanford Air, Inc., dated 29 December 2004.
(13.) Cost estimate for auditing Sanford Air's financial records, submitted by Baker Newman and Noyes, certified public accountants, dated 6 May 2002
(14.) Comparative fuel sales table: Sanford Air, Inc./Presidential Aviation undated
(15.) Sanford Airport diagram, undated

Item 4. Notice of Docket, dated April 13, 2005.

Item 5. Letter from Town Manager to Complainant, regarding formal complaint, dated 19 May 2005

Item 6. Letter from Complainant to Town Manager regarding formal complaint, dated 26 May 2005.

Item 7. Letter extending time to file Answer, dated 3 June 2005.

Item 8. Letter extending time to file Rebuttal, dated 17 June 2005.

Item 9. Respondent's Answer, Affirmative Defenses and Partial Motion to Dismiss, docketed 21 June 2005, including:

(a) Cover letter dated June 16, 2005, from Town of Sanford
(b) Verified Memorandum of Points and Authorities in Support of Respondent's Partial Motion to Dismiss
(c) Motion to Dismiss Exhibit 1 Letter from Town of Sanford to Sanford Air, Inc, dated 23 April 2004.

Item 10. Respondent's Exhibit 1 to Answer, Letter from Town Manager to FAA New England Region, regarding informal complaint, dated 5 August 2004, including exhibits

(1) Sanford Air, Inc., Lease dated 21 September 1983.
(2) Sanford Air, Inc., Lease extension dated 1 October 1988.
(3) Letter from Town Administrator to Sanford Air, Inc., dated 7 May 2003.
(4) Letter from Sanford Air, Inc. to Town Administrator, dated 6 June 2003.
(5) Sanford Regional Airport Master Plan Update dated December 2003.
(6) Minimum Standards and Procedures for the Lease and/or Use of Property and Facilities for Aeronautical Activities, December 4, 1979.
(7) Proposed Changes and Explanation, created by Sanford Air, Inc., dated October 12, 1988.
(8) Letter to Airport Manager, regarding Sanford Air Audit, dated 25 July 2003.
(9) Letter from Sanford Air, Inc. to Town Administrator, dated 4 January 2002.
(10) Sanford Air, Inc. accumulated fuel sales summary for 1998, undated.
(11) Fuel flowage fee calculation of October 31, 2001, dated 31 September 2001.
(12) Electronic transmission from Airport Manager to Sanford Air, Inc. regarding lease amendment dated 13 February 2004.

(13) Sanford Airport Advisory Committee Meeting Minutes dated 10 February 2004.
(14) Letter from Airport Manager to Presidential Aviation, LLC, dated 7 July 2004.
(15) Town of Sanford Fees and Rates Recovery Summary Table, undated
(16) Airport Lease and Rights Agreement between the Town of Sanford and AirTech Management, Inc., dated 6 February 2001.
(17) Airport Lease and Rights Agreement among the Town of Sanford and AirTech Management, Inc., and Warrior (AeroMarine), Inc., dated January 2003.dated 6 February 2001.
(18) 2004-2005 Airport Operating and Maintenance Budget.
(19) Access and Operating Rights Agreement among Presidential Aviation, LLC and the Town of Sanford, dated 1 May 2002.
(20) Letter from Town Manager to Sanford Air, Inc., regarding settlement of Lease Dispute, 2 July 2004.

Item 11. Respondent's Exhibit 2 to Answer. Letter from Town Manager to Sanford Air, Inc., regarding outstanding issues, dated 18 May 2005.

Item 12. Respondent's Exhibit 3 to Answer. Letter from Town Manager to Sanford Air, Inc., regarding Operating fees, dated 4 April 2005.

Item 13. Complainant's Reply dated 12 July 2005.

Item 14. Respondent's Rebuttal dated 2 August 2005.

Item 15. Electronic mail from Town of Sanford to FAA regarding Sanford Air's payment history (information requested by FAA), dated November 8, 2005.

Item 16. Electronic mail from Town of Sanford to FAA regarding Sanford Air's payment history (information requested by FAA) dated November 9, 2005.

Item 17. Electronic mail from Complainant to FAA regarding Items 15 and 16 provided to him by Respondent's Counsel, dated November 14, 2005.

Item 18. Notice of Extension of Time for Director's Determination until February 7, 2006, FAA, dated December 7, 2005.

Item 19. Electronic mail from Town of Sanford to FAA regarding provisions of Minimum Standards regarding rate increases for Presidential Aviation (information requested by FAA) dated January 27, 2006. Attached *Minimum Standards and Procedures for the Lease and/or use of Property and Facilities for Aeronautical Property.*

Item 20. Electronic mail from FAA to Town of Sanford requesting the Town of Sanford to amend the docket to include the Southern Maine agreement dated February 6, 2006.

Item 21. The Town of Sanford's Supplemental Documents, dated February 9, 2006, including:

a. Cover letter dated February 9, 2006 to FAA Office of Chief Counsel
b. Consent to Assignment of Access and Operating Rights Agreement, (Respondent's Exhibit 4).
c. Minimum Standards and Procedures for the Lease and/or Use of Property and Facilities for Aeronautical Activities, adopted June 21, 2005(Respondent's Exhibit 5).

Item 22. Notice of Extension of Time for Director's Determination until March 31, 2006, dated March 6, 2006.

Item 23. Notice of Extension of Time for Director's Determination until April 30, 2006, dated March 27, 2006.