

**UNITED STATES DEPARTMENT OF TRANSPORTATION**  
**FEDERAL AVIATION ADMINISTRATION**  
**WASHINGTON, DC**

**Platinum Aviation and Platinum Jet Center BMI**

**Complainant,**

**v.**

**Bloomington-Normal Airport Authority, Illinois**

**Respondent.**



**DIRECTOR'S DETERMINATION**

**I. INTRODUCTION**

This matter is before the Federal Aviation Administration (FAA) based on the Complaint filed under 14 Code of Federal Regulations (14 CFR) Part 16, by Platinum Aviation and Platinum Jet Center BMI (Platinum/Complainant). The Complaint was filed against the Bloomington-Normal Airport Authority (BNAA), Illinois (BNAA/Airport Sponsor), which owns and operates the Central Illinois Regional Airport (BMI/Airport) in Bloomington, Illinois.<sup>1</sup>

In this Part 16, Complainant alleges that the BNAA, by its actions concerning Complainant's operation of an FBO at the Airport, is in violation of Grant Assurance 22, *Economic Nondiscrimination*, Grant Assurance 23 *Exclusive Rights*, Grant Assurance 38 *Hangar Construction*, and potentially, Grant Assurance 5, *Preserving Rights and Powers*.<sup>2</sup> Complainant seeks an FAA determination that BNAA is in violation of its Federal grant assurances.<sup>3</sup> The BNAA denies all allegations that it violated its

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<sup>1</sup> See FAA Exhibit 1, Item 1, p. 3.

<sup>2</sup> FAA Exhibit 1, Item 1, p. 3-4.

<sup>3</sup> FAA Exhibit 1, Item 1, p. 2. In the Complaint, Complainant specifically requests that the FAA declare that BNAA has operated and is in ongoing violation of 49 USC §§ 47107(a)(1), (4) and (21) and Sponsor Assurances Nos. 22, 23, and 38, in its conduct relating to Platinum; that the Platinum Agreements are not in violation of Sponsor Assurances and 2(a) in the alternative to Request No.2, Platinum requests a Director's Determination and a Final Agency Decision that (i) identifies which provisions of the Platinum Agreements are in violation of Sponsor Assurances; (ii) provides a determination regarding the least intrusive remedy that the FAA would find acceptable given the circumstances; (iii) finds BNAA's conduct in failing to promptly remedy the situation is in violation of Sponsor Assurance No.5; and (iv) requires BNAA to remit any and all federal funds received while it was in violation of Sponsor Assurance No.5. Moreover, Complainant ask that the BNAA be required to submit a corrective action plan explaining how Sponsor Assurance violations will be addressed, that all federal grant funds designated for BNAA's use at the Central Regional Airport Authority shall be withheld until BNAA restores itself to compliance with its Sponsor Assurances; and that whatever and further relief the Agency may deem necessary or appropriate under the circumstances. See FAA Exhibit 1, Item 1, p. 17-18.

Federal obligations,<sup>4</sup> and requests the dismissal of the Complaint,<sup>5</sup> but requests that the FAA assist in determining whether any of the provisions of the BNAA's agreements with Complainant (Platinum Agreements) violate the BNAA's Federal obligations.<sup>6</sup> Under the particular circumstances existing at the Airport and the evidence of record, as discussed below, the Director concludes that:

- ❑ The actions by the BNAA concerning Complainant's operation as a FBO at the Airport are consistent with Grant Assurance 22 *Economic Nondiscrimination*, 49 USC 47107 (a)(1) through (6), which requires the BNAA to make the Airport available to all types, kinds, and classes of aeronautical activity on reasonable terms, and without unjust discrimination.
- ❑ The actions by the BNAA concerning Complainant's operation as a FBO at the Airport are consistent with Grant Assurance 23 *Exclusive Rights*, 49 USC 47107(a) (4), which prohibit the granting of exclusive right for the use of the airport.
- ❑ The actions by the BNAA concerning Complainant's operation as a FBO at the Airport are consistent with Grant Assurance 38 *Hangar Construction*, 49 USC 47107(a) (21), which requires that if the airport sponsor and a person who owns an aircraft agree that a hangar is to be constructed at the airport for the aircraft at the aircraft owner's expense, the airport sponsor will grant to the aircraft owner for the hangar a long term lease that is subject to such terms and conditions on the hangar as the airport owner or operator may impose.
- ❑ The actions by the BNAA concerning Complainant's operation as a FBO at the Airport and to regain control critical airfield infrastructure (taxiways) and ensure safe operations on its airport movement areas are consistent with Grant Assurance 5 *Preserving Rights and Powers*, 49 USC 47107(a), which state that an airport sponsor cannot take any action that may deprive it of its rights and powers as the airport sponsor and requires the airport sponsor not sell, lease, encumber, or otherwise transfer or dispose of any part of its title or other interests in the airport property without the prior approval of the FAA.
- ❑ The actions by the BNAA concerning Complainant's operation as a FBO at the Airport and to regain control critical airfield infrastructure (taxiways) and ensure safe operations on its airport movement areas are consistent with Grant Assurance 19, *Operation and Maintenance*, implementing 49 U.S.C. § 47107(a)(7), which requires the airport sponsor operate the airport and all facilities at all times in a safe and serviceable condition and not cause or permit any activity or action thereon which would interfere with its use for airport purposes.
- ❑ The actions by the BNAA concerning Complainant's operation as a FBO at the Airport and to regain control critical airfield infrastructure (taxiways) and ensure safe operations on its airport movement areas are consistent Grant Assurance 29, *Airport Layout Plan (ALP)*, implementing 49 USC Section 47107(a) (16) requires an airport sponsor to keep up-to-date the ALP and to show on its ALP the boundaries of the airport and all proposed additions thereto, the location and nature of all existing and proposed airport facilities and structures.

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<sup>4</sup> FAA Exhibit 1, Item 8, p. 1.

<sup>5</sup> FAA Exhibit 1, Item 2.

<sup>6</sup> FAA Exhibit 1, Item 8, p. 22.

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

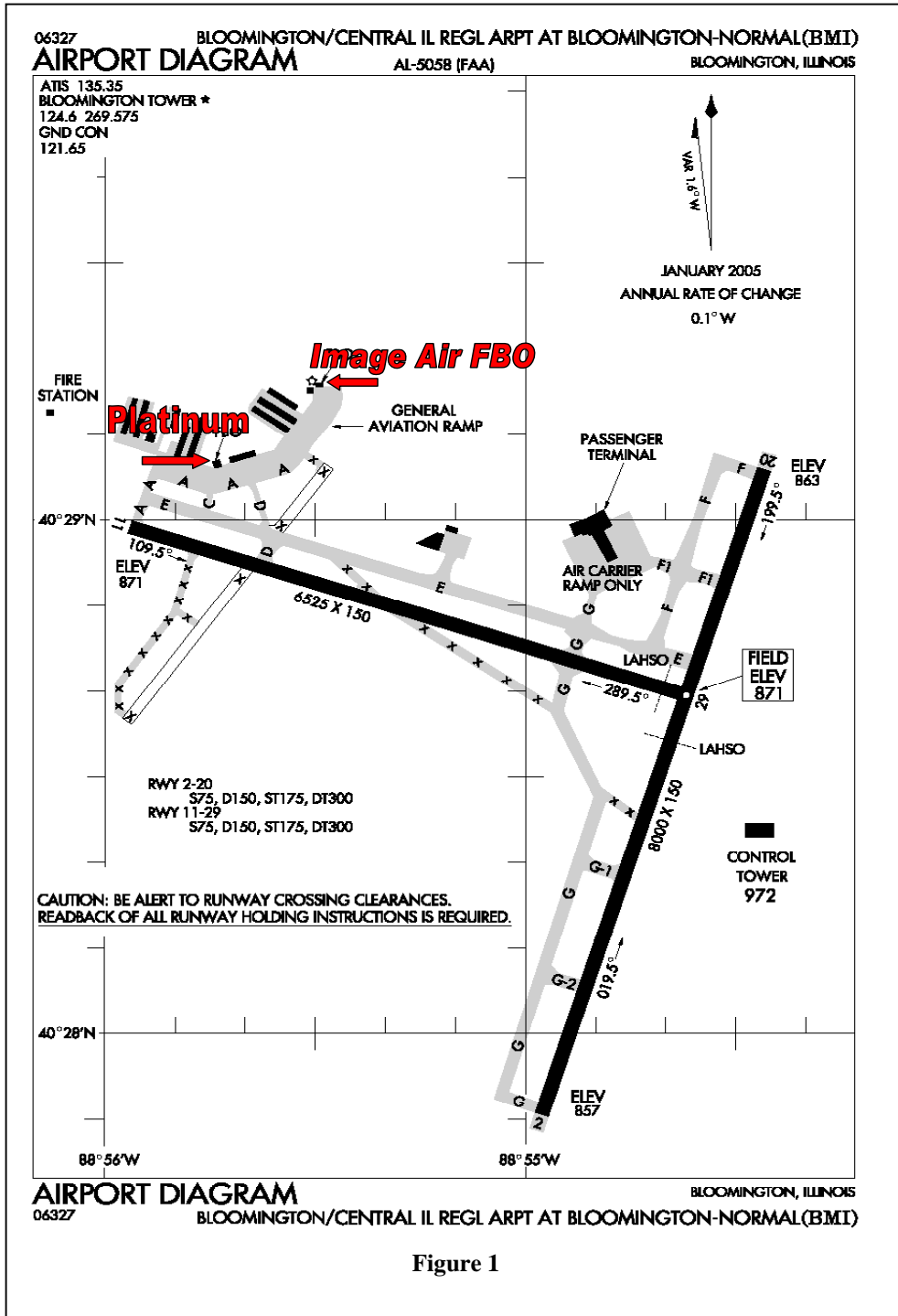


Figure 1

## II. THE COMPLAINANT

The Complainants in this proceeding are Platinum Aviation and Platinum Jet Center BMI. Both companies are Illinois limited liability companies managed by its President and CEO, Mr. Lincoln Francis. Platinum Jet Center is related to Executive Flight Management, a Chicago-based aircraft management and charter company, founded by Mr. Lincoln Francis.<sup>7</sup> In this Complaint, all of these entities are collectively referred to as Platinum or Complainant.<sup>8</sup>

## III. THE AIRPORT AND ITS FEDERAL OBLIGATIONS

The Bloomington-Normal Airport Authority (BNAA) owns and operates the Central Illinois Regional Airport (Airport/BMI) in Bloomington, Illinois. The BNAA is a municipal airport authority pursuant to 70 Illinois Compiled Statutes ILCS 5/1, charged with the operation of the Airport.<sup>9</sup> The BNAA administers its duties, in part, through a Board of Commissioners.<sup>10</sup> The Airport is a commercial service airport and holds a 14 CFR Part 139 Class I Airport Operating Certificate (AOC).<sup>11</sup> The Airport consists of two partially intersecting runways (runways 11/29 and 2/20) with accompanying instrument approaches, along with a system of partial parallel taxiways and aprons for air carrier, freight, and general/corporate aviation.<sup>12</sup> The Airport is the base for more than 100 aircraft and serves a wide spectrum of aeronautical activities totaling 40,000 annual operations.<sup>13</sup> The Airport is served by 5 major airlines, which are responsible for approximately 20 daily flights and the movement of over 519,000 passengers on an annual basis.<sup>14</sup>

Two FBOs are engaged in providing services at the Airport. One is Image Air (aka Image Air of Southwest, Florida), which provides several aeronautical services including maintenance, flight training, charter service, aircraft sales, and general FBO services.<sup>15</sup> The second FBO at the Airport is Complainant, Platinum. Complainant provides several aeronautical services, including fuel, aircraft parking, hangars, and hangar services.<sup>16</sup> Before Platinum came into the Airport, Image Air was the only full-service FBO providing aircraft and fueling services at the Airport and had been in business since 1973.<sup>17</sup> Figure 1, above, depicts the relative location of the two FBOs on the northwest side of the Airport along Taxiway A.

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<sup>7</sup> <http://www.platinumjetcenter.com/about.htm> and <http://executiveflightmgmt.com/home.htm>.

<sup>8</sup> FAA Exhibit 1, Item 1, p.1. The BNAA collectively refers to Complainants, Platinum Jet Center BMI, LLC and Platinum Aviation, LLC as the "Platinum Parties" or "Complainants." FAA Exhibit 1, Item 3, p. 1.

<sup>9</sup> The Bloomington-Normal Airport Authority was established in accordance with the Illinois Airport Authority's Act in 1964, to own and operate what is now the Central Illinois Regional Airport ("Airport"). The Authority is the sponsor, for Federal grant purposes, of the Airport. FAA Exhibit 1, Item 3, Exhibit 1, p.1.

<sup>10</sup> FAA Exhibit 1, Item 1, p. 3. During relevant times, BNAA business has also been conducted by Executive Director Michael LaPier (negotiated and executed the Platinum Agreements and resigned in or about November 2004), Interim Executive Director Dave Anderson (served from approximately November 2004 through June 20, 2005), and current Executive Director Carl Olson (approximately June 20, 2005 through present). FAA Exhibit 1, Item 3, p. 21.

<sup>11</sup> [http://www.faa.gov/airports\\_airtraffic/airports/airport\\_safety/part139\\_cert](http://www.faa.gov/airports_airtraffic/airports/airport_safety/part139_cert)

<sup>12</sup> FAA Exhibit 1, Item 3, Exhibit 1, p. 2.

<sup>13</sup> FAA Exhibit 1, Item 12.

<sup>14</sup> <http://www.cira.com/>

<sup>15</sup> <http://www.imageair.com/index.htm>

<sup>16</sup> <http://www.airnav.com/airport/KBMI>

<sup>17</sup> FAA Exhibit 1, Item 1, p. 4, FAA Exhibit 1, Item 8, p. 8.

FAA records indicate that the planning and development of BMI has been financed, in part, with funds provided by the FAA under the Airport Improvement Program (AIP)<sup>18</sup> and, between 1983 and 2006, the Airport received more than \$83 million in federal airport development assistance in AIP grants.<sup>19</sup>

#### IV. ISSUES UNDER INVESTIGATION

The issues under investigation before the FAA are whether the actions by the BNAA concerning Complainant's operation as a FBO at the Airport are consistent with

- ❑ Grant Assurance 22 *Economic Nondiscrimination*, 49 USC 47107 (a)(1) through (6), which requires the BNAA to make the Airport available to all types, kinds, and classes of aeronautical activity on reasonable terms, and without unjust discrimination.
- ❑ Grant Assurance 23 *Exclusive Rights*, 49 USC 47107(a) (4), which prohibits the granting of an exclusive right for the use of the airport.
- ❑ Grant Assurance 38 *Hangar Construction*, 49 USC 47107(a) (21), which requires that if the airport sponsor and a person who owns an aircraft agree that a hangar is to be constructed at the airport for the aircraft at the aircraft owner's expense, the airport sponsor will grant to the aircraft owner a long term hangar lease that is subject to such terms and conditions on the hangar as the airport owner or operator may impose.
- ❑ Grant Assurance 5 *Preserving Rights and Powers*, 49 USC 47107(a), which states that an airport sponsor cannot take any action that may deprive it of its rights and powers as the airport sponsor and requires the airport sponsor not sell, lease, encumber, or otherwise transfer or dispose of any part of its title or other interests in the airport property without the prior approval of the FAA.
- ❑ Grant Assurance 19, *Operation and Maintenance*, implementing 49 U.S.C. § 47107(a)(7), which requires the airport sponsor operate the airport and all facilities at all times in a safe and serviceable condition and not cause or permit any activity or action thereon which would interfere with its use for airport purposes.
- ❑ Grant Assurance 29, *Airport Layout Plan (ALP)*, implementing 49 USC Section 47107(a) (16) requires an airport sponsor to keep up-to-date the ALP and to show on its ALP the boundaries of the airport and all proposed additions thereto, the location and nature of all existing and proposed airport facilities and structures.

#### V. BACKGROUND

Since 1973, Image Air has provided FBO services at the Airport.<sup>20</sup> In May 2001, Image Air sought protection under Chapter 11 of the U.S. Bankruptcy Code.<sup>21</sup> The company continues to do business at

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<sup>18</sup> FAA Exhibit 1, Item 3, p. 21.

<sup>19</sup> FAA Exhibit 2.

<sup>20</sup> FAA Exhibit 1, Item 3, p. 5, and <http://www.imageair.com/>.

<sup>21</sup> U.S. Bankruptcy Court for the Central District of Illinois, Case No. 01-72-189. FAA Exhibit 1, Item 3, p. 5. Ultimately, the bankruptcy court approved a last minute restructuring plan proposed by the debtor in possession, allowing Image Air to

the Airport today as a result of a 1996 FBO agreement with the BNAA and a 2006 extension to that agreement.<sup>22</sup> This led the BNAA to fear that it could lose the only FBO at the Airport, so the BNAA sought a second FBO to ensure availability of services at the Airport.<sup>23</sup> As a result, on July 18, 2002, the BNAA issued a Request for Proposal (RFP) for additional FBO services.<sup>24</sup> In response to the RFP, the BNAA received four proposals, including one from Complainant.<sup>25</sup> Complainant's proposal was eventually selected.<sup>26</sup>

Negotiations ensued and three separate contracts between the BNAA and Complainant were drafted: (1) the *Ground Lease Agreement* between Platinum Aviation and BNAA, (2) the *Agreement Authorizing Services* between Platinum Jet and BNAA, and (3) the *Agreement Authorizing the Sale of Aviation Fuel* between Platinum Jet and BNAA. These agreements are collectively referred to as "the Platinum Agreements" and were executed on July 30, 2004.<sup>27</sup>

In August 2004, Platinum began submitting and the BNAA began accepting rent payments and other performance consistent with the Platinum Agreements.<sup>28</sup> The Ground Lease Agreement requires Complainant to construct and maintain new facilities, including an aviation hangar and a fuel farm, and therefore, in October 2004, Complainant applied for and received the appropriate building permit from the City of Bloomington.<sup>29</sup>

The BNAA applied for FAA approval relating to the airspace study for the Platinum project, and in November 2004, the BNAA submitted to the FAA Great Lakes Region, on behalf of Complainant's project, a Notice of Proposed Construction or Alteration (Notice) of the construction project relating to the hangar and the fuel farm.<sup>30</sup> In November 2004, a new airport director took over operations at the Airport on an interim basis.<sup>31</sup> On December 2, 2004, based on airspace study 2004-AGL-867-NRA,<sup>32</sup> the FAA responded to the BNAA's notice indicating that it had no material objections to the project.<sup>33</sup>

On December 9, 2004, the BNAA discussed the Platinum Agreements at its regular Board meeting and opted to permit Complainant to proceed with construction, although the BNAA recognized that there was some uncertainty regarding the actual location of Complainant's construction.<sup>34</sup> Complainant

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continue its operations at the Airport. Image Air's FBO agreement expired on October 6, 2006. The BNAA proposed, and Image Air accepted, to extend it pending the resolution of this Part 16 investigation. FAA Exhibit 1, Item 3, p. 6. Also see FAA Exhibit 1, Item 22.

<sup>22</sup> FAA Exhibit 1, Item 21 and Item 22.

<sup>23</sup> FAA Exhibit 1, Item 3, p. 5-6. Image Air's situation eventually improved, but third parties, including the principal for the Platinum Parties, attempted to acquire Image Air's assets in a bankruptcy court sponsored auction.

<sup>24</sup> FAA Exhibit 1, Item 3, Exhibit 5.

<sup>25</sup> FAA Exhibit 1, Item 3, p. 6. Executive Flight Management-Trans American Charter Ltd, was the actual company that submitted the proposal.

<sup>26</sup> FAA Exhibit 1, Item 1, p. 13.

<sup>27</sup> FAA Exhibit 1, Item 1, p. 4.

<sup>28</sup> FAA Exhibit 1, Item 1, p. 5, FAA Exhibit 1, Item 3, p. 22.

<sup>29</sup> FAA Exhibit 1, Item 1, p. 5, FAA Exhibit 1, Item 3, p. 9.

<sup>30</sup> FAA Exhibit 1, Item 1, p. 5.

<sup>31</sup> FAA Exhibit 1, Item 3, p. 9.

<sup>32</sup> FAA Exhibit 1, Item 9. The airspace determination by the ADO was based on a modified location compared to the location originally agreed to by the parties. See FAA Exhibit 1, Item 3, Exhibit 7, Exhibit F.

<sup>33</sup> FAA Exhibit 1, Item 1, p. 5, FAA Exhibit 1, Item 3, p. 9.

<sup>34</sup> FAA Exhibit 1, Item 1, Exhibit H.

broke ground on its project site in December 2004.<sup>35</sup> Soon thereafter, Complainant's contractor uncovered an old storm sewer pipe that had not been disclosed in the underground utilities map that BNAA had provided to Complainant.<sup>36</sup> In addition to the sewer pipe, an issue related to the connection of a water main into the facility also arose.

By March 2005, the BNAA had agreed to a plan to relocate the undisclosed storm sewer pipe and in October 2005, the water main issue was also resolved.<sup>37</sup> In addition to these two issues, after the BNAA gave its approval for construction, the location of the hangar was modified and moved about 50 feet.<sup>38</sup>

On December 13, 2004, Image Air, the existing FBO at the Airport, informally complained to the FAA Chicago Airports District Office (ADO) that the construction of Complainant's new FBO facility would give Complainant an unfair advantage. Image Air also argued that the location of Complainant's FBO hangar was too close to the taxiway/taxilane and restricted access to Image Air's own facility.<sup>39</sup> Image Air noted that it expected to file a lawsuit to prevent the construction. Although at the time, the FAA did not state whether there were compliance issues or not, the FAA suggested talking with the BNAA to explore whether the issues could be resolved informally. As part of its informal review of the case, the FAA rechecked airspace study 2004-AGL-867-NRA and verified that Complainant's hangar met the airport design standards for taxiway and taxilane centerline-to-object clearances but noted that it would be difficult to park any aircraft on the apron in front of the hangar due to lack of taxiway centerline-to-object clearance.<sup>40</sup>

On January 7, 2005, Image Air initiated litigation in State court, naming Complainant and the BNAA as defendants, and seeking injunctive relief against the BNAA and Complainant concerning Complainant's facility and the Platinum Agreements. Both the BNAA and Complainant denied Image Air's claims.<sup>41</sup> The case is Image Air v. Bloomington Normal Airport Authority, et. al., Case No 05 CH04.<sup>42</sup>

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<sup>35</sup> FAA Exhibit 1, Item 1, p. 5.

<sup>36</sup> FAA Exhibit 1, Item 3, p. 24.

<sup>37</sup> FAA Exhibit 1, Item 1, p. 8. The BNAA also stated that although Complainant believes that "the storm sewer issue is further proof of the Authority's conspiracy to unjustly discriminate against them in an attempt to undermine their presence at the Airport", despite the Complainant's protestations, the "storm sewer was a surprise to the Authority as much as it was to the Platinum Parties, and as soon as the problem was discovered, the Authority staff cooperated to resolve the problem." Moreover, there are arguments concerning on whether the BNAA "authorized Platinum to proceed with re-routing the storm sewer," that the BNAA "ought to pay for relocating the storm sewer because the Authority had given them permission to do so" or that "the storm sewer issue seriously delayed construction." However, these arguments are not under review here because this situation was also resolved. FAA Exhibit 1, Item 8, p. 5-6. For additional information on these matters, see FAA Exhibit 1, Item 8, p. 7.

<sup>38</sup> FAA Exhibit 1, Item 9.

<sup>39</sup> A *Taxiway* is defined a path established for the taxiing of aircraft from one part of an airport to another. A *Taxilane* is the portion of the aircraft parking area used for access between taxiways and aircraft parking positions. FAA Advisory Circular 15-5300-13 *Airport Design*, Change 10, Chapter 1, p. 3. Apron taxiways may be located either inside or outside the movement area. Apron taxiways require the same separations as other taxiways. FAA Advisory Circular 15-5300-13 *Airport Design*, Change 10, Chapter 4, p. 35.

<sup>40</sup> FAA Exhibit 1, Item 9.

<sup>41</sup> FAA Exhibit 1, Item 3, p. 12-13.

<sup>42</sup> FAA Exhibit 1, Item 1, p. 6. Also see FAA Exhibit 1, Item 3, p. 12.

On February 17, 2005, Complainant filed a Cross-Claim against the BNAA, followed by a Verified First Amended Cross Claim on July 22, 2005. Complainant claimed that the BNAA had breached its contractual obligations by (1) refusing to ratify the Platinum Agreements; (2) refusing to reasonably approve plans submitted by the Platinum Parties; (3) delaying the construction of the hangar by failing to request FAA approval in a timely manner; (4) providing inaccurate information regarding ground utilities; (5) refusing to authorize access to Airport property to run a water main; (6) issuing two separate "Stop Work Orders"; (7) not honoring the Ground Lease option; (8) attempting to terminate the Platinum Agreements by not accepting rent payments; and (9) erecting barricades to prevent the Platinum Parties from accessing the construction site. In addition, Complainant claimed over \$4 million in damages resulting from the BNAA's alleged actions and omissions.<sup>43</sup>

Following a 10-day trial, a jury rendered a verdict finding that Complainant had proved two claims in their allegations against the BNAA, namely: (1) that the Authority "breached the contracts by unlawfully erecting barricades that physically prevented Platinum and its contractors from accessing the construction site with such actions preventing Platinum from being able to access its leased property or otherwise exercise their rights under the Platinum Agreements," and (2) that the Authority "breached the contracts by delaying the construction of the hangar structure in multiple ways, including the failure to submit FAA approval documents in a timely manner." The jury rejected Complainant's demand for more than \$6.4 million in damages, and instead awarded \$8,500.<sup>44</sup>

In the intervening time, on March 11, 2005, the BNAA had filed a Cross-Claim against Complainant alleging that the Priority Use Area in the Services Agreement and the option in the Ground Lease violated the Airport's Federal obligations,<sup>45</sup> and that as such, "the Platinum Agreements were invalid *ab initio*."<sup>46</sup> On May 23, 2005, Complainant provided written notice to the BNAA that it wished to exercise the option to lease the area identified as Hangar #2, as provided in the Ground Lease Agreement, Section 8.<sup>47</sup>

In the spring of 2005, the BNAA had contacted the FAA Great Lakes Region, and the FAA informed the BNAA that certain portions of the Platinum Agreements could put the Authority in breach of its Grant Assurances.<sup>48</sup> The FAA suggested to the Airport that they review the agreement and try to make the necessary corrections to eliminate any potential compliance issues.<sup>49</sup> To help with its compliance issues, the BNAA contracted with a consulting company to review the Platinum Agreements. The consulting company's review identified several areas that would likely put the Airport in noncompliance.<sup>50</sup>

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<sup>43</sup> FAA Exhibit 1, Item 3, p. 13-14.

<sup>44</sup> FAA Exhibit 1, Item 3, p. 15.

<sup>45</sup> FAA Exhibit 1, Item 3, p. 14. Although, the BNAA also argued that the former Executive Director had no authority to bind the BNAA by entering into agreements that would violate the Airport's sponsor assurances, the Director notes that the issue under review is whether the BNAA, as the airport sponsor, is in compliance with its Federal obligations.

<sup>46</sup> FAA Exhibit 1, Item 3, p. 14.

<sup>47</sup> FAA Exhibit 1, Item 1, p. 6.

<sup>48</sup> FAA Exhibit 1, Item 3, p. 11. Reference was made to five Grant Assurances: Grant Assurances included Grant Assurance 5, *Preserving Rights and Powers*, Grant Assurance 19 *Operations and Maintenance*, Grant Assurance 22 *Economic Non-Discrimination*, Grant Assurance 23 *Exclusive Rights* and Grant Assurance 29 *Airport Layout Plan*. FAA Exhibit 1, Item 1, Exhibit K.

<sup>49</sup> FAA Exhibit 1, Item 9.

<sup>50</sup> FAA Exhibit 1, Item 9. See FAA Exhibit 1, Item 1, Exhibit T, for a copy of the consultant's report.



In June 2005, BNAA began sending back the rent payments tendered by Platinum pursuant to its Ground Lease Agreement<sup>51</sup> “due to concerns about the validity and interpretation of the Platinum Agreements.”<sup>52</sup> On June 10, 2005 and later on June 30, 2005, the BNAA issued two Stop Work Orders. The June 10th Order directed that construction on the Platinum project cease alleging that the Platinum Agreements were in violation of five Grant Assurances between the BNAA and the FAA. The June 30th Order was based on the need to complete a "CATEX Study [Categorical Exclusion]."<sup>53</sup> In response to both Stop Work Orders, Complainant took the position that it “has no intention of abiding by the stop work orders issued by the Bloomington Normal Airport Authority (BNAA)” based on the “information currently available.”<sup>54</sup>

Also in June 2005, the BNAA requested a meeting with FAA officials and disclosed that it considered itself to be in violation of the Grant Assurances because of certain terms it had agreed to in the Platinum Agreements. The BNAA requested from the FAA a letter or order affirming BNAA's position that the Platinum Agreements were inconsistent with the Grant Assurances.<sup>55</sup> On July 8, 2005, the BNAA met with the FAA to discuss the Platinum Agreements<sup>56</sup> and on July 14, 2005, the BNAA wrote to the FAA asking for a legal determination on the validity of the Platinum Agreements.<sup>57</sup> The FAA did not respond because, in part, the BNAA did not provide sufficient information.<sup>58</sup>

In the intervening time, in early July 2005, the BNAA blocked Complainant's construction site over a disagreement concerning the June Stop Work Orders.<sup>59</sup> On July 20, 2005, the trial court accepted further evidence and briefing relating to an injunction proceeding mentioned above and on August 11, 2005, the Court entered its written preliminary injunction against the BNAA. The injunction prevented the BNAA from hindering Complainant's construction efforts and found a likelihood that Platinum would prove that the Platinum Agreements were valid and enforceable against BNAA.<sup>60</sup> The BNAA appealed this ruling to the Illinois Fourth District Court of Appeals, but later withdrew its appeal.<sup>61</sup>

On September 16, 2005, the BNAA suggested a possible solution that included a proposal to "delete [from the Platinum Agreements] any provision" that violates “sponsor assurances.”<sup>62</sup> Also in September 2005, counter-proposals were considered, including a request for \$2 million to reform the Platinum Agreements in accordance with the subrogation provisions contained in the agreements.<sup>63</sup>

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<sup>51</sup> FAA Exhibit 1, Item 1, p. 7, FAA Exhibit 1, Item 3, p. 24.

<sup>52</sup> FAA Exhibit 1, Item 3, p. 23.

<sup>53</sup> FAA Exhibit 1, Item 1, p. 7. In the letter on behalf of the BNAA, Complainant's was informed “that there had not yet been an environmental categorical exclusion approval for the project, and that any additional work on the site would slow such FAA approval.” FAA Exhibit 1, Item 1, p. 9.

<sup>54</sup> FAA Exhibit 1, Item 1, Exhibit M, letter dated July 1, 2005.

<sup>55</sup> FAA Exhibit 1, Item 1, p. 8.

<sup>56</sup> FAA Exhibit 1, Item 3, Exhibit 2, letter dated July 28, 2005 as Deposition Exhibit #4.

<sup>57</sup> FAA Exhibit 1, Item 8, Exhibit 2, letter dated July 14, 2005.

<sup>58</sup> FAA Exhibit 1, Item 3, Exhibit 2, letter dated July 28, 2005 as Deposition Exhibit #4.

<sup>59</sup> FAA Exhibit 1, Item 3, p. 26.

<sup>60</sup> FAA Exhibit 1, Item 1, p. 9. As part of its Order, the trial court restrained BNAA from interfering with Platinum's ability to install a water line to provide the hangar facility with accessible water. Following additional litigation, the BNAA provided an easement as contemplated by the parties. FAA Exhibit 1, Item 1, p. 10.

<sup>61</sup> FAA Exhibit 1, Item 1, p. 10.

<sup>62</sup> FAA Exhibit 1, Item 1, Exhibit M, letter dated September 16, 2005.

<sup>63</sup> FAA Exhibit 1, Item 3, p. 18. In their Reply, Complainant states that their financial demands "were based upon breach of contract damages to be claimed in Court." FAA Exhibit 1, Item 8, p. 17. See FAA Exhibit 1, Item 1, Exhibit M, letter dated September 23, 2005, for additional details.

In February 2006, the FAA's Office of Regional Counsel in the Great Lakes Region received a letter from the BNAA requesting a legal determination on certain provisions of the Platinum Agreements and the findings by the BNAA consultants.<sup>64</sup> However, due to the fact that legal action has been taken against the Airport, the FAA opted not to issue a legal opinion on the matter.<sup>65</sup> Also in February 2006, the BNAA requested the Airport consultants prepare a proposed new FBO agreement for eventual use by Complainant and to do so in a way as to "cure the perceived Grant Assurance violations."<sup>66</sup>

On April 24, 2006, Complainant filed the present Complaint, which was docketed by the FAA as Complaint Docket No. 16-06-09.<sup>67</sup> On May 4, 2006, the BNAA Authority forwarded to Complainant the proposed new proposal and agreement, but the record contains no response from Complainant,<sup>68</sup> but on May 5, 2006, the BNAA filed a Motion and Memorandum in Support of Motion to Dismiss.<sup>69</sup> On May 30, 2006, and concerning the BNAA March 11, 2005 Cross-Claim against Complainant, the Court found, by means of a Summary Judgment Order, that the three Platinum Agreements were valid and enforceable contracts under Illinois law.

On June 30, 2006, the BNAA filed with the FAA its Part 16 Answer along with a Motion and Memorandum in Support of Motion to Dismiss, a Motion and Memorandum in Support of Motion for Declaratory Statement, and supporting evidence.<sup>70</sup> On July 20, 2006, a Motion requesting Extension of Time<sup>71</sup> was filed by the BNAA and this was accepted by the FAA on July 26, 2006, when an Order of Extension of Time was issued<sup>72</sup> and among other things, set the due date for the Authority's Rebuttal "on or before close of business August 30, 2006."<sup>73</sup>

On August 18, 2006, Complainant filed a Memorandum in Opposition to the BNAA's Motion to Dismiss (Reply).<sup>74</sup> Also on August 18, 2006, Complainant filed a Response to BNAA's Motion for Declaratory Statement.<sup>75</sup> This was followed by the BNAA's Rebuttal on August 30, 2006.<sup>76</sup> On September 14, 2006, the BNAA and Image Air executed an extension agreement to their existing FBO

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<sup>64</sup> FAA Exhibit 1, Item 3, Exhibit 2, letter dated February 2, 2006 as Deposition Exhibit #9.

<sup>65</sup> FAA Exhibit 1, Item 9.

<sup>66</sup> FAA Exhibit 1, Item 3, p. 18.

<sup>67</sup> FAA Exhibit 1, Item 1.

<sup>68</sup> FAA Exhibit 1, Item 3, p. 19. The BNAA states that it attempted to negotiate a resolution and has continued to do so after the jury reached its verdict in the state court litigation and that on June 1, 2006, it approached Complainant and "expressed a desire to negotiate to settle all outstanding issues" but that Complainant "rejected the approach and responded, 'the fight is not over, I will continue with this fight' and informed" the BNAA "that all future communication should be directed to his attorney." FAA Exhibit 1, Item 3, p. 19. For the actual letter and agreement dated May 4, 2006, see FAA Exhibit 1, Item 3, Exhibit 11.

<sup>69</sup> FAA Exhibit 1, Item 2. On May 24<sup>th</sup>, 2006, the Illinois Supreme Court denied Image Air's petition for leave to appeal a ruling involving an alleged violation of the Illinois Open Meeting Act involving the Bloomington Normal Airport Authority, originally filed in January 2005. <http://www.cira.com/>. This issue is not under consideration here and therefore, is not further discussed.

<sup>70</sup> FAA Exhibit 1, Item 3, p. 1.

<sup>71</sup> FAA Exhibit 1, Item 4.

<sup>72</sup> FAA Exhibit 1, Item 5.

<sup>73</sup> FAA Exhibit 1, Item 8, p. 1.

<sup>74</sup> FAA Exhibit 1, Item 6.

<sup>75</sup> FAA Exhibit 1, Item 7.

<sup>76</sup> FAA Exhibit 1, Item 8.

agreement to “60 days following final action in the pending proceeding in FAA Docket No. 16-06/09.”<sup>77</sup> On September 25, 2006, the BNAA filed an Errata to its Rebuttal.<sup>78</sup>

On November 3, 2006, Complainant filed legal action against the BNAA in Illinois Court of the Eleventh Judicial Circuit, County of McLean. This legal action concerns the Platinum Agreements and the option to build a second aviation hangar.<sup>79</sup> On December 11, 2006, the BNAA filed a Motion to Supplement the Record<sup>80</sup> and the FAA issued a Notice of Extension of Time on December 14, 2006.<sup>81</sup> On December 20, 2006, Complainant filed an objection to the BNAA Motion to Supplement the Record.<sup>82</sup> On February 27, 2007, the FAA issued a new Notice of Extension of Time.<sup>83</sup>

## **VI. APPLICABLE LAW AND POLICY**

### **A. The Airport Improvement Program and the Airport Sponsor Assurances**

Title 49 USC § 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 (AAIA), as amended. Section 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 obligation between the airport sponsor and the Federal government. The FAA has a statutory mandate to ensure that airport owners comply with these sponsor assurances.<sup>84</sup> FAA Order 5190.6A, *Airport Compliance Requirements*, issued on October 1, 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.

### **B. Enforcement of Airport Sponsor Assurances**

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. Various legislative actions augment the Federal role in encouraging and developing civil aviation. These actions authorize programs providing funds and other assistance to local communities for the development of airport facilities. In each program, the airport sponsor assumes certain obligations, either by contract or by restrictive covenants in property deeds and conveyance instruments, to maintain and operate its airport facilities safely, efficiently, and in accordance with specified conditions.

Commitments assumed by airport sponsors in property conveyance or grant agreements are important factors in maintaining a high degree of safety and efficiency in airport design, construction, operation and maintenance, as well as ensuring the public reasonable access to the airport. Pursuant to 49 U.S.C.

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<sup>77</sup> FAA Exhibit 1, Item 21.

<sup>78</sup> FAA Exhibit 1, Item 22.

<sup>79</sup> See FAA Exhibit 1, Item 15, for additional details on this latest litigation.

<sup>80</sup> FAA Exhibit 1, Item 10.

<sup>81</sup> FAA Exhibit 1, Item 11.

<sup>82</sup> FAA Exhibit 1, Item 13.

<sup>83</sup> FAA Exhibit 1, Item 20.

<sup>84</sup> See, e.g., 49 USC § 40101, 40103(e), 40113, 40114, 46101, 46104, 46105, 46106, 46110, 47104, 47105(d), 47106(d), 47106(e), 47107, 47108, 47111(d), 47122.

§ 47122, the FAA has a statutory mandate to ensure that airport owners comply with their sponsor assurances. FAA Order 5190.6A details aspects of the airport compliance program.<sup>85</sup> Finally, Federal Regulation 14 CFR Part 16 *FAA Rules of Practice for Federally-Assisted Airport Proceedings* was published in the Federal Register (61 FR 53998, October 16, 1996) and implemented on December 16, 1996.

### **C. The FAA Airport Compliance Program**

The FAA ensures that airport owners comply with their federal grant obligations through the FAA's Airport Compliance Program. The program is based on the obligations that 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; it monitors the administration of the valuable rights pledged by airport sponsors to the United States in exchange for monetary grants and donations of federal property to ensure that the public interest is being served.

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. The FAA will make a judgment of whether the airport sponsor is reasonably meeting the federal obligations. FAA may also take into consideration any action or program the sponsor has taken or implemented, or proposed action or program the sponsor intends to take, which in FAA's judgment is adequate to reasonably carry out the obligations under the grant assurances.<sup>86</sup>

### **D. Public Use of the Airport – Grant Assurance 22**

The owner of any airport developed with Federal grant assistance is required to operate the airport for the use and benefit of the public and to make it available to all types, kinds, and classes of aeronautical activity on reasonable terms, and without unjust discrimination. Grant Assurance 22, *Economic Nondiscrimination*, of the prescribed sponsor assurances implements the provisions of 49 USC § 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)]

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<sup>85</sup> See also Sec. 6-2.

<sup>86</sup> See FAA Order 5190.6A, Sec. 5-6. Thus, the FAA can take into consideration reasonable corrective actions by the airport sponsor as measures to resolve alleged or potential violations of applicable federal obligations, and as measures that could prevent recurrence of noncompliance and ensure compliance in the future.

... 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)]

FAA Order 5190.6A describes in detail the responsibilities assumed by the owners of public-use airports developed with Federal assistance.<sup>87</sup>

### **E. The Prohibition Against Exclusive Rights – Grant Assurance 23**

Title 49 USC § 40103(e), in which Congress re-codified and adopted substantially unchanged the exclusive rights prohibition prescribed in Section 303 of the Civil Aeronautics Act of 1938 and in Section 308(a) of the Federal Aviation Act of 1958, as amended. The statute prohibits exclusive rights at certain facilities and states, in pertinent part, that “[a] person does not have an exclusive right to use an air navigation facility on which Government money has been expended.”

49 USC § 47107(a)(4) similarly provides, in pertinent part, that “a person providing, or intending to provide, aeronautical services to the public will not be given an exclusive right to use the airport.” Grant 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 person 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...”

An exclusive right is defined as a power, privilege, or other right excluding or debarring another from enjoying or exercising a like power, privilege, or right. An exclusive right can be conferred either by express agreement, by the imposition of unreasonable standards or requirements, or by any other means. Such a right conferred on one or more parties, but excluding others from enjoying or exercising a similar right or rights, would be an exclusive right.<sup>88</sup>

Therefore, it is FAA’s policy that the sponsor of a federally obligated airport will permit no exclusive right for the use of the airport by any person providing, or intending to provide, aeronautical services to the public and 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. FAA Order 5190.6A clarifies the applicability, extent, and duration of the prohibition against exclusive rights under 49 USC § 40103(e) with regard to airports developed with FAA-administered grant assistance and Federal property conveyances.

The exclusive rights prohibition remains in effect as long as the airport is operated as an airport. FAA takes the position that the grant of an exclusive right for the conduct of any aeronautical activity on such airports is regarded as contrary to the requirements of the applicable laws, whether such exclusive right results from an express agreement, from the imposition of unreasonable standards or requirements, or by any other means.

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<sup>87</sup> See Order, Sec. 4-13(a).

<sup>88</sup> See FAA Advisory Circular 5190-5 *Exclusive Rights and Minimum Standards for Commercial Aeronautical Activities*, June 10, 2002.

#### **F. Preserving Rights and Powers - Grant Assurance 5**

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

FAA Order 5190.6A, *Airport Compliance Requirements*, (Order) describes the responsibilities under Assurance 5 assumed by the owners of public-use airports developed with Federal assistance. Among these is the responsibility for enforcing adequate rules, regulations, or ordinances as are necessary to ensure the safe and efficient operation of the airport.<sup>89</sup>

Under Grant Assurance 5, an airport sponsor cannot take any action that may deprive it of its rights and powers so it can direct and control airport development and comply with the applicable Federal obligations. Grant Assurance 5 requires the airport sponsor not sell, lease, encumber, or otherwise transfer or dispose of any part of its title or other interests in the property shown on Exhibit A without the prior approval of the FAA.

Of particular interest to the FAA would be the granting of property interests to entities on the airport that may restrict the airport sponsor's ability to preserve its rights and powers to operate the airport in compliance with the applicable Federal obligations. One of the most common violations of Grant Assurance 5 may occur when airport sponsors enter into agreements with terms that result in subsequent actions that may place the sponsor in noncompliance with its Federal obligations.

Therefore, clauses in the airport agreements that subordinate the terms of the agreement to the applicable Federal obligations can preserve the airport sponsor's rights and powers to amend an agreement and operate the airport in compliance with the Federal obligations.<sup>90</sup>

#### **G. Operation and Maintenance - Grant Assurance 19**

Grant assurance 19, *Operation and Maintenance*, implements 49 U.S.C. § 47107(a)(7), and requires, in pertinent part, that the airport sponsor operate the airport and all facilities at all times in a safe and serviceable condition and in accordance with the minimum standards as may be required or prescribed by applicable Federal, state, and local agencies for maintenance and operation. The airport sponsor must not cause or permit any activity or action thereon which would interfere with its use for airport purposes. Additionally, Order 5190.6A, provides that the owner should adopt and enforce adequate rules, regulations, or ordinances as necessary to ensure safety and efficiency of flight operations and to protect the public using the airport. In fact, the prime requirement for local regulations is to control the use of the airport in a manner that will eliminate hazards to aircraft and to people on the ground. As in the operation of any public service facility, FAA advises airport sponsors to establish adequate rules

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<sup>89</sup> See Order, Secs. 4-7 and 4-8.

<sup>90</sup> See FAA Docket No. 16-05-17, [SeaSands vs Huntsville](#) at 27.

covering, *inter alia*, vehicular traffic, sanitation, security, crowd control, access to certain areas, and fire protection.<sup>91</sup>

#### **H. Background on 14 CFR Part 139 and Related Policies**

Under Title 49, USC § 44706, the FAA has the statutory authority to issue Airport Operating Certificates (AOC) to airports serving passenger-carrying operations of certain types of air carriers and establish minimum safety standards for the operation of those airports. The FAA uses this authority to issue requirements for the certification and operation of certain land airports through 14 CFR Part 139 (Part 139). Part 139 requires the FAA to issue AOCs to airports that serve scheduled and unscheduled air carrier operations. Airport Operating Certificates serve to ensure safety in air transportation. To obtain a certificate, an airport must agree to certain operational and safety standards.

These requirements vary depending on the size of the airport and the type of flights available, but they incorporates several safety-related requirements, including adequate firefighting equipment, training, public protection, control of pedestrians and ground vehicles within airport surfaces, as well as safe operations in movement areas and safety areas, including runways and taxiways. If the FAA finds that an airport is not meeting its obligations, it often imposes an administrative action. It can also impose a financial penalty for each day the airport continues to violate a Part 139 requirement. In extreme cases, the FAA might revoke the airport's certificate or limit the areas of an airport where air carriers can land or takeoff.<sup>92</sup>

#### **I. Hangar Construction – Grant Assurance 38**

Grant Assurance 38 *Hangar Construction* implements the provisions of 49 USC Section 47107(a) (21) and stipulates that if the airport owner or operator and a person who owns an aircraft agree that a hangar is to be constructed at the airport for the aircraft at the aircraft owner's expense, the airport owner or operator will grant to the aircraft owner for the hangar a long term lease that is subject to such terms and conditions on the hangar as the airport owner or operator may impose.

#### **J. Airport Layout Plan (ALP)– Grant Assurance 29**

Grant Assurance 29, *Airport Layout Plan (ALP)*, implementing 49 USC Section 47107(a) (16) requires an airport sponsor to keep up-to-date the ALP.<sup>93</sup> Specifically, Grant Assurance 29 requires the airport sponsor to show on its ALP the boundaries of the airport and all proposed additions thereto, the location and nature of all existing and proposed airport facilities and structures (such as runways, taxiways, aprons, terminal buildings, hangars and roads), and the location of all existing and proposed non-aeronautical uses.

Airport layout plans and amendments, revisions, or modifications thereto, are subject to the approval of the FAA. What this means from a practical standpoint is that an airport sponsor must not make or

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<sup>91</sup> Order 5190.6A, Sec. 4-7(b).

<sup>92</sup> [http://www.faa.gov/airports\\_airtraffic/airports/airport\\_safety/part139\\_cert/?p1=what](http://www.faa.gov/airports_airtraffic/airports/airport_safety/part139_cert/?p1=what) and [http://www.faa.gov/airports\\_airtraffic/airports/airport\\_safety/part139\\_cert/media/part139\\_wcorrections.doc](http://www.faa.gov/airports_airtraffic/airports/airport_safety/part139_cert/media/part139_wcorrections.doc)

<sup>93</sup> An Airport Layout Plan (ALP) is a scaled drawing of existing and proposed land and facilities necessary for the operation and development of the airport. Any airport will benefit from a carefully developed plan that reflects current FAA design standards and planning criteria. See FAA Advisory Circular 15-5300-13 *Airport Design*, Change 10, Chapter 1, p. 5.

permit any changes or alterations in the airport or any of its facilities which are not in conformity with the ALP. If a change or alteration in the airport or its facilities is made which the FAA determines adversely affects the safety, utility, or efficiency of any Federal investment on or off the airport and which is not in conformity with the ALP as approved by the FAA, an airport sponsor may be required to eliminate such an adverse effect in a manner approved by the FAA. For example, the airport sponsor cannot unilaterally close runways and taxiways without FAA approval or use aeronautical property for non-aeronautical purposes without FAA approval.

#### **K. Overview of Categorical Exclusions (CATEX)**

Council on Environmental Quality (CEQ) regulations allow for the exemption of certain categories of actions at airports from NEPA's (National Environmental Policy Act) EIS (Environmental Impact Statement) requirements,<sup>94</sup> or EA (Environmental Assessment) requirements.<sup>95</sup> Specifically, 40 CFR 1508.4 defines categorical exclusions as "...categories of actions that normally do not individually or cumulatively have significant adverse effects on the human environment and which have been found [by the federal agency] to have no such effect." In developing categorically excluded actions, each Federal agency, including the FAA, must consider "... extraordinary circumstances in which a normally categorically excluded action may have a significant environmental effect." An airport sponsor considering a proposed project must be aware of what environmental documentation is required to satisfy requirements of NEPA. In categorically excluding an action, the FAA meets its NEPA responsibilities. This allows the appropriate FAA official to determine if FAA should approve or fund that action without requiring an EA or preparing an EIS.<sup>96</sup>

Some projects may be clearly categorically excluded from any formal environmental review (may be considered for a categorical exclusion) if the extent of the impact is relatively small or insignificant. Categorical exclusions specific to airports are listed in Chapter 6 of FAA Order 5050.4B *National Environmental Policy Act (NEPA) Implementing Instructions for Airport Projects*. These items may be categorically excluded from the requirement for formal environmental assessment if an appropriate FAA official determines they do not trigger the extraordinary circumstances requiring an environmental assessment.

The FAA will use the information provided in the categorical exclusion checklist to determine whether or not extraordinary circumstances exist. The categorical exclusions listed in Chapter 6 of FAA Order 5050.4 include certain buildings, taxiways, aprons, or repair work, installation or upgrading of airfield lighting systems, and fencing.<sup>97</sup>

#### **L. The FAA's Policy on Minimum Standards**

The FAA encourages airport management, as a matter of prudence, to establish minimum standards to be met by all who would engage in a commercial aeronautical activity at the airport. It is the

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<sup>94</sup> See 40 CFR 1500.4(p). See also FAA Order 1050.1E *Environmental Impacts; Policy and Procedures*, Chapter 3.

<sup>95</sup> See 40 CFR 1500.4(p). See also FAA Order 1050.1E *Environmental Impacts; Policy and Procedures*, Chapter 3.

<sup>96</sup> See FAA Order 5050.4B *National Environmental Policy Act (NEPA) Implementing Instructions for Airport Projects*, p. 6-1.

<sup>97</sup> For additional resources see Categorical Exclusion Checklist and FAA Order 5050.4B *National Environmental Policy Act (NEPA) Implementing Instructions for Airport Projects* at [http://www.faa.gov/airports\\_airtraffic/airports/resources/publications/orders/environmental\\_5050\\_4/](http://www.faa.gov/airports_airtraffic/airports/resources/publications/orders/environmental_5050_4/).



prerogative of the airport owner to impose conditions on users of the airport to ensure its safe and efficient operation. Such conditions must, however, be reasonable and not unjustly discriminatory. They must be relevant to the proposed activity, reasonably attainable, and uniformly applied.<sup>98</sup> The FAA ordinarily makes an official determination regarding the relevance and/or reasonableness of the minimum standards only when the effect of a standard denies an aeronautical activity access to a public-use airport.

FAA Advisory Circular AC No 150/5190-7 *Minimum Standards for Commercial Aeronautical Activities*, August 4, 2006, discusses FAA policy regarding the development and enforcement of airport minimum standards. The FAA policy for recommending the development of minimum standards serves the objective of promoting safety in all airport activities, maintaining a higher quality of service for airport users, protecting airport users from unlicensed and unauthorized products and services, enhancing the availability of adequate services for all airport users, and promoting the orderly development of airport land.

Therefore, airport sponsors should strive to develop minimum standards that are fair and reasonable to all on-airport business operators and relevant to the activity that the minimum standards concern. The use of minimum standards as a vehicle to effect an exclusive business operation is prohibited.<sup>99</sup>

## VII. ANALYSIS AND DISCUSSION

Before addressing whether the actions by the BNAA concerning Complainant's operation of an FBO at the Airport are consistent with the BNAA's Federal obligations (*Grant Assurance 22 Economic Nondiscrimination*, *Grant Assurance 23 Exclusive Rights*, *Grant Assurance 38 Hangar Construction*, and *Grant Assurance 5 Preserving Rights and Powers*) the Director discusses several preliminary issues.

These are: (A) consideration of the State Court litigation in these proceedings, (B) the allegations concerning the basis for FAA investigation, (C) challenge to FAA's jurisdiction, and (D) ascertaining whether there was compliance with 14 CFR Part 16 in the filing of this Complaint.

### A. State Court Litigation

Both parties are engaged in litigation in addition to this Complaint.<sup>100</sup> As discussed in Section V. *Background*, in January 2005, Image Air, the existing FBO at the Airport, filed suit in State court naming Complainant and BNAA as defendants and seeking an injunction against the construction of its facility and the invalidation of the Platinum Agreements.<sup>101</sup> Additional litigation includes the filing of

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<sup>98</sup> See Order, Sec. 3- 12, 3-17 (b),(c); and also FAA Advisory Circular AC No 150/5190-7 *Minimum Standards for Commercial Aeronautical Activities*, August 4, 2006.

<sup>99</sup> See Section 2.2 of FAA Advisory Circular 5190-5 *Exclusive Rights and Minimum Standards for Commercial Aeronautical Activities*, June 10, 2002.

<sup>100</sup> FAA Exhibit 1, Item 10. In addition the litigation discussed above, on November 3, 2006, Complainant filed a complaint against the BNAA in Illinois Court of the Eleventh Judicial Circuit, County of McLean.

<sup>101</sup> FAA Exhibit 1, Item 1, p. 6. This matter is captioned as Image Air of Southwest Florida L.C. d/b/a Image Air, and Kenneth Rittenhouse, SR. v. Bloomington Normal Airport Authority, et. al. Complainant states that "at the beginning of the state litigation, Judge Souk gave BNAA a clear opportunity to re-ratify the Platinum Agreements in order to remove any question about an Open Meetings Act issue. Despite the lengthy negotiations, the complete execution of the documents, the parties' performance consistent with the contracts, BNAA's previous acknowledgement (in a public forum) of the validity of

a Cross-Claim against the BNAA (February 17, 2005), a Verified First Amended Cross-Claim (July 22, 2005), and the filing by the BNAA of a Cross-Claim against Complainant (March 11, 2005).<sup>102</sup>

Both sides link their respective legal actions in State court to this Complaint, despite the fact that the Part 16 process is not a venue for alternatively arguing on-going legal actions or to enforce State court orders.<sup>103</sup> The Director agrees with the BNAA that this Part 16 should not be a venue to “re-litigate contractual matters that have been resolved in state court” or to “redress” “contractual grievances”<sup>104</sup>

Complainant argues that the State court litigation and this Part 16 proceeding are “two entirely different questions.” Complainant also argues that its negative actions concerning the BNAA’s proposals to amend the Platinum Contracts were justified because “the State Court, subsequently, has specifically found the three Platinum Agreements executed by the parties are fully valid and enforceable...”<sup>105</sup>

Although the Director is cognizant that both sides have linked this Part 16 Complaint to actions in State court,<sup>106</sup> the Director rejects all arguments made by both sides insofar as those arguments either imply or suggest that a finding by the State court in any way would limit the FAA’s ability and responsibility to adjudicate grant assurance matters. Contrary to the BNAA’s suggestion, the FAA does not have to be “skeptical” in its review simply because one party believes that would reflect the view of the State court. Complainant’s argument that somehow its actions concerning the BNAA’s proposals to amend the Platinum Contracts were justified because “the State Court, subsequently, has specifically found the three Platinum Agreements executed by the parties are fully valid and enforceable...” is also rejected because although a contract may be valid under State law, it may be in violation of the applicable Federal obligations. Finally, all arguments concerning financial compensation are also rejected since financial demands and claims for damages are not addressed through Part 16 proceedings.<sup>107</sup>

The findings by the State court illustrates not only the contract law nature of the arguments surrounding the Platinum Agreements, but also the disconnection that exists between the issues disputed in State court and those under review here. In other words, the Court may very well find that

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the Platinum Agreements, and BNAA’s own instruction to Platinum to begin construction just weeks earlier, BNAA refused to formally acknowledge the Platinum Agreements. Instead, Platinum has been required to establish the validity of the Platinum Agreements throughout the course of 16 months of litigation (to date) that has brought unnecessary and significant additional cost and delay to Platinum’s project.” FAA Exhibit 1, Item 1, p. 6. Note: this litigation is also referred to as Image Air v. Bloomington Normal Airport Authority, et. al., Docket No. 05-CH-04, in the Circuit Court of the Eleventh Judicial Circuit, State of Illinois, County of McLean. FAA Exhibit 1, Item 3, p. 2.

<sup>102</sup> FAA Exhibit 1, Item 3, p. 13-14.

<sup>103</sup> Nor is it the forum for review of contractual disputes. Such issues are matters of state contract law and are not reviewable here. This is consistent with the position the FAA has taken in prior cases raising state contract claims. See *Consolidated Services v. City of Palm Springs*, FAA Docket No. 16-03-05 (June 10, 2004), *Boca Airport, Inc. v. Boca Raton Airport Authority*, FAA Docket No. 16-00-10 (April 26, 2001) and *Morris Waller and M&M Transportation v. Wichita Airport Authority*, FAA Docket No. 16-98-13 (March 12, 1999). Also see FAA Docket 16-06-01, JetAway Aviation, LLC v. Board of County Commissioners, Montrose County (November 2006).

<sup>104</sup> FAA Exhibit 1, Item 8, p. 2, 10, 17. Also see FAA Exhibit 1, Item 2, p. 5.

<sup>105</sup> FAA Exhibit 1, Item 6, p. 3, 5, 8.

<sup>106</sup> For example, the BNAA states that “if changes in the agreements or in the application of the agreements are necessary for consistency with the Authority’s Federal obligations, the state court has made clear that only a determination by FAA will result in those changes” FAA Exhibit 1, Item 8, p. 10.

<sup>107</sup> FAA Exhibit 1, Item 8, p. 17.

the actions by the BNAA are inconsistent with the agreement it entered into with Complainant, but that does not mean that the BNAA is in violation of its Federal obligations.

The FAA has the responsibility to adjudicate the matter under its jurisdiction and to do so independently. It is the FAA's responsibilities to adjudicate allegations of violations of the associated Federal grant assurances.<sup>108</sup> A decision by the Circuit Court of the Eleventh Judicial Circuit County of McLean does not trump Federal law.

For example, Complainant states that "the State Court judgment against the BNAA for breach of the Platinum Agreements does not exclude the ability of the FAA to investigate whether the BNAA's conduct is also a breach of its FAA grant assurances"<sup>109</sup> while the BNAA argues that the matters Complainant "raise in their Complaint are improperly before the agency because they are allegations of breach of contract that should be, and in fact were, made and resolved in state court..."<sup>110</sup>

Although the Director finds that contractual disputes between the parties are best left to State law,<sup>111</sup> the Director rejects this argument as an Affirmative Defense because although several of the issues in the Complaint are indeed contractual matters that should be worked out in State Court, the allegations of violations of Federal obligations are valid and under the FAA's jurisdiction, as discussed in more detail in Section VII C Basis for FAA Investigation.

## **B. Basis for FAA Investigation**

The BNAA believes that specific complaints raised by Complainant should be dismissed because "a review of the specific actions alleged to correspond to those violations show that there is no reasonable basis for an FAA investigation," and because Complainant has "failed to introduce evidence in support of some" of its claims, "and/or the claims have been litigated and therefore should be precluded."<sup>112</sup> As part of its arguments, the BNAA adds that "the Complaint is based on allegations of potential past compliance violations involving matters that have since been resolved."<sup>113</sup> The BNAA also "believes that the existence and history of the State court proceeding makes clear that the issues raised by the Platinum Parties in this complaint are improperly before the FAA."<sup>114</sup> In reply, Complainant disagrees with the BNAA's argument and request that the BNAA motion to dismiss "be denied and for an investigation on the merits to be conducted."<sup>115</sup>

The Director agrees with Complainant. First, the FAA decides whether "a review of the specific actions alleged to correspond to those violations show that there is no reasonable basis for an FAA

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<sup>108</sup> The FAA was not a party to the cases nor was it in privity with any of the parties. See [Arapahoe County Public Airport Authority v. FAA](#), 242 F.3d 1213, 1220 (10<sup>th</sup> Cir. 2001) (noting "[t]he FAA's interest in fulfilling its statutory responsibility to ensure airport compliance with federal aviation laws and grant assurances, and to protect the public interest").

<sup>109</sup> FAA Exhibit 1, Item 6, p. 2, 8.

<sup>110</sup> FAA Exhibit 1, Item 8, p. 9-10.

<sup>111</sup> FAA Exhibit 1, Item 3, p. 32. See FAA Docket 16-02-12, [Mainardi v. Lincoln Park Aviation, Inc.](#), dated October 18, 2004, and FAA Docket 16-00-10 [Boca Airport, Inc. v. Boca Raton Airport Authority](#), dated April 26, 2001.

<sup>112</sup> FAA Exhibit 1, Item 3, p. 4. The BNAA states that Complainant has "presented unreasonable and constantly escalating financial demands that have made further negotiation fruitless" and that Complainant's "intention is to use the Part 16 process as leverage to force the Authority to settle with it to the tune of millions of dollars." FAA Exhibit 1, Item 3, p. 20.

<sup>113</sup> FAA Exhibit 1, Item 3, p. 31, FAA Exhibit 1, Item 2, p. 3.

<sup>114</sup> FAA Exhibit 1, Item 3, p. 22.

<sup>115</sup> FAA Exhibit 1, Item 6, p. 9.

investigation.” Under 49 USC §§ 40113(a) and 47122, the FAA has proper jurisdiction and powers to investigate all of the issues presented in this case - both by the Complainant and the BNAA. The FAA, and not the parties, conducts this investigation. The FAA’s jurisdictional authority on these matters is stated within the Part 16 rules of practice at 14 CFR § 16.1(a)(1) and (5). Second, Complainant’s allegations that the actions by the BNAA concerning Complainant’s operation of an FBO at the Airport may have been inconsistent with Grant Assurance 22 *Economic Nondiscrimination*, Grant Assurance 23 *Exclusive Rights*, Grant Assurance 38 *Hangar Construction*, and Grant Assurance 5 *Preserving Rights and Powers*, are valid claims under FAA jurisdiction, and the record contains information on Complainant’s claims.<sup>116</sup> Third, as stated above, the fact that there are State court proceedings or a State court decision does not override the FAA’s responsibilities to adjudicate applicable federal grant assurances and to conduct its review on the merits of the allegations and supporting documentation.

Finally, the Director rejects the BNAA’s Affirmative Defense alleging “the Complaint is based on allegations of potential past compliance violations involving matters that have since been resolved.”<sup>117</sup> Notwithstanding the fact that the FAA does not render compliance decisions on past compliance, but whether an airport sponsor is currently meeting its Federal obligations,<sup>118</sup> the Director notes that as Complainant correctly states, “BNAA’s assertion that some actions have been corrected are either wrong or irrelevant.”<sup>119</sup> This is because although several particular issues between the parties may have been resolved [see Section V. Background], it does not mean that other unresolved arguments and issues are to be ignored. For example, in this case, the fact that the water main and sewer issues discovered during construction of Complainant’s facilities were eventually resolved, does not alleviate the fact that other issues, such as the option for additional land or the priority use areas, are to remain unresolved. In summary, the issues under review are those that remain unresolved and do not include allegations related to issues that may have been “potential past violations.”<sup>120</sup>

Therefore, based on the above, as stated in 14 CFR § 16.21(a), because the Director finds that based on the pleadings, and there appears to be a reasonable basis for further investigation, the Director finds that there is a reasonable basis for examining the allegations and therefore, rejects the BNAA argument that the Complaint be dismissed and not investigated.

### **C. Challenge to FAA’s Jurisdiction**

Complainant argues that although “the only issue that can be determined in this Part 16 proceeding is whether BNAA violated its Grant Assurances,” BNAA violating its assurances to the Federal Government “is not, of course, a violation of Federal law.” Complainant also argues that “the BNAA is

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<sup>116</sup> For example, the argument that the action of the airport sponsor concerning construction of an FBO facility may result in the airport not being made available on reasonable terms and without unjust discrimination is a valid allegation to be investigated under Grant Assurance 22. Similarly, the allegation of granting of an exclusive right by a second FBO that, in its views, cannot compete with the incumbent FBO, is a valid claim under Grant Assurance 23.

<sup>117</sup> FAA Exhibit 1, Item 3, p. 31, FAA Exhibit 1, Item 2, p. 3.

<sup>118</sup> In addressing allegations of noncompliance, the FAA considers only those under FAA jurisdiction and makes a determination as to whether an airport sponsor is currently in compliance with the applicable Federal obligations, not whether or not the sponsor was in compliance in the past. See FAA Docket 16-05-11, Paul D. Asmus and PD Aviation Consulting & Leasing, LLC v. State of Hawaii Department of Transportation - Airports Division (State), April 12, 2006, p. 10.

<sup>119</sup> FAA Exhibit 1, Item 6, p. 2.

<sup>120</sup> FAA Exhibit 1, Item 8, p. 3.

only required to comply with the Grant Assurances if it has requested and accepted the benefit of FAA sponsored grants,” that “is an optional program with obligations akin to a contract, as the BNAA is under no obligation to accept or request Grant funds” and that “the BNAA is free to breach its obligations, but it must then comply with whatever corrective action is necessary to compensate the FAA for that breach.”<sup>121</sup>

Complainant states that “any review to determine if the contracts at issue violate “Federal laws” is a job for a State or Federal Court of proper jurisdiction” and that “if the FAA determine that the option in the Ground Lease does not violate BNAA's grant assurances, the FAA should determine whether the option violates section 40103 (e) of title 49 of the United States Code” but that “such a determination is plainly outside the Part 16 jurisdiction of the FAA.” Finally, Complainant states that “no authority is cited for the novel proposition that a Grant Assurances violation (as enumerated under this section) is also a violation of Federal law with recourse and punishments other than those set out in the Part 16 process.”<sup>122</sup>

The Director rejects these arguments as Complainant is wrong. The arguments concerning whether the Platinum Agreements violate the Federal grant assurances are well within 14 CFR Part 16 jurisdiction. Contrary to Complainant’s allegations, it is not a “novel” concept that “a Grant Assurances violation is also a violation of Federal law with recourse and punishments other than those set out in the Part 16 process.” This is because as discussed in Section VI *Applicable Law and Policy* of this decision, Federal obligations, including grant assurances, are based in Federal Law, itself based upon acts of Congress. The grant assurances implement specific statutory provisions in the Law.

Contrary to Complainant’s belief, and pursuant to 49 U.S.C. § 47122, the FAA has a statutory mandate to ensure that airport owners comply with their sponsor assurances while FAA Order 5190.6A details aspects of the airport compliance program and 14 CFR Part 16 *FAA Rules of Practice for Federally-Assisted Airport Proceedings* provides the regulatory framework associated with compliance with airport Federal obligations.

Upon acceptance of an AIP grant, the FAA no longer views an airport sponsor’s compliance as “optional” or that airport sponsors are “free to breach” their obligations. In fact, the FAA expects airport sponsors to meet their Federal obligations and to take corrective action as necessary. The expectation that corrective action be taken does not depend on a formal Part 16 process. The FAA routinely takes compliance actions outside the Part 16 process, such as making informal findings (14 CFR Part 13.1) and curtailing further AIP funding by opting not to issue certain discretionary grants when airport sponsors fail to take corrective action.

Here, the Director rejects the implication or allegation in Complainant’s arguments challenging the FAA’s jurisdiction. The Director rejects all allegations that the BNAA can accept all terms in the Platinum Agreements, without concern, because it is “free to breach” its Federal obligations. BNAA’s Federal obligations under the grant assurances are also contractual. Those obligations cannot be subordinated to the airport’s other contracts with third parties.

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<sup>121</sup> FAA Exhibit 1, Item 7, p. 2-3.

<sup>122</sup> FAA Exhibit 1, Item 7, p. 2-3.

#### **D. Compliance with 14 CFR Part 16**

The BNAA argues that Complainant has “not negotiated in good faith to resolve this matter as required by 14 CFR §16.21(b)” and that Complainant has “failed to introduce evidence on which they rely in support of a number of their claims as required by 14 CFR §§ 16.23(b)(3), 16.23(g), and 16.29(b)(1).”<sup>123</sup> In response, Complainant takes the position that it “fully engaged in good faith efforts to resolve compliance issues” and that its Complaint “set forth more than enough evidence to support its claims.” Complainant objects to the BNAA’s claims that Complainant’s “allegations are unsupported” and argues that “pursuant to § 16.21” it initiated and engaged “in good faith efforts to resolve the disputed matter informally.”<sup>124</sup>

The Director rejects BNAA’s arguments. The record shows that Complainant met the requirements of 14 CFR § 16.21 *Pre-Complaint Resolution*. The record in this case is considerable and shows that there were extensive communications between Complainant and the BNAA as the two sides attempted to work out their differences over a long period of time. The record shows that BNAA itself had a high degree of confidence that the issues could have been worked out, when in July 2006, counsel for the BNAA stated it “was disappointed that Platinum saw fit to file the Complaint [Part 16 Complaint]” it believed the issues could be worked out.<sup>125</sup>

Moreover, the record also shows that Complainant had met the requirements of 14 CFR §§ 16.23(b)(3), 16.23(g), and 16.29(b)(1). In any event, if FAA had doubts regarding the completeness of the Complaint as required under 14 CFR § 16.21, it would not have docketed this Complaint.

#### **E. Whether the actions by the BNAA concerning Complainant’s operation of an FBO at the Airport are consistent with Grant Assurance 22 Economic Nondiscrimination, Grant Assurance 23 Exclusive Rights, Grant Assurance 38 Hangar Construction, and Grant Assurance 5 Preserving Rights and Powers.**

The main argument by Complainant is that the BNAA “entered into certain agreements requiring and permitting Platinum to build and operate a hangar and fuel farm” but that “sometime thereafter, BNAA became concerned that certain aspects of the agreements may be in violation of its Sponsor Assurances” which resulted in the BNAA taking “aggressive and unreasonable steps intended to interfere with Platinum’s ability to perform its contractual obligations.” Complainant argues that these actions by the BNAA are a violation of the BNAA’s Federal obligations.<sup>126</sup> In response, the BNAA contends that its actions were intended to bring Complainant “into reasonable negotiations regarding its construction project,” but that Complainant “reacted first with outrageous financial demands, then by ignoring the Authority’s Stop Work Orders, and finally by filing a court action against the Authority.”<sup>127</sup>

Complainant requests the FAA to declare the Platinum Agreements to be consistent with the applicable Federal obligations and that, in the alternative, that the FAA identifies which provisions of the

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<sup>123</sup> FAA Exhibit 1, Item 3, p. 31.

<sup>124</sup> FAA Exhibit 1, Item 6, p. 2, 5.

<sup>125</sup> FAA Exhibit 1, Item 10, Exhibit G.

<sup>126</sup> FAA Exhibit 1, Item 1, p. 1.

<sup>127</sup> FAA Exhibit 1, Item 3, p. 26.

Platinum Agreements are in violation of Sponsor Assurances<sup>128</sup> and adds that the review of the Platinum Agreements and assessing whether certain provisions at issue in this matter violate BNAA's Grant Assurances "is a key part of the Part 16 Complaint."<sup>129</sup> The BNAA argues that the "FAA should review the Platinum Agreements ...for any violation of the Authority's Federal obligations, both contractual and statutory."<sup>130</sup>

A plain review of this case indicates that the root cause of the many disputes between Complainant and the BNAA resides with the interpretation of the Platinum Agreements. Therefore, in this case, under Issue 1, the Director will review the Platinum Agreements for inconsistencies with the BNAA's Federal obligations. The other issues addressing the allegations of the grant assurances were organized as Issue 2 *Compliance with Grant Assurance 22 Economic Nondiscrimination*; Issue 3 *Compliance with Grant Assurance 23 Exclusive Rights*; Issue 4 *Compliance with Grant Assurance 38 Hangar Construction*; and Issue 5 *Compliance with Grant Assurance 5 Preserving Rights and Powers*.

### **Issue 1. The Platinum Agreements**

As a result of the 2002 RFP (Request for Proposal) for additional FBO services at the Airport,<sup>131</sup> the BNAA selected Complainant's proposal.<sup>132</sup> This selection was followed by negotiations which resulted in three separate contracts between the BNAA and Complainant: (1) the *Ground Lease Agreement* between Platinum Aviation and BNAA, (2) the *Agreement Authorizing Services* between Platinum Jet and BNAA, and (3) the *Agreement Authorizing the Sale of Aviation Fuel* between Platinum Jet and BNAA.

These agreements are collectively referred to as "the Platinum Agreements" and were executed on July 30, 2004.<sup>133</sup>

#### **(a). Main Argument Overview**

The BNAA believes that the Platinum Agreements contains "three provisions that, at least as interpreted by the Platinum Parties [Complainant], raise serious concerns"<sup>134</sup> and that the problematic provisions are the Option language in the Ground Lease, the Priority Use Area language in the Service Agreement, and the limited fuel exclusivity provisions of the Service Agreement and Fuel Agreement.<sup>135</sup> The BNAA contracted with a consulting company to review the Platinum Agreements

<sup>128</sup> FAA Exhibit 1, Item 1, p. 17-18. Complainant expressly requests in the alternative in an FAA finding that the FAA "(i) identifies which provisions of the Platinum Agreements are in violation of Sponsor Assurances; [and] (ii) provides a determination regarding the least intrusive remedy that the FAA would find acceptable given the circumstances." FAA Exhibit 1, Item 8, p. 15.

<sup>129</sup> FAA Exhibit 1, Item 7, p.1.

<sup>130</sup> FAA Exhibit 1, Item 8, p. 14.

<sup>131</sup> FAA Exhibit 1, Item 3, p. 6. Executive Flight Management-Trans American Charter Ltd, was the actual company that submitted the proposal.

<sup>132</sup> FAA Exhibit 1, Item 1, p. 13.

<sup>133</sup> FAA Exhibit 1, Item 1, p. 4.

<sup>134</sup> FAA Exhibit 1, Item 3, p. 3, 19-20.

<sup>135</sup> FAA Exhibit 1, Item 3, p. 6. The Airport Director states that "within a short time after I assumed the position of Executive Director, I became aware of possible discrepancies in the agreements between the Authority and the Platinum Parties which potentially placed the Airport in conflict with FAA Grant Assurances. Those problems with the Platinum Agreements, and with the Platinum Parties' interpretations of those agreements, had led my predecessor (Interim Executive Director Anderson) to begin returning the Platinum Parties' rent checks earlier in June 2005. Throughout my tenure, I have

and the consultants' review identified several areas that would likely put the Airport in noncompliance with its Federal obligations.<sup>136</sup>

Although the BNAA recognized that in June 2004,<sup>137</sup> it entered into the Platinum Agreements, "leasing land and granting certain rights to provide FBO services at the Airport," and "that the State court has found the Platinum Agreements valid,"<sup>138</sup> it nevertheless takes the position that "upon closer scrutiny," "those agreements were poorly drafted," did not meet "common industry standards on a range of issues," could be "interpreted in ways that do not accurately reflect the Authority's intent,"<sup>139</sup> resulting in significant nonconformity with the Authority's obligations to the Federal Government."<sup>140</sup>

Although the BNAA admits "that mistakes were made in the management of the project,"<sup>141</sup> the BNAA believes the "FAA should review the Platinum Agreements and declare that certain specific provisions of those Agreements, as applied to or as interpreted by the Complainants: (a) violate the Authority's sponsor's assurances and, in the case of violations of the prohibition on exclusive rights, violate Federal law, and (b) should be reformed or voided pursuant to the subordination and/or severability provisions of those Agreements."<sup>142</sup> The BNAA states that it "welcomes this investigation because the Authority is concerned that certain specific terms in the ill-advised agreements it has entered into" with Complainant "violate the Authority's Federal obligations."<sup>143</sup> Finally, the BNAA states that it offered to amend the airport rules and regulations to "provide equal and identical protection for all of the Airport's service providers," to provide "for equality among all users, including Image Air," but that this was rejected by Complainant.<sup>144</sup>

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continued to return those checks." FAA Exhibit, Item 3, Exhibit 1, p. 2. The record indicates that the BNAA returned Complainants' checks from July 2004 through July 2006, FAA Exhibit 1, Item 6, Exhibit C.

<sup>136</sup> FAA Exhibit 1, Item 9. See FAA Exhibit 1, Item 1, Exhibit T, for a copy of the consultant's report.

<sup>137</sup> FAA Exhibit 1, Item 1, p. 4.

<sup>138</sup> FAA Exhibit 1, Item 3, p. 20.

<sup>139</sup> FAA Exhibit 1, Item 3, p.2. The BNAA states "that its concerns grew, not necessarily based directly on the language in the Platinum Agreements, but based on Mr. Francis' (Complainant) statements regarding how he interpreted and expected the Authority to apply and enforce that language." The BNAA admits that it retained the services of Airport Corporation of America and that it requested that its consultants opine as to all actual and potential federal compliance and business problems associated with the Platinum Agreements. FAA Exhibit 1, Item 3, p. 30.

<sup>140</sup> See FAA Exhibit 1, Item 1, Exhibit T, pages 12-27.

<sup>141</sup> FAA Exhibit 1, Item 8, p. 2.

<sup>142</sup> FAA Exhibit 1, Item 3, p. 5. In the end, the BNAA seeks "a finding by the FAA to that effect that would allow the Authority to enforce reformation of these provisions" [FAA Exhibit 1, Item 3, p. 4] "if they were to be interpreted and enforced as restrictive covenants, would violate the Authority's Federal statutory and/or contractual obligations." [FAA Exhibit 1, Item 8, p. 21]. Therefore, the BNAA seeks to have the FAA "declare whether the language, or the Platinum Parties' interpretation of that language, violates the Authority's Federal obligations." FAA Exhibit 1, Item 8, p. 3. In the Rebuttal, the BNAA states that "the question of jurisdiction being clear, the FAA should exercise its authority to aid in the resolution of the parties' dispute by determining once and for all whether the Platinum Agreements, on their face or as interpreted by the Platinum Parties, contain any violations of Grant Assurances or Federal law. The Authority has raised three specific concerns of possible violations: whether (1) enforcement of the Platinum Parties' interpretation of the priority use area provision, (2) the Ground Lease option, and (3) enforcement of the limited exclusivity of aviation fuel sales would violate Grant Assurances Nos. 22 and 23, or 49 U.S.C. § 40103(e). The BNAA adds that with the FAA's guidance the parties will be able to put these concerns to rest, either by learning that they are acceptable or by reforming them to comply with Federal requirements. FAA Exhibit 1, Item 8, p. 16.

<sup>143</sup> FAA Exhibit 1, Item 3, p. 2.

<sup>144</sup> FAA Exhibit 1, Item 8, p. 11-12.



Complainant rejects the BNAA's "assertions that the Platinum Agreements were invalid and unenforceable"<sup>145</sup> and argues that although the matter of AIP Grant Assurances is between BNAA and the FAA, Complainant has been "directly and substantially harmed by BNAA's refusal to honor its contracts [Platinum Agreements]..." Complainant adds that the "BNAA has committed independent violations" and takes the position that the Platinum Agreements "properly read" are not "in violation of any FAA Sponsor Assurances" and states that "a clarification of terms [within the Platinum Agreements] may be useful to ease any concerns."<sup>146</sup> However, Complainant also argues that certain provisions in the Platinum Agreements "are not at issue in the Complaint there is no need for any review" and that "there is no alleged violation in this regard and the FAA thus has no authority to make a determination as to an issue not properly raised under Part 16."<sup>147</sup>

The Director disagrees with Complainant that certain provisions in the Platinum Agreements "are not at issue in the Complaint there is no need for any review" or that "there is no alleged violation in this regard and the FAA thus has no authority to make a determination..." Certain provisions in the Platinum Agreements are obviously at issue since they are used by the BNAA as justification for the actions Complainant deems unreasonable. Although the FAA was not initially aware of the agreements, nor was the FAA asked to review the agreements before they were entered into,<sup>148</sup> the FAA first identified its concerns in 2005, when the FAA informed the BNAA that certain portions of the Platinum Agreements could put the Authority in breach of its Grant Assurances.<sup>149</sup>

Based on the above, and notwithstanding that the State court found that the Platinum Agreements are valid contracts under state law, "and that it is up to the FAA", to determine "whether the Agreements contain provisions that violate the Authority's Federal obligations,"<sup>150</sup> the Director finds that a review of the Platinum Agreements is central to this issue because the main issue in this case is whether the actions taken by the BNAA is in response to what it believed were potential violations of its Federal obligations and by themselves, contrary to those same obligations.

### **(b). Ground Lease Agreement and the Option for Additional Space**

As one of the Platinum Agreements, the BNAA entered into the 30-year Ground Lease Agreement with Complainant "for the purpose of constructing a hangar structure and related improvements and a fuel farm."<sup>151</sup> The leasehold area in question includes an Option for additional land for an additional hangar (west of the initial leasehold area).<sup>152</sup> The Option provision of the Ground Lease states as follows:

...Lessee shall have an option to lease property adjacent to the Premises identified as the "Phase 11" area on Exhibit A (Hangar #2) hereto (the "Option Property") for construction of an additional hangar of approximately 180' x 150'. Such option shall exist for only the first three (3) years from the initial date of this Agreement.

<sup>145</sup> FAA Exhibit 1, Item 6, p. 6.

<sup>146</sup> FAA Exhibit 1, Item 1, p. 2.

<sup>147</sup> FAA Exhibit 1, Item 7, p. 3-4.

<sup>148</sup> FAA Exhibit 1, Item 9.

<sup>149</sup> FAA Exhibit 1, Item 3, p. 11, FAA Exhibit 1, Item 9.

<sup>150</sup> FAA Exhibit 1, Item 3, p. 3-4.

<sup>151</sup> FAA Exhibit 1, Item 3, p. 6, 29. See FAA Exhibit 1, Item 1, and Exhibit A for a copy of this lease. It did not require a specified level of investment in capital improvements.

<sup>152</sup> FAA Exhibit 1, Item 3, p. 6-7.

In the event, Lessee desires to exercise its option and lease the Option Property herein described, Lessee shall provide written notice thereof to Lessor no less than ninety (90) days prior to the expiration of said three (3) year period. Upon such written notice by Lessee, all of the terms and conditions of this Lease shall apply to the Option Property. In consideration for such option, Lessee shall pay to Lessor the sum of \$100 per month until the option is exercised or terminated, which payment shall be paid at the same time as the monthly lease payment.<sup>153</sup>

On May 23, 2005, Complainant provided written notice to the BNAA that it wished to exercise the option to lease the area identified as Hangar #2, as provided in the Ground Lease Agreement, Section 8.<sup>154</sup> The BNAA did not grant the option and believed that the “Option Property” contained in the Ground Lease, which allows Complainant to exercise the option for additional space, is inconsistent with the Federal prohibitions against exclusive rights. The BNAA states that it “has learned that land options are generally disfavored by the FAA and that the option in the Ground Lease may violate the Authority's obligations under Grant Assurance 23...”<sup>155</sup>

Complainant argues that the actions by the BNAA were contrary to its Federal obligations because, in part, “the State Court declared the Platinum Agreements to be valid and enforceable contracts” but “nevertheless,” the BNAA refused “to honor the option that Platinum has exercised under the Ground Lease Agreement” even though “the Court ruled that Grant Assurance violations were irrelevant to the option issue...”<sup>156</sup>

Moreover, the BNAA states that the Option Property contains a row of T -hangars that would have to be demolished or relocated elsewhere on the Airport if the option is held to be valid and is properly exercised.<sup>157</sup> The BNAA states that it is not asking the FAA to determine whether or not Complainant exercising the option is valid, but “rather, the Authority is asking the FAA to determine whether the provision itself that creates the option violates Grant Assurances and/or Federal law.”<sup>158</sup>

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<sup>153</sup> FAA Exhibit 1, Item 3, p. 7.

<sup>154</sup> FAA Exhibit 1, Item 1, p. 6.

<sup>155</sup> FAA Exhibit 1, Item 8, p. 19-21.

<sup>156</sup> FAA Exhibit 1, Item 6, p. 6-7.

<sup>157</sup> FAA Exhibit 1, Item 3, p. 7. Complainant purported to exercise this option on May 23, 2005. Under the Ground Lease, the Platinum Parties were supposed to make separate option payments in order to maintain the option. The BNAA believes that these option payments were never made, thus the Authority believes that the option was allowed to lapse. FAA Exhibit 1, Item 3, p. 7. Also see FAA Exhibit 1, Item 6, Exhibit B and C.

<sup>158</sup> FAA Exhibit 1, Item 8, p. 20. In its Reply, Complainant discusses the validity of attempting to exercise the option in the Ground Lease and states that the BNAA believes the option to have expired due to the failure of Complainant to pay the necessary \$100 to keep the option alive. FAA Exhibit 1, Item 8, p. 20. To this, and although the BNAA states “that no payment was ever tendered to maintain the option,” and that “rent payment checks, whether accepted or returned, never included the option payments necessary to keep the option valid, nor, after they purportedly exercised the option, any rental payment for the option land.” FAA Exhibit 1, Item 3, p. 22, the BNAA states “that the Platinum Parties' claim to the option parcel was voided soon after it was granted because the Platinum Parties never, from the beginning of the lease, made the required payments to keep the option open.” FAA Exhibit 1, Item 3, p. 22-23. The fact that one party may or may not have collected the required payment for keeping the option valid is not relevant. As discussed in more detail in the text, the FAA will not determine whether or not Complainant exercising the option is valid, since this is a contractual issue appropriate for state court review, but the FAA will determine whether the provision itself (that creates the option) violates Grant Assurances and/or Federal law.

Finally, the BNAA states that it attempted to resolve this matter through proposing alternatives and that “a number of alternatives to accommodate the Platinum Parties' planned growth, including identifying alternative sites for a second hangar, new airport sites large enough to accommodate both hangars adjacent to each other, proposing the realignment of the first hangar to try to accommodate other uses, or building a larger hangar first to handle the expected growth,” were made but that Complainant “did not entertain any of [of the BNAA’s] proposed alternatives.”<sup>159</sup>

The Director rejects Complainants argument that actions by the BNAA were contrary to its Federal obligations because of the State Court decision since, as mentioned above, a decision by the State Court does not outright override the FAA’s responsibilities to adjudicate applicable Federal grant assurances.<sup>160</sup>

Depending on circumstance, a lease option for land may be inconsistent with the BNAA’ Federal obligations since it may confer an exclusive right or may be construed as having the intent to do so. FAA policy states that airport sponsors are better served by requiring that leases to a single aeronautical service provider be limited to the amount of land the service provider can demonstrate it actually needs and can be put to immediate productive use.<sup>161</sup> In the event that additional space is required later, the airport sponsor may require the incumbent service provider to compete along with all other qualified service providers for the available airport land. The FAA has found that the grant of options or preferences on future airport lease sites to a single service provider may be construed as intent to grant an exclusive right and therefore, the use of leases with options or future preferences, such as rights-of-first refusal, must generally be avoided.<sup>162</sup>

However, in this case, the Option provision was limited to 3 years, in a parcel adjacent to Complainant’s premises and there appears to be ample room on the Airport for other hangar and facilities should the future aeronautical demand require it. As such, the record does not support a finding that the granting of the option to Complainant, in this case, was tantamount to granting an exclusive right.

The record shows that on May 23, 2005, Complainant provided written notice to the BNAA that it wished to exercise the option to lease the area identified as Hangar #2, as provided in the Ground Lease Agreement,<sup>163</sup> and that the BNAA did not concur. Since there appears to be no exclusive rights violation, this disagreement is in effect a contractual matter, to be decided by the State Court. In

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<sup>159</sup> FAA Exhibit 1, Item 3, Exhibit 1, p. 5.

<sup>160</sup> As Complainant openly states, “the State Court judgment against the BNAA for breach of the Platinum Agreements” does not prevent “the FAA to investigate whether the BNAA's conduct is also a breach of its FAA grant assurances...” FAA Exhibit 1, Item 6, p. 2. Complainant cannot on one hand argue that the Court’s decision implies that the BNAA’s actions are unreasonable while on the other hand argue that the State court judgment does not exclude the ability of the FAA to investigate the issues. Similarly, the fact that “the Court ruled that Grant Assurance violations were irrelevant to the Option issue... is in fact, immaterial here because a decision by the State court does not override the FAA’s responsibilities to adjudicate applicable Federal grant assurances nor does it bind the FAA’s ability to make a finding under the applicable Federal obligations. FAA Exhibit 1, Item 6, p. 7. The fact that the option was found valid under state law does not mean that it is so under the applicable Federal obligations.

<sup>161</sup> FAA Order 5190.6A, Sec. 3-9(c).

<sup>162</sup> Advisory Circular No 150/5190-6, *Exclusive Rights at Federally-Obligated Airports*, January 4, 2007, p. 6. A right of first refusal can allow an existing tenant, at little or no cost, to hold a claim on airport land that could be used for a second FBO, then lease that land when there is the prospect of competition. Such an exercise is a violation of the airport’s Federal obligations.

<sup>163</sup> FAA Exhibit 1, Item 1, p. 6.

other words, it appears there is no violation of Federal law, therefore it is unnecessary for the Director to determine whether or not Complainant exercising the option is valid, since this is a contractual issue appropriate for State court review. In this case, the Director finds that the provision itself did not violate the BNAA’s Federal obligations.

That said, the BNAA, as the airport sponsor, may revisit its agreements as necessary. The fact that the BNAA thought the Option provision was a potential violation is not in and of itself an unreasonable action or one that should be considered a violation of its Federal obligations. The BNAA, as the airport sponsor, may take reasonable actions to modify an existing agreement. Case in point, the record shows that by permitting Complainant to exercise the Option for the additional property, the BNAA was concerned that it would be unable to prevent the destruction of a row of existing T-hangars (see Figure 2).<sup>164</sup> At this time, the BNAA favors maintaining those hangars as necessary to the business of airport operations.

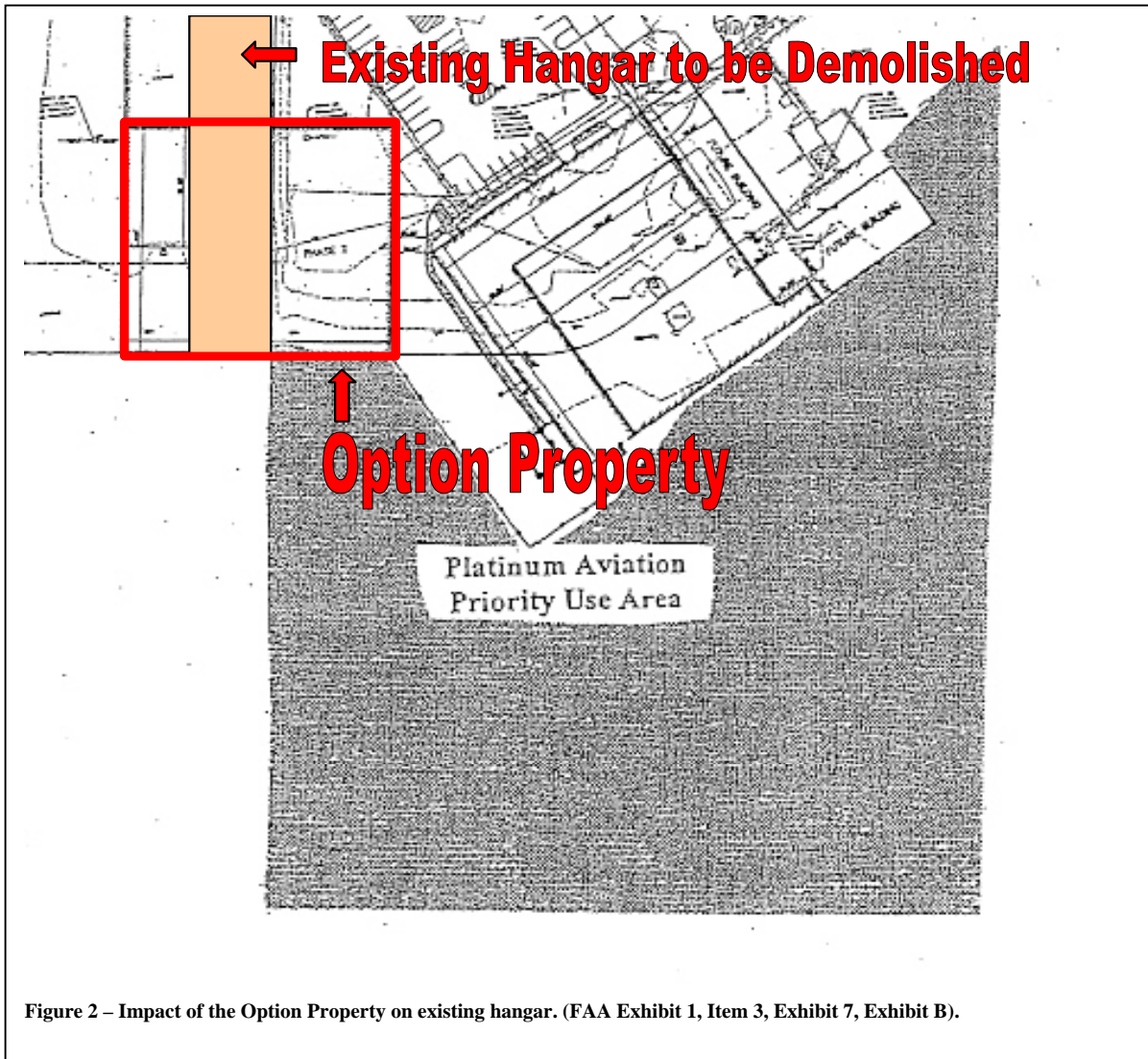


Figure 2 – Impact of the Option Property on existing hangar. (FAA Exhibit 1, Item 3, Exhibit 7, Exhibit B).

<sup>164</sup> FAA Exhibit 1, Item 3, p. 7.

**(c). Agreement Authorizing Services and the Priority Use Area**

In addition to the Ground Lease Agreement, the BNAA entered into an Agreement Authorizing Services with Complainant. This 30-year agreement authorizes, but does not require, Complainant to provide a number of aeronautical services at the Airport.<sup>165</sup> Section 5 of the Services Agreement also establishes a Priority Use Area in the ramp area adjacent to and in front of the area leased by Complainant and provides that Complainant "shall have use of the Priority Use Area for the purposes of parking aircraft, loading aircraft, and preparing aircraft prior to take off." The Services Agreement recognizes the Priority Use Area as a "special privilege," and commits "the assistance of the Airport personnel to ensure that other users of the Airport are not utilizing the Priority [Use] Area for their own commercial use."<sup>166</sup>

The BNAA states that although "the original intent of the Priority Use Area was to designate a reasonable area on the apron adjacent" to Complainant's leasehold for their use,<sup>167</sup> in order to "minimize conflicts between the FBOs,"<sup>168</sup> the BNAA believes that Complainant "expressed interpretation of the Priority Use Area provision would violate its Grant Assurances and is therefore untenable." Consequently, the BNAA takes the position that taking action to change the Priority Use Area is not "a violation of the grant assurances."<sup>169</sup>

The BNAA adds that Complainant has "taken an extremely broad and...untenable interpretation" of the Priority Use Area provision, "claiming that the area should extend beyond the apron onto two currently active taxiways and that it should exclude all other Airport users at all times" and that as a result, Complainant has interpreted the Priority Use Area as being "part of their exclusive leasehold," impacting a portion of the movement area including taxiways.<sup>170</sup> (See Figure 3)

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<sup>165</sup> FAA Exhibit 1, Item 3, p. 7. See FAA Exhibit 1, Item 1, and Exhibit B for a copy of this agreement.

<sup>166</sup> FAA Exhibit 1, Item 3, p. 7-8.

<sup>167</sup> FAA Exhibit 1, Item 8, p. 18.

<sup>168</sup> FAA Exhibit 1, Item 8, p. 11, 18. As the BNAA states, in contrast with Complainant's agreement, Image Air's Fixed Base Operator Agreement does not provide for a priority use area. It imposes the obligation to maintain and manage the aircraft tie-downs east of the former passenger terminal building, and it expressly reserves to the BNAA the right to make an equitable division of the total tie-down spaces amongst all the Fixed Base Operators that may exist at any time. A review of the record shows that contrary to Complainant's situation, Image Air's use of the ramp does not interfere with the use of taxiways. FAA Exhibit 1, Item 8, p. 11.

<sup>169</sup> FAA Exhibit 1, Item 8, p. 18.

<sup>170</sup> FAA Exhibit 1, Item 9. With regard to the Priority Use Area, the BNAA understands the desire of Complainant to restrict competing service providers from engaging in business activities in front of another's facility, but the BNAA is concerned because Complainant "interprets the Priority Use Area provision of the Platinum Services Agreement as no airport user-commercial or otherwise -would be able to use this surface, even for transit purposes," and that "evidence of this can be found in Platinum's insistence that fuel trucks operated by Image Air [competing FBO] be prohibited from traveling across this surface while en route to the airport's fuel farm (located on the western portion of the apron area)" and that instead, Complainant "demands that the Airport either direct these fuel trucks to drive on active taxiways, or that the Airport develop an alternative route outside the perimeter fence." The BNAA believes that these proposed practices violate FAA grant assurances, and proposed to Complainant that these provisions "be removed from the agreement and instead the Airport would revise [its] program of rules and regulations to include prohibitions which would provide equal and identical protection for all of the Airport's service providers." The BNAA reports that Complainant "did not entertain" the proposed alternatives. FAA Exhibit 1, Item 3, Exhibit 1, p. 4-5.

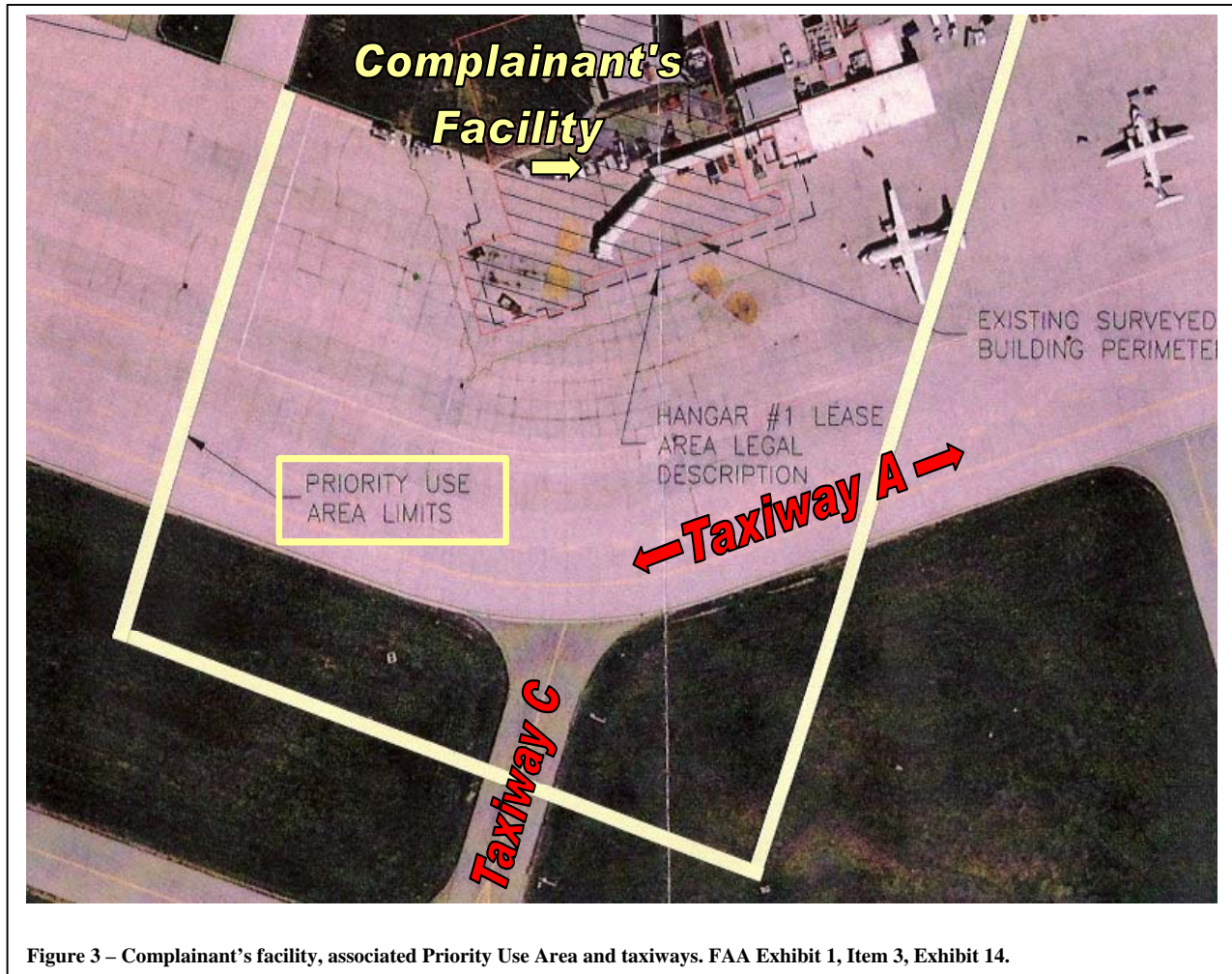


Figure 3 – Complainant’s facility, associated Priority Use Area and taxiways. FAA Exhibit 1, Item 3, Exhibit 14.

The BNAA notes that although one of the issues with the Priority Use Area is its location and dimensions,<sup>171</sup> “it is not so much the physical location and size of the area that creates the problem (although changing the size, shape or location of the priority use area would go a long way toward solving the issue)” but rather Complainant’s “interpretation of the contract language that would serve to exclude other users by, in effect, shutting down an aeronautical transit point and two of the Airport’s taxiways.” The BNAA states that after the Platinum Agreements were executed, the BNAA “learned

<sup>171</sup> The BNAA states that “the original shape of Platinum’s Priority Use Area was simply sketched out on a map of the airport and had no dimensions attached” and that “later in the process, the dimensions of the area were set based on the actual location of the Platinum hangar.” The BNAA adds that “when the Authority board authorized signing agreements with the Platinum Parties, they were not provided with a map showing the actual location and size of either the hangar or the Priority Use Area” and that “the location and scope of the Priority Use Area did not become evident until months later, and the extent of the operational issues posed by the Priority Use Area were not obvious until February 2005 when [Complainant] began opining that he had the right to exclude other users from transiting the area.” In other words, although the Services Agreement Complaint depicts the Priority Use Area, it did not clearly identify how far south into the ramp this area extends. FAA Exhibit 1, Item 3, p. 8, 16. It appears that after the BNAA gave its approval for construction, the location of the hangar was modified and moved about 50 feet encroaching on the old terminal apron and the agreement also gave the new FBO exclusive use of the old terminal apron. FAA Exhibit 1, Item 9. Adding to uncertainty concerning the actual location of the Priority Use Area, it appears that there were inconsistencies between the actual location of Complainants’ hangar/facility and the location as the BNAA understood it to be from earlier in the process. See FAA Exhibit 1, Item 1, Exhibit H and FAA Exhibit 1, Item 6, Exhibit C.

the extent of the physical layout of the Priority Use Area, which interrupted Taxiway A ...and encroaching into Taxiway C."<sup>172</sup>

The BNAA reports that in February 2005, it “offered to ratify...the Platinum Agreements if Platinum Jet Center would agree to amend the layout of the Priority Use Area “to exclude any portion of the taxiway and roadway designated to accommodate tanker trucks and other non-aircraft vehicles using the apron area,” but that “no agreement was reached.”<sup>173</sup> The BNAA adds that “after receiving informal feedback from FAA Great Lakes Region,”<sup>174</sup> the BNAA attempted to negotiate with Complainant but that Complainant took the position that it “intended to use the entirety of the Priority Use Area by excluding other aeronautical users” and “insisted, the Authority would have to close Taxiways A and C as necessary.”<sup>175</sup>

As justification for its actions concerning the Priority Use Area, the BNAA asserts that it has the “responsibility to maintain the taxiways and to provide access for legitimate users of the apron” and that “there is considerable area adjacent” which should accommodate aircraft either using or seeking to use the Platinum services.”<sup>176</sup> Consequently, the BNAA asks the FAA to determine whether enforcement of the Priority Use Area provision would violate the grant assurances and if it were to enforce Platinum Parties' interpretation of their rights under this provision, would the Authority be in violation of its Federal Grant Assurances.<sup>177</sup>

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<sup>172</sup> FAA Exhibit 1, Item 3, p. 9-10, 12. The record establishes that as early as December 2004, the BNAA recognized that there was some uncertainty in terms of the actual location of Complainant’s construction and its impact on the existing taxiway system. See FAA Exhibit 1, Item 1, Exhibit H.

<sup>173</sup> FAA Exhibit 1, Item 3, p. 16. The BNAA contends that it “has in the past and continues to desire a modification of the provision that clarifies the use of the priority use area and ensures it would be in compliance with all applicable Federal requirements.” The BNAA also states that although Complainant “offered to change the priority use area to a permitted use area to remove concerns about exclusivity while simply giving Platinum permission to park its planes out front just like Image Air,” changing the terminology for this area does not demonstrate a change in their interpretation of the provision.” FAA Exhibit 1, Item 8, p. 18-19.

<sup>174</sup> The Director rejects Complainant’s position that contact between the BNAA and FAA concerning compliance is improper *ex parte* communication or otherwise improper. FAA Exhibit 1, Item, 1, p. 8. The Director concurs with the BNAA in that “airport sponsors are encouraged, not discouraged, to seek FAA advice with respect to compliance matters,” especially when attempting to informally resolve a compliance or potential compliance matter. FAA Exhibit 1, Item 8, p. 4-5. See Compliance Guidance Letter 00-01: *FAA Airport Compliance Program - HQ & Region Roles and Responsibilities*, February 28, 2000.

The “Kennedy Letters” mentioned in the Reply are letters from one of the Airport consultants to the Authority's outside legal counsel and the Airport's Executive Director expressing that consultant's advice and that these letters do not necessarily represent the Authority's position with respect to the matters discussed therein. The BNAA adds that one letter states the "opinion" that the Platinum Agreements “contain provisions that clearly violate the BNAA's obligations to the United States Government incurred in accepting Federal airport, development assistance. Consequently, I am also concerned that such provisions may not only be inconsistent with the BNAA's grant agreements with the Federal Aviation Administration (FAA), but may also contravene Federal law to the extent of rendering the BNAA-Platinum agreements invalid and unenforceable. These concerns prompt this request for a legal determination from your office regarding the validity of the BNAA-Platinum agreements consistent with applicable Federal law.” The BNAA argues that it “did not surreptitiously attempt to use the FAA for any nefarious purpose” but that it “sought guidance from the agency regarding its compliance obligations in the context of the then on-going litigation.” FAA Exhibit 1, Item 8, p. 4.

<sup>175</sup> FAA Exhibit 1, Item 3, p. 16-17.

<sup>176</sup> FAA Exhibit 1, Item 6, Exhibit C.

<sup>177</sup> FAA Exhibit 1, Item 8, p. 18-19.

The Complainant claims that the BNAA “has violated Grant Assurances by attempting to take away their priority use area entirely,”<sup>178</sup> that the BNAA imposed “a totally new contract,” although at issue were “only two or three provisions in the existing contracts,” and that the BNAA action were to force Complainant “to accept materially different terms.” Complainant denies “that the priority use area would require closure of an adjacent taxiway” and that it “expected the Airport Authority to close said taxiway.”<sup>179</sup>

However, although Complainant argues that it “expected the Priority Use Area provision of the contract to only limiting the specific area” in front of its hangar as being unavailable to competitors of Platinum, “as a practical consequence, the adjacent taxiway would not be usable when Platinum [Complainant’s] planes were parked in said priority use area....” Complainant adds that the “BNAA continues to object to Platinum's planned utilization of the so-called Priority Use Area” pursuant to the contract, “despite previous approval of this arrangement, as well as a court ruling that it is enforceable, BNAA continues to object.”<sup>180</sup>

The Director rejects Complainant’s arguments. As mentioned above, the fact that the State court found that the Platinum Agreements were valid contracts under state law does not mean that it is consistent with the BNAA’s Federal obligations since, a decision by the State Court does not override the FAA’s responsibilities to adjudicate applicable federal grant assurances or implies that the BNAA actions concerning such grant assurances are limited by the same decision.

Priority use areas, as described and interpreted by Complainant, are not common in FBO agreements. Usually, the areas to be used by an FBO for parking aircraft are clearly defined and identified in the FBO lease, and do not include taxiways and movements areas. The mere fact that Image Air’s parking is larger than Complainant’s, does not mean that there is a violation of the BNAA’s Federal obligations. Complainant and Image Air are not similarly situated (an existing lease versus one in which the parties failed to clearly identify lease premises), and their respective use of the aircraft ramp is dissimilar<sup>181</sup> in that Image Air is not interfering with movement areas and taxiway usage, as discussed below. The fact that Complainant finds itself today operating with a leasehold that contains a smaller area to park aircraft and that “Image Air enjoys a large area to park the airplanes that it is fueling or otherwise servicing,” was a matter to be addressed when Complainant negotiated its leasehold, not one to now define the size of the Priority Use Area to interfere with the use of taxiways and movement areas.

The issue of the Priority Use Area interfering with movement areas and taxiway use is substantial. On December 13, 2004, Image Air informally complained to the FAA Chicago Airports District Office (ADO) that the construction of Complainant’s FBO facility would give Complainant an unfair advantage, in part because Complainant’s FBO hangar was too close to the taxiway/taxilane and restricted access to Image Air’s own facility. Although at the time, the FAA did not state whether there was a compliance issue or not, as part of its review, the FAA rechecked airspace study 2004-AGL-867-NRA and although verified that Complainant’s hangar met the airport design standards for taxiway and taxilane centerline to object clearances, it took the position that it would be difficult to park any aircraft on the apron in front of the hangar due to lack of taxiway centerline or to object

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<sup>178</sup> FAA Exhibit 1, Item 8, p. 21.

<sup>179</sup> FAA Exhibit 1, Item 6, p. 4-5.

<sup>180</sup> FAA Exhibit 1, Item 6, p. 3-4, 7-8.

<sup>181</sup> FAA Exhibit 1, Item 8, p. 11.



clearance. FAA determined that the airport may have entered into an agreement for a new FBO that could result in potential compliance and airfield operating issues.<sup>182</sup>

The Director rejects Complainant's argument that the Priority Use Area would not require closure of an adjacent taxiway.<sup>183</sup> Complainant's argument here is disingenuous. The record indicates that in February, 2005, Complainant specifically stated that it had the right to "early closure of all ramp areas south of our facility including Taxiway C" and that "there were no safety issues..."<sup>184</sup> More recently, in May, 2006, Complainant stated that it believes the Services Agreement gave it "the power to shut down an active taxiway at the Airport" and that it "intended to park planes on the taxiway."<sup>185</sup> FBOs may not be given the power to shut down active taxiways. Such a grant of authority is a direct violation of the airport's grant assurances, including Grant Assurance 5, Grant Assurance 19, Grant Assurance 23, and Grant Assurance 29, as discussed below. The record shows that the BNAA proposed several ways to resolve the Priority Use Area issue, and Complainant rejected them. Complainant "insisted, for example, that no airport user -commercial or otherwise -should be able to use the Priority Use Area, even for transit purposes; proposing, instead, that Image Air fuel trucks transit through the active taxiways or outside the Airport's fence to reach the Airport's fuel farm..."<sup>186</sup>

In addition, in June 2006, Complainant notified the BNAA that it wanted to identify the Priority Use Area by "stripping the ramp area with paint" and requested that the BNAA "create and enforce alternatives routes for Image Air's fuel trucks so they will be directed to go around – and not through – the Platinum's PUA [Priority Use Area]." Complainant's purpose is "in order to ensure that others at the Airport are not utilizing the PUA for their own commercial use." Complainant asked the BNAA to provide "details for the venue Platinum can use to seek assistance of Airport personnel in the event Platinum's PUA is infringed upon..."<sup>187</sup>

On October 2, 2006, the BNAA wrote to Complainant and noted that during a tour of Complainant's new facilities, the BNAA was informed that should the need arise, Complainant "intends to park aircraft beyond the Non-Movement Area Boundary marking on the ramp" and that Complainant had indeed relayed the same information to the Air Traffic Control Tower (ATCT) facility manager. At the time, the BNAA warned Complainant that "the area on the ramp beyond the Non-Movement Area Boundary Marking is designated as an airport movement area and may not be entered without ATC clearance" and that the agreements between the BNAA and Complainant "expressly prohibit parking aircraft in the public portions of the Airport, which includes the movement areas" and that "parking aircraft on taxiways is contrary to the Airport's Rules and regulations."<sup>188</sup>

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<sup>182</sup> FAA Exhibit 1, Item 9.

<sup>183</sup> FAA Exhibit 1, Item 6, p. 4-5.

<sup>184</sup> FAA Exhibit 1, Item 1, Exhibit M, letter dated February 3, 2005.

<sup>185</sup> FAA Exhibit 1, Item 8, p. 19.

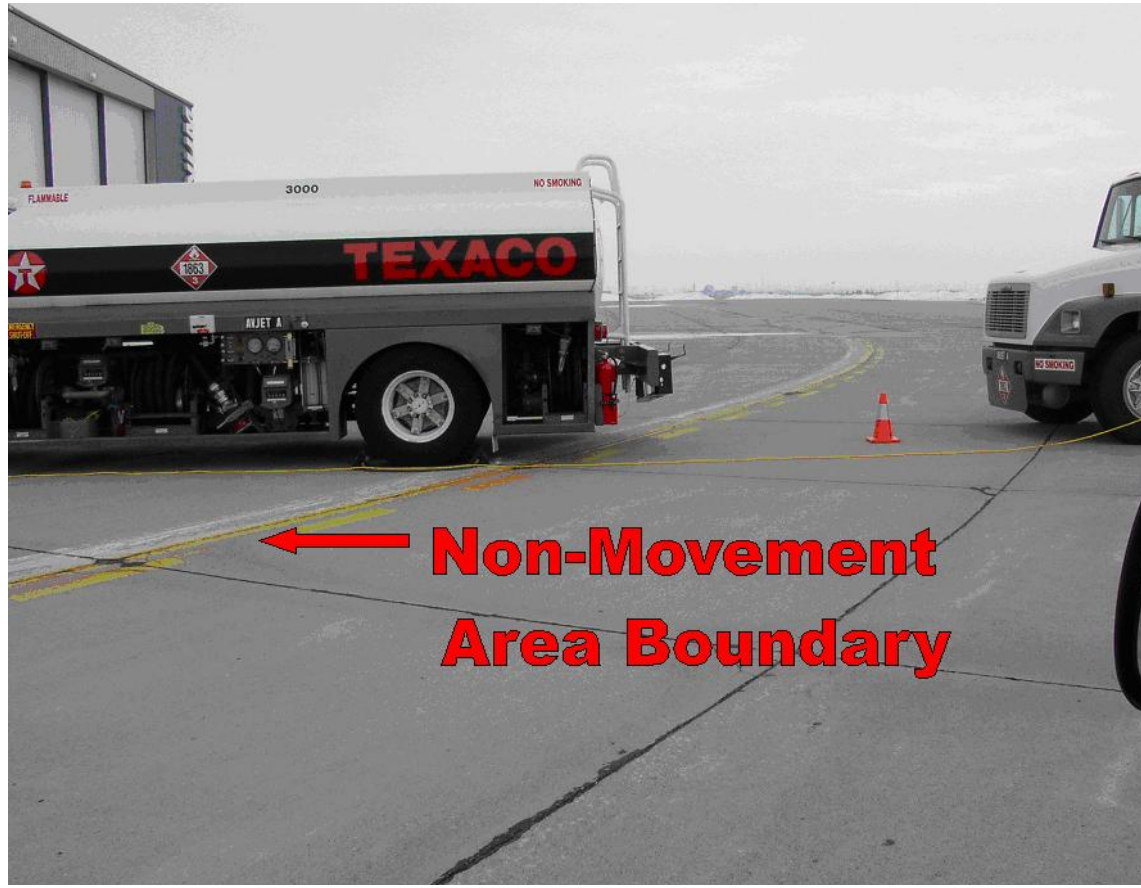
<sup>186</sup> FAA Exhibit 1, Item 3, p. 18. One related issue is the location of Complainant's hangar and fuel farm. The BNAA admits that when discussing the location of Complainant's hangar, it stated that it would not accept a new location east of the old passenger terminal building. The BNAA also admits that the ultimate siting of the footprint of the Platinum Parties' fuel farm had to be adjusted to take into account the runway's building restriction line, but denies that it "dictated" the location of Complainant's hangar or the priority use area. FAA Exhibit 1, Item 8, p. 12. Also see FAA Exhibit 1, Item 6, Exhibit C for more details on both the fuel farm location and the BNAA's offer to accommodate Complainants' need for addition space.

<sup>187</sup> FAA Exhibit 1, Exhibit 10, Exhibit D.

<sup>188</sup> FAA Exhibit 1, Item 10, Exhibit H.

On October 27, 2006, the BNAA again notified Complainant “not to travel past the Non-Movement Area Boundary marking” and not to “park aircraft in any area beyond this particular pavement marking.” In addition, the BNAA once more warned Complainant that it “will pursue whatever means are necessary to insure compliance by the Airport Authority of all applicable FAA rules and Regulations and will enforce all Airport Authority Rules and Regulations.”<sup>189</sup>

**Figure 4 – Complainant’s fuel trucks penetrating the Non-movement Area Boundary and into the airport movement area. FAA Exhibit 1, Item 16, and Item 18.**



On February 20, 2007, the BNAA notified the FAA that on February 19, 2007, Complainant “repositioned and parked their two Jet-A mobile fuel trucks in such a manner (See Figure 4) across our general aviation apron as to create an immediate safety hazard to aircraft, emergency response vehicles, and airport ground vehicles.”<sup>190</sup> The BNAA states that by doing this, Complainant “effectively created a barrier that prevented aircraft and ground vehicles from safely traversing the apron while remaining inside the non-movement boundary marking” and that “the fuel trucks were parked partially beyond the movement boundary marking and inside the object free area [TOFA] for Taxiway A...” The BNAA adds that immediately upon learning of the event, as it is required, the

<sup>189</sup> FAA Exhibit 1, Item 10, Exhibit I.

<sup>190</sup> FAA Exhibit 1, Item 18 and FAA Exhibit 1, Item 16.

BNAA “issued a NOTAM<sup>191</sup> changing that portion of Taxiway A into a non-movement area in order to prevent surface deviations.” The BNAA indicates that it “asked Platinum to relocate its fuel trucks to an appropriate parking location” but that Complainant rejected the Airport's requests.<sup>192</sup>

The BNAA reports that although Complainant eventually agreed to remove the fuel trucks, the issue returned as fuel trucks were moved back into the non-movement boundary marking. As a result, the BNAA face the issue that Complainant maintains this parking arrangement for their fuel trucks, , because of the “their assertion of exclusive rights to this apron area...” As a result, the BNAA advised the FAA of “this continuing unsafe condition, and in accordance with FAR Part 139.343,” the BNAA requested “that all of Taxiway C, and that portion of Taxiway A, north of Taxiway E and west of Taxiway D be temporarily closed to air carrier operations until all unsafe conditions are removed.”<sup>193</sup>

In addition, on February 23, 2007, the FAA was informed by an airport user that “fuel trucks belonging to Platinum FBO that are parked in a manner that impacts safe aircraft movement on the ramp and possibly taxiway A” at the Airport...<sup>194</sup> As a result of the Priority Use Area provision and of Complainants’ subsequent actions that resulted in parking of vehicles in the movement area, the FAA issued an amendment to the Airport Facility Directory (AFD).<sup>195</sup> This write up was as follows

**A110 REMARKS - Taxiway C and Taxiway A west of Taxiway D and north of Taxiway E are not authorized for use by scheduled air carrier aircraft designed for 10+ passengers seats, and scheduled/unscheduled air carrier aircraft designed for 31+ passenger seats.**<sup>196</sup>

The record shows that Complainant’s actions concerning the Priority Use Area have had a significant negative impact on airport operations.<sup>197</sup> If the BNAA were to allow “early closure of all ramp areas” south of Complainant’s facility including Taxiway C, or permit the “shut down an active taxiway, such as Taxiway A, or permit the parking of aircraft on these taxiways and into movement areas as outlined above, because of a lease agreement with a tenant, such interference with airport operations is inconsistent with Grant Assurance 5, *Preserving Rights and Powers* and Grant Assurance 19, *Operation and Maintenance*. In doing so, the BNAA gives up its ability to control critical airfield infrastructure (taxiways) and ensure safe operations on its airport movement areas. In addition, such action is inconsistent with Grant Assurance 23 *Exclusive Rights* as it effectively grants an exclusive right of critical airfield infrastructure to one operator which is supposed to be for public use.

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<sup>191</sup> Notice to Airman. Airport management is responsible for observing and reporting the condition of a movement area. The automated/flight service station (AFSS/FSS) air traffic managers shall coordinate with appropriate airport managers to obtain a list of airport employees who are authorized to issue NOTAMs. FAA Order 7930.2K *Notices to Airmen (NOTAMS)*, Chapter 5. NOTAM CRITERIA, Section 1. MOVEMENT AREA NOTAMs, Section 5-1-1. ORIGINATORS OF MOVEMENT AREA NOTAMs.

<sup>192</sup> FAA Exhibit 1, Item 18 and FAA Exhibit 1, Item 16.

<sup>193</sup> FAA Exhibit 1, Item 18 and FAA Exhibit 1, Item 16.

<sup>194</sup> See FAA Form 1360-33, *Record of Visit, Conference, or Telephone Call*, 1/23/2007, FAA Exhibit 1, Item 19.

<sup>195</sup> FAA Exhibit 1, Item 17.

<sup>196</sup> Source: FAA Exhibit 1, Item 17.

<sup>197</sup> FAA Exhibit 1, Item 18 & 19.

Permitting such actions has a negative impact on the utility of the Airport's taxiway system. It interferes with the use and safe operation of the Airport's taxiway system. The taxiway system should provide for free movement of aircraft to and from the runways, terminal/cargo, and apron parking areas, and not disrupt aircraft movements with restrictions that impact the use of the airfield.<sup>198</sup> In this case, by cutting off parts of Taxiways A and C, and infringing upon the nearby movement areas, the Complainant's actions have affected the Airport in a negative and potentially unsafe manner.

Restricting movements on Taxiway A and Taxiway C significantly impacts airfield operation, when runway 11-29 is in use or when aircraft need to access both sides of the main general aviation ramp after landing on runway 29. Also, it is inherently unsafe to mix aircraft parking and vehicular activity (i.e. fuel trucks) on airport movement areas and taxiways. Even if the Airport takes action to mitigate the situation, such as issuing a NOTAM or declaring the areas in question as non-movement areas, as it did, the damage to the Airport's utility has been done, and thus, actions by the BNAA to prevent it or rectify the situation are not only justified, but expected by the FAA.

The safety implications of Complainant's action cannot be minimized. Permitting a tenant to park aircraft and trucks on movement areas or/and taxiways is inconsistent with the FAA's safety role in eliminating potential runway incursions<sup>199</sup> and would most likely create a "Hot Spot"<sup>200</sup> [problem area] at the Airport by introducing a confusing runway/taxiway layout for pilots and vehicular operators resulting in unintended aircraft or vehicle movements into airfield areas such as active runways. Moreover, Complainant's use of the Priority Use Area is inconsistent with several FAA standards including Taxiway Object Free Areas (TOFA).<sup>201</sup> The Complainant's parking of aircraft and vehicles in the Priority Use Area is inconsistent with FAA design standards, and as such, compromises the TOFA requirements.<sup>202</sup> Again, action by the BNAA to prevent this is not only justified, but expected by the FAA.

If the BNAA were to acquiesce to Complainant's demands to "create and enforce alternatives routes for Image Air's fuel trucks so they will be directed to go around – and not through" Complainant's

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<sup>198</sup> The taxiway system should maintain a smooth flow with a minimum number of points requiring a change in the airplane's taxiing speed. Cutting off Taxiway A and C prevents this and is contrary to taxiway design principles which include providing each runway with a parallel taxiway or capability, build taxiways as direct as possible, provide bypass capability, enhance access to runway ends, minimize crossing runways, provide airport traffic control tower line of sight, and avoid traffic bottlenecks. FAA Advisory Circular 15-5300-13 *Airport Design*, Change 10, Chapter 2, p. 10.

<sup>199</sup> A runway incursion is any occurrence in the airport runway environment involving an aircraft, vehicle, person, or object on the ground that creates a collision hazard or results in a loss of required separation with an aircraft taking off, intending to take off, landing, or intending to land. See <http://www.faa.gov/runwaysafety/>

<sup>200</sup> As part of its safety awareness efforts, the FAA is interested in minimizing runway incursions and eliminate "hot spots" with help from airport operators, a "hot spot" being a location at the airport where the potential for a runway incursion is higher than elsewhere at the airport. For additional information on runway safety, see *FAA Runway Safety Report, August 2005*, p.46 at <http://www.faa.gov/runwaysafety/pdf/report5.pdf>

<sup>201</sup> An *Object Free Area (OFA)* is an area on the ground centered on a runway, taxiway, or taxilane centerline provided to enhance the safety of aircraft operations by having the area free of objects, except for objects that need to be located in the OFA for air navigation or aircraft ground maneuvering purposes. The taxiway and taxilane OFA clearing standards prohibit service vehicle roads, parked airplanes, and above ground objects, except for objects that need to be located in the OFA for air navigation or aircraft ground maneuvering purposes. Vehicles may operate within the OFA provided they give right of way to oncoming aircraft by either maintaining a safe distance ahead or behind the aircraft or by exiting the OFA to let the aircraft pass. Provide vehicular exiting areas along the outside of the OFA where required. FAA Advisory Circular 15-5300-13 *Airport Design*, Change 10, Chapter 1, p.2, Chapter 4, p. 33.

<sup>202</sup> Airspace Case 2004-AGL867-NRA dated December 2, 2004 covered Complainant's hangar and its construction, not the use of the Priority Use Area as proposed. See FAA Exhibit 1, Item 3, Exhibit 7, Exhibit F.

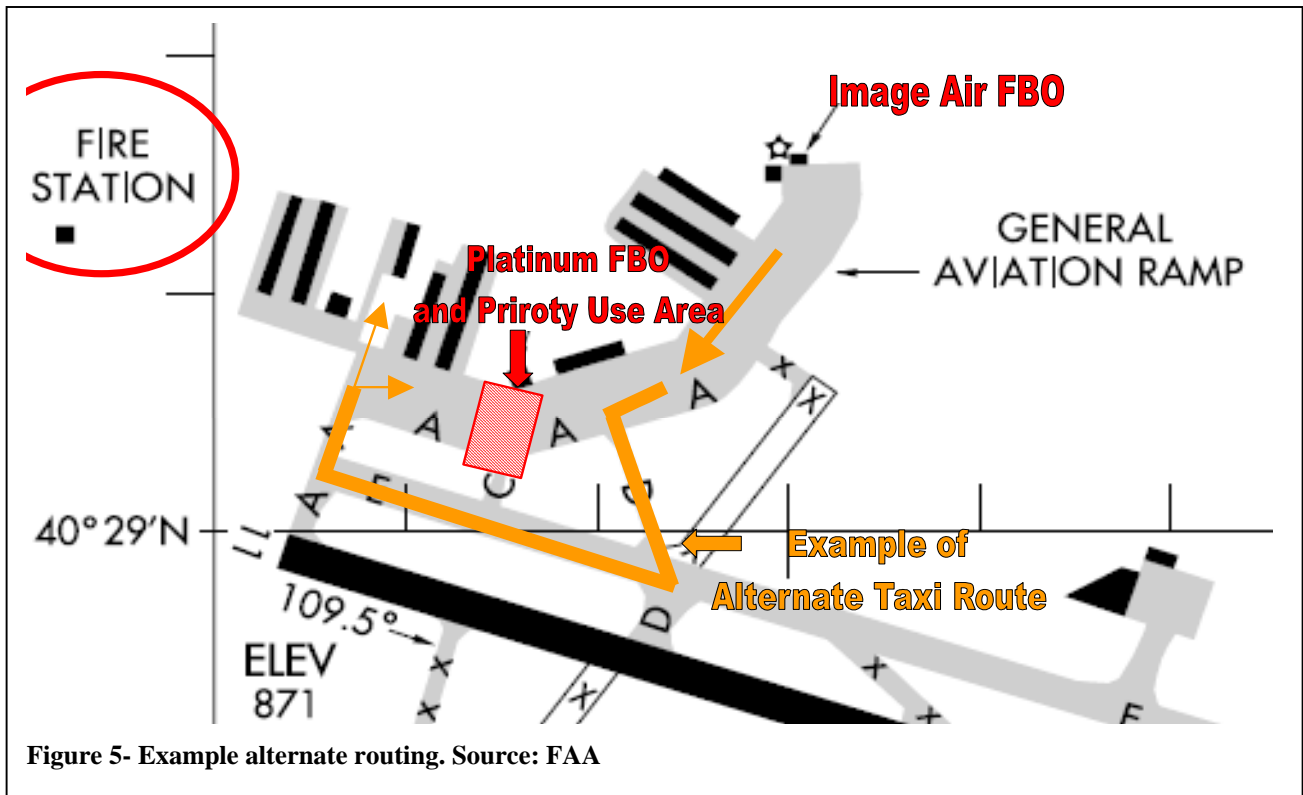


Figure 5- Example alternate routing. Source: FAA

Priority Use Area,<sup>203</sup> Image Air’s fuel trucks servicing users on the West side of the Airport would have to enter Taxiway D, Taxiway E and the extreme West part of Taxiway A, as depicted in Figure 5 (orange line). This is inherently riskier since it introduces vehicular activity to the only remaining taxiway between the runway and the general aviation ramp.

In addition, the Priority Use Area would delay fire rescue equipment from accessing other areas at the Airport, including the general aviation ramp, also depicted in Figure 5. That is, fire rescue equipment, fueling and other vehicles all need individual ATCT clearance before entering the active taxiway. Fire rescue equipment could experience delay in responding to an emergency on the general aviation ramp because of the presence of aircraft were using Taxiway E.

In any event, and without prior FAA approval, under no circumstances would the FAA accept a permanent closure of a taxiway based on an agreement between the airport sponsor and a tenant.<sup>204</sup> To do otherwise would be a violation of Grant Assurance 29, *Airport Layout Plan*. Even if the BNAA was to permit the closing of the taxiways, the FAA would object since, in addition to the safety issues discussed above, and as stated in Grant Assurance 29, “if a change or alteration in the airport or its facilities is made which the FAA determines adversely affects the safety, utility, or efficiency of any Federal investment on or off the airport and which is not in conformity with the ALP as approved by the FAA, an airport sponsor may be required to eliminate such an adverse effect in a manner approved

<sup>203</sup> FAA Exhibit 1, Exhibit 10, Exhibit D.

<sup>204</sup> The FAA evaluates the airport proposal for its impact upon the safe and efficient use of navigable airspace; operation of air navigation facilities; existing or potential airport capacity; and safety of persons and property on the ground. The FAA notifies proponents of the results of the FAA evaluation. FAA Advisory Circular 15-5300-13 *Airport Design*, Change 10, Chapter 1, p. 6.

by the FAA.”<sup>205</sup> This is especially true because the Priority Use Area is located on a public use AIP funded public ramp, and the FAA expects that ramp area to be public, not restricted as Complainant argues.

Finally, for the BNAA to give up control over the taxiways, taxilanes and movement areas by a Priority Use Area, conflict arises with the Airport’s ability to meet its 14 CFR Part 139 requirements, which include several safety-related requirements such as control of pedestrians and ground vehicles within airport surfaces, and securing certain areas of the airfield (such as runways, taxiways and movement areas). If the FAA were to find that the Airport is not meeting its obligations under Part 139, it could impose administrative action or civil penalties for violations of Part 139.<sup>206</sup> In extreme cases, the FAA might revoke the Airport's certificate or limit the areas of an airport where air carriers can land or takeoff.<sup>207</sup> The FAA would expect the BNAA to take whatever action is necessary to regain control of the taxiways and taxi lanes affected by its agreement with Complainant.

In summary, the BNAA did take adequate corrective action in seeking an amendment to the Agreement Authorizing Services with Complainant. The FAA expected the BNAA to do so, including taking all necessary actions to prevent blockage of active taxiways, even if it meant taking legal action or exercising its powers to correct the situation, since the agreements provide the BNAA with some course of action.<sup>208</sup> In any event, even if the agreements did not contain severability or subordination language, the FAA would still expect the BNAA to take adequate action to comply with its Federal obligations.

Based on the above, the Director finds that the BNAA has the responsibility to maintain access to the taxiways and the general aviation ramp and that the actions taken by the BNAA to eliminate or mitigate the negative impact of the Priority Use Area arrangement in the Agreement Authorizing Services is consistent with its Federal obligations.

#### **(d). Sale of Aviation Fuel**

The sale of aviation fuel is part of the Agreement Authorizing Services and the Agreement Authorizing the Sale of Aviation Fuel.<sup>209</sup> The Agreement Authorizing Services provides that the BNAA “may grant

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<sup>205</sup> All airport development carried out at Federally obligated airports must be done in accordance with an FAA-approved ALP. The FAA-approved ALP, to the extent practicable, should conform to the FAA airport design standards existing at the time of its approval. Due to unique site, environmental, or other constraints, the FAA may approve an ALP not fully complying with design standards. Such approval requires an FAA study and FAA finding that the proposed modification is safe for the specific site and conditions. When the FAA upgrades a standard, airport owners should, to the extent practicable, include the upgrade in the ALP before starting future development. FAA Advisory Circular 15-5300-13 *Airport Design*, Change 10, Chapter 1, p. 5.

<sup>206</sup> See 49 USC § 46301 (a) and (d).

<sup>207</sup> See 14 CFR Part 139.343 *Noncomplying Conditions*.

<sup>208</sup> The provisions of both the Services Agreement and the Fuel Agreement are subordinated "to the provisions of any existing or future agreement between the Authority...and the United States... the execution of which has been or may be required as a condition precedent to the expenditure of Federal...funds for the development of the Airport." FAA Exhibit 1, Item 3, p. 8-9. The Ground Lease Agreement contains no such provision, [FAA Exhibit 1, Item 1, p. 4.] but includes severability language that requires reformation of that agreement if any provision is held to be illegal, invalid, or unenforceable. FAA Exhibit 1, Item 3, p. 21-22. See FAA Exhibit 1, Item 8, p. 16-17. Comparison of Ground Lease § 19, with Services Agreement § 18, and Fuel Agreement § 20).

<sup>209</sup> See FAA Exhibit 1, Item 1, and Exhibit C for a copy of this agreement.

by separate agreement a limited exclusivity for aviation fuel sales"<sup>210</sup> Referencing the RFP requirements, Section 3(b) provides that:

[t]he Bloomington-Normal Airport Authority will permit no more than one (1) lease for the operating privilege of either storing or dispensing for their own use, or dispensing at retail, aviation fuels at the Central Illinois Regional Airport to a "Full Fixed Base Operation", as described herein, until a total of 3,000,000 gallons of retail fuel is utilized annually. ...One additional lease may be granted for an additional 7,000,000 gallons of fuel utilized annually thereafter, until a total of 10,000,000 gallons of retail fuel has been dispensed. A third lease may be granted thereafter.<sup>211</sup>

The second agreement, the Agreement Authorizing the Sale of Aviation Fuel, runs contemporaneously with the above-mentioned Agreement Authorizing Services, and authorizes Complainant "to engage in the sale of aviation fuel to the public, including commercial and general aviation users, at the Airport." Like the Agreement Authorizing Services, in Section 3(b) of the Agreement Authorizing the Sale of Aviation Fuel makes reference to the limitations of fuel sales stated in the RFP (i.e. the 3 million gallon limitation).<sup>212</sup>

The BNAA "denies that it promised and represented to Platinum that if Platinum signed the Platinum Agreements and built its hanger [sic] facility and fuel farm, it would restrict the number of aviation fuel vendors at the Airport."<sup>213</sup> The BNAA "acknowledges that the Services Agreement [Agreement Authorizing Services] and the Fuel Agreement include references that could be interpreted to provide an exclusive right on the sale of aviation fuel."<sup>214</sup> The BNAA a "now also understands that if these contractual provisions are interpreted to be enforceable covenants attempting to restrict the sale of aviation fuel at the Airport, they may be in violation of Grant Assurance No. 23 and the statutory ban

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<sup>210</sup> FAA Exhibit 1, Item 3, p. 8.

<sup>211</sup> FAA Exhibit 1, Item 3, p. 8. Under the agreement, the BNAA also retained the right to modify this provision "in the event the Authority determines that Airport traffic necessitates additional FBO service providers."

<sup>212</sup> FAA Exhibit 1, Item 3, p. 8-9.

<sup>213</sup> FAA Exhibit 1, Item 8, p. 21.

<sup>214</sup> The BNAA adds that "as stated in the Motion for Declaratory Statement (Id.), although these purported restrictions have been part of the Airport's Minimum Standards for the past several years, the Authority has not enforced them before." FAA Exhibit 1, Item 8, p. 20-21. In its Rebuttal, the BNAA denies that "the fuel sales exclusivity limitation" is evidence that the Authority has granted an exclusive right to Image Air because, and that as a result, "Image Air is the sole Full Fixed Based Operator at the Airport. The BNAA adds that "the fact that a single business or enterprise is conducting most or all of the on-airport aeronautical activities is not, in itself, evidence of an exclusive right violation." FAA Exhibit 1, Item 8, p. 13. See FAA Advisory Circular 150/5190-5 (June 10,2002), § 1-3(b); (see also FAA Order 5190.6A (October 2,1989). The BNAA states that it "never had the occasion to enforce the fuel sales exclusivity limitation, as evidenced by the fact that the Authority sought proposals from the prospective FBOs and eventually entered into an agreement with Platinum Jet Center notwithstanding its prior agreement with Image Air." Finally, the BNAA denies that it gave "Image Air the exclusive right to access and manage the Airport's existing fuel farm" and claims that it is "unaware of any such legal right, common historical understanding, or oral representations." Although recognizing that "Image Air has been granted the right (but not the exclusive right) to store fuel in the existing fuel farm, a right for which it pays approximately \$30,000 each year to the Authority," all other aeronautical users of the Airport, "including the airlines, have the right to (and many actually do) store their fuel in the existing fuel farm." In any event, a complaint by Complainant that the BNAA has granted an exclusive right to Image Air through a fuel sales exclusivity limitation is undermined by the Complainant's own argument that the fuel sales exclusivity limitation in their Services Agreement and Fuel Agreement are an important part of their business deal with the Authority, and that the Authority must enforce it or undermine their profitability. FAA Exhibit 1, Item 8, p. 13-14.

on exclusive rights found at 49 U.S.C. § 49103(e).”<sup>215</sup> In any event, the BNAA asks the FAA to “determine whether the fuel sales exclusivity limitation in the Services Agreement and the Fuel Agreement violate Grant Assurances or Federal law.”<sup>216</sup>

Generally, this fueling provision grants an exclusive right contrary to Grant Assurance 23. This is because it provides that the BNAA “may grant by separate agreement a limited exclusivity for aviation fuel sales.” The BNAA cannot by express agreement commit to only allow one FBO lease for the operating privilege of fueling. It cannot do so even if it limits its action to a certain number of gallons, in this case, 3,000,000 gallons.<sup>217</sup> All of these actions would be granting an exclusive right to an FBO since that FBO would have an “exclusive” right to sell up to 3 million gallons of fuel and only after that amount is reached, would a second FBO be permitted to dispense or sell fuel.

The record plainly illustrates that Complainant understood the fueling provision as granting it an exclusive right. In fact, Complainant states that “...specifically, BNAA promised and represented to Platinum that if Platinum signed the Platinum Agreements and built its hanger facility and fuel farm, it would restrict the number of aviation fuel vendors at the Airport” and that “the purpose in this regard was not merely to entice Platinum, but to underscore the Airport's position that fuel sales by existing FBO's would be fully maximized before any additional fuel vendors would be permitted...”<sup>218</sup> This is a violation of the exclusive rights prohibition, and as such, the BNAA actions to eliminate it were justified.

Taking action to correct this violation on the prohibition of exclusive right is not only justified, but required. This is especially true when and the provisions of both the Services Agreement and the Fuel Agreement are subordinated “to the provisions of any existing or future agreement between the Authority...and the United States...”<sup>219</sup> As with the Priority Use Area, even if the agreements did not contain subordination language, the FAA would still expect the BNAA to take adequate action to correct the situation, eliminate the exclusive right, and comply with its Federal obligations.

Based on the above, the Director finds that the BNAA was required to eliminate the exclusive right it gave Complainant. Its actions to achieve this, are therefore justified and in compliance with the BNAA’s Federal obligations.

#### **(f). Conclusion on the Platinum Agreements**

Although changes of the Platinum Agreements made pursuant to the subordination clauses may result in giving up contractual rights under state law, it may also be required to maintain compliance with the applicable Federal obligations. The BNAA should not enter into agreements that place it in breach of its Federal obligations. The consequences of such a breach can be severe and may result in the loss of Federal funding.<sup>220</sup> As discussed above, these compliance problems were real and as such, required

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<sup>215</sup> FAA Exhibit 1, Item 8, p. 21. The BNAA makes reference to [Corporate Jets Inc. v. City of Scottsdale](#), FAA Docket No. 16-01-12, at 5 (March 15,2002) (restrictive covenants with existing operators, if enforced, are considered inconsistent with an airport sponsor's Federal obligations).

<sup>216</sup> FAA Exhibit 1, Item 8, p. 20.

<sup>217</sup> FAA Exhibit 1, Item 3, p. 8. Under the agreement, the BNAA retained the right to modify this provision “in the event the Authority determines that Airport traffic necessitates additional FBO service providers.”

<sup>218</sup> FAA Exhibit 1, Item 7, p. 4.

<sup>219</sup> FAA Exhibit 1, Item 3, p. 8-9.

<sup>220</sup> For example, see FAA Docket No. 16-05-09 [Brown Transport Co. v. City of Holland, Michigan](#), March 1, 2006, p.25



action on the part of the BNAA. The Director finds that several of the terms and conditions contained in certain Platinum Agreements, such as the Property Use Area in the Agreement Authorizing Services and the exclusive fueling rights contained in the Agreement Authorizing Services and the Agreement Authorizing the Sale of Aviation Fuel, are inconsistent or potentially inconsistent with the BNAA's Federal obligations. Therefore, actions by BNAA to correct the situation are not a violation of the BNAA's Federal obligations.

## **Issue 2. Compliance with Grant Assurance 22 *Economic Nondiscrimination***

Complainant argues that the BNAA is in violation of 49 USC § 47107(a)(1) and Grant Assurance 22, which provides that "the airport will be available for public use on reasonable conditions and without unjust discrimination" and that 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..."<sup>221</sup> More specifically, Complainant believes that the BNAA "has undertaken a pattern of aggressive and unreasonable steps" to undermine its efforts, and has "done everything in its power to avoid a forthright and reasonable discussion..."<sup>222</sup> and that the BNAA "has failed to operate in good faith and has conducted itself in an unreasonable manner..."<sup>223</sup> Complainants have asserted that the BNAA is forcing Complainant "to unilaterally give up contractual rights without just compensation."<sup>224</sup> Complainant's arguments centering on reasonableness are based on the allegations that the BNAA can be summarized as follows:

- (a) Rejecting the Platinum Agreements;
- (b) Interfering with Complainants' Construction Site;
- (c) Lack of Cooperation; and
- (d) Unjust Discrimination.<sup>225</sup>

The BNAA denies these allegations and argues that its actions "are steps taken by the Authority to manage and control development on the Airport, to maintain a working relationship with FAA, and to accommodate the Platinum Parties' efforts to build their hangar and fuel farm while operating under the burden of poorly drafted, hard to implement agreements."<sup>226</sup> The BNAA argues that "it has operated in good faith and has acted reasonably" and that it "cannot settle with a party whose demands for financial compensation outreach any reasonable actual damages, the value of its investment, and the Authority's ability to pay..."<sup>227</sup> Finally, in defending its actions, the BNAA states that "in spite of the likely fruitlessness of the endeavor, the Authority has prepared a new model lease, which it

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<sup>221</sup> FAA Exhibit 1, Item 1, p. 11-12.

<sup>222</sup> FAA Exhibit 1, Item 8, p. 3.

<sup>223</sup> FAA Exhibit 1, Item 6, p. 6.

<sup>224</sup> FAA Exhibit 1, Item 8, p. 17.

<sup>225</sup> These issues represent Complainant's arguments that the BNAA has violated Grant Assurance 22. Specifically, Complainant's arguments centering on reasonableness are based on the allegations that the BNAA (1) is operating in ongoing, material and willful breach of the Platinum Agreements by refusing to perform its obligations, or even acknowledge the validity of the Platinum Agreements, (2) is intentionally and repeatedly interfering with Platinum's ability to perform its part of the Platinum Agreements; (3) is repeatedly withholding material information relating to the project site; (4) is refusing, until recently, to provide any useful information or guidance regarding exactly how it considers the FAA Sponsor Assurances to be violated; (5) is refusing to provide any alternative language that would satisfy its concerns regarding FAA Assurances; and (6) is improperly and unlawfully denouncing the Platinum Agreements in their entirety. Finally, Complainant also argues that the BNAA has unjustly discriminated against it. FAA Exhibit 1, Item 1, p. 12.

<sup>226</sup> FAA Exhibit 1, Item 8, p. 3.

<sup>227</sup> FAA Exhibit 1, Item 3, p. 27-29, 31.

proposes to use for all FBO agreements going forward, and has offered the terms of that new model lease to the Platinum Parties.”<sup>228</sup>

**(a). Rejecting the Platinum Agreements**

Complainant argues that by denouncing “the Platinum Agreements in their entirety,” the BNAA is acting in violation of its Federal obligations<sup>229</sup> and that although the BNAA suggested a possible solution that included a proposal to “delete [from the Platinum Agreements] any provision violative of FAA regulations or sponsor assurances, it “failed to identify which provisions would thus be subject to deletion.” Complainant adds that although it “followed up with a request for additional information and a counter-proposal, including an offer to relocate the hangar,” the BNAA did not respond in any meaningful manner...<sup>230</sup>

As discussed above, the Director finds that several of the terms and conditions contained in the Platinum Agreements are inconsistent or had the potential to be inconsistent with the BNAA’s Federal obligations and therefore, actions by BNAA to correct the situation, are inherently consistent with the BNAA’s Federal obligations. Thus the effect is that actions by the BNAA to reject several provisions of the Platinum Agreements or taking actions to amend or modify the agreements as to avoid violations of the Airport’s Federal obligations, is not unreasonable. In fact, the course of action is consistent with Grant Assurance 5. When BNAA is attempting to comply with its Federal obligations by revising its standards, it is hard to accuse it of an unjust discrimination violation.

If as a result of actions taken by the BNAA to correct violations of its Federal obligations result in a rejection or changes to the Platinum Agreements to achieve compliance, such actions in and of themselves do not constitute a violation of the BNAA’s Federal obligations. Failure to act, on the part of the BNAA, would have been a violation of its Federal obligations. Moreover, the Complainant’s arguments that “the State Court, subsequently, has specifically found the three Platinum Agreements executed by the parties are fully valid and enforceable...” is rejected as justification for its lack of cooperation with the BNAA to modify the agreements.<sup>231</sup> As to the allegation of unjust discrimination, it is not a question of contractual validity. As mentioned above, the fact that a State court found the Platinum Agreements valid under State law does not make them compliant with the BNAA’s Federal obligations. The BNAA is free to enforce the subordination clauses under the agreements, which is consistent with the state court decision. Failure to enforce the subordination clauses in this instance results in the airport’s non-compliance with its Federal obligations and thus becomes a violation of its grant assurances.

Based on the record and discussion above, the Director finds that the BNAA, in rejecting certain clauses within the Platinum Agreements is not in violation of its obligations under Grant Assurance 22. The Complainant fails to prove that the airport is not available for public use on reasonable conditions and without unjust discrimination and that the airport sponsor has not made 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.

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<sup>228</sup> FAA Exhibit 1, Item 3, p. 27-29, 31.

<sup>229</sup> FAA Exhibit 1, Item 6, p. 5, FAA Exhibit 1, Item 1, p. 11.

<sup>230</sup> FAA Exhibit 1, Item 1, p. 11.

<sup>231</sup> FAA Exhibit 1, Item 6, p. 5.

**(b). Interfering with Complainants' Construction Site**

Complainants allegations concerning the BNAA interfering with Complainants' activities at the Airport stem from the Stop Work Orders issues by the BNAA on June 10, 2005 and June 30, 2005 respectively.<sup>232</sup> The June 10th Order directed that construction on the Platinum project cease alleging that the Platinum Agreements were in violation of several Grant Assurances between BNAA and the FAA.

The June 30, 2005, Stop Work Order was based on the need to complete an Environmental Study for Complainant's project and construction.<sup>233</sup> In response to both Stop Work Orders, Complainant said it "has no intention of abiding by the stop work orders issued by the Bloomington Normal Airport Authority (BNAA) given the information currently available."<sup>234</sup>

**(1). June 10, 2005 Stop Order – Compliance with Grant Assurances**

Complainant argues against the June 10<sup>th</sup> Stop Work Order in part because although it "identified five specific Grant Assurances that BNAA believed were in violation by the Platinum Agreements" it did not contain information explaining "how the Assurances were being violated, which provisions were in violation, and more importantly, what Platinum could do to remedy the problem."<sup>235</sup>

Complainant also argues that although in the September 16, 2005 correspondence, the BNAA suggested a possible solution that included a proposal to delete [from the Platinum Agreements] "any provision violative" of FAA grant assurances, "the letter failed to identify which provisions would thus be subject to deletion" and although "Platinum followed up with a request for additional information in this regard and a counter-proposal, including an offer to relocate the hangar," the BNAA did not respond in any meaningful manner...<sup>236</sup>

The BNAA states "that it had previously objected to the construction in question and had been ignored. The Authority believed, based on its past experience that a tenant's normal reaction to a Stop Work Order would be to respond by acknowledging the order and coming to discuss the matter with the Executive Director. This did not occur."<sup>237</sup>

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<sup>232</sup> See FAA Exhibit 1, Item 1, Exhibit K and L for copies of the Stop Work Orders.

<sup>233</sup> FAA Exhibit 1, Item 1, p. 7.

<sup>234</sup> FAA Exhibit 1, Item 1, Exhibit M, letter dated July 1, 2005.

<sup>235</sup> FAA Exhibit 1, Item 1, p. 7. Moreover, Complainant states in support of its position that "construction on the hangar and fuel farm is currently proceeding at the Platinum site and is expected to be completed, well behind schedule, in late summer or early fall [2006]" and that "the construction has been delayed more than a year, due in large part to the unreasonable conduct of BNAA" and that at completion of the project, Complainant "will have invested in excess of \$5 million dollars, several years, and thousands of man hours, to the negotiation and performance of the Platinum Agreements." FAA Exhibit 1, Item 1, p. 10. Complainant also argues that although the court "explicitly restrained BNAA from interfering with Platinum's ability to install a water line to provide the hangar facility with accessible water" in direct violation of this order, "agents of BNAA approached the City of Bloomington and lobbied officials of the city's Water Department to deny Platinum's request to hook onto the City water system based upon BNAA's own failure to issue an appropriate easement to Platinum." Complainant adds that it was "required to seek assistance from the court yet again to force BNM to perform its minimal contractual obligation and prevent it from further hindering Platinum's efforts to construct its facility. The motion was mooted on October 13, 2005 when BNAA finally provided an easement as contemplated by the parties."

<sup>236</sup> FAA Exhibit 1, Item 1, p. 11.

<sup>237</sup> FAA Exhibit 1, Item 3, p. 23.

Finally, Complainant claims that in seeking FAA review of its allegations concerning violation of the grant assurances, the BNAA acted improperly and did not notify or include Complainant in meetings with the FAA<sup>238</sup> and that Complainant sought FAA review of its alleged violations of the grant assurances so that it could use the FAA in State court.<sup>239</sup>

The BNAA responds that “it met with personnel at FAA Great Lakes Region regarding its concerns about compliance issues arising under the Platinum Parties’ interpretation of the Platinum Agreements, and that it sought guidance from the FAA regarding how to meet its compliance obligations.” The BNAA also sent a letter to the FAA asking for a legal determination on the validity of the Platinum Agreements.<sup>240</sup>

The BNAA rejects Complainant’s the argument that meeting with the FAA “is somehow improper” since the BNAA “has the right to seek agency guidance concerning compliance matters” and that it is not required to notify Complainant “or include them in meetings in order to meet with the FAA” since “the Grant Assurances form a relationship primarily between the FAA and the Authority, and Grant Assurance compliance is a matter primarily for discussion between those two entities.”<sup>241</sup> Finally, in its defense, the BNAA rejects Complainant’s claims that its actions affected Complainant’s construction because “Complainants themselves acknowledge that the project is being built...”<sup>242</sup>

The record establishes that on June 10, 2005 the BNAA issued a Stop Work Order directing that construction on the Platinum project to cease. Also in June 2005, the BNAA communicated with the FAA and noted that it considered itself to be in violation of Sponsor Assurances because of certain terms it had agreed to in the Platinum Agreements, and requested an FAA letter affirming this.<sup>243</sup> The BNAA also hired a consulting company to analyzed its perceived grant assurance violations and to prepare a proposed new FBO agreement for the Complainant to “cure the perceived Grant Assurance violations” with the intent to also create a new standard FBO agreement that would be used at the Airport with all FBOs.<sup>244</sup> Although the record shows that the BNAA believed there were grant compliance issues and that it sought advice and information from both the FAA and an independent consulting company, it also shows that the BNAA did not overtly disclose its documentation to Complainant. Not disclosing this information is one of the issues raised in this Complaint. The BNAA felt that the consultant’s report was damaging to the Airport, and so, it was never shared, not even with the FAA.<sup>245</sup>

The Director rejects Complainant’s argument that the BNAA did not provide sufficient information on the grant assurance violations or which provisions should be modified. First, in its June 10, 2005 letter, the BNAA specifically cited violations of Grant Assurance 5 *Preserving Rights and Powers*, Grant Assurance 19, *Operation and Maintenance*, Grant Assurance 22 *Economic Nondiscrimination*, Grant Assurance 23 *Exclusive Rights*, Grant Assurance 29, *Airport Layout Plan (ALP)*, and Grant Assurance

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<sup>238</sup> FAA Exhibit 1, Item 3, p. 25.

<sup>239</sup> FAA Exhibit 1, Item 1, p. 8.

<sup>240</sup> FAA Exhibit 1, Item 3, Exhibit 2, letter dated July 14, 2005 as Deposition Exhibit #3.

<sup>241</sup> FAA Exhibit 1, Item 3, p. 25.

<sup>242</sup> FAA Exhibit 1, Item 3, p. 5.

<sup>243</sup> FAA Exhibit 1, Item 3, Exhibit 2, letter dated July 14, 2005 as Deposition Exhibit #3.

<sup>244</sup> FAA Exhibit 1, Item 9. See FAA Exhibit 1, Item 1, Exhibit T, for a copy of the consultant’s report.

<sup>245</sup> FAA Exhibit 1, Item 9.

38 *Hangar Construction*.<sup>246</sup> Second, the record shows that Complainant and the BNAA had several communications to discuss alternatives that would resolve the concerns over these specific grant assurances.<sup>247</sup> Eventually, this resulted in the BNAA providing Complainant specific corrections in the restated ground lease proposal of May 4, 2006.<sup>248</sup>

The Director finds that the BNAA was not required or obligated in any way to disclose its consultant's report on potential violations of its Federal obligations to Complainant. The BNAA's actions in this regard were not inconsistent with the Airport's Federal obligations.

The Director would not expect an airport sponsor to disclose its defense when engaged in litigation, especially when the airport's ability to meet its Federal obligations is one of the issues at stake. There is nothing wrong with an airport sponsor taking action to correct an existing lease or agreement with a tenant at the airport if it believes there are grant compliance issues to be addressed. Eventually, in February 2006, the BNAA provided the consultant's report to FAA.<sup>249</sup> The FAA did not respond to the BNAA's request because the BNAA failed to provide related information.<sup>250</sup>

The BNAA, as the airport sponsor, must decide whether its actions comply with its Federal obligations and refrain from taking actions that violate the Federal obligations while taking action to correct violations that are inconsistent with its Federal obligations. It does not require an official FAA determination to take action, since, by design, the FAA expects airport sponsors to understand the grant assurances when entering into an AIP grant agreement, and to pledge to comply with those requirements when entering into tenant or other types of agreements. In other words, the fact that the BNAA believed its actions (agreeing to certain provisions in the Platinum Agreements) conflicted with its Federal obligations is sufficient for it to take action, in this case seeking modification of the agreements.<sup>251</sup> Finally, the fact that the BNAA hired a consultant and sought FAA assistance in determining the true nature of its compliance or lack of compliance with its Federal obligations is not unreasonable, even if what it learns is not in the best interest of the Complainant.

Finally, the record shows that the BNAA believes that there were grant compliance issues, although not overtly communicated to Complainant, at least initially, was based on more than just a perception since the BNAA's arguments before the FAA in the Summer of 2005 and the findings resulting from the consulting company's report, clearly outline actual and potential violations of the grant assurances.

The issue of whether the BNAA acted unreasonably lies with the justification for its actions and what the record establishes. The record establishes that the June 10, 2005 Stop Work Order was not a violation of the BNAA's Federal obligations, as discussed above, because there were real problems with the Platinum Agreement and the related projects at the time under construction at the Airport.<sup>252</sup>

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<sup>246</sup> FAA Exhibit 1, Item 1, Exhibit K.

<sup>247</sup> See FAA Item 3, Exhibit, 1, p. 3-4.

<sup>248</sup> FAA Exhibit 1, Item 3, Exhibit 11.

<sup>249</sup> FAA Exhibit 1, Item 3, Exhibit 2, letter dated February 2, 2006 as Deposition Exhibit #9.

<sup>250</sup> FAA Exhibit 1, Item 3, Exhibit 2, letter dated July 28, 2005 as Deposition Exhibit #4.

<sup>251</sup> In addition, an airport sponsor is not required to notify tenants or include them in meetings the airport sponsor has with the FAA" since as the BNAA correctly states, "the Grant Assurances form a relationship primarily between the FAA and the Authority, and Grant Assurance compliance is a matter primarily for discussion between those two entities." FAA Exhibit 1, Item 3, p. 25.

<sup>252</sup> The record establishes that as early as December 2004, the BNAA recognized that there was some uncertainty regarding the actual location of Complainant's construction. See FAA Exhibit 1, Item 1, Exhibit H.

Complainant's claims that the BNAA actions have not provided reasonable access to the Airport appear unfounded and, for all practical purposes, moot. This is because Complainant acknowledges that its project was being built.<sup>253</sup> The record shows that since in October 2006, Complainant's new FBO facility, has been operational and there are indications that Complainant plans to begin construction of a second building within a year...<sup>254</sup> The FAA does not address past compliance issues, but decides whether an airport sponsor is currently in compliance,<sup>255</sup> even if it were to assume that the June 10, 2005 Stop Work Order was not justified, the Director finds that today, since Complainant's facility is finished and operational, the argument is moot, as such, no relief can be granted at this date under the Grant Assurances.

Therefore, based on the record herein and discussion above, the Director finds that with respect to the June 10 Stop Work Order, there is no violation of Grant Assurance 22.

## (2). June 30, 2005 Stop Order – CATEX

The June 30th Stop Work Order issued by the BNAA was based on the need to complete a CATEX evaluation. Complainant rejects the BNAA actions and contends that "to the extent that there was any issue with an incomplete or improper CATEX Study, it appears BNAA knew about it in early December 2004, before it instructed Platinum that it should begin construction"<sup>256</sup> and that the BNAA "withheld material information relating to the project site."<sup>257</sup>

The BNAA contends that "construction at the Airport requires obtaining all necessary permits and approvals mandated by federal, state, and local laws, ordinances, regulations, and policies"<sup>258</sup> and that

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<sup>253</sup> FAA Exhibit 1, Item 3, p. 5.

<sup>254</sup> FAA Exhibit 1, Item 14, and FAA Exhibit 1, Item 1, Exhibit E. The construction of this second hangar, as an option in the Platinum Agreements, has resulted in additional litigation. See FAA Exhibit 1, Item 15. Also see <http://www.platinumjetcenter.com/>

<sup>255</sup> The FAA's compliance program, a adjudicated under 14 CFR Part 16, is not a punitive program. Rather, it is a program designed to achieve voluntary compliance with the federal obligations accepted by owners and/or operators of public-use airports developed with FAA-administered assistance. FAA will make a determination as to whether an airport sponsor is currently in compliance with the applicable federal obligations. Consequently, the FAA does not consider allegations concerning airport sponsor's action that resulted in alleged or potential past violation of applicable federal obligations. See *Steere v. County of San Diego*, FAA Docket No. 16-99-15 (December 7,2004).

<sup>256</sup> FAA Exhibit 1, Item 1, p. 7.

<sup>257</sup> FAA Exhibit 1, Item 6, p. 5.

<sup>258</sup> FAA Exhibit 1, Item 3, p. 22. The Airport Director states that "...I discovered that the Authority had not yet received the required FAA Environmental Determination for the construction of the Platinum hangar or necessary changes to the Airport Layout Plan. At this point our office contacted the Chicago ADO and was advised that the construction site should not be further disturbed until receipt of the Record of Environmental Review from the FAA. To comply with this guidance, the Authority issued a Stop Work Order on June 30, 2005. In the letter conveying the Stop Work Order, I explained that there had not yet been an environmental categorical exclusion approval for the project [meaning the FAA had not completed its environmental review], and that any additional work on the site would slow such FAA approval." The Airport Director also adds "...our office was informed by representatives of Cornerstone Construction, the Platinum Parties' building contractor, that the Platinum Parties had directed them not to abide by the Stop Work Order. I believed this information to be true, based in part on the fact that the Platinum Parties had neither honored nor communicated with the Authority after the first Stop Work Order was issued. Rather than resort to legal proceedings, I directed that snow-clearing equipment be parked at the site to prevent further construction. My hope was that these actions would help convey to the Platinum Parties the seriousness of the Authority's concerns and that as a result the Platinum Parties would return to the discussion table to resolve our mutual issues. After some cursory conversations between each side's legal counsel, the Platinum Parties primary reaction was to file litigation seeking to have the Illinois State Court issue a restraining order and injunction barring the

it issued the Stop Work Order based on the need to get an unconditional FAA approval of the Airport Layout Plan changes depicting the proposed work. However, the BNAA acknowledges “that it should have been aware of that requirement much earlier...”<sup>259</sup> Finally, the BNAA rejects the Complainant's argument that because the BNAA is an “independent authority that needs no further authorization to protect its interests” and also rejects the allegations that it may have violated Illinois criminal law.<sup>260</sup>

The Director agrees with the BNAA. The CATEX justification contained in the record is valid. First, as the BNAA states, the BNAA would be expected, as the airport sponsor, to retain sufficient authority to be able to “protect its interests” on issues affecting the Airport, such as on-airport construction and the related environmental requirements.

Second, waiting for a CATEX determination is per se a reasonable action since it is a requirement under the *National Environmental Policy Act (NEPA)* and consistent with FAA Order 5050.4B *National Environmental Policy Act (NEPA) Implementing Instructions for Airport Projects*.<sup>261</sup> Complainant's facility is a hangar that will result in an airport layout update, and as such, is covered by NEPA. The FAA notified the BNAA of this.<sup>262</sup>

Third, independently of the environmental requirements and process that must be addressed when construction take place at the Airport, the Director notes that the Ground Lease Agreement specifically required Platinum to construct and maintain new facilities, including a hangar and a fuel farm, “through obtaining the required permits and approval from appropriate state and federal authorities....”<sup>263</sup> Those words would certainly cover the environmental process including a CATEX determination.

Although the Complainant argues that the BNAA “withheld material information relating to the project site,”<sup>264</sup> and the record indicates that the BNAA possibly failed to clearly communicate Complainant's environmental responsibilities, so that Complainant completely understand its responsibilities, the BNAA's authority and ability as the airport sponsor to take action to ensure compliance with applicable environmental requirements, endures. In time, the BNAA determined that an environmental determination had not been received and that after consulting with the FAA Airports District Office (ADO) in Chicago, the BNAA issued the June 30, 2005 Stop Work Order to prevent further disturbing the construction site so that a proper environmental analysis could be conducted.

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Authority from any further actions which interfered with their construction activities.” FAA Exhibit 1, Item 3, Exhibit 1, p. 2-3.

FAA Exhibit 1, Item 3, Exhibit 1, p. 2-3.

<sup>259</sup> FAA Exhibit 1, Item 3, p. 24. The BNAA also states that to the extent that its actions had an impact on Complainant, the jury in the state court litigation found that the Authority's failure to submit the application for this approval earlier resulted in delay to the Platinum Parties' construction, and awarded some part of the \$8,500 in damages in recognition of such delay.”

<sup>260</sup> FAA Exhibit 1, Item 8, p. 7.

<sup>261</sup> The FAA was not aware of the plans for the new hangar and FBO until it received the airspace request for the hangar. At the time of the airspace request, the FAA informed the BNAA that it would need to submit the appropriate NEPA documentation and that construction shouldn't begin without the FAA's environmental approval. The NEPA documentation was submitted in January 2005. However, the FAA required additional information to supplement and support the original submission, and as a result, revised documentation was provided in June 2005. A categorical exclusion for the hangar was issued on 3/16/06. FAA Exhibit 1, Item 9.

<sup>262</sup> FAA Exhibit 1, Item 3, Exhibit 1, p. 2.

<sup>263</sup> FAA Exhibit 1, Item 1, p. 5.

<sup>264</sup> FAA Exhibit 1, Item 6, p. 5.

In summary, taking corrective action concerning a potential environmental requirement (CATEX) and issuing the June 30, 2006 stop work order to ascertain the exact nature of those environmental requirements, was reasonable. Consequently, the Director finds that the BNAA actions concerning the June 30, 2006 Stop Work order, having as justification the need for a CATEX determination, was consistent with the BNAA's NEPA responsibilities and was not an act that constitutes a violation of Grant Assurance 22.

### **(c). Lack of Cooperation**

Complainant argues that it “made multiple overtures and have asked multiple times...for BNAA to provide additional information and propose alternative language to address any concerns it has regarding its Sponsor Assurances” and that “despite requests from Platinum and even apparent representations to the FAA that it would attempt to resolve the outstanding issues and develop alternative language, BNAA has failed to do so.”<sup>265</sup> Complainant contends that “despite the fact that BNAA has been concerned that the Platinum Agreements are in violation of certain Sponsor Assurances since at least June 2005 (and apparently since December 2004), BNAA has made no meaningful efforts to resolve the dispute and has refused to respond to overtures made by Platinum, both directly and through its counsel, to resolve the matter.”<sup>266</sup>

The BNAA disagrees and states that it “attempted to negotiate with the Complainants to either agree on an interpretation that would be consistent with Federal law and the sponsors' assurances, or to reform the language pursuant to the subordination clauses in two agreements and the severability provision in the third.” The BNAA argues that Complainant “insisted on contractual interpretations that the Authority believes are inconsistent with Federal law and with the sponsors' assurances, and have refused to reform the Agreements without unreasonable levels of compensation from the Authority.” The BNAA further states that it attempted resolve the dispute and that it made “numerous good faith efforts to resolve the contractual disputes with Platinum Parties but has continually been met with an unwillingness to negotiate reasonable solutions.”<sup>267</sup> As part of its Answer, the BNAA submits that Complainant “have been advised of the defects the Authority is concerned about in the Agreements and that any failure to promptly correct those defects is due to the Platinum Parties' outrageous demands.”<sup>268</sup>

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<sup>265</sup> FAA Exhibit 1, Item 1, p. 2, 16. Complainant states that the “BNAA also assured the FAA that it would make efforts to resolve the dispute and would propose to Platinum language that would satisfy any subject Sponsor Assurances.” FAA Exhibit 1, Item 1, p. 8.

<sup>266</sup> FAA Exhibit 1, Item 1, p. 10-11. For example, Complainant argues against the June 10<sup>th</sup> Stop Work Order because “the BNAA provided no detailed information explaining how the Assurances were being violated, which provisions were in violation, and more importantly, what Platinum could do to remedy the problem” and that it requested “further information regarding alleged problems with the FAA and any documents supporting the BNAA's position” but that “no further guidance or recommendations were forthcoming.” FAA Exhibit 1, Item 1, p. 7.

<sup>267</sup> FAA Exhibit 1, Item 3, p. 15.

<sup>268</sup> FAA Exhibit 1, Item 3, p. 3, 5. The BNAA adds that “although the Platinum Parties have asked for alternative language, they have done so in a context that made clear that it would be fruitless for the Authority to provide it, as the Authority was not willing or able to meet the Platinum Parties' financial demands.” FAA Exhibit 1, Item 3, p. 31. The BNAA adds that “every effort made by the Authority to reach a resolution has been met with ever-escalating demands for unwarranted financial compensation” and that Complainant has “sought damages ranging from \$2 million to in excess of \$4 million in claimed damages as the cost of reforming the Agreement or entering into a new agreement, an amount the Authority believes exceeds their total projected capital investment on the Airport.” The BNAA reports that it had some discussion with Complainant after August 2005 but that “in each instance the recurring theme was the ever-escalating figure in



The Director rejects Complainant's argument that the actions by the BNAA were inconsistent with Grant Assurance 22. The record does not support Complainant's allegation that the BNAA offered no alternatives to the issues in dispute, namely the Platinum Agreements. It shows the opposite. On February 1, 2005, the BNAA notified Complainant that the Platinum Agreements could be modified and ratified to, for example, "exclude any portion of the taxiway."<sup>269</sup> In the same letter, the BNAA warned against continuing work site construction without addressing the issues. The record also establishes that on February 3, 2005, Complainant responded with its own suggestions<sup>270</sup> while additional proposals were issued by the BNAA to Complainant on September 16, 2005,<sup>271</sup> suggesting a possible solution that included a proposal to "delete [from the Platinum Agreements] any provision violative of FAA regulations or sponsor assurances..."<sup>272</sup> This was followed by a counter-proposal by Complainant on September 23, 2005.<sup>273</sup>

Moreover, as discussed above, the BNAA had prepared a new FBO agreement and later forwarded it to Complainant as a proposed new agreement.<sup>274</sup> On May 4, 2006, the Authority forwarded to Complainant a proposed new agreement.<sup>275</sup> As late as July 2006, the BNAA made overtures to Complainant concerning several of the issues under dispute, including the fuel farm location and accommodating Complainants' need for addition space represented by the Priority Use Area.<sup>276</sup> The record substantiates that the BNAA had extensive contact with Complainant as they attempted to resolve their differences.

For example, the BNAA reports "after reaching out to communicate with Mr. Lincoln Francis, the principal of the Platinum Parties, in late July 2005, we began a course of ongoing discussions aimed at resolving the issues related to the Platinum Agreements and to the construction of the Platinum Parties' hangar at the Airport."<sup>277</sup> The BNAA also state states its "communications with Mr. Francis, both in person at our offices and via telephone, were frequent enough" and "our discussions included my explaining the Authority's concerns with the language of the Platinum Agreements and with the

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"damages" that the Platinum Parties would demand in exchange for resolving compliance issues in their contracts, or for agreeing to adopt interpretations of contract language that would not raise compliance issues. For example, in September, 2005, the Platinum Parties...demanded \$2 million to reform the Platinum Agreements in accordance with their subrogation provisions." id.

<sup>269</sup> FAA Exhibit 1, Item 1, Exhibit M.

<sup>270</sup> FAA Exhibit 1, Item 1, Exhibit M, letter dated February 3, 2005.

<sup>271</sup> FAA Exhibit 1, Item 1, Exhibit M, letter dated September 16, 2005.

<sup>272</sup> FAA Exhibit 1, Item 1, p. 11.

<sup>273</sup> See FAA Exhibit 1, Item 1, Exhibit M, letter dated September 23, 2005, for additional details.

<sup>274</sup> FAA Exhibit 1, Item 3, p. 18-19. The BNAA states that it attempted to negotiate a resolution and has continued to do so after the jury reached its verdict in the state court litigation and that on June 1, 2006, it approached Complainant and "expressed a desire to negotiate to settle all outstanding issues" but that Complainant "rejected the approach and responded, 'the fight is not over, I will continue with this fight' and informed" the BNAA "that all future communication should be directed to his attorney." FAA Exhibit 1, Item 3, p. 19. The BNAA reports that in February 2006, I asked our consultants, Airport Corporation of America ("ACA"), "to create a new standard model FBO agreement that would be used at the Airport with all FBOs going forward. The new standard model FBO agreement would be offered to the Platinum Parties as a cure for all outstanding issues, and would also have broader use in the future with Image Air (whose FBO agreement expires in October 2006) and other aeronautical service providers. The consultants and the airport staff worked through a number of drafts between February and May, and on May 4, 2006, the Authority forwarded to the Platinum Parties the proposed new agreement" but "has not yet received a formal response." id.

<sup>275</sup> FAA Exhibit 1, Item 3, p. 19.

<sup>276</sup> FAA Exhibit 1, Item 6, Exhibit C.

<sup>277</sup> FAA Exhibit 1, Item 3, Exhibit 1, p. 3.

Platinum Parties' interpretations of that language, and proposing alternatives that would resolve the disharmony with FAA grant assurances."<sup>278</sup>

In summary, a review of the information in the record does not support Complainant's argument that the BNAA failed to provide "alternative language." It indicates that the BNAA did provide language, albeit not acceptable to Complainant. The record also shows that both parties disagreed on how to correct the issues with the Platinum Agreements and this, unresolved dispute is not per se a violation of Grant Assurance 22.<sup>279</sup> Specifically, the fact that the BNAA did not agree with Complainant's level of financial compensation for changes to the Platinum Agreements or that it did not provide "acceptable" alternative language or that it refused to accept the negative impact of the Priority Use Area on the operation of the Airport (impact on taxiways), is not inconsistent with the BNAA's Federal obligations.

#### **(d). Unjust Discrimination**

Complainant argues that the BNAA's actions are unjustly discriminatory because the "BNAA has permitted Image Air to continue to operate its business and perform its contracts in relatively peaceful coexistence and has not attempted to nullify or interfere with Image Air's contracts in any material way" and that this "preferential treatment showed to the pre-existing tenant, it is unjust and discriminatory in violation of 49 USC § 47107(a)(1) and Assurance No. 22"<sup>280</sup> Complainant argues that an FAA determination should "include a review of the BNAA's contracts with Image Air..."<sup>281</sup> because "numerous alleged violations set forth in the Part 16 Complaint revolve around the discriminatory treatment that Image Air has received from BNAA over Platinum..."<sup>282</sup>

Complainant takes the position that the actions the BNAA has taken regarding the Priority Use Areas is "a clear example of ongoing, economic discrimination in a very critical manner as Image Air enjoys a large area to park the airplanes that it is fueling or otherwise servicing," and that if Complainant "is not able to provide temporary parking and storage space for its client's aircraft, it will quite simply, and decisively, be unable to conduct its business in any profitable, meaningful manner."<sup>283</sup> Finally, Complainant also complains of the "uncertainty regarding what BNAA might actually do when Platinum attempts to open its business at the Airport."<sup>284</sup>

The BNAA denies Complainant's allegations, and responds that it has treated Complainant "fairly and has not engaged in unjust discrimination in favor of the incumbent FBO, Image Air"<sup>285</sup> and that "rather than discriminate against airport users or restrain competition" the BNAA is "trying to develop

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<sup>278</sup> FAA Exhibit 1, Item 3, Exhibit 1, p. 3-4.

<sup>279</sup> See FAA Exhibit 1, Item 9.

<sup>280</sup> FAA Exhibit 1, Item 1, p. 12.

<sup>281</sup> FAA Exhibit 1, Item 7, p. 4.

<sup>282</sup> FAA Exhibit 1, Item 7, p.2. Complainant argues that the actions by the BNAA put Complainant "at a disadvantage in comparison to its competitor at the Airport, due to -among other reasons -an inability to carry out a business plan based upon two hangars." FAA Exhibit 1, Item 6, p. 7. Complainant takes the position that the BNAA's actions have "unjustly increased Platinum's costs dramatically, requiring expenditures over budget for construction and related delays, lost profits for a business that should have been open last year, and attorneys fees, not to mention the intangible costs of the loss of goodwill of potential customers." FAA Exhibit 1, Item 1, p. 12.

<sup>283</sup> FAA Exhibit 1, Item 6, p. 3-4, 7-8.

<sup>284</sup> FAA Exhibit 1, Item 3, p. 29.

<sup>285</sup> FAA Exhibit 1, Item 3, p. 4, 32.

an environment in which aeronautical activities can grow,” but that Complainant’s “views” are “considerably different from the Authority’s vision.”<sup>286</sup>

For unjust discrimination to take place, the BNAA would apply an inconsistent methodology in imposing terms and conditions for comparable aeronautical users of the Airport (similarly situated users). In order to make a finding of unjust discrimination in this case, Complainant has to provide persuasive evidence that a similarly situated user based at the Airport or one wanting to provide the same service Complainant is proposing received preferential treatment vis-à-vis the Complainant.<sup>287</sup>

In a Part 16 action, the Complainant has the burden of proof.<sup>288</sup> However, the record contains no evidence that other users similar to the Complainant and based at the Airport or wanting to serve BMI experienced any different terms and conditions than the City imposed on Complainant. The record does not contain any information or documentation demonstrating that the BNAA’s agreements with Image Air have similar terms and conditions as those with Complainant or that the BNAA is pursuing certain actions against Complainant while not doing so with a similarly situated FBO, e.g. Image Air.

Complainant’s argument that an FAA determination should “include a review of the BNAA’s contracts with Image Air...”<sup>289</sup> is not necessarily required or needed. Although there is another FBO at the Airport (Image Air), the fact that the BNAA took action against Complainant concerning specific provisions in its leases does not imply that Image Air’s lease agreements or other agreements the BNAA entered into with other entities at the Airport, are subject to this proceeding. The fact that Complainant finds itself today operating with a leasehold that contains a smaller area to park aircraft and that “Image Air enjoys a large area to park the airplanes that it is fueling or otherwise servicing,” was a matter to be addressed when Complainant negotiated its lease.

In any event, Complainant fails to substantiate its argument that it is being treated differently than Image Air in regard to the issues under dispute in this proceeding. A review of the 1996 FBO agreement between Image Air and the BNAA indicates that the issues in dispute here are not present in the Image Air agreement. There was no Option Property, no Priority Use Area cutting across airport movement areas and taxiways, and the BNAA has not granted Image Air an exclusive right for fueling.<sup>290</sup> Moreover, as the BNAA correctly states, there can be no claim of current preferential

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<sup>286</sup> FAA Exhibit 1, Item 8, p. 2.

<sup>287</sup> FAA Docket No. 16-99-09, January 28, 2000, p. 31, and FAA Docket No. 16-05-14, [R/T-182, LLC v. Portage County Regional Airport Authority](#), November 1, 2006, p. 14.

<sup>288</sup> The FAA makes conclusions of fact and law regarding the Complainant’s allegations. Underlying these conclusions is the basic requirement of Part 16 that the Complainant demonstrate that the airport owner or sponsor is violating its commitments to the federal government to serve the interests of the public by failing to adhere to its grant assurances. [See Part 16, Sections 16.23 and 16.29.] It is the Complainant’s responsibility to substantiate that the airport owner or sponsor has unreasonably denied access, unjustly discriminated against him or her, granted an exclusive right, or violated some other applicable grant assurance. The FAA *Rules of Practice for Adjudicating Matters at Federally Assisted Airports*, 14 Code of Federal Regulations (CFR), Part 16, Section 16.23, provides, in relevant part, that complaints filed under this subpart shall “Provide a concise but complete statement of the facts relied upon to substantiate each allegation.” Additionally, Section 16.29 provides that “In rendering its initial determination, the FAA may rely entirely on the complaint and the responsive pleadings provided under this subpart. Each party shall file documents that it considers sufficient to present all relevant facts and argument necessary for the FAA to determine whether the sponsor is in compliance.” Specifically, a claim of unjust discrimination must include a showing that similarly situated users have been treated dissimilarly without adequate justification.

<sup>289</sup> FAA Exhibit 1, Item 7, p. 4.

<sup>290</sup> See FAA Exhibit 1, Item 22. Also see FAA Exhibit 1, Item 8, p. 11.

treatment when in fact Complainant asserts that it is currently operating in accordance with the terms of its Agreements<sup>291</sup> and the record shows that Complainant's facility is completed and operational.<sup>292</sup> Finally, the Director rejects Complainant's financial claims as Part 16 proceedings are not the venue for such claims and the Part 16 process is about compliance and returning to compliance, it is not a punitive process.<sup>293</sup> The Director notes that there is no documentation in the record that would support Complainant's claim regarding "uncertainty regarding what BNAA might actually do when Platinum attempts to open its business at the Airport," and moreover, the issue is moot since Complainant's facility is currently operational at the Airport.

Based on the above, the Director rejects Complainant's assertions that the BNAA has unjustly discriminated against it in regard to Image Air.

It is possible that the lack of minimum standards at the Airport contributed to the inability of the parties to resolve this dispute on their own. As discussed above, the FAA encourages airport management, as a matter of prudence, to establish minimum standards to be met by all of its commercial aeronautical service providers. Airport sponsors are encouraged to develop minimum standards that are fair and reasonable and relevant to the aeronautical activity to which the standards are applied. This policy also promotes the orderly development of airport land, which as shown in this case, is one of the issues in dispute.

Therefore, and although the Director recognizes that the Authority is in the process of developing a comprehensive set of minimum standards,<sup>294</sup> the Director recommends that its minimum standards be consistent with AC No 150/5190-7 *Minimum Standards for Commercial Aeronautical Activities*, August 4, 2006, and to do so as soon as practical to avoid further disputes with service providers at the Airport.

**(f). Conclusion on Compliance with Grant Assurance 22 *Economic Nondiscrimination***

In summary, the Director finds that several of the terms and conditions contained in the Platinum Agreements, namely the Priority Use Area and the granting of an exclusive right for fueling, are inconsistent or have the potential to be inconsistent with the BNAA's Federal obligations.<sup>295</sup>

In addition, as shown in the record, the FAA informed the BNAA that it should correct any provisions in the Platinum Agreements that may place the BNAA in noncompliance with its Federal obligations. As a result, the actions the BNAA took to correct the situation, while not timely and perceived by Complainant as unreasonable and contrary to the BNAA's Federal obligations, were in fact reasonable and thus consistent with Grant Assurance 22.

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<sup>291</sup> FAA Exhibit 1, Item 2, p. 4.

<sup>292</sup> FAA Exhibit 1, Item 14 and Item 15. Also see <http://www.platinumjetcenter.com/>.

<sup>293</sup> See FAA Docket 16-06-08, [Jimsair Aviation Services v. San Diego County Regional Airport Authority](#), April 12, 2007.

<sup>294</sup> FAA Exhibit 1, Item 8, p. 21.

<sup>295</sup> As discussed in the text, although the Director found that the granting of the option to Complainant was not tantamount to granting an exclusive right, the Director also found that the fact that the BNAA thought the Option provision was a potential violation is not in and by itself an unreasonable action or one that could be considered a violation of its Federal obligations.

**Issue 3. Compliance with Grant Assurance 23 Exclusive Rights**

Complainant argues that the actions by the BNAA concerning Complainant's operation of an FBO at the Airport are inconsistent with Grant Assurance 23 *Exclusive Rights*. Complainant states that the BNAA has excluded it "from participating in an on-airport aeronautical activity in violation of 49 USC § 47107(a)(4) and Assurance No. 23." In making its argument, Complainant alleges that the BNAA "unduly extended Image Air's improper and exclusive right to provide aircraft and fueling services," showing "preferential treatment towards the other FBO, Image Air."<sup>296</sup>

The BNAA denies these allegations, and responds that it "did not intend to grant any exclusive rights and has done its best through negotiations and through the state court proceedings to reform the Platinum Agreements to eliminate any possible grant of such rights."<sup>297</sup> The BNAA rejects Complainant's claims that "Image Air enjoys monopoly status."<sup>298</sup> The BNAA argues that neither Complainant nor Image Air are excluded under their agreements with the BNAA in providing aeronautical services at the Airport, including fueling.<sup>299</sup>

A review of the record indicates that the BNAA has not excluded Complainant from participating in an on-airport aeronautical activity in violation of 49 USC § 47107(a)(4) and Assurance No. 23.<sup>300</sup> The record does not contain nor has Complainant shown that Image Air had a monopoly at BMI.<sup>301</sup> In fact, the record shows that the BNAA determined "that an additional FBO would benefit the flying public at the Airport."<sup>302</sup> The record also shows that as a result, an RFP was issued, and that Complainant was selected, resulting in several operating agreements between the parties. Instead of being "denied" access, the BNAA granted Complainant a long-term lease for Airport land on which to build a hangar," and has done so through a 30-year lease, and opened for business in late 2006.<sup>303</sup> The fact that there is a dispute between the parties over the executed agreements does not in itself imply that the BNAA is a violation of Grant Assurance 23.

The Director rejects the Complainant's argument that BNAA has "unduly extended Image Air's improper and exclusive right to provide aircraft and fueling services."<sup>304</sup> Extending the agreement of a competing FBO does not constitute the granting of an exclusive right. Since the 1996 FBO agreement between Image Air and the BNAA contains no provisions for options, no Priority Use Areas and does not grant Image Air an exclusive right for fueling,<sup>305</sup> and since the 30-year Agreement Authorizing Services with Complainant appears to provide an exclusive for fueling, Complainant, and not Image Air has been granted an exclusive right that the BNAA is attempting to correct.

Based on the above, the Director finds that the actions by the BNAA are consistent with Grant Assurance 23 *Exclusive Rights*, 49 USC 47107(a) (4), which prohibit the granting of exclusive right.

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<sup>296</sup> FAA Exhibit 1, Item 6, p. 6.

<sup>297</sup> FAA Exhibit 1, Item 3, p. 5.

<sup>298</sup> FAA Exhibit 1, Item 3, p. 21, 28.

<sup>299</sup> FAA Exhibit 1, Item 3, p. 32.

<sup>300</sup> FAA Exhibit 1, Item 1, p. 13.

<sup>301</sup> FAA Exhibit 1, Item 8, p. 11.

<sup>302</sup> FAA Exhibit 1, Item 3, p. 29.

<sup>303</sup> FAA Exhibit 1, Item 8, p. 9.

<sup>304</sup> FAA Exhibit 1, Item 6, p. 6.

<sup>305</sup> See FAA Exhibit 1, Item 22.

#### **Issue 4. Compliance with Grant Assurance 38 Hangar Construction**

Complainant argues that the actions taken by the BNAA concerning Complainant's operation of an FBO at the Airport are in violation of 49 USC §47107(a)(21) and Grant Assurance No. 38 *Hangar Construction*.<sup>306</sup> Grant Assurance 38 *Hangar Construction* stipulates that if the airport owner or operator and a person who owns an aircraft agree that a hangar is to be constructed at the airport for the aircraft at the aircraft owner's expense, the airport owner or operator will grant to the aircraft owner for the hangar a long term lease that is subject to such terms and conditions on the hangar as the airport owner or operator may impose.

Specifically, Complainant argues that although "the Ground Lease Agreement requires Platinum to construct and maintain new facilities, including a hangar" and a fuel farm and, consistent with applicable regulations and Assurances, provides for a long-term lease of 30 years, the BNAA is in violation of Grant Assurance No. 38 because it has attempted improperly to deprive Platinum of the benefit of its lawful bargain" and that "this conduct attempts to deprive Platinum, despite the parties' agreement to build a hangar, of a long-term lease in violation of 49 USC § 47107(a)(21) and Assurance No. 38."<sup>307</sup> The BNAA counters by stating that "that the Platinum Parties' own allegations regarding the existence and term of the Ground Lease demonstrate that there can be no violation of Grant Assurance No. 38."<sup>308</sup>

The Director disagrees with Complainant's argument. At the time of the filing of the BNAA's Answer, the hangar was nearing completion. The hangar is today built and operational.<sup>309</sup> All indications are that the hangar has been completed and operational.<sup>310</sup> The record shows that the BNAA did not deny Complainant "a long-term lease for Airport land on which they could build a hangar."<sup>311</sup> As discussed above, the BNAA issued an RFP, selected Complainant, and as a result, entered into several operating agreements between Complainant and the BNAA, including one permitting the construction of a large hangar. The fact that there is a dispute between the parties over the executed agreements does not imply that the BNAA is a violation of Grant Assurance 38.

Therefore, the Director finds that the BNAA has not violated Grant Assurance 38.

#### **Issue 5. Compliance with Grant Assurance 5 Preserving Rights and Powers**

Complainant argues that the actions taken by the BNAA concerning Complainant's operation of an FBO at the Airport could be perceived as a violation of Grant Assurance 5, *Preserving Rights and Powers*.<sup>312</sup> Although Complainant recognizes that the "BNAA has had concerns that the Platinum Agreements may be in violation of one or more Sponsor Assurances," including Grant Assurances 5,

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<sup>306</sup> FAA Exhibit 1, Item 1, p. 14.

<sup>307</sup> FAA Exhibit 1, Item 1, p. 14.

<sup>308</sup> FAA Exhibit 1, Item 3, p. 29-30.

<sup>309</sup> FAA Exhibit 1, Item 3, Exhibit 1, and FAA Exhibit 1, Item 14 and Item 15.

<sup>310</sup> FAA Exhibit 1, Item 3, p. 28, 31.

<sup>311</sup> FAA Exhibit 1, Item 3, p. 32.

<sup>312</sup> Grant Assurance 5 requires the airport sponsor not to take or permit any action which would operate to deprive it of any of the rights and powers necessary to perform any or all of the terms, conditions, and assurances in the grant agreement... and to act promptly to acquire, extinguish or modify any outstanding rights or claims of right of others which would interfere with such performance by the sponsor.

Complainant argues that “even if BNAA believed that agreements that it had entered into were non-compliant” with Grant Assurance 5, the “BNAA did nothing meaningful to reach a responsible resolution” but “caused repeated delays, and has utilized alleged Sponsor Assurances violations [including Grant Assurance 5] as a weapon to renegotiate the contracts in their entirety...”<sup>313</sup> Complainant contends that “the BNAA's failure to “act promptly to address the situation is itself a clear and direct violation” of [Grant Assurance 5].<sup>314</sup> The BNAA denies these allegations and the BNAA states that it “did not fail to protect and preserve its rights and powers.”<sup>315</sup>

The Director rejects this argument by Complainant because the BNAA cannot be in violation of Grant Assurance 5 for taking actions it believes were necessary to meet its Federal obligations.<sup>316</sup> Attempting to correct Federal obligations issues, such as certain terms in the Platinum Agreements, is an action by the BNAA that is consistent with Grant Assurance 5. The argument concerning Grant Assurance 5 is whether the BNAA entered into agreements or has taken actions that deprive it from the ability to meet its Federal obligations. The issue under Grant Assurance 5 is not, as Complainant argues, the action of amending the Platinum Agreements, but rather to determine if, by entering into the Platinum Agreements, the BNAA has given away some of its rights and powers in a manner contrary to Grant Assurance 5.

As discussed above, the BNAA entered into agreements that included provisions inconsistent with its Federal obligations. That being the case, the BNAA has not only the right, but the obligation, when needed, to amend or attempt to amend those agreements to ensure that it meets its Federal obligations. In summary, Grant Assurances are not violated when the airport sponsor takes action to correct current or potential violations of its Federal obligations due to one or more provisions of its agreements with a tenant,<sup>317</sup> and taking such actions are the very nature of complying with Grant Assurance 5.

Moreover, as mentioned above, since the FAA had informed the BNAA that certain portions of the Platinum Agreements could put the Authority in breach of its Grant Assurances and that it should review the agreements and try to make necessary corrections to eliminate any potential compliance issues, the BNAA's actions were consistent with Grant Assurance 5.

Based on the above discussion and the record herein, the Director finds that since the Platinum Agreements contained several provisions that could place the BNAA in violation of its Federal obligations, taking action to amend them is consistent with Grant Assurance 5.

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<sup>313</sup> FAA Exhibit 1, Item 1, p. 15.

<sup>314</sup> FAA Exhibit 1, Item 1, p. 15-16.

<sup>315</sup> FAA Exhibit 1, Item 3, p. 32.

<sup>316</sup> The Director notes that in its Answer, the BNAA welcomed the Part 16 filed by Complainant “not because of the allegations made by the Platinum Parties, which are without merit, but because the Authority needs FAA's help in achieving and maintaining compliance with its Federal obligations.” FAA Exhibit 1, Item 3, p. 1-2. Although it is unusual for an airport sponsor to “welcome” a Part 16 Complaint against itself, the Director notes that this attitude appears to support BNAA's conviction, that it acted in an attempt to remain in compliance with its Federal obligations.

<sup>317</sup> FAA Exhibit 1, Item 8, p. 12-13.

## VIII. FINDINGS AND CONCLUSIONS

The Director finds that the Priority Use Area provision [Section 5]<sup>318</sup> in the Agreement Authorizing Services and the exclusive fueling rights provision contained in the Agreement Authorizing Services and the Agreement Authorizing the Sale of Aviation Fuel [Section 3(b)],<sup>319</sup> are inconsistent with the BNAA's Federal obligations. Therefore, upon consideration of the evidence and arguments presented by the parties, and based on a preponderance of reliable, probative, and substantial documentation in the record herein, the Director finds that by taking action to mitigate those provisions of the Platinum Agreements, the BNAA is currently in compliance with its grant assurances.

The Director expects the BNAA to continue to aggressively pursue action to resolve these concerns and remain in compliance with its Federal obligations, because the subordination causes in the Agreement Authorizing Services and the Agreement Authorizing the Sale of Aviation Fuel are valid and enforceable. In addition, the Director finds that:

- The actions by the BNAA concerning Complainant's operation as a FBO at the Airport are consistent with Grant Assurance 22 *Economic Nondiscrimination*, 49 USC 47107 (a)(1) through (6), which requires the BNAA to make the Airport available to all types, kinds, and classes of aeronautical activity on reasonable terms, and without unjust discrimination.
- The actions by the BNAA concerning Complainant's operation as a FBO at the Airport are consistent with Grant Assurance 23 *Exclusive Rights*, 49 USC 47107(a) (4), which prohibit the granting of exclusive right for the use of the airport.
- The actions by the BNAA concerning Complainant's operation as a FBO at the Airport are consistent with Grant Assurance 38 *Hangar Construction*, 49 USC 47107(a) (21), which requires that if the airport sponsor and a person who owns an aircraft agree that a hangar is to be constructed at the airport for the aircraft at the aircraft owner's expense, the airport sponsor will grant to the aircraft owner for the hangar a long term lease that is subject to such terms and conditions on the hangar as the airport owner or operator may impose.
- The actions by the BNAA concerning Complainant's operation as a FBO at the Airport and to regain control critical airfield infrastructure (taxiways) and ensure safe operations on its airport movement areas are consistent with Grant Assurance 5 *Preserving Rights and Powers*, 49 USC 47107(a), which state that an airport sponsor cannot take any action that may deprive it of its rights and powers as the airport sponsor and requires the airport sponsor not sell, lease, encumber, or otherwise transfer or dispose of any part of its title or other interests in the airport property without the prior approval of the FAA.
- The actions by the BNAA concerning Complainant's operation as a FBO at the Airport and to regain control critical airfield infrastructure (taxiways) and ensure safe operations on its airport movement areas are consistent with Grant Assurance 19, *Operation and Maintenance*, implementing 49 U.S.C. § 47107(a)(7), which requires the airport sponsor operate the airport and

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<sup>318</sup> See FAA Exhibit 1, Item 1, Exhibit B.

<sup>319</sup> See FAA Exhibit 1, Item 1, and Exhibit C for a copy of this agreement.



all facilities at all times in a safe and serviceable condition and not cause or permit any activity or action thereon which would interfere with its use for airport purposes.<sup>320</sup>

□ The actions by the BNAA concerning Complainant's operation as a FBO at the Airport and to regain control critical airfield infrastructure (taxiways) and ensure safe operations on its airport movement areas are consistent Grant Assurance 29, *Airport Layout Plan* (ALP), implementing 49 USC Section 47107(a) (16) requires an airport sponsor to keep up-to-date the ALP and to show on its ALP the boundaries of the airport and all proposed additions thereto, the location and nature of all existing and proposed airport facilities and structures.<sup>321</sup>

### ORDER

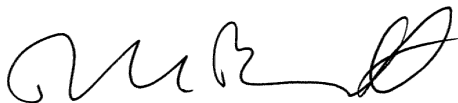
ACCORDINGLY, it is ordered that:

- 1.The Complaint is dismissed.
- 2.All motions not specifically granted herein are denied.

### RIGHT TO APPEAL

This Director's Determination is an initial agency determination and does not constitute final agency action subject to judicial review under 49 USC § 46110.<sup>322</sup> A party to this proceeding adversely affected by the Director's Determination may appeal this 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.

Date: JUNE 4, 2007



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

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<sup>320</sup> As discussed in the main text, the Director found that actions by the BNAA to prevent the Priority Use Area from interfering with movement areas and taxiways were consistent with Grant Assurance 19, *Operation and Maintenance*. Based on this, the Director elects to include this finding here.

<sup>321</sup> As discussed in the main text, the Director found that actions by the BNAA concerning the Option provision and the existing row of existing T-hangar were consistent with Grant Assurance 29 *Airport Layout Plan*. The Director also found that the actions by the BNAA to prevent the Priority Use Area from interfering with movement areas and taxiways were also consistent with Grant Assurance 29. Based on this, the Director elects to include this finding here.

<sup>322</sup> See also 14 C.F.R. § 16.247.

**INDEX OF THE ADMINISTRATIVE RECORD**

The following items constitute the administrative record in this proceeding:

**FAA Exhibit 1**

**Item 1**

Complaint No. 16-06-09 dated April 24, 2006, including appendices containing the following documents:

- Exhibit A Ground Lease Agreement, July 1, 2004.
- Exhibit B Agreement Authorizing Services, July 1, 2004.
- Exhibit C Agreement Authorizing the Sale of Aviation Fuel, July 1, 2004.
- Exhibit D Letter from Mrs. Lynnette Hindman, Executive Assistant, Central Illinois Regional Airport, to Mr. David Schlentner, General Manager, Executive Flight Management, July 30, 2004.
- Exhibit E Commercial Building Permit, City of Bloomington, 10/06/2004.
- Exhibit F Notice of Proposed Construction or Alteration, (2 notices), undated.
- Exhibit G Letter from Mr. Denis R. Rewerts, FAA, to Mr. David Scheider, Deputy Director Security & Special Projects, Central Illinois Regional Airport, December 2, 2004.
- Exhibit H Minutes of BNAA Board Meeting, December 9, 2004.
- Exhibit I Letter from Mr. Lincoln Francis, President, Platinum Aviation, LLC, to Mr. David S. Anderson, Interim Executive Director, Bloomington Normal Airport Authority, May 23, 2005.
- Exhibit J Discovery Deposition of David S. Anderson in the Circuit Court of the Eleventh Judicial Circuit, County of McLean, case No. 05-CH-04, April, 14, 2006.
- Exhibit K Letter from Mr. David S. Anderson, Interim Executive Director, Bloomington Normal Airport Authority, to Mr. Mark Noonan, Cornerstone Construction, LLC, June 10, 2005.
- Exhibit L Letter from Mr. Carl G. Olson, Executive Director, Central Illinois Regional Airport, to Mr. Mark Noonan, Cornerstone Construction, LLC, June 30, 2005.
- Exhibit M Correspondence:
  - Letter from Mr. David S. Anderson, Interim Executive Director, Bloomington Normal Airport Authority, to Mr. Lincoln Francis, Executive Flight Management, February 1, 2005.
  - Letter from Mr. Lincoln Francis, President, Platinum Jet center, BMI, LLC, to Mr. David S. Anderson, Interim Executive Director, Bloomington Normal Airport Authority, February 3, 2005.
  - Letter from Mr. Michael J. Scotti, III, to Mr. William C. Wetzel, July 1, 2005.
  - Letter from Mr. William C. Wetzel, to Mr. Michael J. Scotti, III, September 16, 2005.
  - Letter from Mr. Michael J. Scotti, III, to Mr. William C. Wetzel, September 23, 2005.

- Exhibit N Affidavit of Steven C. Ladage, in the Circuit Court of the Eleventh Judicial Circuit County of McLean, case No. 05-CH-04, filed, July 11, 2005. It includes the following exhibits:

  - Commercial Building Permit, City of Bloomington, May 25, 2005. Letter from Mr. David S. Anderson, Interim Executive Director, Bloomington Normal Airport Authority, to Mr. Mark Noonan, Cornerstone Construction, LLC, June 10, 2005.
  - Letter from Mr. Carl G. Olson, Executive Director, Central Illinois Regional Airport, to Mr. Mark Noonan, Cornerstone Construction, LLC, June 30, 2005.
  - Work site photographs.
  
- Exhibit O Platinum Memorandum in Support of Its Motion for Temporary Restraining Order and Preliminary Injunction, in the Circuit Court of the Eleventh Judicial Circuit County of McLean, case No. 05-CH-04, filed, July 11, 2005.
- Exhibit P Affidavit of David Schlentner, in the Circuit Court of the Eleventh Judicial Circuit County of McLean, case No. 05-CH-04, filed, July 11, 2005. It includes the following exhibits:

  - Letter from Mr. Denis R. Rewerts, FAA, to Mr. David Scheider, Deputy Director Security & Special Projects, Central Illinois Regional Airport, December 2, 2004.
  - Letter from Illinois Environmental Protection Agency, to Platinum Jet Center, June 27, 2005. It includes General NPDES Permit No. ILR10, issued May 30, 2003.
  
- Exhibit Q Preliminary Injunction Order, in the Circuit Court of the Eleventh Judicial Circuit County of McLean, case No. 05-CH-04, filed, August 11, 2005.
- Exhibit R Platinum Defendant's Motion to Enforce Preliminary Injunction Order, September 26, 2005. It includes the following attachments:

  - Preliminary Injunction Order, in the Circuit Court of the Eleventh Judicial Circuit County of McLean, case No. 05-CH-04, filed, August 11, 2005.
  - Letter from Mr. Craig M. Cummings, City of Bloomington, to Mr. Fred Hahn, P.E., September 19, 2005.
  - Letter from Mr. Michael J. Scotti, III to Mr. Todd Greenburg, City of Bloomington, Corporation Counsel, September 21, 2005.
  - Letter from Mr. J. Todd Greenburg, City of Bloomington, Corporation Counsel, to Mr. Michael J. Scotti, III, September 22, 2005.
  - Letter from Mr. Michael J. Scotti, III, to Mr. William C. Wetzel, September 22, 2005.
  - Letter from Mr. William C. Wetzel, to Mr. Michael J. Scotti, III, September 23, 2005. (Letter is incomplete)
  
- Exhibit S Grant of Utility Easement, October 13, 2005.

- Exhibit T Commentary on FAA Sponsors Assurances 5, 19, 22, 23, 24 and 29 and their Applicability to the Central Illinois regional Airport, September 17, 2005.
- Exhibit U Affidavit of Michael J. Scotti, III, April 21, 2006.

**Item 2**

Motion and Memorandum in Support of Motion to Dismiss, May 5, 2006.

**Item 3**

Answer of the Bloomington-Normal Airport Authority, June 30, 2006, including appendices containing the following documents:

- Exhibit 1 Affidavit of Carl G. Olson, June 28, 2006.
- Exhibit 2 Discovery Deposition of Carl G. Olson in the Circuit Court of the Eleventh Judicial Circuit, County of McLean, case No. 05-CH-04, April 9, 2006. It includes an index and the following exhibits:
  - B. Certified letter re: stop work order, Olson to Noonan, 6/30/06.
  - C. Letter re: Checks, Andes to Schlentner, 7/12/05.
  - D. Letter to Kilpatrick from Wetzel, 7/14/05.
  - E. Letter re: Lease agreements, et al, Kennedy to Wetzel, 7/28/05.
  - F. Letter re: Lease agreements, et al, Kennedy to Wetzel, 8/23/05.
  - G. Letter re: Lease agreements, et al, Kennedy to Wetzel, 9/20/05.
  - H. Letter Olson to Kennedy re: Preparation of new standard FBO Lease, 3/9/05.
  - I. Confidential and Privileged letter from Kennedy to Olson, 8/8/05
  - J. CIRA Olson letter to Kilpatrick, plus commentary on FAA Sponsors Assurances, et all (Bates 87-114, inclusive)
- Exhibit 3 Order Granting Summary Judgment, in the Circuit Court of the Eleventh Judicial Circuit, County of McLean, case No. 05-CH-04, filed May 30, 2006.
- Exhibit 4 Discovery Deposition of Neale McCormick in the Circuit Court of the Eleventh Judicial Circuit, County of McLean, case No. 05-CH-04, December 16, 2005.
- Exhibit 5 Excerpt of Request for Proposal for Fixed Base Operation Services, July 18, 2002.
- Exhibit 6 Discovery Deposition of Donald G. Schneider in the Circuit Court of the Eleventh Judicial Circuit, County of McLean, case No. 05-CH-04, July 19, 2005.
- Exhibit 7 Platinum Jet Center BMI, LLC and Platinum Aviation, LLC Verified First Amended Cross Claim Against the Bloomington Normal Airport Authority in the Circuit Court of the Eleventh Judicial Circuit, County of McLean, case No. 05-CH-04, Filed July 22, 2005. It includes the following exhibits:

- A. Ground Lease Agreement, July 1, 2004.
- B. Agreement Authorizing Services, July 1, 2004.
- C. Agreement Authorizing the Sale of Aviation Fuel, July 1, 2004.
- D. Letter from Mrs. Lynnette Hindman, Executive Assistant, Central Illinois Regional Airport, to Mr. David Schlentner, General Manager, Executive Flight Management, July 30, 2004.
- E. Letter from Mr. Lincoln Francis, President, Platinum Aviation, LLC, to Mr. David S. Anderson, Interim Executive Director, Bloomington Normal Airport Authority, May 23, 2005.
- F. Letter from Mr. Denis R. Rewerts, FAA, to Mr. David Scheider, Deputy Director Security & Special Projects, Central Illinois Regional Airport, December 2, 2004.
- G. Letter from Mr. David S. Anderson, Interim Executive Director, Bloomington Normal Airport Authority, to Mr. Mark Noonan, Cornerstone Construction, LLC, June 10, 2005.
- H. Letter from Mr. Carl G. Olson, Executive Director, Central Illinois Regional Airport, to Mr. Mark Noonan, Cornerstone Construction, LLC, June 30, 2005.

- Exhibit 8 Verdict Form A. (undated).
- Exhibit 9 Discovery Deposition of David Schlentner, in the Circuit Court of the Eleventh Judicial Circuit County of McLean, case No. 05-CH-04, January 26, 2006.
- Exhibit 10 Discovery Deposition of Lincoln Francis in the Circuit Court of the Eleventh Judicial Circuit County of McLean, case No. 05-CH-04, January 27, 2006.
- Exhibit 11 Letter from Mr. William C. Wetzel to Mr. Michael J. Scotti, III, May 4, 2006. It includes a restated Ground Lease and Operating Agreement By and Between Bloomington-Normal Airport Authority and Platinum jet center, LLC, (Draft), dated May 4, 2006.
- Exhibit 12 Existing Airport Layout Plan (ALP), (Sheet 2 of 16), 7/21/2000.
- Exhibit 13 Aerial Location Map, FBO Lease Survey, 6/16/2006.
- Exhibit 14 Enlarged Aerial Location Map, FBO Lease Survey, 6/16/2006.
- Exhibit 15 Letter from Mr. Lincoln Francis, Executive Flight Management to Mr. Carl Olson, Executive Director, BNAA, June 7, 2006.
- Motion and Memorandum in Support of Motion to Dismiss, June 30, 2006.
- Motion and Memorandum in Support of Motion for Declaratory Statement, June 30, 2006.

#### Item 4

Respondent's Motion requesting Extension of Time, July 20, 2006.

#### Item 5

Order of Extension of Time, July 26, 2006.

### Item 6

Platinum's Memorandum in Opposition to the BNAA's Motion to Dismiss (Reply), August 18, 2006, including the following exhibits:

- Exhibit A Platinum Jet Center BMI, LLC and Platinum Aviation, LLC's Reply to the BNAA's Affirmative Defenses, in the Circuit Court of the Eleventh Judicial Circuit County of McLean, case No. 05-CH-04, Filed May 1, 2006.
- Exhibit B Letter from Mr. Lincoln Francis, Executive Flight Management to Mr. Carl Olson, Executive Director, BNAA, June 26, 2006.
- Exhibit C Letter from Mr. William C. Wetzel, to Mr. Peter Mason, July 7, 2006.

### Item 7

Response in To BNAA's Motion For Declaratory Statement, August 18, 2006.

### Item 8

Rebuttal of the Bloomington-Normal Airport Authority, August 30, 2006, including the following exhibits:

- Exhibit 1 Jury Trial, in the Circuit Court of the Eleventh Judicial Circuit County of McLean, case No. 05-CH-04, May 25, 2006.
- Exhibit 2 Letter from Mr. William C. Wetzel, Counsel for Bloomington Normal Airport Authority, to Mrs. Laura E. Kilpatrick, Office of the Regional Counsel (AGL-7), Federal Aviation Administration, July 14, 2005.
- Exhibit 3 Discovery Deposition of Donald G. Schneider in the Circuit Court of the Eleventh Judicial Circuit, County of McLean, case No. 05-CH-04, July 19, 2005.
- Exhibit 4 Record of the Bloomington-Normal Airport Authority Board of Commissioners Regular Meeting, October 13, 2005.
- Exhibit 5 Bloomington-Normal Airport Authority Fixed Base Operator Agreement, with Clark Acquisition Company, LLC, October 25, 1994.

### Item 9

E-mail from Mr. Denis Rewerts, FAA, Chicago Airport District Office (ADO) to Miguel Vasconcelos, FAA, HQ, AAS-400, September 6, 2006.

### Item 10

Motion of the Bloomington-Normal Airport Authority to Supplement the Record, December 11, 2006, including the following exhibits:

- Exhibit A Complaint Against the Bloomington Normal Airport Authority, in the Circuit Court of the Eleventh Judicial Circuit County of McLean, case No. 06-CH-381, Filed November 3, 2006.

- Exhibit B Document is missing, but main text refers to it as the “Agreement Authorizing Services, July 1, 2004, same as FAA Exhibit 1, Item 1, Exhibit B.
- Exhibit C Order Granting Summary Judgment, in the Circuit Court of the Eleventh Judicial Circuit, County of McLean, case No. 05-CH-04, filed May 30, 2006.
- Exhibit D Letter from Mr. Lincoln Francis, Executive Flight Management to Mr. Carl Olson, Executive Director, BNAA, June 7, 2006.
- Exhibit E Letter from Mr. Carl G. Olson, Executive Director, Central Illinois Regional Airport, to Mr. Lincoln Francis, Executive Flight Management, June 15, 2006.
- Exhibit F Letter from Mr. Lincoln Francis, Executive Flight Management to Mr. Carl Olson, Executive Director, BNAA, June 26, 2006.
- Exhibit G Letter from Mr. William C. Wetzel, to Mr. Peter Mason, July 7, 2006.
- Exhibit H Letter from Mr. Carl G. Olson, Executive Director, Central Illinois Regional Airport to Mr. David Schlentner, General Manager, Platinum Jet Center, LLC, October 2, 2006.
- Exhibit I Letter from Mr. Carl G. Olson, Executive Director, Central Illinois Regional Airport to Mr. David Schlentner, General Manager, Platinum Jet Center, LLC, October 27 2006.

#### **Item 11**

Notice of Extension of Time, December 14, 2006.

#### **Item 12**

FAA Form 5010, Airport Master Record, BMI, December 21, 2006.

#### **Item 13**

Objection to Bloomington-Mormal Airport Authority’s Motion to Supplement the Record, December 20, 2006.

#### **Item 14**

*Platinum Jet Center Opens*, Aviation International News, February 2007.

#### **Item 15**

*Platinum Files New Lawsuit*, [www.pantagraph.com](http://www.pantagraph.com), November 9, 2006.

#### **Item 16**

E-mail and attached photographs from John Lott, FAA, Great Lakes Region, dated February 22, 2007.

#### **Item 17**

E-mail from John Lott, FAA, Great Lakes Region, dated February 23, 2007.

**Item 18**

Letter from Carl G. Olson, Executive Director, Central Illinois Regional Airport, to John Lott, Lead Airport certification/Airport Safety Inspector, FAA, February 20, 2007.

**Item 19**

FAA Form 1360-33, dated 02/23/2007, by Frank D. Crawford/PAI.

**Item 20**

Notice of Extension of Time, February 27, 2007.

**Item 21**

Extension Agreement, September 14, 2006.

**Item 22**

Notice of Docketed, May 12, 2006.

**Item 23**

Respondent's request for Extension of Time to File Answer, May 23, 2006.

**Item 24**

Platinum Reply to Answer of BNAA, July 13, 2006 (Exhibit. A-1).

**Item 25**

Complainant's Request for Extension of Time, July 13, 2006.

**Item 26**

BNAA's Corrected Exhibit 5, September 25, 2006.

**Item 27**

Notice of Extension of Time, May 25, 2006.

**Item 28**

Notice of Service and Filing of Exhibit A to Platinum's Reply to Answer, September 19, 2006.



**Item 29**

Notice of Extension of Time, April 30, 2007.

**INDEX OF THE ADMINISTRATIVE RECORD**

The following items constitute the administrative record in this proceeding:

**FAA Exhibit 2**

Grant History Report						Report Date	01/10/2007
FAA - Office Of Airports							
Region: GL							
ADO: CHI							
Worksite: Bloomington/Normal, IL		Locid: BMI	Worksite Name: Central IL Regional Airport at Bloomington-Normal		Current Service Level: P	Current Hub Type: N	
Grant Number	Entitlement	Discretionary	Total	Descr			
001-1983	\$0.00	\$876,503.00	\$876,503.00	Construct Taxiway; Install Runway Sensors; Rehabilitate Taxiway			
002-1983	\$0.00	\$284,000.00	\$284,000.00	Improve Airport Drainage; Install Apron Lighting - 11/21; Install Apron Lighting; Install Runway Sensors; Rehabilitate Runway Lighting			
003-1986	\$0.00	\$325,215.00	\$325,215.00	Groove Runway - 11/29; Install Apron Lighting			
004-1988	\$0.00	\$155,968.00	\$155,968.00	Conduct Noise Compatibility Plan Study			
005-1988	\$754,274.00	\$2,977.00	\$757,251.00	Acquire Land for Development; Noise Mitigation Measures for Public Buildings			
006-1989	\$21,075.00	\$263,475.00	\$284,550.00	Acquire Aircraft Rescue & Fire Fighting Vehicle			
007-1990	\$661,000.00	\$789,152.00	\$1,450,152.00	Acquire Land for Development; Acquire Miscellaneous Land; Improve Airport Drainage			
008-1991	\$0.00	\$2,213,682.00	\$2,213,682.00	Acquire Land for Development; Acquire Security Equipment; Install Guidance Signs			
009-1992	\$463,575.00	\$3,544,480.00	\$4,008,055.00	Construct Runway - 2/20; Construct Taxiway			
010-1993	\$172,370.00	\$3,906,428.00	\$4,078,798.00	Acquire Land For Approaches; Construct Runway - 2/20; Construct Runway - 2/20; Install Guidance Signs			
011-1993	\$292,500.00	\$0.00	\$292,500.00	Construct Runway - 2-20; Construct Taxiway			
012-1994	\$155,012.00	\$1,536,192.00	\$1,691,204.00	Acquire Land For Approaches; Acquire Land for Noise Compatibility within 75 DNL; Acquire Land for Noise Compatibility within 75 DNL			
013-1994	\$858,642.00	\$0.00	\$858,642.00	Extend Taxiway; Extend Taxiway; Improve Service Road; Rehabilitate Taxiway			
014-1995	\$283,000.00	\$2,582,637.00	\$2,865,637.00	Acquire Land For Approaches; Construct Taxiway; Install Perimeter Fencing; Install Runway Sensors			
015-1996	\$1,417.00	\$2,898,856.00	\$2,900,273.00	Acquire Land for Noise Compatibility within 75 DNL			
016-1997	\$308,000.00	\$313,000.00	\$621,000.00	Acquire Land for Noise Compatibility within 75 DNL			
017-1997	\$715,500.00	\$0.00	\$715,500.00	Extend Runway - 11/29			
018-1998	\$0.00	\$1,498,861.00	\$1,498,861.00	Rehabilitate Runway - RW 11/29			

Grant History Report						Report Date	01/10/2007
FAA - Office Of Airports							
Region: GL							
ADO: CHI							
Worksite: Bloomington/Normal, IL		Locid: BMI	Worksite Name: Central IL Regional Airport at Bloomington-Normal		Current Service Level: P	Current Hub Type: N	
Grant Number	Entitlement	Discretionary	Total	Descr			
019-1998	\$50,363.00	\$0.00	\$50,363.00	Conduct Airport Master Plan Study			
020-1999	\$262,800.00	\$0.00	\$262,800.00	Acquire Snow Removal Equipment			
021-1999	\$485,204.00	\$0.00	\$485,204.00	Construct Terminal Building			
022-1999	\$0.00	\$2,420,900.00	\$2,420,900.00	Construct Terminal Building			
023-2000	\$1,769,046.00	\$6,580,192.00	\$8,349,238.00	Construct Terminal Building			
024-2000	\$0.00	\$300,000.00	\$300,000.00	Acquire Land for Noise Compatibility within 65 - 69 DNL			
025-2000	\$1,802,387.00	\$1,110,000.00	\$2,912,387.00	Construct Terminal Building			
026-2001	\$1,026,976.00	\$0.00	\$1,026,976.00	Construct Apron			
027-2001	\$0.00	\$0.00	\$0.00	No projects assigned.			
028-2001	\$0.00	\$1,700,000.00	\$1,700,000.00	Acquire Land for Noise Compatibility within 65 - 69 DNL			
029-2001	\$0.00	\$755,037.00	\$755,037.00	Acquire Aircraft Rescue & Fire Fighting Vehicle			
030-2001	\$0.00	\$690,885.00	\$690,885.00	Acquire Snow Removal Equipment			
031-2001	\$0.00	\$456,482.00	\$456,482.00	Improve Service Road			
033-2002	\$0.00	\$4,872,200.00	\$4,872,200.00	Strengthen Runway			
034-2002	\$0.00	\$1,286,100.00	\$1,286,100.00	Acquire Land for Noise Compatibility within 65 - 69 DNL			
035-2002	\$0.00	\$151,020.00	\$151,020.00	Security Enhancements			
036-2003	\$1,778,263.00	\$0.00	\$1,778,263.00	Construct Apron - Construct Terminal Building Apron - Phase 6			
037-2003	\$0.00	\$4,872,200.00	\$4,872,200.00	Extend Runway - 2/20; Extend Taxiway - G, F and E; Strengthen Runway - 11/29; Widen Runway - 2/20; Widen Taxiway - G, F and E.			
038-2003	\$0.00	\$200,000.00	\$200,000.00	Acquire Land for Noise Compatibility within 65 - 69 DNL			
039-2004	\$0.00	\$4,872,200.00	\$4,872,200.00	Strengthen Runway - 11/29			
040-2004	\$0.00	\$1,378,787.00	\$1,378,787.00	Acquire Land for Noise Compatibility within 65 - 69 DNL			
041-2004	\$104,665.00	\$0.00	\$104,665.00	Acquire Snow Removal Equipment			

**INDEX OF THE ADMINISTRATIVE RECORD**

The following items constitute the administrative record in this proceeding:

**FAA Exhibit 2 Continued**

Grant History Report				
FAA - Office Of Airports			Report Date	01/10/2007
Region: GL				
ADO: CHI				
Worksite: Bloomington/Normal, IL		Locid: BMI	Worksite Name: Central IL Regional Airport at Bloomington-Normal	Current Service Level: P Current Hub Type: N
Grant Number	Entitlement	Discretionary	Total	Descr
042-2005	\$0.00	\$4,872,200.00	\$4,872,200.00	Widen Runway - 02/20
043-2005	\$1,858,995.00	\$0.00	\$1,858,995.00	Acquire Miscellaneous Land; Acquire Snow Removal Equipment
044-2005	\$1,730,238.00	\$1,796,171.00	\$3,526,409.00	Widen Runway - 02/20
045-2006	\$0.00	\$4,872,200.00	\$4,872,200.00	Widen Taxiway
046-2006	\$305,743.00	\$360,007.00	\$745,750.00	Acquire Aircraft Rescue & Fire Fighting Vehicle; Acquire Friction Measuring Equipment; Construct Aircraft Rescue & Fire Fighting Building; Update Airport Master Plan Study
047-2006	\$1,576,633.00	\$795,150.00	\$2,371,783.00	Acquire Safety Equipment; Improve Terminal Building
<b>Report Total</b>	<b>\$17,517,678.00</b>	<b>\$65,533,157.00</b>	<b>\$83,050,835.00</b>	

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on \_\_\_\_\_, I caused to be placed in the United States mail (first class mail, postage paid) a true copy of the Director's Determination dated \_\_\_\_\_ and addressed to:

Michael J. Scotti, III  
David Ter Molen  
Tonita M. Helton  
Freeborn & Peters LLP  
311 S. Wacker Drive – Suite 3000  
Chicago, IL 60606

Pablo O. Nüesch  
Spiegel & McDiarmid  
1333 New Hampshire Ave., NW  
Washington, DC 20036

FAA Part 16 Airport Proceedings Docket

\_\_\_\_\_  
Nikita Lawhorn  
Office of Airport Safety and Standards