UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC

Airborne Flying Service, Inc., **COMPLAINANT** **V.** **City of Hot Springs, Arkansas** **RESPONDENT**	**Docket No. 16-07-06** **Final 12-18-2007**

DIRECTOR'S DETERMINATION

I. INTRODUCTION

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

Airborne Flying Service, Inc. (Airborne or Complainant) has filed this Complaint against the City of Hot Springs, Arkansas (City or Respondent). Airborne alleges that the Respondent, as sponsor of Hot Springs Memorial Airport (Airport), has engaged in activity contrary to its Federal obligations.

Specifically, the Complainant states, "This Complaint is in regard to the City's refusal to reasonably accommodate Airborne's desire to self-fuel their aircraft, and their actions against Airborne in enforcing said claim." [FAA Exhibit 1, Item 1, p. 1]

Specifically, the Respondent "affirmatively asserts that at no time has it engaged in any conduct that has unreasonably restricted the Complainant's ability to self fuel." [FAA Exhibit 1, Item 3, p. 1]

The decision in this matter is based on applicable law and FAA policy regarding the Respondent's Federal obligations as imposed upon it by its grant assurances 22(d) (under 49 U.S.C. § 47107(a)(6)), review of the arguments and supporting documentation submitted by the parties, and the administrative record in this proceeding.

With respect to the allegations presented in this Complaint, under the specific circumstances at the Airport as discussed below and based on the evidence of record in this proceeding, the FAA finds that the Respondent is not in violation of its Federal obligations. This Director's Determination discusses the bases for this finding.

II. THE PARTIES

Airport

The Hot Springs Memorial Airport (Airport) is a public-use airport located in Hot Springs, Arkansas. The City of Hot Springs owns the Airport and is the sponsor of Federal grants. The development of the Airport has been financed, in part, with funds provided to the City as the Airport sponsor under the Airport Improvement Program (AIP), authorized by the Airport and Airway Improvement Act of 1982, as amended, 49 USC §47101, *et seq.* [FAA Exhibit 1, Item 6]. As a result, the City is obligated to comply with the FAA sponsor assurances and related Federal law, 49 USC § 47107. The City operates the commercial fuel concession from the Airport as a proprietary exclusive retail operation.

Complainant

The Complainant, Airborne Flying Service, Inc. is:

> *an Air Charter and Air Ambulance Service located on the Hot Springs Memorial Airport (HOT), and operates under Part 135 of the Federal Aviation Regulations (FAR)… Airborne has been operating from the Hot Springs Airport for nineteen years, employs 15 people, operates a fleet consisting of eight aircraft, both piston and turbine. Airborne occupies two hangars.* [FAA Exhibit 1, Item 1, p. 2]

III. BACKGROUND

Procedural History

Airborne Flying Service served its formal Complaint on the FAA on May 16, 2007.

The FAA served its notice of docketing on June 8, 2007.

The City of Hot Springs served its Answer on June 28, 2007.

No subsequent pleadings were submitted by the parties to this Complaint. Neither party notified the FAA of their intentions to not file a Reply or Rebuttal, as allowed under Part 16 procedures.

Factual Background

On January 18, 2006, Airborne wrote to the City in an email, stating:

> *Pleased be advised that Airborne Flying Service, Inc. (Airborne) intends to locate fuel tanks on its premises for refueling Airborne's aircrafts. Airborne does not intend to sell fuel to third parties.*

Please advise what sort of drawings and/or plats of the property locations that you would like to see, together with any requirements that the City of Hot Springs might have in regard to insurance, permits or flowage….

We have elected to install our own fuel farm as a result of the Airport's failure to fuel our airplanes in a timely or accurate manner. I have documented several instances of fueling problems. Since, as you know, we are primarily in the Air Ambulance business, we can not afford any delays in fueling. Our patient's lives depend on immediate service. By installing our own fuel farm, we will no longer be a burden to you or your staff.

It is our intent to install two 10,000 gallon tanks adjacent to Airborne's Hangar A1. [FAA Exhibit 1, Item 1, exh. B]

On the same day, the City responded, stating, "We'll need to meet and discuss the requirements." [FAA Exhibit 1, Item 1, exh. B]

Neither party presents a copy of any self-fueling requirements in the spring of 2006. However, as discussed below, discussions between Airborne and the City concern the type, location, monitoring, liability and economics of fuel tanks as proposed by Airborne.

This discussion is presented in the record in the form of the minutes of the Airport Advisory Committee Meeting in June 2006 submitted by the Complainant. [FAA Exhibit 1, Item 1, exh. C] These meeting minutes (and the accompanying audio recording) provide evidence of the controversy. The discussion regarding Airborne's proposal on self-fueling and the installation of an underground tank and fuel dispensing system comprises 38 pages of transcript. Generally, the transcript of the meeting reveals that Airborne proposes to install an underground fuel tank/fueling system on its leasehold, near its hangar, but approximately one-quarter mile away from the City's fuel farm. This installation would allow Airborne to taxi its aircraft to its own fuel storage/dispensing system and directly fuel the aircraft with its own employees, possibly the pilot. The City responds that it does not wish to allow any more underground tanks around the Airport for environmental and liability reasons, but proposes to allow Airborne to store fuel in above-ground tanks at the City's fuel farm and truck fuel to its aircraft in refueling trucks, in a technical manner similar to the current practice, except Airborne would conduct the fueling with its own employees and equipment, including two refueling trucks. In part, the transcript (as confirmed by the audio recording) states:

Mr. Downie[1]: Mr. Higdon[2] has sent us a proposal asking for approval to install two underground storage fuel tanks at Hangar A-1…. [FAA Exhibit 1, Item 1, exh. C, p. 2]

Mr. Chairman[3]: Has there ever been a time where you had to make [an air ambulance] run and you couldn't because of fuel?

[1] Mr. George Downie is the Airport Manager of Hot Springs Memorial Airport.
[2] Mr. Jolly Higdon is the owner or principal of Airborne Flying Service, Inc., the Complainant.
[3] The Chairman of the Airport Advisory Committee is Mr. Ed Burke.

Mr. Higdon: Well, they've gotten other folk to do it, yes. Other folks that dispatch and I couldn't do it because I couldn't respond quick enough. It's far and few between though, Ed, but yes it has happened to us on occasion.

Mr. Harris[4]: Because of fuel?

Mr. Higdon: Yes. Well, I don't know, maybe not necessarily all together. I mean first of all you have to get up with the pilot and get him here and he's really kind of a key to getting everything in motion, but also out company starts expediting, dispatching fuel, getting it to the airplane and then so on. After hours could be a critical situation, could be. [FAA Exhibit 1, Item 1, exh. C, pp. 3-4]

Mr. Higdon: I guess its been suggested to me that we transport-- if you was too recognize us on this basis that we would locate a fuel farm next to the existing fuel farm and that would require fuel trucks, it would require liability insurance, moving fuel from the existing fuel farm to our facility, training personnel and then storage of our trucks or the trucks would be a situation. It really puts unrealistic, to me, an unrealistic procedure or policy to make that happen like that. That's why I'm pleading for building A-1 and then I can utilize my current personnel. I'll probably end up hiring another person or two, but I can use my current personnel to fuel their aircraft just like you fuel your car. [FAA Exhibit 1, Item 1, exh. C, p. 7]

Mr. Downie: They have the right to fuel their own aircraft, no argument there. It's at the city or sponsor's, which is the airport, decision as to where he is to put the tanks or where he can put the tanks. It's our decision, but Mr. Higdon has the right to fuel his own aircraft. [FAA Exhibit 1, Item 1, exh. C, p. 9]

Mr. Downie: Hot Springs has already removed [ten] underground storage tanks [four of] which were left by former tenants. We've already expensed a lot of money [in] removing underground storage tanks….

I don't think we are [exhibiting or] imposing any unfair restrictions, Mr. Higdon, by asking him to put those tanks[5] in our fuel farm area.[6] Because already we'd have a fuel farms there… [Airborne] would have to purchase two trucks, one for Avgas and one for Jet…. We asked Mr. Higdon consider a proposal… placing them up next to our fuel farm. [FAA Exhibit 1, Item 1, exh. C, pp. 15-16]

[4] Mr. Harris is an Advisory Committee member.

[5] In the context of the discussion, these refer to above-ground tanks installed at the consolidated fuel-farm at the Airport. The same fuel farm used by the Airport's retail fuel operation, and from where Airborne's fuel is currently delivered.

[6] Words in brackets represent the recorded version, where the transcribed text differs from the recorded version.

Mr. Higdon: The expense of purchasing two trucks[7] and the purchasing of trucks like that are not cheap. So that's pretty good lick on purchasing fuel for trucks of that caliber. In addition to that, I'm not real comfortable that the personnel that would be transporting that fuel from that fuel farm to my facility; I think it puts me in a liability situation. I think liability is going to be an issue and its going to be an expense in addition to that.

In addition, I'm not going to have just anybody, if that was to be in place, to move fuel from there to here…, other aircraft are here, is this person going to be able to keep this truck from getting away from him, has he had a bad night and not paying attention or something. I don't want that exposure.

Mr. Chairman: We do that all day long, though. Our trucks do that all day and all night long, too.

Mr. Higdon: I know your trucks do, but you're in the fuel business or the airport is as an FBO here and that's all you do. [FAA Exhibit 1, Item 1, exh. C, p. 17]

Mr. Higdon: I'm going to elaborate here that my application here would be no more than as if you were fueling your vehicle as done everyday. My pilots could fuel their own aircraft and my maintenance people could fuel their own airplanes.[8] [FAA Exhibit 1, Item 1, exh. C, p. 18]

Mr. Higdon: I'm not interested in any above-ground system. [FAA Exhibit 1, Item 1, exh. C, p. 37]

Mr. Higdon's vendor discussed the technical, environmental and liability issues regarding above-ground and below-ground fuel storage. [FAA Exhibit 1, Item 1, exh. C, pp. 19-34]

With regard to Airport policy, Mr. Downie, Airport Manager, expressed concern that if the City allows non-consolidated fuel storage at the Airport, by approving fuel-storage at Airborne's hangar, then the City will have to allow others to do the same. Mr. Downie states, "We cannot deny [other tenants' proposals for] underground tanks, then we'd have them all over this field. We'd be setting precedence." [FAA Exhibit 1, Item 1, exh. C, p. 32]

The Airport Advisory Committee concluded the discussion by tabling the issue until the Airport Manager can get advice from the FAA. [FAA Exhibit 1, Item 1, exh. C. p. 38]

[7] This refers to refueling trucks to transport fuel from the fuel farm to the aircraft: one for avgas for Airborne's piston aircraft; and one for jet fuel for Airborne's jet aircraft. This is how the City retails fuel to Airborne and other consumers of fuel at the airport. [FAA Exhibit 1, Item 1, exh. C. p. 17]

[8] From this reference and other context in the record, the FAA accepts that Airborne's proposal involves underground tanks and an automated fuel dispensing system to dispense fuel directly into aircraft that taxi to the fuel storage. Airborne's technical proposal from its vendor, Southern Company, includes a quote for an underground tank/fueling system, including a fueling nozzle. [FAA Exhibit 1, Item 1, exh. H]

On July 24, 2006, the City wrote to the FAA's local Airport Development Office to solicit input regarding proposed Minimum Standards regarding fuel dispensing at the Airport. The letter stated:

> *The proposed Minimum Standards for Non-Public Aircraft Fuels and Oil Dispensing.. provide: B. Tank Farm.*
> *(1) If Lessee elects to utilize fixed storage tanks, such storage tanks for each type of fuel shall have minimum capacities of 5,000 gallons each…. Fuel storage tanks shall be above ground and such installations shall be in a location approved by the* [City] [FAA Exhibit 1, Item 1, exh. D, p. 1]…
> *Some of the stated reasons for prohibiting underground storage of fuel on airport property include provisions of the City's Fire Code, increased environmental liability (storm drainage to nearby Lake Hamilton), and the difficulty in making necessary repairs. An above ground tank would make it easier to detect any leak.*
> *We currently have a tenant who desires to install underground tanks, which would be contrary to our proposed Minimum Standards. Please advise us as to whether such a prohibition would be deemed "unreasonable."* [FAA Exhibit 1, Item 1, exh. D, p. 2]

On August 4, 2006, the FAA's local Airport Development Office responded, stating, "Upon review of the proposed Hot Springs Memorial Field Minimum Standards, [they] do not appear to conflict with the Airport Grant Assurances.[9] The policy decision regarding installation of above ground fuel tanks is a local issue and FAA does not have an opinion." [FAA Exhibit 1, Item 1, exh. E]

At the August Airport Advisory Committee Meeting, the Committee again discussed the technical merits of Airborne's proposal, including the possibility of requiring double-walled underground tanks. According to Airborne's Complaint, "The Airport Advisory Committee voted four to one to allow Airborne to place single wall fuel tanks at the A1 hangar, provided that Airborne post a performance bond for insurance and name the City of Hot Springs as a named insured." [FAA Exhibit 1, Item 1, p. 5] The Complainant's transcript does not contain this evidence, however, FAA review of the audio tape confirms that the Advisory Committee did submit its recommendation to the Hot Springs Board of Directors (City Council) that Airborne's fuel-tank storage proposal be approved. [FAA Exhibit 1, Item 1, exh. F, audio]

On September 18, 2006, the Hot Springs Board of Directors (City Council) took up the question of Airborne's proposal for underground fuel storage tanks, with fuel dispensing, on its leasehold, adjacent to one of its hangars. [FAA Exhibit 1, Item 1, exh. J] As stated by the Complainant and confirmed by viewing of the video recording, the Airport Advisory Committee recommended to accept Airborne's proposal for a single-wall, underground tank, with a performance bond. The Complainant states, "Despite the

[9] As stated above, the draft minimum standards submitted for FAA review by the City, specifically stated the requirement of 'above ground' tank installation. [FAA Exhibit 1, Item 1, exh. D, p. 1]

Airport Advisory Committee's action, Downie [Airport Manager] once again instated (sic) that the tanks be located at its fuel farm." [FAA Exhibit 1, Item 1, p. 5] At the Board meeting, Mr. Downie made several points regarding his opinion that allowing underground tanks on Airborne's leasehold was not required by Federal obligations and an unwise decision. As stated by the Complainant, Mr. Downie did raise the issue of lost revenue to the City. [FAA Exhibit 1, Item 1, p. 5 and Item 1, exh. J, video] Finally, as stated by Complainant, the Hot Springs Board of Directors voted four to three to override the recommendation of the Airport Advisory Committee and not allow Airborne to place tanks at its hangar." [FAA Exhibit 1, Item 1, p. 6 and Item 1, exh. J, video]

On March 15, 2007, the FAA's local Airport Development Office wrote to both Mr. Higdon and Hot Springs City Manager, Kent Myers. In that letter, FAA manager, Ed Agnew stated:

> *FAA reviewed the proposed minimum standards [for self fueling] and concluded they would not conflict with the Airport Grant Assurances. The city of Hot Springs demonstrated the rationale for prohibiting underground storage of fuel on airport property and FAA determined the city's rationale was reasonable. FAA also concluded the city's policy decision regarding installation of above ground fuel tanks versus underground fuel tanks is a local issue….*
>
> *Based on the above, this office has determined the city of Hot Springs is in compliance with their grant assurances.* [FAA Exhibit 1, Item 1, exh. K]

IV. ISSUE

The Complainant states:

> *The City's actions are in violation of General Order 5190.6A[10], which is among other things, the FAA's requirement of an Airport which receives Federal Grants to allow section 135 operators to fuel their own aircraft. Under this order, the Airport may only require **reasonable** restrictions, and not restrictions which are so burdensome as to be calculated to be a denial of the operator's right to self-fuel. The record reflects a pattern and practice designed to be so burdensome as to amount to a denial of the right to self-fuel. In addition the minimum standards proposed after the City learned of Airborne's plan to self-fuel are clearly in violation of General Order 5190.6A. Advisory Circular 150/5190.5, dated June 10, 2002, specifically prohibits crafting minimum standards for purposes of deterring self-fueling.* [FAA Exhibit 1, Item 1, pp. 6-7]

[10] As stated, below in the Applicable Law and Policy Section, Order 5190.6A (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. The Order 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 receiving Federal funds or Federal property for airport purposes.

The Director has construed allegations citing the Order and/or Advisory Circulars to be sufficient to allege a violation of the grant assurances under Part 16. Part 16 jurisdiction applies to allegations of grant assurance violations. [See 14 CFR 16.1] The grant assurances and Federal law are controlling, not the Order or Advisory Circulars.[11]

Considering the allegation, the City's Federal obligations and controlling Federal law, and above background, the Complaint by Airborne Flying Service, Inc. raises the following issue for FAA consideration:

Whether the City, has instituted unreasonable standards regarding self-fueling, or has refused to accept specific proposals from Airborne regarding Airborne's preferred method of self-fueling, resulting in a violation of its Federal obligations under grant assurance 22(d) and Federal law 49 U.S.C. 47107(a)(6).

V. APPLICABLE LAW AND POLICY

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

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

[11] In *Lanier Aviation v. Gainesville, GA*, FAA Docket No. 16-05-03, (November 25, 2005) (Director's Determination, not appealed), the Director stated, "Advisory Circular AC 150-5190-5 does not impose obligations on a sponsor separate from those imposed by the assurances and Federal law that apply to the issues presented in this Complaint. Rather, the Advisory Circular provides advice. Consequently, the Director will examine the record regarding the related issues in light of the sponsor's obligations under grant assurances 22 and 23 and Federal law." (DD, p. 11)

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

The Airport Sponsor Assurances

The AAIA, 49 USC § 47107, et seq., sets forth assurances to which an airport sponsor receiving Federal financial assistance must agree as a condition precedent to receipt of such assistance. Pursuant to 49 USC § 47107(g)(1), the Secretary is authorized to prescribe project sponsorship requirements to ensure compliance with 49 USC § 47107. These sponsorship requirements are included in every AIP agreement as explained in the Order, Chapter 2, "Sponsor's Obligations." Upon acceptance of an AIP grant by an airport sponsor, the assurances become a binding obligation between the airport sponsor and the Federal government.

Federal Grant Assurance 22, Economic Nondiscrimination

Federal Grant Assurance 22, *Economic Nondiscrimination*, 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)]
>
> "...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 subsections (a), (d) and (f), 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.

The Order 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 Order also provides "…an aircraft operator, otherwise entitled to use the landing area, may tie-down, adjust, repair, refuel, clean and otherwise services 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).]

More specifically, with regard to self-fueling, the Order states, "The airport owner may establish reasonable standards covering the refueling… of aircraft, but it may not refuse to negotiate for the space and facilities needed to meet such standards." [See Order, Sec. 3-9(d)(2).] Also, the Order states, "An airport owner is under no obligation to permit aircraft owners to introduce on the airport equipment, personnel or practices which would be unsafe, unsightly, detrimental to the public welfare, or which would affect the efficient use of the airport facilities by others. Reasonable rules and regulations should be adopted to confine aircraft maintenance and fueling operations to appropriate locations with equipment commensurate to the job being done… With respect to fuel, therefore, the aircraft owner may assert the right to obtain fuel where he pleases and bring it onto the airport to service his own aircraft, but only with his own employees and only in conformance with the reasonable safety standards or other reasonable requirements of the airport." [See Order, Sec. 3-9(e)(3).] Finally, the Order states, "Storage and transport of aviation fuel, though not procured for resale, should be subject to reasonable restrictions and minimum standards for equipment, location and handling practices." [See Order, Sec. 3-9(e)(4)(b).]

It is the FAA's position that the airport owner meets Federal commitments when: (a) the obligations are fully understood, (b) a program (preventive maintenance, leasing policies, operating regulations, etc.) is in place which in the FAA's judgment is adequate to reasonably carry out these commitments, and (c) the owner satisfactorily demonstrates that such a program is being carried out. [Order, Sec 5-6(a)(2)]

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).]

The Prohibition Against the Granting of an Exclusive Right

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

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

Title 49 U.S.C. §40103(e), provides, in relevant part, that "[a] person does not have an exclusive right to use an air navigation facility on which Government money has been expended." An "air navigation facility" includes an "airport." [49 U.S.C. §§40102(a)(4), (9), (28)] Title 49 U.S.C. §47107(a)(4), similarly provides, in pertinent part, that "a person providing or intending to provide aeronautical services to the public will not be given an exclusive right to use the airport…"

FAA policy on exclusive rights broadly identifies aeronautical activities as subject to the statutory prohibition against exclusive rights. While public use airports may impose qualifications and minimum standards upon those who engage in aeronautical activities, we have taken the position that the application of any unreasonable requirement or standard that is applied in an unjustly discriminatory manner may constitute a constructive grant of an exclusive right. Courts have found the grant of an exclusive right where a significant burden has been placed on one competitor that is not placed on another. [*See* e.g. Pompano Beach v FAA, 774 F.22 1529 (11th Cir, 1985).]

The FAA Airport Compliance Program

The FAA discharges its responsibility for ensuring that airport sponsors comply with their Federal obligations through its Airport Compliance Program. Sponsor obligations are the basis for the FAA's airport compliance effort. The airport owner accepts these obligations when receiving Federal grant funds or 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 investment in civil aviation. The Airport Compliance Program does not control or direct the operation of airports. Rather, it monitors the administration of the valuable rights that airport sponsors pledge to the people of the United States in exchange for monetary grants and donations of Federal property to ensure that airport sponsors serve the public interest.

The Order sets forth policies and procedures for the FAA Airport Compliance Program. The Order is not regulatory and is not controlling with regard to airport sponsor conduct. Rather, it establishes the policies and procedures for FAA personnel to follow in carrying out the FAA's responsibilities for ensuring airport compliance. The Order 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 receiving Federal funds or 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 the interpretation of grant assurances by FAA personnel.

The Complaint Process

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 USC §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 that the complainant must 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."

VI. ANALYSIS

As stated in the Issues section, above, the issue before the FAA is:

Whether the City, has instituted unreasonable standards regarding self-fueling, or has refused to accept specific proposals from Airborne regarding Airborne's preferred method of self-fueling, resulting in a violation of its Federal obligations under grant assurance 22(d) and Federal law 49 U.S.C. 47107(a)(6).

Arguments of the Parties

The Director construes this issue as an allegation of a violation of grant assurance 22(d), based upon the Complainant's allegation:

> *The City's actions are in violation of General Order 5190.6A[12], which is among other things, the FAA's requirement of an Airport which receives Federal Grants to allow section 135 operators to fuel their own aircraft. Under this order, the Airport may only require* ***reasonable*** *restrictions, and not restrictions which are so burdensome as to be calculated to be a denial of the operator's right to self-fuel. The record reflects a pattern and practice designed to be so burdensome as to amount to a denial of the right to self-fuel. In addition the minimum standards proposed after the City learned of Airborne's plan to self-fuel are clearly in violation of General Order 5190.6A. Advisory Circular 150/5190.5, dated June 10, 2002, specifically prohibits crafting minimum standards for purposes of deterring self-fueling.* [FAA Exhibit 1, Item 1, pp. 6-7]

Generally, the City "affirmatively asserts that at no time has it engaged in any conduct that has unreasonably restricted the Complainant's ability to self fuel." [FAA Exhibit 1, Item 3, p. 1] The City relies, solely, on the plain language of the Order, quoting, section 3-9, which states:

> *(d)(2) The airport owner may establish reasonable standards covering the refueling… of aircraft, but it may not refuse to negotiate for the space and facilities needed to meet such standards… If the airport owner reserves unto itself the exclusive right to sell fuel, it can prevent an airline or air taxi from selling fuel to others, but it must deal reasonably to permit such operators to refuel their own aircraft…*

and

> *(e)(3) An airport owner is under no obligation to permit aircraft owners to introduce on the airport equipment, personnel or practices which would be unsafe, unsightly, detrimental to the public welfare, or which would affect the efficient use of the airport facilities by others. Reasonable rules and regulations*

[12] See footnote 10.

should be adopted to confine aircraft maintenance and fueling operations to appropriate locations with equipment commensurate to the job being done… With respect to fuel, therefore, the aircraft owner may assert the right to obtain fuel where he pleases and bring it onto the airport to service his own aircraft, but only with his own employees and only in conformance with the reasonable safety standards or other reasonable requirements of the airport…..

(e)(4) Local airport regulations may and should include such restrictions as are reasonably necessary for safety, preservation of facilities and protection of the public interest. For example: (b) Storage and transport of aviation fuel, though not procured for resale, should be subject to reasonable restrictions and minimum standards for equipment, location and handling practices. [FAA Exhibit 1, Item 3, pp. 2-3] [See Order, Sec. 3-9]

Airborne states in its Complaint:

Airport management insisted on a different arrangement, which would be to place the above ground tanks at the Airport Fuel Farm and require Airborne to truck the fuel across the Airport, this would require Airborne to buy two fuel trucks, one for 100 octane low lead and one for jet fuel. [FAA Exhibit 1, Item 1, p. 4]

The Complainant's argument relies on the alleged, apparent intent of the City's Airport Manager to discourage self-fueling, stating:

The main rationale that Mr. George Downie, the Airport Manager, (Downie) advanced at the [Airport Advisory] meeting for disallowing the underground tanks was that the City could not easily use them after Airborne's lease expired. Downie also raised concerns about ground water contamination, but was unable to produce any engineering studies….

Downie's reasons for requiring Airborne to place its tanks at the City's fuel farm had changed somewhat between the Airport Advisory Committee meeting and the Board of Director's meeting. Downie cautioned the Board about lost revenue if Airborne was allowed to self-fuel…. One may only conclude from Downie's statement that the purpose of requiring placement of the tanks at the fuel farm was to make self fueling so burdensome and expensive that Airborne would be forced to continue buying fuel from the City. [FAA Exhibit 1, Item 1, pp. 5-6]

However, the Complainant does not explain how the City's actions or requirements are unreasonable or burdensome, other than to mention the added cost over Airborne's preferred method and location. As stated in *BMI Salvage Corp. v Miami-Dade County*, FAA Docket No. 16-05-16, (July 25, 2006) (Director's Determination) "motive or ill will does not, alone, amount to non-compliance, even if established by the Complainant. Such evidence must be accompanied by an actual unreasonable denial of access for an aeronautical activity or unjust economic discrimination. Motive alone does not establish non-compliance." [DD, p. 16] Evidence of motive is not irrelevant, but must be

accompanied by proof from a complainant that a sponsor has unreasonably denied access. The audio and video recordings of the Advisory Committee meetings and the Board of Directors meeting do include mention of financial issues, but are not evidence that the Airport Manager's primary motive was to discourage self-fueling for the financial benefit of the City's proprietary exclusive fuel concession. [FAA Exhibit 1, Item 1, exh. J, video]

Consequently, the FAA is left with the question as stated as the *Issue*, above: whether the sponsor's self-fueling requirements are reasonable and whether their denial of Airborne's preferred self-fueling method is reasonable.

Part 16 Precedent and Analysis on Self-Fueling

The FAA has issued many agency decisions with regard to a sponsor's Federal obligations regarding self-fueling. In the extant Determination, we discuss the following:

> *AmAv v. Maryland Aviation Administration*, Docket No. 16-05-12, Director's Determination;
>
> *Monaco Coach Corporation v. City of Eugene*, Docket No. 16-03-17, Director's Determination and Final Agency Decision;
>
> *Scott Aviation v. Dupage Airport Authority*, Docket No. 16-00-19, Director's Determination; and
>
> *Cedarhurst Air Charter, Inc. v. County of Waukesha*, FAA Docket No. 16-99-14, Director's Determination.

Scott is a Director's Determination (DD) that was not appealed to the Associate Administrator for Airports. *AmAv* is a DD, upheld by a Final Agency Decision and not appealed to an U.S. Court of Appeals. *Monaco Coach* is a DD and Final Agency Decision that was not appealed to a U.S. Court of Appeals. *Cedarhurst* is a DD, upheld by a Final Agency Decision and resolved by sponsor corrective action. Thus all four decisions are now final and authoritative precedent.

Monaco Coach is particularly similar and is quoted extensively, below. This comparison of a complainant's preferred method of self-fueling and a sponsor's self-fueling requirements is evident in *Monaco Coach*. That case is substantially similar to the extant case, with the exception that the Respondent, the City of Eugene, did not operate a proprietary exclusive for the sale of fuel. Rather the Complainant alleged, there, that

unreasonable terms discouraged self-fueling to the benefit of the airport's FBO. The Director's Determination summarizes the facts of *Monaco Coach*:

> *The Complainant alleges that it was denied the right to install an aircraft fueling station on its leasehold to provide jet fuel for its fleet of privately owned aircraft. This measure would save the Complainant $65,000 annually. The Complainant argues that by denying its request, the City has granted an exclusive right to the Airport's sole fixed-base operator for providing jet fuel on Mahlon Sweet Field. Complainant also argues that the City has no reasonable explanation for denying the Complainant's request; and that the plan the Complainant submitted for a fueling station addresses the City's safety and environmental concerns and is superior to the Airport's existing fuel farm.*
>
> *The City argues that it has not granted the fixed-base operator an exclusive right for the sale of jet fuel. The Complainant has not been barred from servicing its aircraft. The City has exercised its management authority as defined in the airport rules and the Complainant's lease to determine how the Complainant services its aircraft and where its support equipment (fuel station) is located. In this case, the City has for safety and environmental reasons, centralized all fuel storage on the airport at its existing fuel farm, including fuel storage for the fixed-base operator.* [*Monaco Coach*, DD, p. 2]

In the Final Agency Decision in *Monaco Coach*, the Associate Administrator upholds the Director's dismissal of the complaint, stating:

> *The Director correctly and consistently applied Federal law and policy in regard to the Respondent's obligations to the public to provide for reasonable opportunities to self-fuel. The Respondent's Federal obligations do not require it to provide a specific level of service, level of convenience or amount of cost savings, simply because a specific proposal might be reasonable. Rather, the standard is that any sponsor will provide a reasonable opportunity to self-fuel, so that the public taxpayers that finance airport improvements can be assured that the Airport Improvement Program investments are reasonably available to the public, including reasonable access to self-fueling. Even though the Complainant ably describes how reasonable its specific proposal for fuel storage is, the Complainant fails to develop how the Respondent's self-fueling requirement is unreasonably burdensome, other than to contend that it is more expensive. The FAA expects that operating at an airport according to reasonable sponsor-required standards may cost more money than any specific alternative might cost. As discussed below, the Record in this case does not establish that the Respondent's proposed alternatives are unreasonably expensive, nor that the Respondent's interest in the safe and prudent management of the airfield is unreasonable.*
>
> *Furthermore, the Complainant's argument is unconvincing in part, because, it is arguing that it is being discriminated against in favor of the FBO. However, it is precisely the requirement that the Complainant operate in a manner nearly*

identical to the FBO to which the Complainant objects. The cost savings to be obtained by near-hangar fueling is one of adhering to Airport procedures that require moving fuel from the Airport's fuel farm to the aircraft. The savings is not one of avoiding retail mark-up. If Monaco wishes to avoid the FBO's retail mark-up, it may do so by self-fueling in a manner similar to the FBO. However, it has rejected this alternative as infeasible and more expensive than its preferred alternative, which is to deny the sponsor's discretion to manage the operation of the Airport. (*Monaco Coach*, FAD, p. 16)

In this case, because of the specific circumstances regarding self-fueling opportunities at the Airport, the Sponsor's Federal obligations did not require it to further consider the Complainant's specific proposal for its preferred method of self-fueling. The Director correctly concluded this in his finding. We note that the Complainant places an inaccurate emphasis on the Director's statement that the Respondent is not obligated to consider users' preferred alternatives, since clearly, the Director expects that sponsors will continue to respectfully consider the proposals of its users. That is precisely what occurred here, as the Record indicates that the Respondent did consider the Complainant's original proposal, did discuss it with airport users and its governing board, made a determination, and did communicate that determination to the Complainant sufficiently. [FAA Exhibit 1, Item 3, exhs. A & B] Since it appears by the Record that the Respondent is still willing to consider the specific circumstances of self-fueling from a centrally located fuel-farm, the FAA expects that the Respondent will work cooperatively to consider mutually acceptable proposals by Monaco regarding self-fueling. The FAA has found in Cedarhurst Air Charter, Inc. v. County of Waukesha, FAA Docket No. 16-99-14 (August 7, 2000), that unreasonably confounding, vague or uncooperative behavior on behalf of a sponsor in developing self-fueling procedures can amount to an unreasonable denial of access. The FAA does not see that in this case.[13]

In regard to the Respondent's obligation not to prevent access to reasonable self-fueling, the Associate Administrator finds that the Director's Determination is based on a preponderance of reliable evidence presented in the Record and an accurate application of Federal law and the Respondent's grant assurances. Specifically, the Associate Administrator concurs with the Director's findings that the Record in this case did not establish that the Respondent violated its Federal obligations under grant assurance 22 by improperly denying the Complainant's fuel storage proposal. (*Monaco Coach*, FAD, p. 17)

The Complainants in the present case have failed to show that the City's proposal to accommodate Airborne's self-fueling, as described by Airborne above, is unreasonable, or that the City's interest in the safe and prudent management of the airfield is

[13] In *Cedarhurst*, the sponsor not only declined to issue a specific, approved self-fueling procedure, but also declined to allow any process preferred by a tenant, confounding any ability to self-fuel. The FAA does not conclude in the extant case that the City's actions toward the Complainant, including three extensive public meetings [FAA Exhibit 1, Item 1, exhs. C, F and J] has been confounding, vague, or uncooperative.

unreasonable. In fact, the sponsor in *Monaco Coach* had very similar requirements to those proposed by the City, in this case. The Complainant in the extant case simply complains, "Airport management insisted on a different arrangement, which would be to place the above ground tanks at the Airport Fuel Farm and require Airborne to truck the fuel across the Airport, this would require Airborne to buy two fuel trucks, one for 100 octane low lead and one for jet fuel." [FAA Exhibit 1, Item 1, p. 4] Also, the sponsor in both the extant case and in *Monaco Coach* provided an opportunity to consider the complainants' proposals and offered an alternative method to self-fuel, unlike *Cedarhurst,* discussed above, wherein the sponsor provided no method to self-fuel. The FAA is unable to find fault with the Complainant's own description of the City's proposal or to distinguish the circumstances from that of *Monaco Coach,* discussed above.

The findings in *Monaco Coach* constitute strong precedent, having been applied to cases prior to and subsequent to the decisions in *Monaco Coach*. Prior to *Monaco Coach*, the Director issued *Scott Aviation v. Dupage Airport Authority*, Docket No. 16-00-19, (July 19, 2002)(Director's Determination). In *Scott*, the Director stated:

> *The Director is not persuaded that the requirement … to park fuel trucks … off the airport is unreasonable.*[14] *The Director agrees with the Airport Authority that airport sponsors can restrict fueling or certain other types of equipment to specific locations. Although Scott Aviation argues that it should be able to park its fuel trucks on the public ramp area, the Airport Authority is under no obligation to allow this.* [Scott v. Dupage Airport Authority, Docket No. 16-00-19, p. 21 para. 5.]

Also, the concepts of *Monaco Coach* have been applied in subsequent dismissals, including *AmAv v. Maryland Aviation Administration*, Docket No. 16-05-12, (March 20, 2006). In AmAv, the Director stated, "As…. applied in both *Scott* and *Monaco,* a sponsor has discretion in determining how fueling will operate at its airport." [AmAv, DD, p. 19]

Prior to the extant Complaint, the FAA reviewed the City's minimum standards, at the request of the City, regarding the handling of fuel for self-fueling and the City's requirement of above-ground fuel storage tanks. [FAA Exhibit 1, Item 1, exh. D] The FAA stated that the City's minimum standards were not in conflict with the City's Federal obligations. [FAA Exhibit 1, Item 1, exh. E] In any case, the City's proposed minimum standards, as reflected in the record at exh. D, allowed the City to offer Airborne a reasonable method of self-fueling at the Airport, as discussed above. The Complainant presents no information in this Complaint to alter the FAA's prior

[14] As stated in *AmAv v. Maryland Aviation Administration*, Docket No. 16-05-12, (March 20, 2006)(Director's Determination), *Scott* stands for the airport proprietor's right to administer self-fueling procedures to promote its proprietary interests, including protection from liability, self-sustainability, safety and efficiency. Some of these procedures might be more burdensome to a self-fueler than other available procedures. In other words, *Scott* stands for the principle that a sponsor can tell tenants where and under what circumstances to park their trucks engaged in self-fueling.

conclusion. Upon review of the City's requirement to store fuel at the City's fuel farm and truck the fuel to aircraft, the FAA concurs that this does not appear to be an unreasonable requirement, nor are the minimum standards unreasonably drafted. It's important to note that the FAA does not approve minimum standards. Rather, the standard of compliance is measured against what a sponsor actually requires in its proposals to users. The record in this case reveals a self-fueling process, technically similar to that sustained in *Monaco Coach.*

Exclusive Rights

The Complainant cited the Advisory Circular AC 150-5190-5 (dated June 10, 2002), relating to Exclusive Rights and Minimum Standards and the Respondent relied, solely, on the Order and its chapter, titled "Exclusive Rights." As stated above, however, the Complainant did not reference the Federal law underlying exclusive rights, nor allege a violation of grant assurance 23. According to long-standing practice, the Director construed the Complainant's allegations according to the most relevant grant assurance (22(d)), since that grant assurance specifically addresses the rights of Part 135 air carriers to service their own aircraft, as claimed by the Complainant. The Director declines to construe an allegation of a violation of the prohibition on an exclusive right, because the Complainant did not cite such a violation. However, the analysis of a violation is the same under grant assurances 22 and 23. When, as in this case, the Director could find a constructive granting of an exclusive right through exercise of an unreasonable restriction on fueling, such a finding would also require the finding of a violation of grant assurance 22(d). As discussed extensively herein, the evidence does not support a finding of a violation of grant assurance 22(d); therefore, there cannot be a violation of grant assurance 23.

VII. CONCLUSION

The Director finds that the record in this case does not provide sufficient evidence to sustain Airborne's allegations that the City of Hot Springs has violated its Federal obligations by imposing unreasonable requirements upon Airborne to self-fuel. The Complainant has not shown that the City's offer of a method to self-fuel is unreasonable. Nor has the Complainant shown that the City's declining to accept Airborne's preferred method of self-fueling is an unreasonable denial of access. The City correctly recognized Airborne's right to self-fuel and proposed a reasonable method to do so, in general compliance with grant assurance 22(d).

Based on the foregoing discussion and analysis, which takes into account the procedural history and background information as well as the applicable law and policy, the Director finds that the City is not in violation of its Federal obligations pursuant to grant assurance 22, *Economic Nondiscrimination* pursuant to Federal law 49 USC § 47107(a).

ORDER

Accordingly, it is ordered that:

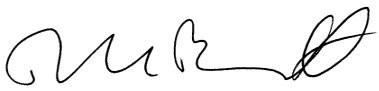
1. The Complaint is dismissed.

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

RIGHT OF APPEAL

This Director's Determination, FAA Docket No. 16-07-06, is an initial agency determination and does not constitute a final agency decision and order subject to judicial review. [14 CFR § 16.247(b)(2)] A party to this proceeding adversely affected by the Director's Determination may appeal the initial determination to the FAA Associate Administrator for Airports pursuant to 14 CFR § 16.33(b) within thirty (30) days after service of the Director's Determination.

Signed,



December 18, 2007

_____ _____

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

Date