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

Platinum Aviation and Platinum Jet Center BMI **Complainants/Appellants** **v.** **Bloomington-Normal Airport Authority, Illinois** **Respondent/Appellee**	**Docket No. 16-06-09** ***November 28, 2007***

FINAL DECISION AND ORDER

I. INTRODUCTION

This matter is before the Federal Aviation Administration (FAA) Associate Administrator for Airports on appeal filed by Platinum Aviation and Platinum Jet Center BMI (Complainants or Appellants) from the Director's Determination of June 4, 2007, issued by the Director of the FAA Office of Airport Safety and Standards, pursuant to the *FAA Rules of Practice for Federally Assisted Airport Enforcement Proceedings* found in Title 14 Code of Federal Regulations (CFR) Part 16 (FAA Rules of Practice).

Complainants argue on appeal to the Associate Administrator for Airports that the Director committed errors in conducting the investigation and interpreting the evidence, causing the FAA to dismiss the Complaint erroneously.

Specifically, Complainants argue on appeal the Director (a) accepted the Respondent's remedy to correct sponsor assurance violations even though the remedy was unreasonable and prejudicial to the Complainants; (b) interpreted key facts in the record incorrectly and drew incorrect conclusions from the evidence, specifically as they relate to hangar location and sponsor assurances; (c) failed to investigate the facts of the case fully when evaluating Complainants' use of the Priority Use Area; and (d) rendered a decision that contained uncertainties and ambiguities regarding the acceptable use and designation of the Complainants' Priority Use Area. [*See* Section VI, "Analysis and Discussion," beginning on page 14 in this Final Decision and Order, for more detail.]

II. SUMMARY OF THE DIRECTOR'S DETERMINATION

The record shows Complainants responded to the Airport's July 2002 Request for Proposals (RFP) to develop a second fixed-base operator[1] business at the Airport. Negotiations resulted in three separate contracts, referred to herein as the Platinum Agreements. The Platinum Agreements required Complainants to construct and maintain new facilities, including an aviation hangar and a fuel farm. After the Respondent gave approval for the construction, the location of the hangar was modified and moved about 50 feet. The resulting modification placed the hangar close to the taxiway/taxilane, making it "difficult to park any aircraft on the apron in front of the hangar due to lack of taxiway centerline-to-object clearance." [*See* FAA Exhibit 1, Item 30, *Director's Determination*, pages 6-7.]

However, for Complainants to engage in the type of business activity they envisioned when negotiating their agreements with the Respondent, it was necessary to park aircraft in this area. Complainants assert a right – under their lease agreements – to park aircraft in this area, referred to as the "Priority Use Area." [*See* FAA Exhibit 1, Item 31, pages 25-26.] This area overlaps active taxiways and public access movement areas that were funded under the FAA Airport Improvement Program. When used by the Complainants for parking aircraft, these public-access areas would have to be closed to other traffic.

Under its grant agreements with the FAA, the Respondent is required to ensure the active taxiways and public-access movement areas remain open for the use of all aeronautical users. Such areas may not be restricted by agreement between an airport sponsor and an airport tenant – even for short periods of time – for the tenant's personal use.

The Respondent had entered into agreements with the Complainants that were in conflict with the Respondent's requirements under its federal obligations. The parties were unable to resolve the conflict between the Complainants' rights under the agreements and the Respondent's federal obligations. A state court found the Platinum Agreements, which contain the language for the Priority Use Area, were valid and enforceable contracts under Illinois law. [FAA Exhibit 1, Item 30, *Director's Determination*, page 10.] Nonetheless, the Respondent's federal obligations prohibit it from permitting the Complainants to exercise their claim to use the Priority Use Area in the manner they envisioned. The Respondent and Complainants subordinated the Complainants' contractual rights in the Platinum Agreements to the Respondent's federal obligations.

In this case, Complainants attempt to regain control of the Priority Use Area or resolve the issue of aircraft parking in another manner through the Part 16 process. In their initial complaint, Complainants alleged the Respondent violated grant assurances 5, *Preserving Rights and Powers*; 22, *Economic Nondiscrimination*; 23, *Exclusive Rights*; 38, *Hangar Construction*.

[1] A fixed-base operator (FBO) is a commercial entity providing aeronautical services such as fueling, maintenance, storage, ground and flight instruction, etc., to the public. [FAA Order 5190.6A, *Airport Compliance Requirements*, October 2, 1989, Appendix 5.]

Complainants alleged that even though a state court found the contractual agreements between the Complainants and Respondent to be valid, Respondent has refused to honor those agreements, causing Complainants to be directly and substantially harmed. The Director acknowledged that revisions to the Platinum Agreements made pursuant to the subordination clauses may result in giving up contractual rights under state law, but determined it may also be required in order to comply with applicable federal obligations. That is, the terms of the Platinum Agreements make them subordinate to any existing and future agreements between the Respondent and the United States. [*See* FAA Exhibit 1, Item 30, *Director's Determination*, Issue 1, pages 21-41.]

Complainants alleged Respondent took unreasonable steps to conform the Platinum Agreements to the grant assurances, thereby forcing Complainants to give up contractual rights without just compensation in violation of grant assurance 22, *Economic Nondiscrimination*. The Director reviewed the Platinum Agreements and found they did contain terms and conditions that were inconsistent with the Respondent's grant assurances. However, the Director found that the steps taken by the Respondent to address the issues of noncompliance were reasonable and consistent with grant assurance 22. That is, steps were taken to ensure the public-use taxiways and movement areas are kept open for public use and are not restricted for Complainants' use. [*See* FAA Exhibit 1, Item 30, *Director's Determination*, Issue 2, pages 41-52.]

Complainants alleged Respondent excluded Complainants from participating in an on-airport activity and granted an exclusive right to its competitor, Image Air, to provide aircraft and fueling services in violation of grant assurance 23 *Exclusive Rights*. The Director found the Respondent invited, rather than excluded, Complainants to operate on the Airport. The Director also found the Respondent did not grant an exclusive right to Image Air. [*See* FAA Exhibit 1, Item 30, *Director's Determination*, Issue 3, page 53.]

Complainants alleged Respondent prevented Complainants from enjoying the benefits of a 30-year ground lease consistent with Complainants' agreement to construct a hangar at Complainants' expense, in violation of grant assurance 38, *Hangar Construction*. Grant assurance 38 addresses an individual aircraft owner's ability to secure a lease sufficiently long enough to amortize the cost of constructing a hangar for the individual's own aircraft. The Complainants do not fall into this category. Complainants are commercial operators providing hangar space to third party customers; they did not construct a hangar to house their own aircraft. Nonetheless, the Director reviewed this issue. The Director found the Respondent did enter into a long-term ground lease with the Complainants. On-going contract disputes, which are to be resolved in state court, may impact the Complainants' continuing operation under the long-term lease agreement entered into with the Respondent, but that does not alter the fact that the Complainants did obtain a long-term agreement. [*See* FAA Exhibit 1, Item 30, *Director's Determination*, Issue 4, page 54.]

Complainants alleged the actions taken to conform the Platinum Agreements to the Respondent's federal obligations violated grant assurance 5, *Preserving Rights and Powers*. The Director explained that the Respondent entered into agreements that included provisions inconsistent with the Respondent's federal obligations. The Respondent not only had the right, but the obligation to amend, or attempt to amend, those agreements to ensure the

Respondent meets its federal obligations. Such action actually preserves the Respondent's rights and powers; it does not violate them. The Director noted it is not a violation of grant assurance 5 to take actions the airport sponsor believes are necessary to correct a potential grant assurance violation. [*See* FAA Exhibit 1, Item 30, *Director's Determination*, Issue 5, pages 54-55.]

III. THE AIRPORT

The Bloomington-Normal Airport Authority owns and operates the Central Illinois Regional Airport (Airport) in Bloomington, Illinois. The Airport is a commercial service airport having two partially intersecting runways with accompanying instrument approaches and a system of partial parallel taxiways and aprons for air carrier, freight, and general/corporate aviation. More than 100 aircraft are based at the Airport. The Airport has 40,000 annual operations and a wide spectrum of aeronautical activities. The Airport is served by five major airlines that operate approximately 20 daily flights, accounting for the movement of over 519,000 passengers on an annual basis.

The Airport was financed, in part, with funds provided by the FAA under the Airport Improvement Program (AIP); between 1983 and 2006, the Airport received more than $83 million in federal airport development assistance in AIP grants.

Two fixed-base operators (FBOs) provide services at the Airport. One is Image Air (aka Image Air of Southwest, Florida), which provides several aeronautical services including fueling, maintenance, flight training, charter service, aircraft sales, and other FBO services. The second, Platinum, is operated by the Complainants. Complainants provide several aeronautical services, including fueling, aircraft parking, and hangar services. Before Platinum came onto the Airport, Image Air was the only full-service FBO providing aircraft and fueling services at the Airport since 1973.

(More detailed information regarding the Airport is included in FAA Exhibit 1, Item 30, *Director's Determination*, Section III, "The Airport and its Federal Obligations.")

IV. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

The Director's Determination includes a detailed factual background section. [*See* FAA Exhibit 1, Item 30, *Director's Determination*, pages 5-11.] In this Final Decision and Order, only the procedural history for this Part 16 Appeal is included.

On June 4, 2007, the FAA issued the Director's Determination in this matter. [FAA Exhibit 1, Item 30, *Director's Determination*.]

On August 3, 2007, Counsel for Complainants filed the *Appeal from the Director's Determination*, received August 6, 2007. [FAA Exhibit 1, Item 31.]

On August 23, 2007, Counsel for Respondent filed the Reply to Complainants' appeal. On the same date, Counsel for Respondent filed a motion seeking to prevent further pleadings. (No further pleadings were filed by either party.) [FAA Exhibit 1, Items 32 and 33.]

V. APPLICABLE LAW AND POLICY

The following is a discussion pertaining to the (a) FAA's enforcement responsibilities; (b) the FAA compliance program; (c) statutes, sponsor assurances, and relevant policies; and (d) the complaint and appeal process.

A. FAA Enforcement Responsibilities

The Federal Aviation Act of 1958, as amended, 49 U.S.C. § 40101, et seq., assigns the FAA Administrator broad responsibilities for the regulation of air commerce in the interests of safety, security, and development of civil aeronautics. The federal role in encouraging and developing civil aviation has been augmented by various legislative actions, which authorize programs for providing funds and other assistance to local communities for the development of airport facilities. In each such program, the airport sponsor assumes certain obligations, either by contract or by restrictive covenants in property deeds and conveyance instruments, to maintain and operate its airport facilities safely, efficiently, and in accordance with specified conditions. Commitments assumed by airport sponsors in property conveyance or grant agreements are important factors in maintaining a high degree of safety and efficiency in airport design, construction, operation, and maintenance, as well as ensuring the public reasonable access to the airport. Pursuant to 49 U.S.C. § 47122, the FAA has a statutory mandate to ensure airport owners comply with their federal grant assurances.

B. FAA Airport Compliance Program

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

The FAA designed the Airport Compliance Program to ensure the availability of a national system of safe and properly maintained public-use airports that airport sponsors operate in a manner consistent with their federal obligations and the public's interest in civil aviation. The Airport Compliance Program does not control or direct the operation of airports. Rather, it monitors the administration of valuable rights, which airport sponsors pledge to the people of the United States in exchange for monetary grants and donations of federal property, to ensure that airport sponsors serve the public interest.

FAA Order 5190.6A, *Airport Compliance Requirements*, October 2, 1989, (hereinafter Order) sets forth policies and procedures for the FAA Airport Compliance Program. The Order is not

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

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

C. Statutes, Sponsor Assurances, and Relevant Policies

As a condition precedent to providing airport development assistance under the Airport and Airway Improvement Act of 1982 (AAIA), codified at Title 49 U.S.C. § 47101, et seq., the Secretary of Transportation receives certain assurances from the airport sponsor.

The AAIA, 49 U.S.C. § 47101, et seq., sets forth assurances to which an airport sponsor receiving federal financial assistance must agree as a condition precedent to receiving such assistance. These sponsorship requirements are included in every airport improvement program (AIP) grant agreement. Upon acceptance of an AIP grant by an airport sponsor, the assurances become a binding obligation between the airport sponsor and the federal government.

Six federal grant assurances apply to the specific circumstances of this complaint and appeal. In addition, FAA policies regarding the Airport Operating Certificate and Categorical Exclusions are relevant to this Part 16 case.

1. Assurance 5, *Preserving Rights and Powers*

Federal Grant Assurance 5, *Preserving Rights and Powers*, (Assurance 5) requires the airport owner or sponsor to retain all rights and powers necessary to ensure the continued operation of the airport consistent with its federal obligations. This assurance implements the provisions of the AAIA, 49 U.S.C. § 47107(a), et seq., and requires, in pertinent part, that the owner or 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*, describes the responsibilities under Assurance 5 assumed by the owners or sponsors of public-use airports developed with federal assistance. Among these is the responsibility for enforcing adequate rules, regulations, or ordinances as are necessary to ensure the safe and efficient operation of the airport. [*See* Order, Secs. 4-7 and 4-8.]

2. Assurance 19, *Operation and Maintenance*

Federal Grant Assurance 19, *Operation and Maintenance*, (Assurance 19) implements 49 U.S.C. § 47107(a)(7), and requires that the airport owner or sponsor of a federally obligated airport assure:

"The airport and all facilities which are necessary to serve the aeronautical users of the airport, other than facilities owned or controlled by the United States, shall be operated 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. It will not cause or permit any activity or action thereon which would interfere with its use for airport purposes. It will suitably operate and maintain the airport and all facilities thereon or connected therewith, with due regard to climatic and flood conditions. Any proposal to temporarily close the airport for non-aeronautical purposes must first be approved by the Secretary. In furtherance of this assurance, the sponsor will have in effect arrangements for:

(a) Operating the airport's aeronautical facilities whenever required;

(b) Promptly marking and lighting hazards resulting from airport conditions, including temporary conditions; and,

(c) Promptly notifying airmen of any condition affecting aeronautical use of the airport.

Nothing contained herein shall be construed to require that the airport be operated for aeronautical use during temporary periods when snow, flood, or other climatic conditions interfere with such operation and maintenance. Further, nothing herein shall be construed as requiring the maintenance, repair, restoration, or replacement of any structure or facility which is substantially damaged or destroyed due to an act of God or other condition or circumstance beyond the control of the sponsor.

It will suitably operate and maintain noise compatibility program items that it owns or controls upon which federal funds have been expended."

Assurance 19 requires the airport owner or sponsor to ensure the airport and all facilities necessary to serve the aeronautical users of the airport are operated 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 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 prerogative of the airport owner or sponsor to impose conditions on users of the airport to ensure its safe and efficient operation. Such conditions must be fair, equal, and not unjustly discriminatory. They must be relevant to the proposed activity, reasonably attainable, and uniformly applied. [*See* FAA Order 5190.6A, Sec. 3-12]

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 access to a public-use airport. If such a determination is requested, it is limited to a judgment as to whether failure to meet the qualifications of the standard is a reasonable basis for such denial or whether the standard results in an attempt to create an exclusive right. [*See* Order, Sec. 3-17(b).]

The airport owner or sponsor may quite properly increase the minimum standards from time to time in order to ensure a higher quality of service to the public. Manipulating the standards solely to protect the interest of an existing tenant, however, is unacceptable. [*See* Order, Sec. 3-17(c).]

FAA Advisory Circular 150/5190-7, *Minimum Standards for Commercial Aeronautical Activities*, August 28, 2006, discusses FAA policy regarding the development and enforcement of airport minimum standards. FAA Advisory Circular 150/5190-6, *Exclusive Rights at Federally Obligated Airports*, January 4, 2007, provides basic information on the prohibition of granting an exclusive right at federally obligated airports.

3. Assurance 22, *Economic Nondiscrimination*

Federal Grant Assurance 22, *Economic Nondiscrimination*, (Assurance 22) implements the provisions of 49 U.S.C. § 47107(a)(1) through (6), and requires, in pertinent part, that the owner or 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)]
>
> "…each air carrier using such airport shall have the right to service itself or to use any fixed-base operator that is authorized or permitted by the airport to serve any air carrier at such airport." [Assurance 22(d)]
>
> " will not exercise or grant any right or privilege which operates to prevent any person, firm, or corporation operating aircraft on the airport from performing any services on its own aircraft with its own employees (including, but not limited to maintenance, repair and fueling) that it may choose to perform."
> [Assurance 22(f)]

> "...may establish such reasonable, and not unjustly discriminatory, conditions to be met by all users of the airport as may be necessary for the safe and efficient operation of the airport." [Assurance 22(h)]
>
> "...may prohibit or limit any given type, kind or class of aeronautical use of the airport if such action is necessary for the safe operation of the airport or necessary to serve the civil aviation needs of the public." [Assurance 22(i)]

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

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

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

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

FAA policy regarding the airport owner or sponsor's responsibility for ensuring the availability of services on reasonable terms and without unjust discrimination provides that third-party leases contain language incorporating these principles. Assurance 22(b) states,

> In any agreement, contract, lease, or other arrangement under which a right or privilege at the airport is granted to any person, firm, or corporation to conduct or to engage in any aeronautical activity for furnishing services to the public at the airport, the owner or sponsor will insert and enforce provisions requiring the contractor to:
>
> (a) furnish said services on a reasonable, and not unjustly discriminatory, basis to all users thereof, and
>
> (b) charge reasonable, and not unjustly discriminatory, prices for each unit or service, provided that the contractor may be allowed to make reasonable and nondiscriminatory discounts, rebates, or other similar types of price reductions to volume purchasers.

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

4. Assurance 23, *Exclusive Rights*

Federal Grant Assurance 23, *Exclusive Rights*, (Assurance 23) implements the provisions of 49 U.S.C. §§ 40103(e) and 47107(a)(4), and requires, in pertinent part, that the owner or sponsor of a federally obligated airport:

> "…will permit no exclusive right for the use of the airport by any persons providing, or intending to provide, aeronautical services to the public."
>
> "…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…"
>
> "…will terminate any exclusive right to conduct an aeronautical activity now existing at such an airport before the grant of any assistance under Title 49 United States Code."

In FAA Order 5190.6A, *Airport Compliance Requirements*, the FAA discusses its exclusive rights policy and broadly identifies aeronautical activities as subject to the statutory prohibition against exclusive rights. While public-use airports may impose qualifications and minimum standards upon those who engage in aeronautical activities, FAA has taken the position that the application of any unreasonable requirement or any standard that is applied in an unjustly discriminatory manner may constitute the constructive grant of an exclusive right. Courts have found the grant of an exclusive right where a significant burden has been placed on one competitor that is not placed on another. [*See* e.g. Pompano Beach v FAA, 774 F2d 1529 (11th Cir, 1985).] An owner or sponsor is under no obligation, however, to permit aircraft owners to introduce onto the airport equipment, personnel, or practices which would be unsafe, unsightly, detrimental to the public welfare, or which would affect the efficient use of airport facilities. [*See* Order, Sec.3-9 (e).]

Leasing all available airport land and improvements planned for aeronautical activities to one enterprise will be construed as evidence of intent to exclude others unless it can be demonstrated that the entire leased area is presently required and will be immediately used to conduct the activities contemplated by the lease. [*See* Order, Sec. 3-9(c).]

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

5. Assurance 29, *Airport Layout Plan*

Federal Grant Assurance 29, *Airport Layout Plan*, (Assurance 29) requires the airport owner or sponsor to keep its Airport Layout Plan (ALP), which is a planning tool for depicting current and future airport use, up to date. Assurance 29 prohibits the airport owner or sponsor from making or permitting any changes or alterations in the airport or any of its facilities that are not in conformity with its FAA-approved Airport Layout Plan. Assurance 29 states:

> (a) [The airport owner or sponsor] will keep up to date at all times an Airport Layout Plan of the airport showing (1) boundaries of the airport and all proposed additions thereto, together with the boundaries of all offsite areas owned or controlled by the sponsor for airport purposes and proposed additions thereto; (2) the location and nature of all existing and proposed airport facilities and structures (such as runways, taxiways, aprons, terminal buildings, hangars, and roads), including all proposed extensions and reductions of existing airport facilities; and (3) the location of all existing and proposed non-aviation areas and of all existing improvements thereon. Such Airport Layout Plans and each amendment, revision, or modification thereof, shall be subject to the approval of the Secretary which approval shall be evidenced by the signature of a duly authorized representative of the Secretary on the face of the Airport Layout Plan. The sponsor will not make or permit any changes or alternations in the airport or any of its facilities that are not in conformity with the Airport Layout Plan as approved by the Secretary and which might, in the opinion of the Secretary, adversely affect the safety, utility, or efficiency of the airport.
>
> (b) If a change or alteration in the airport or the facilities is made which the Secretary determines adversely affects the safety, utility, or efficiency of any federally owned, leased, or funded property on or off the airport and which is not in conformity with the Airport Layout Plan as approved by the Secretary, the owner or operator will, if requested by the Secretary (1) eliminate such adverse effect in a manner approved by the Secretary; or (2) bear all costs of relocating such property (or replacement thereof) to a site acceptable to the Secretary and all costs of restoring such property (or replacement thereof) to the level of safety, utility, efficiency, and cost of operation existing before the unapproved change in the airport or its facilities.

6. Assurance 38, *Hangar Construction*

Federal Grant Assurance 38, *Hangar Construction*, (Assurance 28) states in its entirety, "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."

7. Airport Operating Certificate

Under Title 49, U.S.C. § 44706, the FAA has the statutory authority to issue Airport Operating Certificates (AOC) to airports with passenger service on certain types of air carriers and to establish minimum safety standards for operating those airports. Under this authority, the FAA issues requirements for certifying and operating certain land airports through 14 CFR Part 139 (Part 139). Part 139 requires the FAA to issue AOCs to airports with scheduled and unscheduled air carrier operations. Airport Operating Certificates help ensure safety in air transportation. To obtain a certificate, an airport must agree to certain operational and safety standards.

The requirements for obtaining a Part 139 AOC vary depending on the size of the airport and the type of flights available. There are several safety-related standards, including requirements for (a) adequate firefighting equipment, (b) training, (c) public protection, (d) control of pedestrians and ground vehicles within airport surfaces, and (e) safe operations in movement areas and safety areas, including runways and taxiways. If the FAA finds that an airport is not meeting its obligations under the Part 139 AOC, it may impose an administrative action. The FAA may 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.[2]

8. Categorical Exclusions

The National Environmental Policy Act (NEPA) includes requirements for conducting Environmental Assessments (EA) and for preparing Environmental Impact Statements (EIS). The Council on Environmental Quality (CEQ) regulations, however, allows certain exemptions from NEPA's EA and EIS requirements.

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 Environmental Assessment (EA) or preparing an Environment Impact Statement (EIS).

Some projects clearly may be categorically excluded from any formal environmental review and 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*, and include certain buildings; taxiways; aprons; as well as repairing, installing, or upgrading airfield lighting systems and fencing. Items on the list may be categorically excluded

[2] *See* FAA Exhibit 1, Item 30, *Director's Determination*, page 15.

from the requirement to conduct a formal environmental assessment if an appropriate FAA official determines the project under consideration does not trigger the extraordinary circumstances requiring an environmental assessment.

D. The Complaint and Appeal Process

1. Right to File the Formal Complaint

Pursuant to 14 CFR, Part 16, § 16.23, a person directly and substantially affected by any alleged noncompliance may file a complaint with the FAA. The Complainant shall provide a concise but complete statement of the facts relied upon to substantiate each allegation. The complaint shall also describe how the Complainant was directly and substantially affected by the things done or omitted by the Respondents. [14 CFR, Part 16, § 16.23(b)(3,4).]

If, based on the pleadings, there appears to be a reasonable basis for further investigation, the FAA will investigate the subject matter of the complaint. In rendering its initial determination, the FAA may rely entirely on the complaint and the responsive pleadings provided. Each party shall file documents that it considers sufficient to present all relevant facts and arguments necessary for the FAA to determine whether the sponsor is in compliance. [14 CFR, Part 16, § 16.29.]

The proponent of a motion, request, or order has the burden of proof. A party who has asserted an affirmative defense has the burden of proving the affirmative defense. This standard burden of proof is consistent with the Administrative Procedure Act (APA) and federal case law. The APA provision states, "[e]xcept as otherwise provided by statute, the proponent of a rule or order has the burden of proof." 5 U.S.C. § 556(d). [*See* also, Director, Office of Worker's Compensation Programs, Department of Labor v. Greenwich Collieries, 512 US 267, 272 (1994); Air Canada et al. v. Department of Transportation, 148 F3d 1142, 1155 (DC Cir, 1998).] Title 14 CFR § 16.229(b) is consistent with 14 CFR §16.23, which requires the complainant to submit all documents then available to support his or her complaint. Similarly, 14 CFR § 16.29 states that "[e]ach 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."

2. Right to Appeal the Director's Determination

A party to this decision adversely affected by the Director's Determination may file an appeal with the Associate Administrator within 30 days after the date of service of the initial determination. If no appeal is filed within the time period specified, the Director's Determination becomes the final decision and order of the FAA without further action. A Director's Determination that becomes final because there is no administrative appeal is not judicially reviewable. [14 CFR, Part 16, § 16.33]

Part 16 requires all relevant facts to be presented in the complaint documents. [14 CFR, Part 16, § 16.23(b)(3).] New allegations or issues should not be presented on appeal. Review by the Associate Administrator is limited to an examination of the Director's Determination and the Administrative Record upon which such determination was based. Under Part 16, Complainants

are required to provide with the complaint and reply all supporting documentation upon which it relied to substantiate its claims. Failure to raise all issues and allegations in the original complaint documents may be cause for such issues and allegations to be deemed waived and not reviewable upon appeal. This is consistent with the Supreme Court's recognition that courts may require administrative issue exhaustion as a general rule because it is usually appropriate under an [administrative] agency's practice for contestants in an adversarial proceeding before it to develop fully all issues there. The Court concluded that where parties are expected to develop the issues in an adversarial administrative proceeding, the rationale for requiring issue exhaustion is at its greatest. [*See* Sims v. Apfel, 530 US 103, 108-110 (2000) citing Hormel v. Helvering, 312 US 552 (1941) and US v. LA Tucker Truck Lines, 344 US 33, (1952).]

3. FAA's Responsibility with Regard to an Appeal

Pursuant to 14 CFR, Part 16, § 16.33, the Associate Administrator will issue a final decision on appeal from the Director's Determination, without a hearing, where the complaint is dismissed after investigation.

In such cases, it is the Associate Administrator's responsibility to determine whether (a) the findings of fact made by the Director are supported by a preponderance of reliable, probative, and substantial evidence, and (b) each conclusion of law is made in accordance with applicable law, precedent, and public policy. [*See* e.g. Ricks v Millington Municipal Airport, FAA Docket No. 16-98-19, (December 30, 1999) (Final Decision and Order) page 21 and 14 CFR, Part 16, § 16.227.]

VI. ANALYSIS AND DISCUSSION

This case involves two separate and parallel interests, the federal interest of the Airport as reflected by the grant assurances and the local contractual interests of an Airport tenant. The two interests are not equivalent. The federal interest looks after the federal investment in the national air transportation system for all current and future aeronautical users. The local interest of the Complainants is to protect rights they believe they have under contracts with the Airport. The federal interest cannot be subordinated to the Complainants' contracts. Rather, the opposite is true. The terms of the Complainants' *Agreement Authorizing Services* and *Agreement Authorizing the Sale of Aviation Fuel* [3] carry clauses subordinating the Complainants' agreements to the grant agreements between the Respondent and the United States or the federal interest.[4] [*See* FAA Exhibit 1, Item 1, exhibit B, page 8; and Item 1, exhibit C, page 7.] Therefore, it may be helpful to provide a brief overview of the case before exploring the details of the Complainants' appeal.

Complainants and Respondent entered into three separate agreements (Platinum Agreements) to establish a fixed-base operator business on the Airport. Subsequent to entering into these contracts, the Respondent identified several areas in the agreements that would likely put the

[3] Referred to collectively as the Platinum Agreements.

[4] The *Ground Lease Agreement* does not contain the subordination clause. [*See* FAA Exhibit 1, Item 1, exhibit A.] The language regarding the Priority Use Area is included in the *Agreement Authorizing Services*, which does contain a subordination clause. [*See* FAA Exhibit 1, Item 1, exhibit B, pages 3-4, and page 8.]

Airport in noncompliance with its federal obligations, including the grant assurances. The Respondent's resolution of these potential noncompliance issues satisfied the FAA but negatively impacted the Complainants' ability to operate their business in the manner they had anticipated when entering into the agreements initially.

In an earlier state court proceeding, the court found the Platinum Agreements were valid and enforceable contracts under Illinois law. [*See* FAA Exhibit 1, Item 31, *Director's Determination*, page 10.] Nonetheless, the FAA found certain terms of the agreements violated the Respondent's federal obligations. The Director determined the state court ruling could not limit the FAA's ability and responsibility to adjudicate grant assurance matters. [*See* FAA Exhibit 1, Item 30, *Director's Determination*, page 18.] The FAA is satisfied with the Respondent's resolution of the grant assurance issues, which addresses the federal grant agreements between the FAA and the Respondent. The Complainants, however, are extremely dissatisfied that the resolution of the grant assurance issues reduces the rights Complainants expected to enjoy under the terms of *their* agreements with the Respondent. The parties have not resolved the contract dispute issues created by the resolution of the grant assurance compliance issues; additional state court action is pending, to which the FAA is not a party.

Complainants filed this Part 16 action, in part, to compel the Respondent to comply with the initial terms of the Platinum Agreements insofar as the agreement applied to the Complainants' Priority Use Area. The Priority Use Area is a space on the ramp area adjacent to and in front of the area leased by Complainants to provide space for parking aircraft, loading aircraft, and preparing aircraft prior to take off. [*See* FAA Exhibit 1, Item 30, *Director's Determination*, page 29.] In this case, because of the location of the hangar, the Priority Use Area the Complainants want to use for parking aircraft extends onto two currently active taxiways; parking aircraft in that area results in the closure of the taxiway to other aeronautical users. This would violate the federal interest in the airfield and is not acceptable under the federal grant assurances. At the same time, shrinking the Priority Use Area to protect the taxiway and movement areas renders the space too small to accommodate the size aircraft Complainants anticipated servicing when establishing their fixed-base operation and entering into the agreements with the Respondent.

Understandably, the Complainants are dissatisfied that the resolution – which is to reduce the size of the Priority Use Area to protect public access to taxiways and movement areas – limits the Complainants' business potential. Complainants have asked the FAA to step in to help resolve the issue. Complainants state, "Platinum respectfully suggests that, given the unique circumstances of this case, an accommodation could be proposed by the FAA that would permit Platinum to utilize the [Priority Use Area] (as negotiated) when it needs to do so and would provide a mechanism for the [Respondent] to avoid sanction for assurance violations." [FAA Exhibit 1, Item 31, page 32.]

FAA is not able to represent both the federal interest and the Complainants' contractual interests in this case. FAA can neither bargain away the rights of access to public-use taxiways and movement areas nor waive the grant assurances of the Respondent. FAA is required to enforce the federal statutes to protect the federal interest in the Airport. The Part 16 process ensures respondents comply with their agreements with the federal government to protect and serve the

public interest. The resolution, though unsatisfactory to the Complainants, meets the Respondent's federal obligations regarding this issue.

Upon consideration of the Complaint, filed with the FAA April 24, 2006, the Director of the Office of Airport Safety and Standards determined that the Respondent's actions with regard to Complainants' operation are consistent with Respondent's federal obligations under grant assurances 5, *Preserving Rights and Powers*; 19, *Operation and Maintenance*; 22, *Economic Nondiscrimination*; 23, *Exclusive Rights*; 29, *Airport Layout Plan*; and 38 *Hangar Construction*. The Director dismissed the Complaint.

On appeal from a Director's Determination, the appellant must demonstrate that the Director erred by (1) making findings of fact that were not supported by a preponderance of reliable, probative, and substantial evidence, or (2) by making conclusions of law that were not in accordance with applicable law, precedent, and public policy. Complainants argue four issues on appeal:

A. Complainants argue on appeal that the Director presumed incorrectly that the Respondent's conduct to remedy perceived sponsor assurance violations, including unilateral revocation of bargained-for rights, is permissible without regard to the reasonableness or prejudicial effect of the action. [FAA Exhibit 1, Item 31, pages 5-6, #1.]

B. Complainants argue on appeal the Director made errors in interpreting the key facts in the record and drawing conclusions from the evidence. [FAA Exhibit 1, Item 31, page 6, #2.]

C. Complainants argue on appeal the Director failed to investigate the facts of the case fully. [FAA Exhibit 1, Item 31, page 6, #3.]

D. Complainants argue the Director's Determination contains uncertainties and ambiguities. Complainants ask on appeal for clarification of the FAA's position on the Complainants' Priority Use Area. [FAA Exhibit 1, Item 31, page 6, #4.]

Issue A: Respondent's Conduct to Remedy Perceived Assurance Violations

Complainants allege on appeal that the Director presumed incorrectly that the Respondent's conduct to remedy perceived sponsor assurance violations, including unilateral revocation of bargained-for rights, is permissible without regard to the reasonableness or prejudicial effect of the action. [FAA Exhibit 1, Item 31, pages 5-6, #1.]

Complainants state, "The Director's Determination is based on the improper assumption that *any conduct* by a sponsor airport is allowed if motivated to correct a *perceived* sponsor assurance problem." (emphasis theirs) [FAA Exhibit 1, Item 31, page 13.] Complainants argue that the problems were created by the Respondent, but the Director appeared to place blame on Complainants and, therefore, disregarded the hardship and prejudice the corrective actions created for the Complainants. [FAA Exhibit 1, Item 31, page 13, footnote #17.]

Actually, the Director did not state that an airport sponsor may take any action it chooses to resolve perceived grant assurance violations. Nor did the Director state, as Complainants contend, that the Respondent could "unilaterally take away contractual rights if it simply believes (or pretends to believe) that there is an assurance problem with an existing contract." [FAA Exhibit 1, Item 31, pages 27-28.] Rather, the Director stated "the airport sponsor may revisit its agreements as necessary" and "may take reasonable actions to modify an existing agreement." [FAA Exhibit 1, Item 30, *Director's Determination*, page 28.]

The Respondent argues that the record supports it was not "pretending to believe" the Platinum Agreements raised grant assurance problems. [FAA Exhibit 1, Item 32, page 19.] The record shows the Respondent contracted with an airport consultant who provided the opinion that the Platinum Agreements "contain provisions that clearly violate the [Respondent's federal] obligations…" [*See* FAA Exhibit 1, Item 30, *Director's Determination*, page 31, footnote #174.] In addition, the Respondent states it did not seek to take away contractual rights. Respondent states, "As the Illinois state court held, to the extent that a provision of the [Platinum Agreements] is inconsistent with the Authority's grant assurances, such a provision must be renegotiated." [FAA Exhibit 1, Item 32, page 19.]

The Director found several of the terms and conditions contained in the Platinum Agreements were inconsistent, or had the potential to be inconsistent, with the Respondent's federal obligations.[5] As such, the Director found the actions by the Respondent to reject several provisions of the Platinum Agreements or to take action to amend or modify the agreements to avoid violations of the Airport's federal obligations were not unreasonable. The Director found the Respondent's actions to correct the grant assurance violations relating to the agreements were inherently consistent with its federal obligations. [FAA Exhibit 1, Item 30, *Director's Determination*, page 42.] In fact, the Director noted the "FAA informed the [Respondent] that it should correct any revisions in the Platinum Agreements that may place the [Respondent] in noncompliance with its federal obligations." [FAA Exhibit 1, Item 30, *Director's Determination*, page 52.]

The Associate Administrator does not find that the Director stated or implied that an airport sponsor may take *any* action it chooses to resolve grant assurance violations. As noted above, what the Director said in his determination was that the sponsor may "revisit its agreements as necessary" and may "take reasonable actions to modify an existing agreement." [FAA Exhibit 1, Item 30, *Director's Determination*, page 28.]

Complainants disagree, however, and state, "the most glaring example" of the Director's improper assumption that *any conduct* is acceptable to correct a perceived assurance violation is the "option provision" in Complainants' lease agreement. The option provision was not honored by the Respondent. [FAA Exhibit 1, Item 31, page 13.] The option was for the lease of additional premises adjacent to Complainants' existing leased premises.

[5] Specifically, the Director identified the Priority Use Area and the granting of an exclusive right for fueling. [FAA Exhibit 1, Item 30, *Director's Determination*, page 52.]

The record reflects the Respondent did not grant the option, in part, because it believed the option was inconsistent with the federal prohibition against granting exclusive rights. [FAA Exhibit 1, Item 30, *Director's Determination*, page 26.] The Director found that was not the case. The Director noted that the record does not support a finding that the granting of the option to the Complainants, in this case, would be tantamount to granting an exclusive right. [FAA Exhibit 1, Item 30, *Director's Determination*, page 27.] Neither granting the option nor refusing the grant the option would violate the Respondent's federal obligations.

The Director noted the "option provision" is part of an agreement between the Respondent and the Complainants, to which the FAA is not a party. The Respondent's decision not to exercise the Complainants' "option provision" does not violate the Respondent's federal obligations, which are contained in the grant agreements between the Respondent and the FAA. The Respondent's decision not to exercise the Complainants' "option provision" is a contract issue between the Complainants and Respondent; it must be resolved in state court, not through the Part 16 process. The Director stated, "Since there appears to be no exclusive rights violation, this disagreement is, in effect, a contractual [matter] to be decided by the state court." [FAA Exhibit 1, Item 30, *Director's Determination*, page 27.]

Complainants also argue the Director asserts a sponsor airport may unilaterally revisit or modify a bargained-for contractual provision. Notwithstanding the fact that the Director made no such assertion, Complainants argue that such a presumption means no entity contracting with an airport sponsor is ever secure in its rights under an agreement with the sponsor. [FAA Exhibit 1, Item 31, page 14.]

When accepting a grant of federal funds or conveyance of federal property, the airport sponsor enters into agreements with the federal government obligating that sponsor to comply with certain assurances. The assurances become a binding obligation between the airport sponsor and the federal government. The FAA Airport Compliance Program is designed to assist airport sponsors in understanding and complying with these federal obligations. The Airport Compliance Program does not control or direct the operation of airports. Rather, it monitors the administration of valuable rights, which airport sponsors pledge to the people of the United States in exchange for monetary grants and donations of federal property, to ensure that airport sponsors serve the public interest. [*See* Section V, "Applicable Law and Policy," above.]

The FAA neither approves nor monitors terms of agreements between airport sponsors and airport tenants. The FAA does not arbitrate disputes through the Part 16 complaint process. Nor does the FAA enforce contract terms between parties to an agreement when the FAA is not a party to that agreement. Rather, the FAA enforces the grant agreements it enters into with airport sponsors. [*See* AmAv v. Maryland Aviation Administration, FAA Docket No. 16-05-12, (March 20, 2006) (Director's Determination).]

The Director's Determination speaks only to the Respondent's obligations under the grant assurances. Tenant contractual rights affected by actions of an airport sponsor to correct a grant assurance violation may be resolved in state court, not under Part 16. [*See* Jet 1 Center, Inc. v Naples Airport Authority, FAA Docket No. 16-04-03, (January 4, 2005) (Director's Determination).] However, while a state court may adjudicate a contract dispute between an

airport sponsor and one its tenants, it lacks jurisdiction over a sponsor's federal obligations under the federal grant assurances. For example, a state court would exceed its jurisdiction if it were to order the closure of active taxiways and movement areas to the detriment of all aeronautical users at the federally funded Airport in order to provide relief to the Complainants' contract dispute. However, the state court has otherwise broad authority to decide contractual disputes under state law.[6]

Indeed, the parties in this case have already been involved in state court litigation to resolve various contract issues. [*See* FAA Exhibit 1, Item 30, *Director's Determination*, page 32.] The record shows additional litigation is pending. [FAA Exhibit 1, Item 33, #3.]

Associate Administrator's Conclusion on Issue A

The Associate Administrator finds no error in findings of fact or conclusions of law with regard to the Director's Determination that an airport sponsor may revisit its agreements as necessary and may take reasonable actions to modify existing agreements that are in conflict with the sponsor assurances. In this case, the Respondent revisited its agreements with the Complainants and, through the subordination clauses in those agreements, took action to comply with the sponsor's federal obligations. Complainants' preferred action to permit Complainants to enjoy full use of a Priority Use Area that extends into active public-use taxiways and movement areas is not feasible.[7] FAA may neither bargain away public access to a federally obligated airport nor waive a sponsor's grant assurances to resolve a dispute between the sponsor and one of its tenants. The federal interest in this case is to preserve public access to the Airport and ensure the Respondent complies with its federal obligations. Other than this federal interest, the parties are free to resolve their dispute in any number of ways, financial or otherwise.

Issue B: Interpreting Key Facts

Complainants allege the Director made errors in interpreting the key facts in the record and drawing conclusions from the evidence. [FAA Exhibit 1, Item 31, page 6, #2.]

Complainants state the Director relied upon a "demonstrably false understanding of key facts of the record." Complainants state there were "multiple instances" in which the Director relies on "a patently false, or at times, an arbitrarily one-sided view of the documents and facts submitted." Complainants argue the Director's failure to analyze the facts correctly led to

6 In two recent federal cases, Arapahoe County Public Airport Authority v. FAA, 242 F.3d 1213 (10th Cir. 2001), and American Airlines v. City of Dallas, 202 F.3d 788 (5th Cir. 2000), an airport sponsor or owner argued that the United States Department of Transportation (DOT) or FAA was barred from carrying out its duties to administer the federal aviation laws because of pending state court cases or an earlier state court decision finding that the airport's conduct was lawful. In both cases, the courts of appeals held that the pending or prior state court litigation did not bar the federal agency from conducting its own proceeding and determining whether an airport was complying with its obligations under federal law. In American Airlines, the Fifth Circuit held "because of the important Federal interests here, we decline to hold that common law preclusion doctrines apply in this case. Instead, DOT properly declined to give preclusive effect to the state court judgment." 202 F.3d at 801.

7 Complainants state, "Platinum respectfully suggests that, given the unique circumstances of this case, an accommodation could be proposed by the FAA that would permit Platinum to utilize the [Priority Use Area] (as negotiated) when it needs to do so and would provide a mechanism for the [Respondent] to avoid sanction for assurance violations." [FAA Exhibit 1, Item 31, page 32.]

improper conclusions and renders the determination arbitrary and capricious. [FAA Exhibit 1, Item 31, page 16.] Specifically, Complainants argue the Director erred in drawing conclusions regarding (1) the hangar location, (2) the Respondent's failure to resolve the dispute, (3) blockades and stop work orders, (4) FAA's position on the Priority Use Area, (5) Complainants' position on the Priority Use Area, and (6) sponsor assurances.

1. Hangar location

Complainants argue that the Director erred in making determinations regarding Complainants' Priority Use Area on the assumption that the hangar location was changed *after* the Respondent gave approval for construction, rather than *before*. [FAA Exhibit 1, Item 31, page 17.]

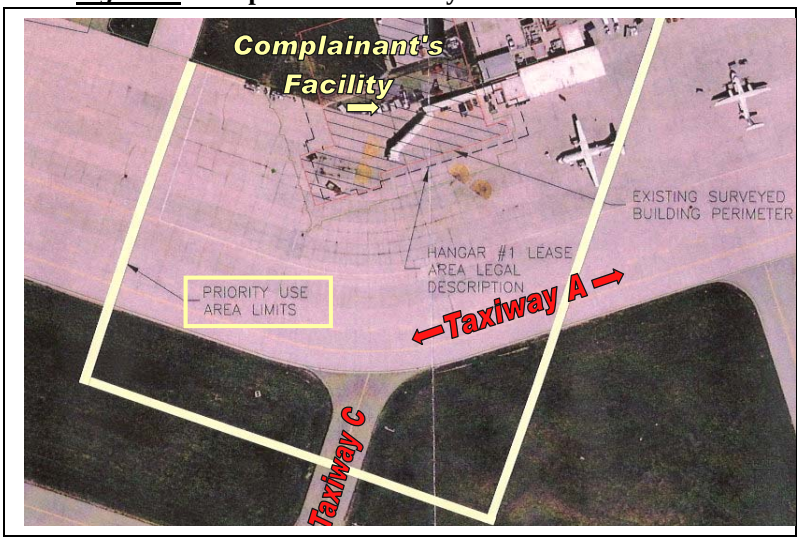
The Complainants admit the hangar location resulted in an additional 50-foot encroachment onto the apron, but deny placement of the hangar was a unilateral decision by the Complainants. Complainants argue the modified location was established months before the FAA conducted its airspace study and almost six months before the Respondent gave its approval for construction. [FAA Exhibit 1, Item 31, page 17.]

Complainants state they orally represented to agents and employees of the Airport that the Priority Use Area would not be available for use by competitors and, as a practical consequence, the adjacent taxiway would not be usable when Complainants' planes were parked in the Priority Use Area. [FAA Exhibit 1, Item 6, exhibit A, page 4.]

The record shows the Respondent notified Complainants February 1, 2005, that the Complainants' Priority Use Area needed to be "amended to exclude any portion of the taxiway and roadway designated to accommodate tanker trucks and other non-aircraft vehicles using the apron area." [FAA Exhibit 1, Item 1, exhibit M, February 1, 2005.] Two days later, Complainants requested "early closure of all ramp areas south of Complainants' facility, including taxi[way] C." [FAA Exhibit 1, Item 1, exhibit M, February 3, 2005.]

As *Figure 1* below shows, the Complainants' Priority Use Area extends beyond Taxiways A and C, and encroaches on public access ramps and movement areas.

Figure 1: **Complainants' Priority Use Area**



In discussing the Priority Use Area, the Director included a footnote stating:

> The [Respondent] states that "the original shape of [Complainants'] 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 [Complainants'] hangar." The [Respondent] adds that "when the Authority board authorized signing agreements with the [Complainants], 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 [Complainants] began opining that [they] had the right to exclude other users from transiting the area." In other words, although the [*Agreement Authorizing Services*] depicts the Priority Use Area, it did not clearly identify how far south into the ramp this area extends. [FAA Exhibit 1, Item 30, *Director's Determination*, page 30, footnote #171.]

The Respondent argues that it did not dictate the location of the hangar, other than to insist that it not be east of the old passenger terminal building, and that it not interfere with the runway's building restriction line. [FAA Exhibit 1, Item 32, page 11, footnote #10.] The Respondent states the Priority Use Area was not well defined. The Respondent further argues that it is not the ultimate location of the hangar that drives the findings on this issue, but rather, the failure to clearly identify the scope of the Priority Use Area and the parties' failure to negotiate a reasonable solution that has led to the operations problems in front of the hangar. [FAA Exhibit 1, Item 31, pages 11-12.]

Regardless of when the decision was made to locate the hangar in such a way that the Priority Use Area encroached on public access taxiways and movement areas – or who was involved in making that decision – the record shows that the Priority Use Area *does* encroach on, and adversely affect, the public use of the taxiways and movements areas. [*See Figure 1*, Complainants' Priority Use Area, on page 20.] The Priority Use Area cannot be defined in such a way to interfere with the use of active public-use taxiways and movement areas.

The Director determined the Respondent has a responsibility to maintain public access to the taxiways and movement areas, and the actions taken by the Respondent to eliminate or mitigate the negative impact of the Priority Use Area are consistent with the Respondent's federal obligations. [FAA Exhibit 1, Item 30, *Director's Determination*, page 38.] Whether the hangar location was changed before or after the Respondent gave approval for construction does not alter the fact that the Priority Use Area location restricted public access to portions of the airfield that could not be restricted. Regardless of how the issue evolved, the Respondent had a federal obligation to take action to maintain public access to these taxiways and movement areas.

The Associate Administrator finds the Director's Determination was not predicated on when the decision was made regarding the hangar location or who was involved in making that decision. The Associate Administrator finds the Director did not err in interpreting the facts or drawing conclusions from the evidence regarding hangar location.

2. Respondent's Failure to Resolve

Complainants argue on appeal the Director erred in concluding the Respondent had made multiple overtures to resolve the dispute while characterizing the Complainants as conducting themselves in an unreasonable manner. [FAA Exhibit 1, Item 31, page 18.] Complainants state the Director "cites multiple statements from letters and self-serving documents submitted by the Respondent that provide the *impression* that it was working towards a *reasonable* resolution of the conflict," when, in fact, they were not. (emphasis theirs) [FAA Exhibit 1, Item 31, page 18.] Complainants argue the Respondent's goal was to void the existing contracts, and the only proposed resolution was to enter into an entirely new contract. [*See* FAA Exhibit 1, Item 31, pages 18 and 21.]

In its reply, the Respondent points to numerous instances in the administrative record that demonstrate the Respondent communicated its concerns to the Complainants and made efforts to resolve the dispute, [*see* FAA Exhibit 1, Item 32, pages 12-13] including:

- A February 1, 2005, offer to ratify the Platinum Agreements if Complainants 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. [FAA Exhibit 1, Item 1, exhibit M (February 1, 2005 letter).]

- A conference in the spring of 2005 in which the Respondent proposed alternatives to the Priority Use Area that would not violate grant assurances.[8] [FAA Exhibit 1, Item 1, exhibit J at 75:9-17.]

- The June 10, 2005, Stop Work Order, in which the Respondent expressly outlined the grant assurances it believed were being violated. [FAA Exhibit 1, Item 1, exhibit K.]

- Conversations between Respondent and Complainants that transpired during the summer and fall of 2005 in which the Respondent offered to (a) do away with the concept of a Priority Use Area [FAA Exhibit 1, Item 3, exhibit 2 at 84:2-5]; (b) institute airport rules that would prevent competitors from doing business in front of the Platinum hangar[9] [FAA Exhibit 1, Item 3, exhibit 1, paragraph 11]; (c) identify alternative sites for a second hangar, realign the first hangar to accommodate other uses, or allow for a larger hangar to accommodate expected growth [FAA Exhibit 1, Item 3, exhibit 1, paragraph 12; and Item 3, exhibit 2 at 95:3-10].

[8] The record shows this was not a conference, but a conference call referred to in the *Discovery Deposition of David S. Anderson* taken on April 14, 2005. In that deposition, Mr. Anderson states that "things quickly deteriorated" and "it became quite obvious after just a few minutes that the conversation was going nowhere." The record does not reflect that the Respondent proposed alternatives to the Priority Use Area that would not violate grant assurances during that conference call. [*See* FAA Exhibit 1, Item 1, exhibit J, at 75.]

[9] The referenced document states the Respondent proposed removing the Priority Use Area provision from the agreement and revising the Airport's program of rules and regulations to include prohibitions that would provide "equal and identical protection for all of the Airport's service providers." [FAA Exhibit 1, Item 3, pages 4-5.]

- A September 16, 2005, letter from the Respondent's counsel to litigation counsel for the Complainants offering to settle all disputes by paying $500,000 and revising the agreements "to delete therefrom any provisions violative of FAA regulations." [FAA Exhibit 1, Item 1, exhibit M (letter from William Wetzel to Michael Scotti).]

- A May 4, 2006, proposal to enter into a revised fixed-base operator agreement that would eliminate any grant assurance concerns. [FAA Exhibit 1, Item 3, exhibit 11.]

- A late May 2006, offer to settle all outstanding issues between the parties (made soon after the jury reached its verdict in the state court litigations).[10] [FAA Exhibit 1, Item 3, exhibit 1, paragraph 17.]

The Respondent states, "the record clearly demonstrates that … the Authority did, in fact, come forward with numerous suggestions for ways to resolve the dispute and to bring the Platinum Agreements in line with the Authority's federal obligations." [FAA Exhibit 1, Item 31, page 13.] Indeed, the items listed above are included in the administrative record, and while they are not necessarily accurately depicted by the Respondent (*see* footnotes 8, 9, and 10), they do indicate actions taken on the part of the Respondent to reach a resolution with the Complainants.

Nonetheless, Complainants continue to assert the Respondent "never came to [Complainants] with a concrete proposal to address the issues it had with the Platinum Agreements in general, or the Priority Use Area, in particular." [FAA Exhibit 1, Item 31, pages 18-19.] Complainants state they had "reasonably expected the [Respondent] to provide a proposed amendment to those limited portions of the contracts that raised Sponsor assurances issues" and "these amendments could be expected to address the assurance issues adequately, while altering the terms of the Agreement to the least extent necessary to do so." [FAA Exhibit 1, Item 31, page 19.] It is evident that the proposed solutions were not satisfactory to the Complainants. Complainants restate on appeal the argument made in the Complaint that the Respondent "failed to come forward with any sort of meaningful resolution to its alleged concerns regarding its sponsor assurances." [FAA Exhibit 1, Item 31, page 18.]

The Respondent asks the FAA to reject the Complainants' claim that responsibility for developing workable language to amend the Platinum Agreements so that they may fully comply with the requirements of the grant assurances rests solely on the Respondent's shoulders. The Respondent states in its reply, "The Authority cannot reform the agreements unilaterally. Rather, according to the order entered by the Illinois state court, the [Complainants] must negotiate any changes with the [Respondent] pursuant to the subordination provisions in the Platinum Agreements…[Complainants] would be required by the subordination clause to renegotiate that provision to eliminate any violation of sponsor assurances." [FAA Exhibit 1, Item 31, page 14.]

In a Part 16 complaint, 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

[10] The referenced document does not refer to a specific offer to settle all outstanding issues. Rather, it states Respondent expressed a desire to contact Complainants to discuss ways in which the parties could work together. Complainants purportedly advised Respondent to direct future communications through their attorney. [*See* FAA Exhibit 1, Item 3, exhibit 3, page 8.]

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." The administrative record includes sufficient evidence to show the Respondent attempted to resolve the dispute. The fact that the Complainants preferred a different resolution and did not agree with the various actions taken or proposed does not diminish the fact that the Respondent attempted resolution.

The Respondent states, "The fact that the [Complainants] did not like the solutions offered by the authority does not mean that the solutions were not 'workable.' The Platinum Agreements contain subordination provisions requiring that language inconsistent with the grant assurances be renegotiated … and that illegal or unenforceable clauses by severed. … Those rights and obligations were part of the deal struck between the parties." [FAA Exhibit 1, Item 32, page 21.]

The Associate Administrator finds the Director did not err in concluding the Respondent had made multiple overtures to resolve the dispute based on a preponderance of evidence in the administrative record.

The Associate Administrator rejects the Complainants' allegation that the Director improperly characterized the Complainants as conducting themselves in an unreasonable manner with regard to striving for resolution on the contract dispute. The Complainants do not point to any reference in the Director's Determination to support this statement. While the Director quoted the Respondent as stating the Complainants "refused to reform the Agreements without unreasonable levels of compensation" [*see* FAA Exhibit 1, Item 30, *Director's Determination*, page 48], the Associate Administrator finds no place where the Director, himself, referred to Complainants' actions as "unreasonable" in regard to the contract resolution efforts. The Director acknowledges that both sides failed to come to agreement, stating, "The record also shows that both parties disagreed on how to correct the issues with the Platinum Agreements…" [FAA Exhibit 1, Item 30, *Director's Determination*, page 50.] In the end, the Director found the Respondent's actions to correct the situation regarding the Platinum Agreements, while not timely and perceived by Complainants as unreasonable and contrary to the Respondent's federal obligations, were, in fact, reasonable. [FAA Exhibit 1, Item 30, *Director's Determination*, page 52.] Finding that the Respondent's actions were "reasonable" does not imply that the Complainants' actions were, therefore, "unreasonable."

The Associate Administrator finds the Director did not err in concluding the Respondent had made multiple overtures to resolve the dispute. In addition, the Associate Administrator disagrees that the Director improperly characterized the Complainants as conducting themselves in an unreasonable manner or that such a characterization, if made, did impact – or would have impacted – the determination in this case.

3. Blockades and Stop Work Orders

Complainants argue on appeal that the Director disregarded the facts when determining the Respondent's multiple Stop Work Orders and blockades represented reasonable efforts to comply with the Respondent's federal obligations. [FAA Exhibit 1, Item 31, page 21.] Complainants further state the Director missed key facts in the record and "Instead of

reprimanding the [Respondent] for refusing to pursue a more reasonable, effective and professional avenue of resolution, the Determination actually applauds the [Respondent] for failing to engage in even the most basic standard of civility." [FAA Exhibit 1, Item 31, page 23.]

The Director's Determination addresses two Stop Work Orders, one on June 10, 2005, and one on June 30, 2005. [FAA Exhibit 1, Item 30, *Director's Determination*, pages 43 and 46.]

- In analyzing the June 10, 2005, Stop Work Order, the Director determined that issuing the Stop Work Order was not a violation of the Respondent's federal obligations since there were problems with the project under construction. The Stop Work Order listed five grant assurances the Respondent needed to resolve regarding the project before work could resume. [*See* FAA Exhibit 1, Item 1, exhibit K; Item 30, *Director's Determination*, pages 44-45; and footnote #252.]

- In analyzing the June 30, 2005, Stop Work Order, the Director determined the Stop Work Order was issued based on the need to complete a CATEX[11] evaluation and to prevent further disturbance of the construction site pending a proper environmental analysis. [FAA Exhibit 1, Item 30, *Director's Determination*, page 47.] The Director also acknowledged that the Respondent "possibly failed to clearly communicate" the environmental responsibility to the Complainants.

Complainants argue the Director should have chastised the Respondent for taking the drastic step of issuing Stop Work Orders rather than following a different course of action.

The Associate Administrator reemphasizes that the FAA's role in a Part 16 Complaint is to determine whether the Respondent is in current compliance with its federal obligations. [*See* Section V.B, "Applicable Law and Policy," *FAA Airport Compliance Program*, on pages 5-6 in this Final Decision and Order.]

The Director explained that the Part 16 process addresses current compliance only; the Complainants' argument that the Stop Work Orders deny the Complainants reasonable access to the Airport is moot. The Complainants are on the Airport. The structure has been built. Since Complainants' facility is finished and operational, arguments regarding construction interference are moot. [*See* FAA Exhibit 1, Item 30, *Director's Determination*, page 46.] The Respondent states the Complainants' hangar is now finished and the Complainants are operating a fixed-base operation from it. [FAA Exhibit 1, Item 32, page 16.]

The Associate Administrator is not persuaded the Director disregarded the facts when determining that the Respondent's multiple Stop Work Orders and blockades during construction

[11] CATEX refers to a categorical exclusion under the National Environmental Policy Act (NEPA) regarding requirements for conducting Environmental Assessments (EA) and for preparing Environmental Impact Statements (EIS). [*See* Section V.C.8, "Applicable Law and Policy," *Categorical Exclusions*, on pages 12-13 in this Final Decision and Order.]

of the hangar are moot and do not place the Respondent in current noncompliance with its federal obligations.

4. FAA's Position of the Priority Use Area

The Complainants take issue with the Director's statement that in December 2004, the FAA took the position that it would be difficult to park any aircraft on the apron in front of the Complainants' hangar without mentioning that the FAA did not communicate this position to the Complainants. The only position the Complainants were aware of at that time was a non-objection in November 2004 to a location modification. Complainants state the Respondent never communicated to the Complainants that the FAA had changed its position in December 2004. Complainants state that had they been advised of this issue timely, they could have moved the hangar location "without catastrophic financial losses." Complainants argue the Respondent intentionally withheld this information in violation of grant assurance 22, *Economic Nondiscrimination*. [FAA Exhibit 1, Item 31, pages 23-24.]

The Priority Use Area desired by the Complainants to accommodate a certain size aircraft cannot be realized because it interferes with public access taxiways and aprons. The FAA cannot be flexible on that position. This may have resulted in unspecified financial losses to the Complainants. However, this is not a grant assurance issue to be resolved under the Part 16 process. Additionally, Complainants present no evidence that the Respondent provided similar information to other similarly situated airport tenants while withholding this information from the Complainants. As such, Complainants cannot substantiate a grant assurance violation. Complainants' redress to recover any financial loss sustained as a result of the Respondent's failure to communicate important information is in state court, not the Part 16 process.

The FAA's grant agreements are with airport sponsors, not with individual airport tenants. The FAA communicates potential grant assurance violations with the airport sponsor and works with the sponsor to implement corrective action when necessary, not with airport tenants. The FAA does not direct airport operations at over 3,400 federally funded airports. The Director noted that the "FAA determined that the airport may have entered into an agreement for a new [fixed-base operator] that could result in potential compliance and airfield operating issues." [FAA Exhibit 1, Item 30, *Director's Determination*, page 33.] The record reflects that FAA's Chicago Airports District Office discussed potential compliance issues regarding the Platinum Agreements with the airport sponsor. [FAA Exhibit 1, Item 9.] This is the appropriate course of action for the FAA to respond to potential compliance issues.

The Associate Administrator finds no error in interpreting the key facts in the record and drawing conclusions from the evidence regarding the FAA's obligation to discuss potential grant assurance compliance issues with the airport sponsor and not with airport tenants directly. In addition, the Associate Administrator finds the Director did not err in failing to conclude the Respondent "intentionally" withheld important information from the Complainants. Such a position is not supported by the administrative record.

5. Complainants' Position on the Priority Use Area

Complainants state the Director relied on hearsay statements and self-serving documents submitted by the Respondent to adopt the most extreme view of the Complainants as an unreasonable tenant. Complainants argue that the Director accepted the Respondent's statements that Complainants consider the Priority Use Area to be an exclusive use area reserved to the Complainants while ignoring Complainants' stated view that it does not, in fact, consider the contract to provide it with an exclusive right to the Priority Use Area. [FAA Exhibit 1, Item 31, pages 24-25.]

Complainants go on to explain their need to have this area designated as a "priority" area, not an "exclusive use" area. They state it is necessary to have this area outside of their hangar to conduct commercial operations. Complainants continue to argue that it was the Respondent and not the Complainants who determined the location for the new hangar facility and that their interpretation of the agreement to permit this priority use is reasonable. [FAA Exhibit 1, Item 31, page 25.]

The terminology used to describe the public access area in question – whether priority use or exclusive use – has no impact on the final conclusion that these active taxiways and movement areas may not be closed to the public for the benefit of a single tenant. It does not matter how the space is labeled. These public access active taxiways and movement areas may not be closed to the public. The Director stated it very clearly, "…under no circumstances would the FAA accept a permanent closure of a taxiway based on an agreement between the airport sponsor and a tenant." [FAA Exhibit 1, Item 30, *Director's Determination*, page 37.]

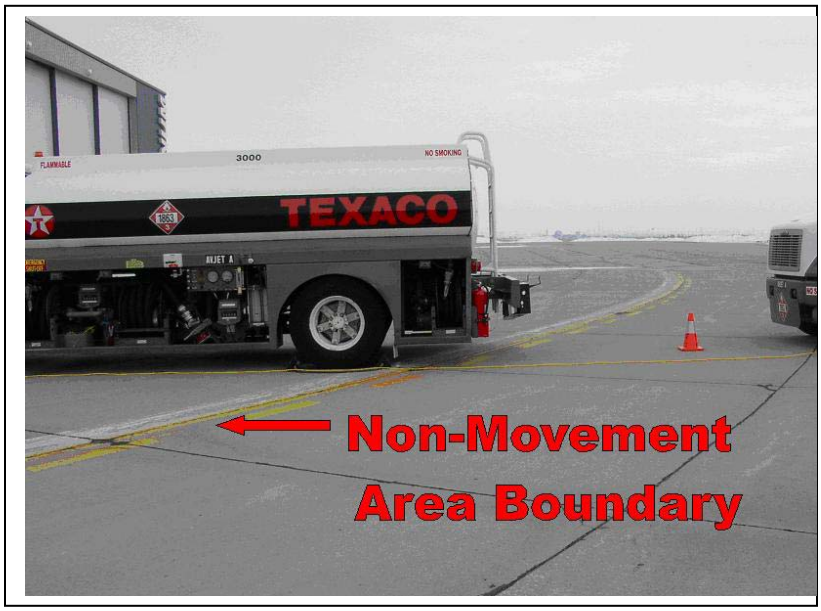
The record contains substantial reliable evidence to show Complainants claimed to have the right to early closure of all ramp areas south of their facility including Taxiway C. [FAA Exhibit 1, Item 1, exhibit M, February 3, 2005, letter from Lincoln Francis to David Anderson).] Complainants believed their contract gave them the power to shut down an active taxiway. [FAA Exhibit 1, Item 8, exhibit 1 page 208.] They also stated they intended to park aircraft on the taxiway even though they were aware that the Airport considered that a safety issue. [FAA Exhibit 1, Item 8, exhibit 1, page 130.]

The Respondent states, "The Director outlined how: the [Complainants] demanded the closure of all ramp areas south of their facility, including Taxiway C, asserted their power to shut down active taxiways; demanded that ground vehicles belonging to other airport tenants go around – and not through – the Priority Use Area, disregarded the Authority warnings not to cross the Non-Movement Area Boundary Marking without first seeking [Air Traffic Control] clearance, and actually blocked the movement areas within the general aviation apron by parking their own fuel trucks across the ramp, requiring that FAA issue an amendment to the Airport Facility Directory to restrict air carrier traffic in the area." (Internal references omitted.) [FAA Exhibit 1, Item 32, page 24, footnote #30.]

The record shows Complainants were advised, more than once, that "the area beyond the Non-Movement Area Boundary marking is identified as an aircraft movement area, which is under the direct control of Air Traffic Control and cannot be entered without a proper [Air Traffic Control]

clearance. Further, parking of aircraft in the movement areas creates an immediate and serious safety concern for the airport, while also being a violation of both the Airport Authority's Rules and Regulations and the FAA's Rules and Regulations."[12] [*See* FAA Exhibit 1, Item 10, exhibit I.] The evidence also shows Complainants blocked public-access movement areas with fuel trucks. [*See* ***Figure 2***, Parking in the Non-Movement Area, below.]

Figure 2: **Parking in the Non-Movement Area**



The Director's Determination states, "If the [Respondent] were to allow early closure of all ramp areas south of Complainant's facility including Taxiway C, or permit the shut down [of] an active taxiways, such as Taxiway A, or permit the parking of aircraft on these taxiways and into movement areas … 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 [Respondent] 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." [FAA Exhibit 1, Item 30, *Director's Determination*, page 35.]

While asserting they are not claiming to have an "exclusive use" of the Priority Use Area, Complainants do argue that "similar 'exclusive use areas' have been approved by the FAA in previous cases." [FAA Exhibit 1, Item 31, page 25.] Complainants cite Roadhouse Aviation, LLC v. City of Tulsa, et. al., FAA Docket No. 16-05-08 (June 26, 2007) (Final Decision and Order) "holding that there was no assurance violation even where complainant's competitor held

[12] The October 27, 2006, letter to Mr. David Schlentner, General Manager, Platinum Jet Center, BMI, LLC, from Mr. Carl G. Olson, Executive Director, Central Illinois Regional Airport, at Bloomington-Normal, does not identify the specific Airport Authority Rules and Regulations or the FAA Rules and Regulations to which he refers. [*See* FAA Exhibit 1, Item 10, exhibit I.]

the 'only exclusive use apron areas on the Airport.'" [FAA Exhibit 1, Item 31, page 25, footnote # 46.] In that case, the complainant was seeking an exclusive lease on a portion of the aircraft apron that required common access through it by a taxilane, and, when denied, pointed to its competitor's exclusive area, not requiring common access through it, as evidence that the denial constituted unjust economic discrimination. In that case, the FAA found the tie-down block leasehold of the complainant required access through it to reach other leaseholds while the exclusive lease area of the competitor did not. Therefore, the leaseholds were not similarly situated. [*See* Roadhouse, page 19.] The Respondent points out that in the case of Roadhouse, the competitor's exclusive lease area in question did not require common public-use access through the area. In the present case, however, common public-use access is necessary through the area identified by Complainants as their Priority Use Area. Using the Priority Use Area "to the exclusion of others would infringe on critical airfield infrastructure, requiring the permanent closure of aircraft movement areas, and introducing a dangerously confusing airfield layout for pilots and ground vehicle operators." [FAA Exhibit 1, Item 32, page 17.]

In addition, the Priority Use Area is located on a public-use Airport Improvement Program funded public ramp; the FAA expects that ramp area to remain public, not reserved for the Complainants' use even for interim periods. The grant agreements the Respondent signed with federal government obligate the Respondent to take whatever action is necessary to keep this public-access space available at all times to the public. If the Respondent consented to the closing of active taxiways, it would violate grant assurance 29, *Airport Layout Plan*. [*See* FAA Exhibit 1, Item 30, *Director's Determination*, page 37.] Such a closing would also compromise safety on the airfield.[13]

The Director also pointed out that if the Respondent did give up control over taxiways and movement areas to support the Complainants' desired use of the Priority Use Area, it would conflict with the Airport's ability to meet its 14 CFR Part 139 requirements. Part 139 includes several safety-related requirements such as control of pedestrians and ground vehicles within airport surfaces, as well as securing certain areas of the airfield (such as runways, taxiways, and movements areas). If the FAA were to find that the Airport is not meeting its obligations under Part 139, the FAA could impose administrative actions or civil penalties for violations of Part 139. In extreme cases, the FAA might revoke the Airport's certificate, effectively terminating scheduled air carrier service, or limit the areas where air carriers can use the airfield. The FAA would expect the Respondent to take whatever action is necessary to regain control of the taxiways and airfield movement areas affected by its agreement with the Complainants in order to comply with Part 139. [FAA Exhibit 1, Item 30, *Director's Determination*, page 38.]

There is no evidence the Director relied on incorrect information. The record clearly shows the Complainants believe they should have the ability to use the Priority Use Area as needed for

[13] Creating an alternative route to go around the Complainants' Priority Use Area would require fuel trucks servicing users on the west side of the Airport to enter Taxiway D, Taxiway E, and the extreme west part of Taxiway A. This is inherently riskier since it introduces vehicular activity to the only remaining taxiway between the runway and the general aviation ramp. In addition, maintaining the Priority Use Area would delay fire rescue equipment from accessing other areas at the Airport, including the general aviation ramp. Fire rescue equipment, fueling, and other vehicles would all need individual air traffic control tower clearance before entering active taxiways. [*See* FAA Exhibit 1, Item 30, *Director's Determination*, page 37.]

their commercial operations. They repeat this view on appeal. To consent to such priority use would require closing active taxiways and movement areas to other aeronautical traffic any time the Priority Use Area is used by the Complainants for their commercial operations. The Director's Determination is very clear that these airfield areas may *not* be reserved for a tenant's sole use.[14]

The Director noted the Respondent took adequate corrective action in seeking an amendment to the Platinum Agreements. The FAA expects the Respondent to take all necessary actions to prevent blockage of active taxiways, including taking appropriate legal action or exercising other administrative remedies to correct the situation. The Priority Use Area is included in Complainants' *Agreement Authorizing Services* with the Respondent. This agreement includes a subordination clause subordinating it to agreements between the Respondent and the United States. [FAA Exhibit 1, Item 1, exhibit B, pages 3 and 8.] However, even if the agreement did not contain such a subordination clause, the FAA would still expect the Respondent to take the action necessary to comply with its federal obligations.

The Associate Administrator finds no error in interpreting the key facts in the record and drawing conclusions that the Priority Use Area may *not* be reserved for the Complainants' sole use at any time.

6. Sponsor Assurances

Complainants argue the Director erred in interpreting the facts and drawing conclusions with regard to grant assurances 5, *Preserving Rights and Powers*; 22, *Economic Nondiscrimination*; 23, *Exclusive Rights*; and 38, *Hangar Construction*.

A. Grant Assurance 5, *Preserving Rights and Powers*

The Complainants do not identify how the Director erred in interpreting the facts and drawing conclusions with respect grant assurance 5, *Preserving Rights and Powers*. Rather, Complainants criticize the Director's "congratulatory way in which [he] sanctions" the behavior of the Respondent in correcting this compliance issue. [FAA Exhibit 1, Item 31, page 30.]

In the Complaint, the Complainants contended that the Respondent's failure to act promptly to address the issues regarding the Platinum Agreements resulted in a violation of grant assurance 5, *Preserving Rights and Powers*. [*See* FAA Exhibit 1, Item 30, *Director's Determination*, page 55.] The Director recognized that the Complainants misinterpreted the meaning of grant assurance 5. The Director states, "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 [Respondent] has given away some of its rights

[14] *See* FAA Exhibit 1, Item 30, *Director's Determination*: "[Fixed-base operators] may not be given the power to shut down active taxiways" (page 33); "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" (page 36); "the Priority Use Area is located on a public use [Airport Improvement Program] funded public ramp, and the FAA expects that ramp area to be public, not restricted as Complainant argues" (page 38); "the [Respondent] has the responsibility to maintain access to the taxiways and general aviation ramp…" (page 38).

and powers in a manner contrary to grant assurance 5." [FAA Exhibit 1, Item 30, *Director's Determination*, page 55.]

The Director noted the Respondent had entered into agreements that included provisions inconsistent with its federal obligations. The Director continued, "That being the case, the [Respondent] 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 obligation. 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, and taking such action is the very nature of complying with grant assurance 5." [FAA Exhibit 1, Item 30, *Director's Determination*, page 55.]

Complainants characterize the steps taken by the Respondent to correct the grant assurance violations as "outrageous." Complainants do not define the steps referred to in this section of the appeal, but do refer to "outrageous steps detailed above" (in the appeal). Those steps include such things as "attempting to impose a Priority Use Area that is inadequate to the needs of the [Complainants'] facility." [FAA Exhibit 1, Item 32, page 29.]

Complainants object to the Director's description of these same steps as acceptable. [FAA Exhibit 1, Item 31, pages 29-30.] The Complainants object to the loss in size of their Priority Use Area, and the FAA insists the Priority Use Area may not include public-use taxiways and movement areas.

Regarding grant assurance, 5, the Associate Administrator concurs with the Director. Grant assurances are not violated when the airport sponsor takes action to correct violations of its federal obligations due to one or more provisions of its agreements with a tenant, and taking such actions are the very nature of complying with grant assurance 5. The Associate Administrator finds no error in interpreting the facts as they apply to grant assurance 5, *Preserving Rights and Powers*.

B. Grant Assurance 22, *Economic Nondiscrimination*

Complainants argue they provided significant evidence to demonstrate the Respondent is in violation of grant assurance 22, *Economic Nondiscrimination*, yet the Director concluded the Respondent's actions were reasonable. [FAA Exhibit 1, Item 31, page 27.] Complainants argue the Director (i) relied on false statements, (ii) ignored significant evidence, and (iii) incorrectly concluded the Complainants and Image Air were not similarly situated. In addition, Complainants argue that in previous cases, the FAA considered the amount of the investment in deciding whether the airport had engaged in economic discrimination.

(i) Alleged False Statements

In the appeal, Complainants repeat their arguments highlighting the Respondent's actions that Complainants characterize as "outrageous conduct." Complainants state the "factual understanding relied upon by the Director … is false in many instances, arbitrarily one-sided in others, and requires reversal." [FAA Exhibit 1, Item 31, pages 27-28.]

Complainants identify "key examples of the facts that the Director ignored or misinterpreted," including: [FAA Exhibit 1, Item 31, pages 1-2.]

- "The location of the hangar was chosen *by the [Respondent]* and the location issue was settled (and approved by both the FAA) [sic] well before [Complainants] ever broke ground on the facility." [FAA Exhibit 1, Item 31, page 1.]

- "The Priority Use Area was the result of careful negotiations in an effort to provide [Complainants] with a sufficient space to provide fueling and aircraft maintenance services, particularly with respect to the larger aircraft that the hangar was designed to accommodate; and without the Priority Use Area [Complainants are] severely if not irreparably harmed." [FAA Exhibit 1, Item 31, page 2.]

- "The [Respondent] failed to communicate that the FAA had taken a position contrary to Complainants' ability to utilize the Priority Use Area prior to construction of the Platinum Facility." [FAA Exhibit 1, Item 31, page 2.]

- "The [Respondent] did not attempt to find a reasonable and meaningful resolution to its sponsor assurance concerns in the Platinum Agreements, but instead utilized the litigation instituted by Image Air to either void the Platinum Agreement entirely and get [Complainants] to 'go away' or, failing that, to force [Complainants] to accept entirely new agreements." [FAA Exhibit 1, Item 31, page 2.]

Complainants state "there was absolutely no uncertainty about the location of the hangar where the [Respondent] told [Complainants] to build." [FAA Exhibit 1, Item 31, page 28.]

The Associate Administrator finds the location of Complainants' hangar resulted in a designated Priority Use Area that encroached onto two active taxiways and airfield movement areas. This encroachment created safety issues with the operation of the airfield. That issue had to be resolved. There can be no compromise with safety. This area may not be reserved for the Complainants' sole use at any time under any circumstances. As stated earlier, the points raised by the Complainants here may be addressed in state court litigation. The Complainants may not maintain their Priority Use Area across active public-use taxiways and movement areas as a matter of federal law.

Complainants contend that if the restriction on the use of public taxiways and movement areas relating to the Priority Use Area are the real problem, then the Respondent should have arranged to move the hangar. [FAA Exhibit 1, Item 31, pages 28-29.]

The movement of the hangar – or resolution of this contractual matter by another means – is not within the FAA's purview to decide. The FAA's role is to monitor the sponsor's compliance with its federal obligations in order to preserve the federal interest in the Airport. With regard to regaining control of the public-use taxiways and movement areas, the Respondent addressed the grant assurance issues, albeit in a manner that did not benefit the Complainants. Now the parties will need to resolve their dispute in a manner that does not compromise the federal interest in the Airport.

Complainants cite additional "key examples of the facts that the Director ignored or misinterpreted," including:

- "The [Respondent's] aggressive and prejudicial conduct in interfering with [Complainants'] construction efforts was not a reasonable or appropriate response to the [Respondent's] regulatory concerns. Moreover, the record shows that the [Respondent's] proposed justifications for interference were thinly veiled covers for prejudicial intent, seeking a nullification of the contracts rather than their amendment. For example, that the [Respondent] knew the CATEX had not been completed a full week before it instructed Complainants to begin its construction and yet waited almost seven months before it issued the Stop Work Order on the ostensible basis that the CATEX was incomplete." [FAA Exhibit 1, Item 31, page 2.]

Complainants acknowledge that several of the issues based on the Respondent's past conduct, including "misinformation, illegal blockades, and Stop Work Orders," have been resolved by court order or the parties' circumstances as the situation and litigation has developed. [FAA Exhibit 1, Item 31, page 5, footnote #3.] The Director explained that the Part 16 process addresses current compliance only. Since Complainants' facility is finished and operational, arguments regarding construction interference are moot. [*See* FAA Exhibit 1, Item 30, *Director's Determination*, page 46.] Still, Complainants argue on appeal that the Director erred in determining the Respondent was not currently in violation of grant assurances regarding these past actions "despite significant evidence to the contrary" and the Complainants argue the fact that these actions are past does not erase the "ongoing pattern of misconduct that continues to date." [FAA Exhibit 1, Item 31, page 5.]

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

In terms of any "ongoing pattern of misconduct," the Complainants have had the opportunity to identify and support allegations of grant assurance violations in this Part 16 process. Allegations brought forward by the Complainants have been addressed in the Director's Determination and this Final Decision and Order.

Complainants contend another "key example of the facts that the Director ignored or misinterpreted" is:

- "[Complainants do] not take the position that the Priority Use Area is an area reserved exclusively to [Complainants.]" [FAA Exhibit 1, Item 31, page 2.]

Complainants do not explain what bearing this statement has on the Director's Determination. The Director acknowledged Complainants denied that the Priority Use Area would require closure of an adjacent taxiway and denied they expected the Airport to close the taxiway. [*See* FAA Exhibit 1, Item 30, *Director's Determination*, page 32.] However, the Director also quoted Complainants' explanation that the Priority Use Area "would not be available for use by competitors of [Complainants] and that, as a practical consequence, the adjacent taxiway would not be usable when [Complainants'] planes were parked in said Priority Use Area." [FAA Exhibit 1, Item 6, exhibit A, page 4.]

Clearly, Complainants do take the position that the Priority Use Area is reserved for Complainants' exclusive use – even requiring the partial closure of two adjacent taxiways (Taxiways A and C) – during periods when planes are parked in the area. Complainants' argue they suggested changing the wording of this area to a "permitted use area" to "alleviate concerns about exclusivity." [FAA Exhibit 1, Item 31, page 25.] Complainants do not suggest that changing the language would also change how they expect to use the area. Indeed, Complainants continue to argue for the full use of the Priority Use Area for parking aircraft as needed. [*See* FAA Exhibit 1, Item 31, pages 25-26.]

Complainants do not appear to grasp the public safety and access significance of permitting any tenant to cause the closure of portions of an airfield by entering into agreements with federally obligated airport sponsors. Such sponsors do not have the authority to contract away their federal obligations. As stated by the Director, and reiterated by the Associate Administrator throughout this Final Decision and Order, the issue of the Priority Use Area interfering with the public-use movement areas and taxiways is substantial and cannot be ignored. It violates the federal interest in a national system of airports that the FAA is required to defend and maintain. [FAA Exhibit 1, Item 30, *Director's Determination*, page 32.]

(ii) Significant Evidence

Complainants argue on appeal they submitted significant evidence to demonstrate the Respondent is in violation of grant assurance 22, *Economic Nondiscrimination*, relating to (a) contractual agreements, (b) construction interference, and (c) inappropriate reliance on sponsor assurance obligations.

(a) Contractual Agreements

Complainants state on appeal that they submitted significant evidence to show the Respondent: (1) "refused to acknowledge the validity of the Platinum Agreements…;" and (2) "failed … to present [Complainants] with a workable offer to amend the Platinum Agreements." [FAA Exhibit 1, Item 31, page 27.] Complainants argue the Director erred in concluding these actions do not result in a violation of grant assurance 22, *Economic Nondiscrimination*. [*See* FAA Exhibit 1, Item 31, page 27.]

The Respondent's inability to "acknowledge the validity of the Platinum Agreements" by conceding the Priority Use Area to the Complainants is covered in depth throughout this Final Decision and Order. To acquiesce to the Complainants' wish to maintain a Priority Use Area that encroaches on public-use taxiways and movement areas would violate the Respondent's federal obligations. Prohibiting such action conforms to the Respondent's federal obligations.

The Complainants' contention that the Respondent failed to present a workable solution is also discussed elsewhere in this Final Decision and Order, including under Section VI, Issue B, item 2, *Respondent's Failure to Resolve*, pages 22-24.

Again, Complainants fail to grasp the significance of the federal interest in this case. The Director did not err in his review of the evidence and the conclusions derived from that evidence.

(b) Construction Interference

Complainants state they submitted significant evidence to show that Respondent (1) "repeatedly withheld critical information relating to the construction or operation of [Complainants'] facility;" (2) "failed to obtain permits in a timely manner that could only be acquired by the [Respondent];" and (3) "issued Stop Work Orders and erected physical blockades to attempt to prevent the construction of [Complainants'] hangar…" [FAA Exhibit 1, Item 31, page 27.] Complainants argue the Director erred in concluding these actions do not result in a violation of grant assurance 22, *Economic Nondiscrimination*. [*See* FAA Exhibit 1, Item 31, page 27.]

As discussed above in Section VI, Issue B, item 3, *Blockades and Stop Work Orders* (pages 24-26), Complainants acknowledge that several of the issues based on the Respondent's past conduct, including construction interference, have been resolved. Complainants' facility is finished and operational.

The FAA addresses current compliance only. These past actions do not affect the Respondent's current compliance with the grant assurances. Issues relating to construction interference are moot.

(c) Sponsor Assurance Reliance

Complainants state they submitted significant evidence to show Respondent relied on actual or potential violations of grant assurances to further its own interests. Complainants state Respondent (1) "has not acted in good faith to address any legitimate concerns …regarding its

sponsor assurance concerns, including refusing to timely provide [Complainants] with critical information relating thereto" and (2) attempted to use their alleged concerns regarding sponsor assurances to force [Complainants] to accept entirely new contracts that are more to [Respondent's] current liking." [FAA Exhibit 1, Item 31, page 27.]

Complainants argue the Director erred in concluding these actions do not result in a violation of grant assurance 22, *Economic Nondiscrimination*. [*See* FAA Exhibit 1, Item 31, page 27.] Complainants also argue the Director erred by assuming the Respondent could "unilaterally take away contractual rights if it simply believes (or even pretends to believe) that there is an assurance problem with an existing contract." [FAA Exhibit 1, Item 31, page 27-28.]

These specific points are addressed elsewhere in this Final Decision and Order:

- Complainants' argument that the Respondent has not acted in good faith to address sponsor assurance concerns is proved inaccurate by the very fact that the FAA is satisfied with the Respondent's resolution of grant assurance issues; the Director's Determination found no current grant assurance violations. The Respondent's attempts to work with the Complainants is addressed in Section VI, Issue B, item 2, *Respondent's Failure to Resolve*, (pages 22-24). It is clear that the Complainants are dissatisfied with the solutions offered, but that does not mean the Respondent did not act in good faith or that the solutions suggested were not workable.

- Complainants' argument that the Respondent did not provide critical information to the Complainants in a timely manner is addressed in Section VI, Issue B, item 3, *Blockades and Stop Work Orders*, (pages 24-26). The Director acknowledged that the Respondent "possibly failed to clearly communicate" the environmental responsibility to the Complainants. Nonetheless, the issue of providing timely information relates to construction interference. Since the structure is built, the issue is moot. [*See also* Section VI, Issue B, item 6B(ii)(b), *Construction Interference*, page 35.] The allegation of misinformation is also addressed in Section VI, Issue B, item 6B(i), *Alleged False Statements*, pages 32-34. Complainants acknowledge that several of the issues based on the Respondent's past conduct, including "misinformation, illegal blockades, and Stop Work Orders," have been resolved by court order or the parties' circumstances as the situation and litigation has developed. Again, this issue is moot.

- The Director also found the Respondent's actions to correct the situation regarding the Platinum Agreements may not have been timely, but they were reasonable. [*See* Section VI, Issue B, item 2, *Respondent's Failure to Resolve*, pages 22-24.]

- Complainants' statement that the Director assumed the Respondent could "unilaterally take away contractual rights if it simply believes (or pretends to believe) that there is an assurance problem with an existing contract" is discussed under Section VI, Issue A, *Respondent's Conduct to Remedy Perceived Assurance Violations*. The assurance violations were legitimate concerns of the Respondent; the Director stated "the airport sponsor may revisit its agreements as necessary" and "may take reasonable actions to modify an existing agreement." [*See* Issue A, pages 16-19.]

Notwithstanding Complainants' use of arguments that include the grant assurances, the argument itself is about modifications to contractual agreements between the Complainants and Respondent. Complainants argue the Director's Determination should be reversed because the Respondent "had not negotiated the deal that it really wanted, and engaged in outrageous behavior in order to get a new contract, and is now attempting to impose a Priority Use Area that is inadequate to the needs of the Platinum Facility." [FAA Exhibit 1, Item 31, page 29.]

The Associate Administrator again emphasizes that the federal interest in this case is one of preserving safety on, and access to, public-use taxiways and movement areas on a federally obligated airport. The FAA could not allow the Respondent to contract away its federal obligations by permitting a portion of the airfield to be blocked by parked aircraft and/or vehicles. In resolving the compliance matter with the FAA, the Respondent elected to take action that satisfied the FAA but, clearly, is not satisfactory to the Complainants. Complainants will have to resolve that dispute directly with the Respondent or in state court. FAA's involvement is limited to the Respondent's compliance with its federal obligations.

(iii) Similarly Situated

Complainants also argue the Director erred in concluding competitor Image Air is not similarly situated with the Complainants. Complainants state, "The Director's analysis … falls well short of the standard applied by the FAA that provides that '[fixed-base operators] making the same or similar uses of such airport utilizing the same or similar facilities' should be similarly treated." [FAA Exhibit 1, Item 31, page 28.]

The Respondent argues Image Air and the Complainants are not similarly situated in that (1) Image Air had an existing lease, as opposed to a new ground lease that failed to clearly identify the lease premises, and (2) Image Air's use of the aircraft apron does not interfere with movement areas and taxiway use. The Respondent points out that Image Air's agreement contains no Priority Use Area cutting across airport movement areas and taxiways. [FAA Exhibit 1, Item 32, pages 19-20.]

The Director noted Complainants and Image Air are not similarly situated in that Image Air's leased premises do not encroach on public access taxiways and movement areas while Complainants' Priority Use Area does encroach on public access taxiways and movement areas. [*See* FAA Exhibit 1, Item 30, *Director's Determination*, page 32.]

To succeed in an argument that the Respondent violated grant assurance 22, *Economic Nondiscrimination*, the Complainants would need to show how the Complainants and Image Air were treated differently under the same circumstances. The Complainants have not done that. They argued that Image Air has a larger parking area, but the record shows the circumstances differ on how Image Air obtained its leased parking area as compared to why Complainants do not have a parking area of the size they desire. Complainants' parking area was reduced because the Priority Use Area interfered with the use of public access taxiways and movement areas. The encroachment of the Priority Use Area resulted in safety and grant assurance issues that had to be resolved by the Respondent. Image Air's parking area was not reduced because it did not

interfere with public access taxiways and movement areas. The Respondent is not in noncompliance under grant assurance 22, *Economic Nondiscrimination*, for failure to close active taxiways and movement areas on the Airport in order to make the Complainants' parking area equivalent to Image Air's. Such an outcome would undermine the federal interest in the Airport and result in grant assurance violations by the Respondent. As noted by the Respondent, the Complainants' dispute concerns the encroachment of the Priority Use Area into active taxiways and public-access movement areas; any comparison between the Priority Use Area and the apron adjacent to Image Air's facilities is not relevant to this dispute. [FAA Exhibit 1, Item 32, pages 17-18.]

Complainants have not demonstrated that the Director erred in interpreting the facts as they apply to grant assurance 22, *Economic Nondiscrimination*, and this Part 16 action. The Associate Administrator finds no error in interpreting the facts as they apply to grant assurance 22, *Economic Nondiscrimination*.

(iv) Previous Cases and Economic Investment

The Complainants also argue that in previous Part 16 cases, the FAA has considered the amount of investment an airport tenant was asked to make as an important factor in determining whether an airport sponsor was in noncompliance with grant assurance 22, *Economic Nondiscrimination*. Complainants cite Skydance Helicopters, Inc. d/b/a Skydance Operations, Inc. v. Sedona Oak-Creek Airport Authority and Yavapai County, Arizona, FAA Docket No. 16-02-02 (March 7, 2003) (Director's Determination). [FAA Exhibit 1, Item 31, page 29, footnote #54.] That case, however, is not pertinent to the facts in this current case. In Skydance, the complainant was seeking to make a significant investment pursuant to a long-term lease, yet the airport required the complainant also to operate under a renewable two-year operating license. Other tenants operating under the two-year operating license had not made a significant financial investment comparable to that of the complainant. Such a significant investment under a long-term lease coupled with a short-term operating license was unreasonable. In other words, the security of the long-term investment was placed at risk because the lessee only had a two-year license to operate its business on the airport. In this case, Complainants have a long-term lease consistent with their significant investment; no such short-term renewal license is at issue.

The Associate Administrator stresses that the size of the Complainants' investment does not, and cannot, obfuscate the Respondent's requirement to comply with its federal obligations. The size of a tenant's investment does not, and cannot, eliminate the obligation to maintain public-use taxiways and movement areas.

C. Grant Assurance 23, *Exclusive Rights*

Complainants argue the Director ignored the fact that the Respondent's position with respect to the Priority Use Area "hamstrings [Complainants'] ability to compete with Image Air, as the inability to park planes in front of its hangar is a decisive and fatal blow to [Complainants'] ability to acquire that business." [FAA Exhibit 1, Item 31, page 26, footnote #26.] In support of their argument that this inability to make full use of their Priority Use Area violates grant assurance 23, Complainants cite FAA's position that "any unreasonable requirement or any

standard that is applied in an unjustly discriminatory manner may constitute the constructive grant of an exclusive right." [*See* FAA Exhibit 1, Item 31, page 26, footnote #26.]

The Respondent asks the FAA to reject this claim. The Respondent argues this is a new claim raised for the first time on appeal. The Respondent also states, "The fact that Image Air has a larger area in front of its hangar than the [Complainants] does not automatically vest Image Air with an exclusive right. There is nothing in the record to suggest any discriminatory treatment by the authority in favor of Image Air to create an exclusive right, constructive or otherwise." [FAA Exhibit 1, Item 32, page 18, footnote # 17.]

The Priority Use Area in question extends into public access taxiways and movement areas. Parking aircraft and vehicles on taxiways and movement areas, as the Complainants argue they should be able to do, compromises safety and undermines the utility of the Airport. The Respondent insists Complainants may not park aircraft and vehicles on active taxiways and public-access movement areas. As evidenced by the photograph shown in ***Figure 2*** on page 28 of this Final Decision and Order, Complainants did just that. The Respondent was forced restrict public access to this area – in conflict with the grant assurances – in the interest of safety. As a result, the Respondent contacted the FAA to request "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." [*See* FAA Exhibit 1, Item 30, *Director's Determination*, page 35.]

As the Director noted, permitting such actions has a negative impact on the utility of the Airport and interferes with the use and safe operation of the Airport's taxiway system. The taxiway system should provide for the free movement of aircraft to and from the runways, terminal/cargo, and apron parking areas. Aircraft movements should not be subject to restrictions that impact the utility of the airfield. In this case, by cutting off parts of Taxiways A and C, and infringing upon the nearby movement areas, the Complainants' actions affected the utility of the Airport. [FAA Exhibit 1, Item 30, *Director's Determination*, page 36.]

Allowing the Complainants to shut down active taxiways violates grant assurances 5, *Preserving Rights and Powers*; 19, *Operation and Maintenance*; 23, *Exclusive Rights*; and 29 *Airport Layout Plan*. [*See* FAA Exhibit 1, Item 30, *Director's Determination*, page 33.] Thus, preventing Complainants from parking aircraft in an area that interferes with the use of active taxiways and movement areas is *not* an unreasonable requirement. In addition, Complainants have neither demonstrated nor stated that competitor Image Air *is* allowed to park aircraft that interfere with the use of active taxiways and movement areas. As stated earlier, the Director noted Complainants and Image Air were not similarly situated in that Image Air's leased premises do not encroach on public access taxiways and movement areas while Complainants' Priority Use Area does encroach on public access taxiways and movement areas. [*See* FAA Exhibit 1, Item 30, *Director's Determination*, page 32.] The size of the parking area is irrelevant to this case. Thus, there is no finding of unjust economic nondiscrimination upon which to base a finding of a constructive exclusive right.

The Associate Administrator finds no error in interpreting the facts and drawing conclusions from the evidence as they apply to grant assurance 23, *Exclusive Rights*.

D. Grant Assurance 38, *Hangar Construction*

Complainants argue Respondent is in constructive violation of grant assurance 38, *Hangar Construction*, because – as a result of the reduced size of the Priority Use Area – Complainants are unable to service the aircraft that the hangar was designed and built to service. Complainants are unable to enjoy the use of its expensive building. [FAA Exhibit 1, Item 31, page 26, footnote #48.] Respondent asks the FAA to reject this claim, asserting that it is argued for the first time in the appeal, and that its lacks precedential support. [FAA Exhibit 1, Item 32, page 18, footnote #17.]

Grant assurance 38, *Hangar Construction*, is intended to ensure aircraft owners who build a hangar for their own aircraft at their own expense are able to enter into a lease that is sufficiently long enough to amortize the cost of building such a hangar. [*See* Section V.C.6 on page 11 of this Final Decision and Order for the exact wording of grant assurance 38.]

The record shows Complainants entered into a 30-year ground lease agreement. [FAA Exhibit 1, Item 1, exhibit A.] Complainants also entered into a five-year agreement authorizing services with an automatic five-year renewal period. [FAA Exhibit 1, Item 1, exhibit B.] Complainants entered into an agreement authorizing the sale of aviation fuel that was also five years with an automatic five-year renewal period. [FAA Exhibit 1, Item 1, exhibit C.]

Complainants' 30-year ground lease agreement satisfies the requirements of grant assurance 38. As the Director stated, "The record shows that the [Respondent] did not deny Complainants a long-term lease for Airport land on which they could build a hangar." [FAA Exhibit 1, Item 30, *Director's Determination*, page 54.] Complainants' inability to enjoy the full benefit of the hangar in the manner they had intended results from the necessity to limit the Priority Use Area to curtail interference with the use of active taxiways and movement areas. This is a safety and airport utility issue that cannot be ignored. As stated by the Director, "The fact that there is a dispute between the parties over the executed agreements does not imply that the [Respondent] is in violation of grant assurance 38." [FAA Exhibit 1, Item 30, *Director's Determination*, page 54.] The Associate Administrator finds no error in interpreting the facts as they apply to grant assurance 38, *Hangar Construction*. Alternatively, the text of grant assurance 38 addresses an individual aircraft owner desiring to erect a hangar for the owner's own aircraft, assuring that the individual will be granted a long-term ground lease by the Airport. The Complainants are commercial operators providing hangar space to third party customers. They did not erect the hangar for their own aircraft. The assurance is directed at individual aircraft owners, not commercial service providers, and would be inapplicable here.

Associate Administrator's Conclusion on Issue B
The Associate Administrator finds the Director did not err in interpreting the facts or drawing conclusions from the evidence regarding sponsor assurances, including grant assurances 5, *Preserving Rights and Powers*; 22, *Economic Nondiscrimination*; 23, *Exclusive Rights*; or 38, *Hangar Construction*.

Issue C: Investigating Facts

Complainants argue on appeal the Director failed to investigate the facts of the case fully. [FAA Exhibit 1, Item 31, page 6, #3.] Specifically, Complainants argue that after all scheduled briefs and evidence had been submitted, the Director accepted evidence from the Respondent regarding fuel trucks parked in the Priority Use Area without inquiring from Complainants why the fuel trucks were parked where they were. [FAA Exhibit 1, Item 31, page 30.]

The record shows the initial pleadings from Complainants and Respondent were submitted between April 24, 2006 [*see* FAA Exhibit 1, Item 1, Complaint] and August 30, 2006 [*see* FAA Exhibit 1, Item 8, Rebuttal]. In December 2006, there was a motion to supplement the record and an objection to the motion to supplement. [*See* FAA Exhibit 1, Items 10 and 13.] The record does not show any additional submittals from Respondent or Complainants to the Part 16 docket.

Complainants make statements on appeal alleging the Director accepted evidence ex parte from the Respondent and violated Complainants' due process rights by failing to provide Complainants the opportunity to respond. [*See* FAA Exhibit 1, Item 31, page 3.]

The Associate Administrator, however, finds the Director did not "accept evidence from the [Respondent]" as argued by Complainants. [*See* FAA Exhibit 1, Item 31, page 30.] The evidence in question came to the Director, Office of Airport Safety and Standards, from the FAA through normal FAA channels.

In February 2007, apart from the Part 16 action, the FAA Lead Airport Certification/Safety Inspector for Great Lakes Region was notified of an unsafe condition at the Airport involving Complainants' fuel trucks parked in an area that impeded the safe movement of aircraft. [*See* the photograph identified as *Figure 2* on page 28.] This unsafe condition required FAA action to amend the Airport Facility Directory limiting the aircraft movement area. The FAA Great Lakes Region forwarded this information and accompanying photographs to FAA Headquarters, Office of Safety and Standards. [*See* FAA Exhibit 1, Items 16 and 17.]

Internal communication within the FAA is not ex parte communication with the Respondent. Such internal communication does not present an opportunity to respond for either Respondent or Complainants. The Complainants' due process rights under the Part 16 process were not violated.

In addition, the Associate Administrator points out that the Part 16 investigation may include a review of the written submissions or pleadings of the parties, as supplemented by any informal investigation the FAA considers necessary and by additional information furnished by the parties

at FAA request. [*See* 14 CFR § 16.29(b)(1).] The Office of Airport Safety and Standards' use of data that is considered relevant from other FAA offices in its Part 16 investigation was within the scope of the rule.

Complainants do not deny that the alleged actions did occur. Complainants admit they "took the unpopular step of parking fuel trucks in the Priority Use Area for a period of time in a manner that limited the ability of other vehicles to traverse the apron area directly in front of [Complainants'] hangar. [FAA Exhibit 1, Item 31, page 11.] Complainants argue in their appeal they parked fuel trucks in an unapproved area "in direct response to an immediate safety hazard affecting [Complainants'] employees and property." They do not identify the safety issue they were addressing by such action or how this action alleviated, rather than created, safety issues on the Airport.

The Associate Administrator is doubtful that the Complainants' actions regarding the fuel truck incident are justified or appropriate. Parking fuel trucks in a manner that blocks the aircraft and vehicle movement areas is a safety issue requiring immediate FAA action. As the Director noted, the safety implications of Complainants' action cannot be minimized. Permitting a tenant to park aircraft and trucks on active movement areas and/or taxiways in inconsistent with the FAA's safety role in eliminating runway incursions. [*See* FAA Exhibit 1, Item 30, *Director's Determination*, page 36.]

Associate Administrator's Conclusion on Issue C
The Associate Administrator finds the Director did not err with respect to conducting a full investigation of the facts.

Issue D: Uncertainties and Ambiguities

Complainants argue the Director's Determination contains uncertainties and ambiguities. Complainants ask on appeal for clarification of the FAA's position on the Complainants' Priority Use Area. [FAA Exhibit 1, Item 31, page 6, #4.] Specifically, Complainants ask the FAA to "declare that the Platinum Agreements are in conformity with the [Respondent's] sponsor assurances, or in the alternative, to provide a determination regarding the least intrusive remedy that the FAA would find acceptable given the circumstances." [FAA Exhibit 1, Item 31, page 31.]

The FAA cannot declare the Platinum Agreements in conformity with the Respondent's sponsor assurances. The FAA has already stated that using the portion of the Priority Use Area that extends beyond the non-movement boundary for aircraft or vehicle parking is inconsistent with several FAA standards including the Taxiway Object Free Area, which is an area on the ground that is to remain free of objects not needed for air navigation or aircraft ground maneuvering purposes. [*See* FAA Exhibit 1, Item 30, *Director's Determination*, page 36.] Complainants argue the Platinum Agreements provide for Complainants' use of this Priority Use Area to park aircraft; the FAA determined Complainants' use of this Priority Use Area has – or will – result in violations of the Respondent's federal obligations. It is, therefore, not possible for the FAA to declare this use – and the agreements purporting to allow this use – to be in conformity with the Respondent's federal obligations, including the sponsor assurances. They are not.

In the alternative, Complainants ask the FAA to identify the least intrusive remedy that the FAA would find acceptable given the circumstances. Complainants suggest the FAA could propose an accommodation that would permit Complainants to use the Priority Use Area in the manner interpreted in the Platinum Agreements when needed, yet still provide some mechanism that would permit the Respondent to avoid sanctions for assurance violations. [*See* FAA Exhibit 1, Item 31, page 32.]

The FAA cannot do that either. First, the FAA cannot agree to permit the Complainants to block public access movement areas and active taxiways for any purpose or for any period of time. Second, the FAA cannot waive safety concerns and compliance with the grant assurances.

In addition, the FAA will not attempt to negotiate a remedy to the dispute between the Complainants and Respondent.[15] The FAA does not mediate disputes through the Part 16 complaint process. Part 16 is an adjudicatory process that results in an FAA decision on the merits. Nor does the FAA enforce contract terms of agreements between airports and tenants. Rather, the FAA enforces the agreements it enters into with airport sponsors. [*See* AmAv v. Maryland Aviation Administration, FAA Docket No. 16-05-12, (March 20, 2006) (Director's Determination).] The Director's Determination correctly addresses the Respondent's obligations under the grant assurances.

The Complainants request clarification of the FAA's position on the Complainants' Priority Use Area. [*See* FAA Exhibit 1, Item 31, page 33.] The FAA's position – from the Director's Determination to this Final Decision and Order – has been clear.

The Director provided the following clear guidance:

- The existence of the Priority Use Area may not be used to justify the closure of taxiways.

> The Director stated, "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." [FAA Exhibit 1, Item 30, *Director's Determination*, page 36.] The Director also stated, "…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." [FAA Exhibit 1, Item 30, *Director's Determination*, page 37.] In addition, the Director stated, "For the [Respondent] to give up control over taxiways, taxilanes and movement areas by a Priority Use Area, conflict arises with the Airport's ability to meet its 14 CFR Part 139

[15] Complainants argue that if the problem is the Complainants' use of public-access taxiways and movement areas as they relate to the Priority Use Area, then the Respondent should have moved the hangar "at comparatively minimal cost" in December 2004. [FAA Exhibit 1, Item 32, pages 28-29.] It is unclear what the Complainants are arguing in making this point. That opportunity is past. It is incumbent upon the parties to find a solution to their contractual issues, whether it be in negotiations or through the state court system. The FAA's interest is in ensuring the airport sponsor complies with its federal obligations.

requirements, which include several safety-related requirements." [FAA Exhibit 1, Item 30, *Director's Determination*, page 38.]

- The airport movement area may not be affected by aircraft or ground equipment parked within the Priority Use Area.

  The Director states, "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 and would most likely introduce a [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." [FAA Exhibit 1, Item 30, *Director's Determination*, page 36.] The Director further states, "The Complainant's parking of aircraft and vehicles in the Priority Use Area is inconsistent with FAA design standards, and as such, compromises the [Taxiway Object Free Area] requirements." [FAA Exhibit 1, Item 30, *Director's Determination*, page 36.]

- Ground vehicles, including airport emergency vehicles, should not be expected to go around the Priority Use Area to transit within the general aviation apron.

  The Director states, "it is inherently unsafe to mix aircraft parking and vehicular activity (i.e. fuel trucks) on airport movement areas and taxiways." [FAA Exhibit 1, Item 30, *Director's Determination*, page 36.] The Director further states, "the Priority Use Area would delay fire rescue equipment from accessing other areas at the Airport, including the general aviation ramp." [FAA Exhibit 1, Item 30, *Director's Determination*, page 37.]

- Public areas funded under the Airport Improvement Program may not be restricted to an individual tenant's use.

  The Director states, "because the Priority Use Area is located on a public use [Airport Improvement Program] funded public ramp, …the FAA expects that ramp area to be public, not restricted as Complainant argues." [FAA Exhibit 1, Item 30, *Director's Determination*, page 38.]

Public access to movement areas and active taxiways may not be blocked for the use of any Airport tenant. Airport sponsors do not have the authority to contract away their federal obligations that require them to keep the airfield open to access by aeronautical users. The federal interest in maintaining access to a national system of airports for all current and future aeronautical users trumps the individual claim of a commercial service provider to block and deny access to active taxiways and movement areas. A portion of the Complainants' disputed Priority Use Area is on a public-use, federally funded ramp and extends into movements areas and taxiways. Any portion of the Priority Use Area that falls into these areas cannot be held for Complainants' (or any other tenant's) sole use.

Complainants argue in this section of the appeal that the Director's decision is "arbitrary and capricious and unsupported either in law or in fact," but do not describe under this section how the Director erred other than to disagree with the Director's characterization of the Priority Use Area as an exclusive use area. [FAA Exhibit 1, Item 31, page 31.] Complainants argue they are not claiming this area for exclusive use, but rather for priority use at times when Complainants need this area for parking aircraft and/or vehicles. [*See* FAA Exhibit 1, Item 31, pages 8 and 32.]

Complainants state, "…to the extent that the Determination can or will be read to permit the Airport to eviscerate any priority usage rights the [Complainants] hold in the [Priority Use Area], the decision is rendered arbitrary and capricious and unsupported either in law or in fact." [FAA Exhibit 1, Item 31, page 31.]

The Director's Determination clearly states that the Priority Use Area provision in the Platinum Agreements in inconsistent with the Respondent's federal obligations. [FAA Exhibit 1, Item 30, *Director's Determination*, page 56.] The Priority Use Area, as described by the Complainants, interferes with the use of the airport's taxiways and movement areas. The Director states,

- "The issue of the Priority Use Area interfering with movement areas and taxiways use is substantial." [FAA Exhibit 1, Item 30, *Director's Determination*, page 32.]

- "…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." [FAA Exhibit 1, Item 30, *Director's Determination*, page 36.]

Complainants are understandably upset that reducing the size of the Priority Use Area to exclude their claim on active movement areas and taxiways will derogate their ability to accommodate the size of aircraft they had anticipated accommodating when entering into their business arrangement with the Respondent. [*See* FAA Exhibit 1, Item 31, page 32, footnote #58.] This is a regrettable situation, but not one the FAA can resolve. The Complainants may not park aircraft and/or vehicles in the active movement areas and taxiways of the Airport regardless of how or what terminology they choose to describe their desired use of the Priority Use Area.

Associate Administrator's Conclusion on Issue D

The Associate Administrator is not persuaded the Director erred by failing to clarify the acceptable parameters of the Priority Use Area to the Complainants' satisfaction. The Associate Administrator finds the Director's Determination is sufficiently clear in underscoring the importance of maintaining the integrity of airfield movement areas and taxiways, and is based on applicable law, precedent, and public policy.

VII. CONCLUSION

FAA's role in this appeal is to determine whether the Director erred in findings of fact or conclusions of law in issuing the Director's Determination of June 4, 2007.

Upon an appeal of a Part 16 Director's Determination, the Associate Administrator must determine whether (a) the findings of fact made by the Director are supported by a preponderance of reliable, probative, and substantial evidence, and (b) each conclusion of law is made in accordance with applicable law, precedent, and public policy. [*See* e.g. Ricks v Millington Municipal Airport, FAA Docket No. 16-98-19 (December 30, 1999) (Final Decision and Order), page 21, and 14 CFR § 16.227.]

In arriving at a final decision on this appeal, the FAA has reexamined the record, including the Director's Determination, the administrative record supporting the Director's Determination, and the appeal and reply submitted by the parties, in light of applicable law and policy. Based on this reexamination, the Associate Administrator concludes that the Director's Determination is supported by a preponderance of reliable, probative, and substantial evidence, and is consistent with applicable law, precedent, and FAA policy. The appeal does not contain persuasive arguments sufficient to reverse any portion of the Director's Determination.

The Associate Administrator affirms the Director's Determination. This decision constitutes the final decision of the Associate Administrator for Airports pursuant to 14 CFR § 16.33(a).

ORDER

ACCORDINGLY, it is hereby ORDERED that (1) the Director's Determination is affirmed, and (2) the appeal is dismissed, pursuant to 14 CFR § 16.33.

RIGHT OF APPEAL

A party to this decision disclosing a substantial interest in the final decision and order of the Federal Aviation Administration may file a petition for review pursuant to 49 U.S.C. § 46110, in the United States Court of Appeals for the District of Columbia Circuit or in the court of appeals of the United States for the Circuit in which the person resides or has its principal place of business. The petition must be filed not later than 60 days after a Final Decision and Order has been served on the party. [14 CFR, Part 16, § 16.247(a).]

November 28, 2007

D. Kirk Shaffer
Associate Administrator
for Airports

Date