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

JetAway Aviation, Inc.
COMPLAINANT
v.
Montrose County, Colorado and the Montrose County Building Authority
RESPONDENT

Docket No. 16-08-01

DIRECTOR'S DETERMINATION

I. INTRODUCTION

This matter is before the Federal Aviation Administration (FAA), Director of the Office of Airport Compliance and Field Operations, to investigate pursuant to the *Rules of Practice for Federally Assisted Airport Enforcement Proceedings* found in Title 14 Code of Federal Regulations (CFR), Part 16.

JetAway Aviation (JetAway/Complainant) filed this formal Complaint pursuant to 14 CFR Part 16 against the Board of County Commissioners (BOCC), Montrose County, Colorado and the Montrose County Building Authority (County/Respondent/Sponsor), which owns and operates the Montrose Regional Airport (Airport) in Montrose County, Colorado. The Complainant alleges that the Respondent is in violation of its Federal grant assurances 22, *Economic Nondiscrimination*; and 23, *Exclusive Rights* by allegedly favoring the incumbent full-service FBO,[1] Jet Center Partners (JCP) and disfavoring JetAway in a manner that unreasonably denies JetAway's aeronautical access to the Airport and grants a prohibited exclusive right to JCP. [FAA Exhibit 1, Item 1, pp. 1-2]

JetAway and the Respondent were parties to a previous Part 16 proceeding. [*See* JetAway Aviation LLC v Board of County Commissioners, Montrose County, Colorado, FAA Docket No. 16-06-01, (November 6, 2006) (Director's Determination) and FAA Exhibit 1, Item 3, exh. A] (2006 JetAway DD) Complainant states that "two years have now passed… and the County has continued its pattern of delay and refusal to negotiate with JetAway in good faith with respect to JetAway's proposal to provide FBO services and sell aviation fuel on the Airport." [FAA Exhibit 1, Item 1, p. 3]

[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.]

The Respondent denies these claims. Specifically, the Respondent denies that it is violating grant assurance 22. [FAA Exhibit 1, Item 3, p. 8] The County denies that it is violating grant assurance 23 or 49 U.S.C. §§ 40103(e) and 47107(a)(4), stating that it has identified a site available on the Airport which may be leased for FBO operations in accordance with the Director's comments in the 2006 JetAway DD. [FAA Exhibit 1, Item 3, p. 4] [See Also FAA Exhibit 1, Item 3, exh. A, p. 35]

Based on the Director's review and consideration of the evidence submitted, the administrative record designated as FAA Exhibit 1, the relevant facts, and pertinent law and policy, the Director concludes, as set forth herein, that the Respondent is currently not in violation of grant assurances 22, *Economic Discrimination* or 23, *Exclusive Rights.*

II. PARTIES

Montrose Regional Airport (Airport) is a public-use airport owned by Montrose County and operated by the Montrose County Board of County Commissioners (BOCC), Montrose County, Colorado. The Montrose County Building Authority is the owner of the land and included as a co-sponsor of the Airport, having signed AIP grant agreements. [FAA Exhibit 1, Item 4, p. 1] Montrose Regional Airport is a primary commercial service airport. FAA records indicate the planning and development of the Airport has been financed with funds provided by the FAA under the Airport Improvement Program (AIP) authorized by the Airport and Airway Improvement Act of 1982, as amended, 49 U.S.C. § 47101, *et seq.* [See FAA Exhibit 1, Item 18]

The Complainant, JetAway Aviation leases land from One Creative Place, LLC. JetAway may access the Airport (including the taxiing of aircraft through the airport boundaries), pursuant to the powers granted by Montrose County in a specific 'through the fence agreement'[2] assigned to One Creative Place and its tenants, titled "Agreement Authorizing Off-Airport Operations at Montrose Regional Airport." (Off-Airport Agreement) [FAA Exhibit 1, Item 1, exh. 2] JetAway does business at the Airport and provides several aeronautical services. [*See* 2006 JetAway DD; FAA Exhibit 1, Item 3, exh. A, pp. 2 & 4]

However, One Creative Place and JetAway have common ownership. According to the Complainant's FBO proposal and revised draft settlement agreement, dated November 28, 2007[3], Stephen S. Stuhmer offers himself on the signature line as a principle of JetAway Aviation, One Creative Place LLC and KMTJ Fuel LLC, located at One Creative Place, Montrose, Colorado. [FAA Exhibit 1, Item I, exhs. 6 & 7] JetAway states, in its Reply, "JetAway Aviation, LLC and One Creative Place, LLC are two separate legal entities...

[2] The FAA uses the term 'through-the-fence' operation to refer to an operation that involves the movement of aircraft to and from the airfield to a location not owned or controlled by the airport sponsor. Such an operation may be commercial or non-commercial. A "through-the fence" (TTF) operation may range from only aircraft storage to a full-service fixed-base operation offering the into-plane sale of aviation fuels.
[3] In this case, JetAway alleges that the County's failure to accept this November 28, 2007 settlement agreement establishes the County's violation of the grant assurances, as discussed herein.

The two limited liability companies presently do have common ownership...." [FAA Exhibit 1, Item 5, pp. 33-34] In the 2006 JetAway DD, the Director stated that JetAway filed an action in Montrose County District Court, "to determine the extent of services that may be provided to the general public under the Off-Airport Agreement." [FAA Exhibit 1, Item 3, exh. A, p. 6] In its Findings of Fact, Conclusions of Law and Order, that Court ordered, "Jetaway can self-fuel aircraft but cannot fuel any other aircraft. Any airplane to be self-fueled must be owned and titled to One Creative Place, LLC." [FAA Exhibit 1, Item 5, exh. 60, p. 40] It appears that JetAway and/or KMTJ Fuel have the right to self-fuel aircraft titled to One Creative Place, LLC. Throughout the multiple court pleadings, the parties and the court refer to the plaintiffs as JetAway, stating, "One Creative Place, LLC, JetAway, LLC and KMTJ Fuel, LLC (collectively referred to as "JetAway")." [FAA Exhibit 1, Item 5, exh. 60, p. 1] The Director adopts the Montrose County District Court's practice to refer to One Creative Place, LLC, JetAway, LLC and KMTJ Fuel, LLC, collectively as "JetAway."

III. PROCEDURAL HISTORY and BACKGROUND

Complainant's Part 16 Procedural History

On January 10, 2006, JetAway filed formal Complaint, FAA Docket No. 16-06-01, against the County with the FAA under 14 CFR Part 16. (2006 JetAway Complaint) [FAA Exhibit 1, Item 3, exh. A, p. 7]

On November 6, 2006, the FAA issued a Director's Determination for FAA Docket No. 16-06-01 (2006 JetAway DD) [JetAway Aviation LLC v Board of County Commissioners, Montrose County, Colorado, FAA Docket No. 16-06-01, (November 6, 2006) (Director's Determination) and FAA Exhibit 1, Item 3, exh. A], finding that the County was not currently in violation of its grant assurances. (2006 JetAway DD) The FAA also offered to assist in dispute resolution through mediation. [2006 JetAway DD, FAA Exhibit 1, Item 3, exh. A, p. 35]

FAA engaged in mediation with both parties beginning on March 6, 2007. [FAA Exhibit 1, Item 1, page 7-8] The FAA mediation ended on November 19, 2007. [FAA Exhibit 1, Item 1, page 6] The County terminated settlement negotiations by letter dated December 5, 2007. [FAA Exhibit 1, Item 1, exh. 8]

On January 25, 2008, JetAway filed this Part 16 Complaint, FAA Docket No. 16-08-01 [FAA Exhibit 1, Item 1]

FAA issued its Notice of Docketing, dated February 12, 2008. [FAA Exhibit 1, Item 2]

On March 26, 2008, the Respondent filed its Answer and Motion to Dismiss and an errata on April 30, 2008. [FAA Exhibit 1, Items 3 & 4]

On July 14, 2008, JetAway filed their Reply to the Respondent's Answer and Motion to Dismiss. [FAA Exhibit 1, Item 5]

On August 15, 2008, the Respondent filed its Rebuttal to the Complainant's Reply. [FAA Exhibit 1, Item 6]

In the fall of 2008, the parties continued negotiations in an attempt to settle their dispute. [FAA Exhibit 1, Item 17] The parties moved to supplement the record with additional pleadings, with evidence, several times through March 3, 2009. [FAA Exhibit 1, Items 7-12, 14-16]

The FAA acknowledged the parties' attempts and pleadings, eventually extending the due date of the issuance of the Director's Determination to June 30, 2009. [FAA Exhibit 1, Items 13, 17, 18]

Factual Background

Many of the documents comprising the record for this Complaint consist of pleadings submitted in court proceedings in other venues, including Colorado State Court and United States District Court, where action is still pending. Also, as stated, JetAway has filed a previous formal Part 16 Complaint on similar grounds. The parties submit extensive draft and final planning documents, some with FAA-approval and some without. The parties submit opposing technical studies regarding the layout and operation of the Airport. Finally, JetAway submits documents associated with negotiations between the parties in FAA-sponsored mediation, prior to and after the filing of the extant 2008 JetAway Complaint.

In its Complaint, JetAway states: "the background has been stated in parties' pleadings and the 2006 JetAway DD in FAA Docket No. 16-06-01, which JetAway incorporates by reference." [FAA Exhibit 1, Item 1, p. 2]

On August 23, 2001, the County entered into an "Agreement Authorizing Off-Airport Operations" (Off-Airport Agreement) with several entities that controlled property adjacent to the Airport. This adjacent property, known as "the Park," is on the northern boundary of the Airport between the runways. The Off-Airport Agreement specifies that any successor in interest to any of the Park owners "shall be entitled to all rights and responsible for all liabilities under this Agreement." It contains a covenant specifying that "this Agreement, and the obligations and benefits of the parties provided herein, shall be covenants running with the land, and shall [be] binding upon and inure to the benefit of the parties herein, and their respective heirs, successors, and assigns." [FAA Exhibit 1, Item 1, exh. 2, p. 9] [2006 JetAway DD, FAA Exhibit 1, Item 3, exh. A, p. 4]

On August 4, 2003, the County adopted minimum standards and requirements for the provision of commercial aeronautical services at the Airport (2003 Minimum Standards). [FAA Exhibit 1, Item 1, p. 9 & exh. 9] At the time, a full-service, County-owned, fixed-base operator – MTJ Air Services – served the Airport. The fixed-base operator was

located on the south end of the apron, west of Runway 13/31. [2006 JetAway DD, FAA Exhibit 1, Item 3, exh. A, p. 4]

In 2004, another entity – One Creative Place, LLC – purchased property within the Park and succeeded to rights under the Off-Airport Agreement. The County executed the Assignment of the Off-Airport Agreement in October 2004, effectively giving One Creative Place the rights under the original August 23, 2001, Agreement Authorizing Off-Airport Operations. [FAA Exhibit 1, Item 1, exh. 2] One Creative Place owns off-airport land and facilities and leases certain facilities to several tenants engaged in various business activities. JetAway Aviation is one of the tenants of One Creative Place. This allowed JetAway to conduct "through-the-fence" aeronautical activities at the Airport. [2006 JetAway DD, FAA Exhibit 1, Item 3, exh. A, p. 4]

In 2005, the County decided to privatize fixed-base operations and issued a Request for Proposals (RFP) seeking fixed-base operators that complied with the Montrose Regional Airport Minimum Standards. The County issued the RFP on April 1, 2005. [FAA Exhibit 1, Item 1, exh. 13] Two entities submitted proposals in accordance with the County's RFP and the minimum standards. One was the Complainant, JetAway Aviation; the other was Jet Center Partners (also known as Black Canyon Jet Center or JCP). [2006 JetAway DD, FAA Exhibit 1, Item 3, exh. A, p. 4]

On August 15, 2005, the County selected the JCP proposal for negotiation. JetAway's proposal was not selected. [2006 JetAway DD, FAA Exhibit 1, Item 3, exh. A, p. 4]

On November 7, 2005, JetAway entered into a noncommercial Land Lease Agreement with the County for airport ramp space. The term of the land lease was for 25 years and the total area of the leased premises was 272,508 square feet. This area, pursuant to the Land Lease Agreement, was not intended for fixed-base operator activities and was designated "for the parking and moving of aircraft and for no other purpose." [FAA Exhibit 1, Item 1, exh. 1] [2006 JetAway DD, FAA Exhibit 1, Item 3, exh. A, p. 4]

On December 5, 2005, the County amended its minimum standards for land and improvements. With this amendment, the County increased its minimum land requirements for a fixed-base operation to 350,000 square feet with 250,000 square feet allocated as ramp. It also increased the minimum standards for improvements to require at least 27,500 square feet to be designated for fixed-base operator activities. Previously, the Airport's *Minimum Standards for the Provision of Commercial Aeronautical Services* provided: (1) the minimum land to be leased for a fixed base operation shall be 125,000 square feet, and (2) building improvements shall be permanent in nature and shall contain at least 15,000 square feet for fixed-base operations. The change in the minimum standards was adopted in Resolution No. 80-2005 of the Montrose County Board of County Commissioners dated December 5, 2005. [FAA Exhibit 1, Item 1, exhs. 20 & 21] [2006 JetAway DD, FAA Exhibit 1, Item 3, exh. A, pp. 4-5]

Also on December 5, 2005, as a result of the August 15, 2005 selection of the JCP proposal for FBO services, the County entered into an FBO agreement with JCP. The

initial term was twenty years with options to extend and rights of first refusal at the end of the options, commencing on January 4, 2006. [FAA Exhibit 1, Item 1, exh. 19]

On December 9, 2005, JetAway submitted an FBO proposal to the County and requested that the County accept its proposal at the next Board of County Commissioners meeting to be held on December 19, 2005. This proposal was for JetAway to become a second fixed-base operator. [2006 JetAway DD, FAA Exhibit 1, Item 3, exh. A, p. 5]

On December 20, 2005, the County notified JetAway that consideration of JetAway's proposal had been postponed due to specific concerns with the existing agreement authorizing off-airport operations. The County also noted that it needed to understand the functional use of the existing off-airport facility, review the proposed fixed-base operation improvements in terms of the Airport's master plan, review the fixed-base operator proposal relative to VOR[4] restrictions, determine whether to issue a request for proposals, and provide other commissioners an opportunity to participate in the evaluation process. [2006 JetAway DD, FAA Exhibit 1, Item 3, exh. A, p. 5]

On December 30, 2005, the County requested the FAA to review and comment on the Off-Airport Agreement in relation to the County's FAA grant assurances. [2006 JetAway DD, FAA Exhibit 1, Item 3, exh. A, p. 5]

On January 4, 2006, JCP began providing fixed-base operator services, including the sale of aviation fuel. [2006 JetAway DD, FAA Exhibit 1, Item 3, exh. A, p. 6]

Also, on January 4, 2006, JetAway and One Creative Place filed a Complaint for Declaratory Judgment in Montrose County District Court. The action was filed to determine the extent of services that may be provided to the general public under the Off-Airport Agreement as well as the 2004 Assignment of that Agreement. KMTJ Fuel, LLC, an affiliate or related entity of One Creative Place and JetAway, also filed in Montrose County District Court seeking declaratory relief to perform off-airport through-the-fence fixed-base operations, including fueling. [2006 JetAway DD, FAA Exhibit 1, Item 3, exh. A, p. 6 and Item 3, exh. E]

The County filed an action for Injunctive Relief against JetAway, One Creative Place, and KMTJ Fuel, LLC, requesting the Court to enjoin those entities permanently from offering any services on the off-airport property that are not permitted by the Off-Airport Agreement. JetAway and the County's cases both address the same central issue, which is the extent of services that JetAway and other Park owners and tenants may provide to the general public on the off-airport property under the Off-Airport Agreement. [2006 JetAway DD, FAA Exhibit 1, Item 3, exh. A, p. 6]

As stated above, the County did not accept JetAway's December 2005 proposal to become a second FBO on the Airport at its location adjacent to the through-the-fence access point. Therefore, on January 10, 2006, JetAway filed its 2006 formal Complaint, FAA Docket No. 16-06-01, against the County with the FAA under 14 CFR Part 16 alleging the County

[4] A VOR is a ground-based navigational aid.

had granted a prohibited exclusive right to JCP by failure to act on JetAway's proposal. (2006 JetAway Complaint) [FAA Exhibit 1, Item 3, exh. A, p. 7]

In the County's February 2006 motion for a temporary restraining order, the County requested, among other things, that the Court enjoin JetAway from fueling aircraft and providing fixed-base operator services. The Court held a hearing on the motion on February 15 and 17, 2006, and issued an Order on February 17. The District Court for Montrose County, in response to a request for a temporary restraining order, issued an Order on April 10, 2006, which was effective as of February 17, 2006. The Court was requested, *inter alia*, to restrain JetAway and its affiliates from providing fixed-base operator services at Montrose, and from interfering with JCP's FBO services. The Court reviewed the Off-Airport Use Agreement between JetAway and the County and found that JetAway was precluded from fueling any aircraft that are not owned by JetAway. As a result, the Court took the position that JetAway could do what it did before, but could not add fueling and fixed-base operator services not covered by the Off-Airport Agreement. [2006 JetAway DD, FAA Exhibit 1, Item 3, exh. A, p. 6]

The Court issued an Order temporarily restraining JetAway from fueling to preserve the status quo. Additionally, the Court issued an Order on April 11, 2006 consolidating the pending cases, permitting intervention, and denying a stay of the proceedings. [2006 JetAway DD, FAA Exhibit 1, Item 3, exh. A, page 6]

On August 5, 2006, JetAway requested a lease of the South Tract adjacent to its off-airport parcel consisting of 187,395 square feet. [FAA Exhibit 1, Item 1, exh. 25]

In November of 2006, the Court issued a clarifying Order that added to and clarified the temporary restraining order. This Order prohibited JetAway from advertising services that it had not been authorized by the Authority to provide. JetAway continued to advertise itself as an FBO and use the AvFuel logo. JetAway was found to be in contempt of court regarding its advertising practices, and a remedial contempt order was issued. [FAA Exhibit 1, Item 5, exhibit 60, p. 19]

On March 6, 2007, the parties and the FAA commenced mediation. The process was conducted through the FAA's Office of the Chief Counsel, Administrative and Alternative Dispute Resolution Division. [FAA Exhibit 1, Item 3, exh. F] It was not part of the Part 16 process. The FAA's participation in the mediation was governed by an agreement signed by the mediator and the parties in March 2007, which states, "mediation is a confidential process." [FAA Exhibit 1, Item 3, exh. F, para. 5] The agreement also states, "no party shall be bound by anything said or done at the mediation unless a written settlement is reached and executed by all necessary parties." [FAA Exhibit 1, Item 3, exh. F, para. 6]

On November 16, 2007, the County submitted its final settlement agreement to JetAway, which was rejected. [FAA Exhibit 1, Item 1, exh. 5] JetAway responded with its version of a settlement agreement on November 28, 2007, which the County rejected. [FAA Exhibit 1, Item 1, exh. 6] The County terminated settlement negotiations by letter to JetAway on December 5, 2007. [FAA Exhibit 1, Item 1, exh. 8]

On June 30, 2008, the District Court, Montrose County, Colorado issued its "Findings of Fact, Conclusions of Law and Order," that consolidated and ruled on the three separate lawsuits. The District Court ordered that JetAway can self-fuel its aircraft but cannot fuel any other aircraft. In addition, any self-fueling must comply with the Minimum Standards, must be from a pump with a meter system able to accurately calculate the fuel flowage, and is subject to the uniform fuel flowage fee established by the County. The Court also found that JetAway can provide towing, crew and passenger lounge facilities, public restrooms and telephone, loading and unloading, hangar storage, and aircraft maintenance. Although the Order permits JetAway to conduct these FBO activities, it must comply with the Airport's Minimum Standards. The Court also said that JetAway must apply and pay for an access permit. Upon application and payment of the fee, the County is obligated to execute a written document establishing and granting the access right as a property right appurtenant to JetAway's off-Airport parcel. The Court also terminated the Land Lease Agreement.[5] [FAA Exhibit 1, Item 5, exh. 60, pp. 40-42]

The parties continued negotiations in the fall of 2008 in an attempt to settle their dispute, but their efforts were not successful. [FAA Exhibit 1, Item 17] The parties each moved to supplement the record with additional evidence several times through March 3, 2009.

IV. ISSUES

The Complainant states that, "The County has unjustly discriminated against Complainant JetAway and granted exclusive rights to Jet Center Partners in violation of Grant Assurances 22 and 23."[6] [FAA Exhibit 1, Item 1, p. 21] In JetAway's 30 counts, within two broad allegations,[7] it raises the issues of the granting of an exclusive right to JCP by means of land leases with JCP and by means of unreasonable terms imposed upon JetAway's plan to offer commercial services, including aeronautical fueling; and the unjust economic discrimination against JetAway by alleged preference to JCP. JetAway also raises issues of errors in the County's Airport Layout Plan in its Reply [FAA Exhibit 1, Item 5, p. 55] and questions Rights and Powers granted to JCP in the form of a right of first refusal term in JCP's lease. [FAA Exhibit 1, Item 1, p. 27] Considering the above, the FAA has determined that the following issues require analysis in order to provide a complete review of the Respondents' compliance with applicable Federal law and policy:

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[5] JetAway entered into the Montrose Regional Airport Land Lease Agreement on November 7, 2005. The use of the ramp area premises was limited to parking and moving of aircraft, and FBO services were not permitted.

[6] The Complainant cites the applicable Federal law. [FAA Exhibit 1, Item 1, p. 2]

[7] The burden of proof lies with the Complainants. Complainants who file under 14 CFR Part 16 shall provide a concise but complete statement of the facts relied upon to substantiate each allegation. [*See* 14 CFR § 16.23(b)(3)] Complainants will not be deemed to meet this burden simply because they have submitted volumes of pages in exhibits if they have failed to explain how the individual exhibits support specific allegations. [*See* M. Daniel Carey and Cliff Davenport v. Afton-Lincoln County Municipal Airport Joint Powers Board, FAA Docket No. 16-06-06, (January 19, 2007) (Director's Determination), page 55]

1. Whether the County has violated grant assurance 5, *Preserving Rights and Powers.*

2. Whether the County has violated grant assurance 29, *Airport Layout Plan.*

3. Whether the County has granted an exclusive right for the use of the Airport in violation of grant assurance 23, *Exclusive Rights,* 49 U.S.C. § 40103(e) and 49 U.S.C. § 47107(a)(4) by means of land leases to Jet Center Partners (JCP).

4. Whether the County's actions with regard to JetAway's proposal for a FBO business at the Airport constitute the constructive granting of an exclusive right by means of an unreasonable denial in violation of grant assurance 23, *Exclusive Rights*, 49 U.S.C. § 40103(e) and 49 U.S.C. § 47107(a)(4).

5. Whether the County has provided more favorable treatment to JCP with regard to retail aircraft services in a manner that unjustly discriminates against JetAway in violation of Federal grant assurance 22, *Economic Nondiscrimination*, 49 U.S.C. § 47107(a).

V. APPLICABLE FEDERAL LAW AND FAA POLICY

The Federal role in civil aviation has been augmented by various legislative actions that authorize programs for providing Federal funds to local communities for the development of airport facilities. In each such program, the airport sponsor assumes certain obligations to maintain and operate its airport facilities safely and efficiently and in accordance with specified conditions. Commitments assumed by airport sponsors in 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 aeronautical access.

Title 49 U.S.C. § 47101, *et seq.*, provides for Federal airport financial assistance for the development of public-use airports under the Airport Improvement Program (AIP) established by the Airport and Airway Improvement Act of 1982, as amended. Title 49 U.S.C. § 47107, *et seq.*, sets forth assurances to which an airport sponsor agrees as a condition of receiving Federal financial assistance. Upon acceptance of an AIP grant, the assurances become a binding contractual obligation between the airport sponsor and the Federal government. The assurances made by airport sponsors in AIP grant agreements are important factors in maintaining a viable national airport system.

Airport Sponsor Assurances

As a condition precedent to providing airport development assistance under the Airport Improvement Program, 49 U.S.C. § 47107, *et seq.*, the Secretary of Transportation and, by extension, the FAA must receive certain assurances from the airport sponsor. Title 49 U.S.C. § 47107(a) sets forth the statutory sponsorship requirements to which an airport sponsor receiving Federal financial assistance must agree.

The FAA has a statutory mandate to ensure that airport owners comply with these sponsor assurances.[8] FAA Order 5190.6A, *Airport Compliance Requirements* (FAA Order 5190.6A), issued on October 2, 1989, provides the policies and procedures to be followed by the FAA in carrying out its legislatively mandated functions related to Federally obligated airport owners' compliance with their sponsor assurances. The FAA considers it inappropriate to provide Federal assistance for improvements to airports where the benefits of such improvements will not be fully realized due to inherent restrictions on aeronautical activities. The following grant assurances are relevant to this Complaint:

Grant Assurance 5, *Preserving Rights and Powers*

Grant Assurance 5, *Preserving Rights and Powers*, implements the provisions of Title 49 U.S.C. § 47107, and requires, in pertinent part, that the sponsor of a Federally obligated airport:

> *"...will not take or permit any action which would operate to deprive it of any of the rights and powers necessary to perform any or all of the terms, conditions, and assurances in the grant agreement without the written approval of the Secretary, and will act promptly to acquire, extinguish or modify any outstanding rights or claims of right of others which would interfere with such performance by the sponsor. This shall be done in a manner acceptable to the Secretary."*

The Order describes the responsibilities under Grant Assurance 5 assumed by the owners of public-use airports developed with Federal assistance. Among these is the responsibility for enforcing adequate rules, regulations, or ordinances as are necessary to ensure the safe and efficient operation of the airport. [*See* FAA Order 5190.6A, Sec. 4-7 & 4-8.]

Grant Assurance 22, *Economic Nondiscrimination*

The owner of any airport developed with Federal grant assistance is required to operate the airport for the use and benefit of the public. Federal grant assurance 22, *Economic Nondiscrimination*, (Assurance 22) deals with both the reasonableness of airport access and the prohibition of adopting unjustly discriminatory conditions as a potential for limiting access. Assurance 22 of the prescribed sponsor assurances implements the provisions of 49 U.S.C. § 47107(a)(1) through (6), and requires, in pertinent part:

> [The airport owner or sponsor] *will make the airport available as an airport for public use on reasonable terms and without unjust discrimination to all types, kinds and classes of aeronautical activities, including commercial aeronautical activities offering services to the public at the airport.* [Assurance 22(a)]

[8] *See, e.g.*, the Federal Aviation Act of 1958, as amended and recodified, Title 49 U.S.C. §§ 40101, 40113, 40114, 46101, 46104, 46105, 46106, 46110; and the Airport and Airway Improvement Act of 1982, as amended and recodified, Title 49 U.S.C. §§ 47105(d), 47106(d), 47107(k), 47107(l), 47111(d), 47122

Each fixed-based operator at the airport shall be subject to the same rates, fees, rentals, and other charges as are uniformly applicable to all other fixed-base operators making the same or similar uses of such airport and utilizing the same or similar facilities. [Assurance 22(c)]

The sponsor may establish such reasonable, and not unjustly discriminatory, conditions to be met by all users of the airport as may be necessary for the safe and efficient operation of the airport. [Assurance 22 (h)]

The sponsor may prohibit or limit any given type, kind or class of aeronautical use of the airport if such action is necessary for the safe operation of the airport or necessary to serve the civil aviation needs of the public. [Assurance 22(i)]

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

In all cases involving restrictions on airport use imposed by airport owners for safety and efficiency reasons, the FAA will make the final determination on the reasonableness of such restrictions when those restrictions deny or limit access to, or use of, the airport. [FAA Order 5190.6A, Section 4-8]

Grant 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.... 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. [Assurance 23]

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. [FAA Order 5190.6A, Section 3-9 (e)]

The FAA has updated exclusive rights guidance in FAA Advisory Circular 150/5190-6 *Exclusive Rights at Federally-Obligated Airports,* January 4, 2007, stating:

> *An exclusive rights violation can occur through the use of leases where, for example, all the available airport land and/or facilities suitable for aeronautical activities are leased to a single aeronautical service provider who cannot put it into productive use within a reasonable period of time, thereby denying other qualified parties the opportunity to compete to be an aeronautical service provider at the airport. An airport sponsor's refusal to permit a single FBO to expand based on the sponsor's desire to open the airport to competition is not a violation of the grant assurances. Additionally, an airport sponsor may exclude an incumbent FBO from participating under a competitive solicitation in order to bring a second FBO onto the airport to create a more competitive environment.* [Excusive Rights AC, Section 1.3(b)(3)]

Grant Assurance 24, *Fee and Rental Structure*

Grant assurance 24, *Fee and Rental Structure*, addresses fees the owner or sponsor levies on airport users in exchange for the services the airport provides.

Title 49 U.S.C. § 47107(a)(13) requires, in pertinent part, that the owner or sponsor of a Federally obligated airport "will maintain a schedule of charges for use of facilities and services at the airport that will make the airport as self-sustaining as possible under the circumstances existing at the airport."

Grant assurance 24 satisfies the requirements of § 47107(a)(13). It provides, in pertinent part, that the owner or sponsor of a Federally-obligated airport agrees to establish a fee and rental structure that will make the airport as self-sustaining as possible under the circumstances existing at the particular airport, taking into account such factors as the volume of traffic and economy of collection. This sponsor will maintain a fee and rental structure consistent with assurances 22, *Economic Nondiscrimination*, and 23, *Exclusive Rights.* The intent of the assurance is for the airport operator to charge fees that are sufficient to cover as much of the airport's costs as is feasible.

Moreover, the Order states that the owner or sponsor's obligation to make an airport available for public use does not preclude the owner or sponsor from recovering the cost of providing the facility. The owner or sponsor is expected to recover its costs through the establishment of fair and reasonable fees, rentals, or other user charges that will make the airport as self-sustaining as possible under the circumstances existing at the particular airport. [*See* FAA Order 5190.6A, Section 4-14(a).]

Grant Assurance 29, *Airport Layout Plan*

Grant Assurance 29, *Airport Layout Plan* (ALP), implements the provisions of 49 U.S.C. § 47107(a)(16) by requiring an airport sponsor to keep up-to-date the ALP. Specifically, Grant Assurance 29 requires the airport sponsor to show on its ALP the boundaries of the airport and all proposed additions thereto, the location and nature of all existing and

proposed airport facilities and structures (such as runways, taxiways, aprons, terminal buildings, hangars and roads), and the location of all existing and proposed nonaeronautical uses.

Airport layout plans and amendments, revisions, or modifications thereto, are subject to the approval of the FAA. What this means from a practical standpoint is that an airport sponsor must not make or permit any changes or alterations in the airport or any of its facilities which are not in conformity with the airport layout plan. The FAA may require elimination, relocation or mitigation of any change to the airport that is not approved by the FAA on the ALP and that adversely affects the safety, utility or efficiency of any Federally improved property.

Airport Agreements Granting "Through-the-Fence" Access

The Federal obligation to make an airport available for the use and benefit of the public does not impose any requirement to permit access by aircraft from adjacent property.[9] However, there are times when the sponsor will enter into an agreement that permits access to the airfield by aircraft based on land adjacent to, but not a part of, the airport property. This type of an arrangement has frequently been referred to as a "through-the-fence" operation even though a perimeter fence may not be visible.

Because through-the-fence arrangements can place an encumbrance upon the airport property and reduce the airport's ability to meet its Federal obligations, as a general principal the FAA does not support agreements that grant access to the public landing area by aircraft stored and serviced off-site on adjacent property. The existence of such an arrangement could conflict with the sponsor's Federal obligations unless the sponsor retains the legal right to require the offsite property owner or occupant to conform in all respects to the requirements of any existing or proposed grant agreement or Federal property conveyance obligation. [FAA Order 5190-6A, Section 6-6]

The development of aeronautical enterprises on land off-airport and not controlled by the sponsor can create problems. For example, it can result in an economic competitive advantage for the "through-the-fence" operator to the detriment of on-airport tenants. To equalize this imbalance, the sponsor should obtain from any off-airport enterprise or entity a fair return for its use of the airfield by assessing access fees from those entities having "though-the-fence" access.

The airport sponsor must not discriminate against those aeronautical users within the airport. However, the airport may also charge any fee it sees fit to those outside the airport. In addition, the airport sponsor is entitled to seek recovery of initial and continuing capital and operating costs of providing a public use airfield. Moreover, special safety and operational requirements should be incorporated into any access

[9] See FAA Order 5190.6A, Section 6-6(a). Based on this, an airport sponsor may simply deny "through-the-fence" access if it so chooses. Since federal obligations do not require that access be granted under these circumstances, users having access to the airport under a "through-the-fence" agreement are not protected by the airport sponsor's federal obligations to the FAA.

agreement to ensure that the through-the-fence access does not complicate the control of vehicular and aircraft traffic or compromise the security of the airfield operations area. [FAA Order 5190-6A, Section 6-6]

Finally, the existence of an arrangement granting access to a public landing area from off-site locations contrary to FAA recommendations shall be reported to the FAA along with details on the circumstances. If the FAA determines that the existence of such an agreement circumvents the attainment of the public benefit for which the airport was developed, the owner of the airport will be notified that the airport may be in violation of its agreements with the Government. [FAA Order 5190-6A, Section 6-6]

The FAA Airport Compliance Program

The FAA discharges its responsibilities for ensuring airport owners' compliance with their Federal obligations through its Airport Compliance Program. The FAA's airport compliance efforts are based on the contractual obligations an airport owner accepts when receiving Federal grant funds or the transfer of Federal property for airport purposes. These obligations are incorporated in grant agreements and instruments of conveyance in order to protect the public's interest in civil aviation and to ensure compliance with Federal law.

The FAA Airport Compliance Program is designed to ensure the availability of a national system of safe and properly maintained public-use airports operated in a manner consistent with the airport owners' Federal obligations and the public's investment in civil aviation.

The Airport Compliance Program does not control or direct the operation of airports. Rather, it monitors the administration of the valuable rights pledged by airport sponsors to the people of the United States in exchange for monetary grants and donations of Federal property to ensure that the public interest is being served. FAA Order 5190.6A sets forth policies and procedures for the FAA Airport Compliance Program. The Order is not regulatory and is not controlling with regard to airport sponsor conduct. Rather, it establishes the policies and procedures to be followed by FAA personnel in carrying out the FAA's responsibilities for ensuring airport compliance. It provides basic guidance for FAA personnel in interpreting and administering the various continuing commitments made to the United States by airport owners as a condition of receiving a grant of Federal funds or the conveyance of Federal property for airport purposes. The Order analyzes the various obligations set forth in the standard airport sponsor assurances, addresses the nature of those assurances, addresses the application of those assurances in the operation of public-use airports, and facilitates interpretation of the assurances by FAA personnel.

The FAA Compliance Program is designed to achieve voluntary compliance with Federal obligations accepted by owners and/or operators of public-use airports developed with FAA-administered assistance. Therefore, in addressing allegations of noncompliance, the FAA will make a determination as to whether an airport sponsor is *currently* in compliance with the applicable Federal obligations. Consequently, the FAA will consider the successful action by the airport to cure any alleged or potential past violation of

applicable Federal obligation to be grounds for dismissal of such allegations. [*See* e.g. Wilson Air Center v. Memphis and Shelby County Airport Authority, FAA Docket No. 16-99-10, (August 30, 2001) (Final Decision and Order)]

Enforcement procedures regarding airport compliance matters may be found at *FAA Rules of Practice for Federally Assisted Airport Enforcement Proceedings* (14 CFR Part 16). These enforcement procedures were published in the Federal Register (61 FR 53998, October 16, 1996) and became effective on December 16, 1996.

VI. ANALYSIS AND DISCUSSION

This Complaint is primarily an allegation that Montrose County has granted an unlawful exclusive right to the Airport's FBO, Jet Center Partners (JCP), by the circumstance of the Airport layout and land leases (allegation A, counts 1-5, 8, 9) and by the intent to deny access to others by means of unreasonable terms (allegation A, counts 6 & 7). Also, JetAway alleges that the County has failed to accommodate JetAway's proposed FBO business plan at its preferred airport location (Airpark adjacent location) to such an extent as to unjustly discriminate against JetAway (allegation B). [FAA Exhibit 1, Item 1, p. 2]

The County states:

> *The County sought to accommodate JetAway's request by resolving the through-the-fence issues and without exposure for the County's residents and the expense of further litigation. The County was unable to do so. By identifying and making available the 9.612-acre site, the County is confirming its position from the onset: There is no exclusive right.* [FAA Exhibit 1, Item 3, pp. 4-5]

The allegations, arguments and evidence in this case are extensive and complex. The parties dispute each others' facts and question each others' motives, evidence and experts. Also, the parties have been engaged in extensive litigation in state court and United States District Court. [*See* FAA Exhibit 1, Item 1, exh. 3 and Item 6, exh. QQ, p.3] JetAway filed a Formal Part 16 Complaint in 2006 with similar allegations to the extant Complaint. The Director dismissed that Complaint on November 7, 2006. [FAA Exhibit 1, Item 3, exh. A] The Director understands that the Complainant and the Respondent may be expecting the FAA to find facts on various questions indirectly related to matters under FAA's jurisdiction. However, as is appropriate for a FAA Part 16 investigation, the Director must focus on questions of the Respondent's compliance with its grant assurances and Federal law. We will find facts relevant when they pertain to the question of the Respondent's compliance with its Federal obligations, relying on FAA law, policy and Part 16 precedent.

Motions and Preliminary Matters

Motion to Dismiss: Building Authority

The Complainant, JetAway, included the Montrose County Building Authority as a named-respondent in this case. JetAway had not included the Building Authority in its 2006 JetAway Complaint. In correcting an original error in its Answer, the Respondent admits that the Montrose County Building Authority has signed grant agreements, and accepted the associated grant obligations as the owner of the Airport property. [FAA Exhibit 1, Item 4] Therefore, the FAA simply accepts that the Montrose County Building Authority and Montrose County are co-sponsors of the Airport and will simply refer to them, collectively, as the Respondent, County or Sponsor. The County moved to dismiss the Montrose County Building Authority from the Complaint, because JetAway had not specifically engaged the Building Authority in informal resolution. JetAway and the County have an extensive record of attempts to resolve this ongoing dispute, including the prior 2006 JetAway Complaint and FAA-sponsored mediation. While the parties may continue to argue the importance of the relationship between Montrose County and the Montrose County Building Authority, it is the Director's view that JetAway's ongoing dialogue with airport management is sufficient for purposes of conducting informal resolution.

The County's motion to dismiss the Montrose County Building Authority is denied.

Motion to Dismiss: Confidentiality

The County moves to dismiss the Complaint because JetAway violated the confidentiality of the FAA-sponsored mediation in its pleadings. Participation in the mediation was governed by an agreement signed by the mediator and the parties in March 2007, which states, "mediation is a confidential process." [FAA Exhibit 1, Item 3, exh. F, para. 5] The agreement also states, "no party shall be bound by anything said or done at the mediation unless a written settlement is reached and executed by all necessary parties." [FAA Exhibit 1, Item 3, exh. F, para. 6] The mediation is separate and apart from this Part 16 proceeding.

In this case, JetAway has provided a snapshot in the form of JetAway's November 2007 Settlement Offer. [FAA Exhibit 1, Item 1, exh. 5] The County responds with a motion to dismiss the Complaint.

The County's motion to dismiss the Complaint over confidentiality breaches of the mediation is denied. The mediation does not control the Part 16 proceedings. Nevertheless, the confidentiality of the mediation has been breached and the documents are now in the public domain. As such the Director will consider the documents in this proceeding.

Motions to Supplement Record

Each of the parties has submitted Motions to Supplement the Record. Complainant filed multiple motions to supplement the record with additional exhibits and two responses which included additional exhibits. [FAA Exhibit 1, Item 7 (Exhibit 73), Item 8 (Exhibits 74 and 75), Item 12 (Exhibit 76), Item 14 (Exhibit 76(a), and Item 16 (Exhibit 77)] Respondent filed multiple motions to supplement the record with multiple exhibits. [FAA Exhibit 1, Item 9 (Exhibits TT, UU, VV, WW, XX), Item 11 (Exhibits YY and ZZ), and Item 15 (Exhibit AAA)] The Director issued two orders acknowledging the parties' multiple filings to supplement the record. [FAA Exhibit 1, Item 13 and Item 17]

Clearly this extensive number of supplemental filings is highly unusual in a Part 16 proceeding. Nonetheless, motions are the appropriate means to make application for an order or ruling not otherwise specifically provided for in the regulation. [See 14 CFR § 16.19(a)] The requisite procedural requirements have been met. The Director has reviewed the filings and will permit the parties to supplement the record with the requested exhibits. Accordingly, the exhibits contained in the supplemental filings, including motions and answers, will be considered by the Director in this determination and are included in the Index of the Administrative Record.

Proprietary Rights, Federal Obligations and Negotiations

One of the key fundamental principles at issue here is the proprietary rights of an airport sponsor. This was at issue in the 2006 JetAway DD. Succinctly, Federal obligations limit a sponsor's proprietary rights, but do not eliminate them. [*See,* Kent J. Ashton and Jacquelin R. Ashton v. City of Concord, North Carolina, FAA Docket No. 16-02-01 (Director's Determination Issued August 22, 2003) (Final Agency Decision Issued February 27, 2004) Ashton III, DD, p. 27]

One example of where an airport sponsor may exercise its proprietary rights is to protect itself as a going concern in the face of litigation.[10] Another way in which an airport sponsor may exercise its proprietary rights is to pursue a range of aeronautical services to serve the needs of the aviation community.[11] A third way in which an airport sponsor may reasonably exercise its proprietary rights is to plan for the long-term development,

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[10] In Kent J. Ashton and Jacquelin R. Ashton v. City of Concord, FAA Docket No. 16-02-01 (Director's Determination Issued August 22, 2003) (Final Agency Decision Issued February 27, 2004), the Director acknowledges, "*it is the Complainants' right to pursue complaints and protect their interest (however) it is the Respondent's right to protect itself from the possibility of future costly and frivolous litigation.*" Continuing, the Director found that an Airport sponsor: "... *was not obligated to expose itself to future lawsuits by entering into a business agreement with (Complainant). Given (Complainant's) prior history of lawsuits and FAA complaints, plus a threat of future litigation*" [*See,* Ashton III DD, Page 27]

[11] In Self Serve Pumps v Chicago Executive Airport, FAA Docket No. 16-07-02 (Director's Determination Issued March 17, 2008), the Director stated, "*Clearly, the Airport management believes that its bundling of associated services with the sale of fuel serves the interests of the public in civil aviation. This is its primary mission. ... In the end, the evidence presented by the Complainant is insufficient to eclipse the Airport's proprietary discretion to make management decisions in the best aeronautical interests of the public, balanced with the best business interests of the Airport as a going concern.*" [SSPumps, DD, p.25]

marketing and layout of its airport to ensure its utility and self-sustainability.[12] Finally, an airport sponsor may exercise its proprietary rights to protect itself as a going concern by limiting, mitigating or eliminating aeronautical access from adjacent off-airport property 'through-the-fence.'[13] In some cases, a sponsor's Federal obligation under grant assurance 5, *Preserving Rights and Powers*, might prevent a sponsor from accommodating the wishes of a particular on-airport, or through-the-fence proponent.

The negotiations in the FAA-sponsored mediation were not a negotiation of the County's state of compliance with its Federal obligations or part of this Part 16 proceeding. The FAA had not found the County to be in non-compliance with its Federal obligations. [FAA Exhibit 1, Item 3, exh. A]

The Director has already observed that the County might be able to structure some kind of an agreement or agreements at the Airport to allow JetAway to sell fuel in a manner within the bounds of its Federal obligations. The Director stated:

> *Additionally, the Director believes that all of the issues in this case can be resolved informally in a manner consistent with the County's Federal obligations. Since both the County and JCP have stated that an additional FBO at the Airport is feasible, that it appears that sufficient airport property is available to accommodate a second FBO, and the County appears to have concluded on March 20, 2006 that JetAway's proposal meets all Minimum Standards, successful resolution appears to be possible.* [FAA Exhibit 1, Item 3, exh. A, p. 35]

However, the Director also stated:

> *... the Federal obligation to make an airport available for the use and benefit of the public does not impose any requirement to permit access by aircraft from adjacent property and the airport sponsor may, from FAA's perspective, simply deny "through-the-fence" access if it so chooses. Based on this, Complainant's right to provide any services from its off-airport location is not a matter protected by the County's Federal obligations. Additionally, the Off-Airport Agreement can lead to violations of the airport's Federal obligations.* [FAA Exhibit 1, Item 3, exh. A, p. 13]

In addition, the Director stated other options, by pointing out that an "aerial view and the **Airport Layout Plan** clearly show that there are potential locations for FBO facilities at the Airport in addition to JCP, albeit the area may not be adjacent to JetAway's current off-airport facilities. .... The fact that potential locations for FBO operations are not located next to JetAway's current off-Airport facility should not be an issue since JetAway

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[12] In Thermco Aviation v Los Angeles, FAA Docket No. 16-06-07 (Final Agency Decision Issued December 17, 2007), the Associate Administrator states: "*The very nature of lease agreements is that they are for a definite term, so that both parties may change plans and arrangements to suit their respective interests. Federal obligations do not prevent this sponsor from exercising such change... In fact, the terms of the lease agreement are the primary protection of tenants for continued occupancy of a leasehold, not the grant assurances.*" [Thermco, FAD, p. 27]

[13] See 2006 JetAway DD.

has argued that its proposed on-Airport proposal is independent from its off-airport operations." [FAA Exhibit 1, Item 3, exh. A, p. 35, fn. 302] [*See Also* FAA Exhibit 1, Item 1, exh. 12, p. D.13, exh. 17, p. 2, exh. 26 and Item 5, exh. 53 & exh. 43, pp. E.13 & E.17]

The FAA has found in Santa Monica Airport Association (SMAA), Krueger Aviation, and Santa Monica Air Center v. County of Santa Monica, FAA Docket No. 16-99-21 (February 4, 2003), that: "*A sponsor is not required to develop any and all parcels of land in a manner consistent with the wishes of any one party, but rather may exercise its proprietary rights and powers to develop and administer the Airport's land in a manner consistent with the public's interest.*" [SMAA FAD, 16-99-21, p. 19]

Thus, the Director's guidance to the parties in the prior 2006 DD is informative here and clarifies the bounds of the County's Federal obligations and the County's proprietary rights.

Other Disputes Between the Parties

The point of the FAA-sponsored mediation was to determine whether the two parties, JetAway and Montrose County, could come to terms on their specific interests and goals. The process was conducted through the FAA's Office of the Chief Counsel, Administrative and Alternative Dispute Resolution Division. [FAA Exhibit 1, Item 3, exh. F] It was not part of this Part 16 proceeding. The Director notes that the extensive record in this case clearly demonstrates that the Complainant's primary intent in the mediation, the two FAA formal Part 16 complaints and its litigation against the County is to establish a full-service FBO facility, vending fuel, in the vicinity of its existing infrastructure on the off-airport property known as the Park. [See Procedural History and Background, and Findings of Fact]

The FAA does not arbitrate or mediate negotiations through a formal Part 16 proceeding. Nor does the FAA enforce lease terms between parties to an agreement. Rather, the FAA enforces contracts between an airport sponsor and the Federal government. [*See* AmAv v. Maryland Aviation Administration, FAA Docket No. 16-05-12, (March 20, 2006) (Director's Determination), p.23] State courts are the appropriate place for the disposition of disputes of contracts and performance under contracts. Airport sponsors are free to include terms of performance in agreements, such as leases. As discussed above, and in the 2006 JetAway DD, airport sponsors are bound by Federal obligations regarding reasonableness, non-discrimination and exclusive rights as applied to on-airport aeronautical users. But even with on-airport users, the FAA does not adjudicate questions of default under leases agreed to by parties. [FAA Exhibit 1, Item1, exh.1][14]

In fact, JetAway has been aggressive in state and Federal courts to protect its rights under its agreements. [See FAA Exhibit 1, Item 6, exh. QQ, p. 3] For example, two agreements

[14] Penobscot Air Service v. Knox County, FAA Docket No. 16-97-04 (September 25, 1997) (Director's Determination) (Penobscot), the FAA summarized this long-standing concept: *The Agency made it clear that, "The purpose of the grant assurances is to protect the public interest in the operation of Federally obligated airports. The purpose is not to provide alternative or supplemental rights to those normally available to commercial tenants in disputes with their landlords, i.e. negotiation or commercial litigation under applicable state and local laws...."* [Penobscot at page 24, citing to Sky East Services. Inc. v. Suffolk County, Complaint Nos. 13-88-06 and 13-89-01]

between JetAway and the County have been litigated: the Off-Airport Agreement [FAA Exhibit 1, Item 1, exh. 2] and the non-commercial Land Lease Agreement. [FAA Exhibit 1, Item 1, exh. 1] The findings of the state court appear well-supported by evidence and appear to address issues properly before a state court. The court's Findings Fact, Conclusions of Law and Order (Montrose Court Order), dated June 30, 2008, states:

> *The [Off-Airport Agreement is ambiguous because it is susceptible to two reasonable interpretations. Specifically, Section 3(g) can be interpreted, as argued by the County, that JetAway can only engage in services expressly allowed under the agreement. On the other hand, as argued by JetAway, Section 3(g) can be interpreted as allowing JetAway to offer any services not expressly prohibited.* [FAA Exhibit 1, Item 5, exh. 60, p. 26]

As stated, this contract dispute is within the jurisdiction of the state court. It is proper for the state court to interpret the meaning of the terms of the Off-Airport Agreement. JetAway's rights to conduct commercial activities that involve the transit of aircraft 'through-the-fence' of the Airport may be protected by the Off-Airport Agreement, but not the County's Federal grant assurances.

With regard to JetAway's rights to provide commercial services under the Off-Airport Agreement, the Montrose Court Order found:

> *The* [Off-Airport Agreement] *specifically lists the sale of aircraft fuel, flight training* [with exceptions] *and aircraft rentals or charters as additional FBO services that are prohibited. Therefore, Jetaway cannot offer these services without express approval from the County.* [FAA Exhibit 1, Item 5, exh. 60, p. 27]

With regard to JetAway's noncommercial Land Lease Agreement (LLA), the Montrose Court Order found:

> *The LLA specifies that the leased premises is for the parking and moving of aircraft and for no other purpose, and that the LLA does not create any additional rights or diminish any existing rights under the* [Off-Airport Agreement]...
>
> *The County also argues that Jetaway breached the lease by using the leased area for FBO operations. The Court agrees. It is undisputed that Jetaway fueled airplanes on the leased premises after entering into the LLA. Although Jetaway initially argued it had a right under the* [Off-Airport Agreement] *to fuel airplanes once fueling services were privatized at the Airport, it later withdrew that argument. Jetaway now concedes that it had no right to fuel airplanes without the County's approval. Fueling is an FBO service. The LLA specifically prohibits engaging in FBO services on the leased premises. Therefore, Jetaway breached the LLA in this regard. The County is entitled to terminate the lease for this breach.*
>
> *In conclusion, the LLA can be rescinded for a mutual mistake of facts. The LLA can be terminated by the County for Jetaway's breach in fueling airplanes on the leased premises.* [FAA Exhibit 1, Item 5, exh. 60, pp. 30-32]

The Court did order that, "The Land Lease Agreement is terminated." [FAA Exhibit 1, Item 5, exh. 60, p. 41] So, JetAway has no on-airport presence. Also, as stated, JetAway's noncommercial Land Lease Agreement never allowed for the conduct of commercial operations on the Airport. [FAA Exhibit 1, Item 1, exh. 1, p. 2]

Issue 1

Whether the County has violated grant assurance 5, *Preserving Rights and Powers.*

In addition to the proprietary rights and powers reserved to an airport owner, grant assurance 5 prohibits the airport sponsor from giving away rights and powers it needs to control and operate the airport. It obligates the sponsor to retain financial and legal control of airport property to ensure the airport's continued operation as an airport.

Two ways in which an airport sponsor might intentionally or unintentionally cede rights and powers is by allowing through-the-fence aeronautical access as discussed herein and by granting rights of first refusal. An airport sponsor can protect its rights and powers by limiting, mitigating or eliminating the through-the-fence agreements and by negotiating away rights of first refusal. In some circumstances, an airport sponsor's Federal obligations may require such action.

The FAA did express concern over the Off-Airport Agreement in the 2006 JetAway DD, stating that the Off-Airport Agreement provides perpetual access and benefits to any successor in interest without providing any controls for the County to negotiate with prospective successors and redefine the terms of the agreement. [2006 JetAway DD, pp. 20-21] In that determination, the Director did not find the issue rose to a level of noncompliance with grant assurance 5, *Preserving Rights and Powers*, under the circumstances existing at the Airport. The Director is reassured by the Montrose Court Order, discussed above, providing clarity to the limitations of the Off-Airport Agreement and by ensuring that commercial aircraft fueling cannot occur on the noncommercial Land Lease by terminating JetAway's on-airport leasehold.[15]

From the record, it appears that important financial considerations from the Off-Airport parties have yet to be resolved. These financial concerns are important in regard to the County's obligation to protect its on-airport aeronautical service providers from unjust economic discrimination under grant assurance 22, *Economic Nondiscrimination*; and to pursue a financially self-sustaining rate structure under grant assurance 24, *Fee and Rental Structure*. Grant assurance 24 obligates the airport sponsor to maintain a fee and rental structure that will make the airport as self-sustaining as possible under the particular circumstances existing at that airport. [*See Applicable Law and Policy*, above]

The record reflects some information relevant to the County's obligation to impose a fee and rental structure that will make the Airport as self-sustaining as possible under the circumstances. The 2006 JetAway DD notes that JetAway had not paid any fees to the

[15] In addition, the Montrose Court Order also eliminated JetAway's ability to advertise that it sells aviation fuel. [FAA Exhibit 1, Item 5, exh. 60, p. 42]

County for its access to the Airport, except for a $250 access permit fee. In the 2006 JetAway DD, the Director noted that the "disparity in [fixed-base operator] fees could affect the Airport's ability to be self-sustaining, in violation of grant assurance 24, *Fee and Rental Structure*." [2006 JetAway DD, p. 21.] Furthermore, the Montrose Court Order observed the following:

> *JetAway never obtained an access permit from the County. Its position regarding this issue is inconsistent. On the one hand, JetAway maintains that nobody ever brought the need for an access permit to its attention, even though the requirement of an access permit is explicitly addressed in the OAA* [Off-Airport Agreement]. *It has also argued that the OAA itself was the access permit. Recently, JetAway tendered to the County $250 for the access fee (the amount specified in the OAA). The County did not accept the fee because of this litigation. JetAway never received an access permit or an assignment of one from STW* [the prior holder of the OAA]. *The County's position regarding an access permit is also somewhat inconsistent...* [FAA Exhibit 1, Item 5, exh. 60, p. 5]

Also in the Montrose Court Order, the Court resolved the issue by ordering:

> *JetAway must apply and pay for an access permit. Upon application and payment of the fee, the County is obligated to execute a written document establishing and granting the access right as a property right appurtenant to JetAway's off-Airport parcel.* [FAA Exhibit 1, Item 5, exh. 60, p. 29]

An annual access fee of $250 appears to be too low in proportion to the level of through-the-fence business activity and is insufficient to meet the Airport's Federal obligations under grant assurance 24, *Fee and Rental Structure*, under the circumstances existing at this Airport. However, the record in this case is insufficient to determine that the County has failed to exercise an option to limit, mitigate or extinguish the Off-Airport Agreement contrary to grant assurance 24. Since grant assurance 24 regards financial self-sustainability, the costs associated with generating appropriate revenue or limiting access is a relevant 'particular circumstance existing at the Airport.'

In any event, that is not the allegation made by this Complainant. Rather, JetAway states, "The County executed a lease agreement with JCP that contains an option and right of first refusal." [FAA Exhibit 1, Item 1, p. 27] The JCP Lease does include the following provision:

> ***1.03 Right of First Refusal.*** *After the completion of the extended term of the Agreement, the parties will in good faith negotiate mutually agreeable terms for the continued lease and occupancy of the leased properties and improvements described herein. However, if mutually agreed upon terms have not been reached and County has a bona fide written offer from another party it desires to accept, County can do so if it first provides to Operator the right to continue the agreement by matching the terms of the bona fide written offer.* [FAA Exhibit 1, Item 1, exh. 19]

The County states that "The right of first refusal, however, is open ended.... If the [FAA] notifies the County ... that there is a grant assurance issue with the option to extend or the

right of first refusal... the County will notify JCP that the offending provision must be rectified." [FAA Exhibit 1, Item 3, pp. 29-30]

JetAway presents this allegation as circumstantial evidence of the County's alleged intent to grant an exclusive right to JCP. However, that allegation is inapt and not supported, as discussed below in Issue 3.

FAA observes that sponsors might over-grant rights out of a lack of discipline or foresight, or because they had previously over-granted rights to another operator in another agreement. A through-the-fence agreement is an example of where an airport sponsor may have over-granted rights to an airport user.

A right of first refusal for future occupancy of the same leasehold is generally of greater concern because it might limit an airport sponsor's ability to change the use of property in the future, when the public's interest in aviation may demand some other use. This is potentially a violation of grant assurance 5. However, the facts in this case are far too speculative for a finding of non-compliance in related to grant assurance 5. To avoid future problems, the County is well advised to negotiate the elimination of the right-of-first refusal provision in its existing leases, including the JCP Lease.

Considering the above, the Director finds that the County is not in violation of grant assurance 5, *Preserving Rights and Powers.*

Issue 2

Whether the County has violated grant assurance 29, *Airport Layout Plan.*

An Airport Layout Plan is a scaled drawing of existing and proposed land and facilities necessary for the operation and development of the airport. It represents an understanding between the airport owner and the FAA regarding the current and future development and operation of the airport. FAA approval of Airport Layout Plans assists to ensure that federally funded airport development will be safe, useful and efficient.

JetAway raises an allegation of the County's violation of grant assurance 29, *Airport Layout Plan*, in its Reply. JetAway states:

> *It now appears that Respondents have also violated Grant Assurance 29 by manipulating the Airport Layout Plan and constructing an aircraft parking apron and access road for JCP that are not shown as existing or proposed improvements on the Airport Layout Plan that was in effect when the County made those improvements.* [FAA Exhibit 1, Item 5, p. 6]

In its Rebuttal, the County moves to dismiss this allegation, stating that JetAway has not complied with Part 16 requirements for pre-complaint resolution (14 CFR § 16.21). [FAA Exhibit 1, Item 6, p. 10] Also, in its Answer, the County characterizes the Airport Layout Plan (ALP) process and its significance to compliance. Airport Layout Plans can be

updated at any time, easily resolving mistakes or omissions.[16] [FAA Exhibit 1, Item 6, pp. 8-9] The FAA recognizes an airport's planning process is dynamic, not static

In its Complaint, and in more detail in its Reply, JetAway relies heavily on allegations of manipulation of the County's airport planning processes. This elevation of the planning process is inappropriate. For example, in its Complaint, JetAway focuses in property 'identified' for FBO purposes on various draft and final planning documents to form the basis for concluding that the County has granted an exclusive right to JCP, by leasing all 'identified' FBO parcels to JCP. [FAA Exhibit 1, Item 1, p. 22] This is a misapplication of the role of the planning process and the standards for compliance.

Montrose County Airport Management correctly states the appropriate role of the ALP:

> *It is common for airports to regularly update and revise ALPs based on changes at the airport. The FAA does not have to approve specific FBO locations and FAA approval of an ALP does not require an airport to locate FBO facilities at such locations as may be designated on the ALP or prohibit the airport from later changing its designated site to another location.* [FAA Exhibit 1, Item 6, exh. GG, exh. 5, p. 2]

This understanding of the need to engage in ongoing planning, in consultation with the FAA, recognizes that we expect airport management pursue its Federal obligations and its proprietary interests in an environment of change. The Director points to Pacific Coast Flyers, Inc. v. County of San Diego, FAA Docket No. 16-04-08 (July 25, 2005) (Director's Determination) (Pacific Coast). In Pacific Coast, the complainant alleged that the sponsor's airport development plans discriminated against small piston aircraft types by reducing accessibility through leasehold development in favor of jet aircraft. [Pacific Coast, DD, p. 32] Specifically, Pacific Coast states:

> *The Director recognizes that the current* [Master Plan] *for* [the Airport], *as the County's "vision" for the future of the airport, plays a role in its decision-making process, and for development of the airport. Having said that, the Director also notes that deviating from the* [Master Plan], *to accommodate changing airport conditions or new requirements, is not only permissible, but may be necessary and expected.* [Pacific Coast, DD, p. 35]

A typical violation of grant assurance 29 would be more akin to a refusal to cooperate with the FAA on an ongoing planning process, or refusing to mitigate a significant problem arising from an un-planned circumstance at an airport upon a demand from the FAA to do so. In Pacific Coast, the Director acknowledged that deviation from an airport plan may be necessary and expected. Conversely, the Director has found that refusal to alter an ALP as a means to deny any access may be a violation of a grant assurance. In Gate 9 v

[16] The FAA has previously stated that it is common practice for the FAA to accept interim updates to the ALP, resulting in a 'pen and ink' notation on an existing, approved ALP. (Boca Aviation v. Boca Raton Airport Authority, FAA Docket No. 16-00-10 (March 20, 2003) (Final Decision and Order), p. 24, fn. 80. (Boca).

DeKalb County, FAA Docket No. 16-05-13 (February 1, 2006) (Director's Determination) (Gate 9), the Director stated:

> *The FAA fully expects that pursuit of aeronautical development would reasonably include pursuing any necessary and appropriate alteration or added detail to an Airport Layout Plan. .... In fact, the airport layout planning process is a tool in planning for appropriate development to meet aeronautical demand. ...*
> *The Director's role in determining compliance is to determine whether or not a sponsor has a program in place that reasonably adheres to its Federal obligations. While a sponsor is not obligated to agree to a specific lease proposal, a sponsor is responsible for exercising its rights and powers to be responsive to aeronautical demand to provide aeronautical facilities in a manner that is consistent with its Federal obligations.*[17] [Gate 9 DD, p. 14]

The Director also notes here that Montrose County is not simply citing its ALP as prohibiting it from accommodating JetAway and walking away, as was the case in Gate 9. Instead, the County has engaged in extensive discussions with JetAway to attempt to accommodate JetAway's preferred location for an FBO, despite a problematic through-the-fence access point. It has cited actual reasons for not preferring the FBO alternatives at JetAway's location and it has offered an alternative location.[18] The County summarizes its reasons, stating that it

> *wants any JetAway FBO operation* [to be] *on the Airport and it wants the through-the-fence issues of the Off-Airport Agreement created by JetAway, resolved and addressed. The County submits it is acting consistently with the Director's Determination in Docket No. 16-06-01. Based on feasibility studies conducted by the County's expert and the unjustly discriminatory effect of the Off-Airport Agreement for the on-airport commercial aeronautical activities, the County has identified a second FBO location. It is clear from the Director's Determination that an on-airport, non-adjacent site is acceptable.* [FAA Exhibit 1, Item 3, pp. 37-38]

It is JetAway that has constructed this red herring. JetAway holds this perception that the ALP process mandates that the County must accept JetAway's off-airport parcel, because it was once depicted on an ALP as a potential future location for an FBO. This is clearly not the case and the Director believes it is again important to stress that an airport's planning process is dynamic, not static.

Considering the above, the Director grants the County's motion to dismiss the allegation of the violation of grant assurance 29, *Airport Layout Plan.* The County's planning has been consistent with the requirement that airport development be safe, useful and efficient.

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[17] The Director distinguishes the extant case from Gate 9 by noting that DeKalb did not cite an airport benefit obtained by adhering to its ALP, nor did it provide any reasonable option for access and the FAA had independent knowledge of stymied aeronautical development at DeKalb's airport.

[18] This alternative location has in fact been 'identified' in part in draft planning documents submitted to the record by JetAway, and had been noted by the Director in the 2006 JetAway DD at fn. 302. *See* FAA Exhibit 1, Item 1 exh. 12, p. D.13, exh. 17, p. 2, exh. 26 and Item 5, exh. 43, pp. E.13 & E.17.

Issue 3

Whether the County has granted an exclusive right for the use of the Airport in violation of grant assurance 23, *Exclusive Rights*, 49 U.S.C. § 40103(e) and 49 U.S.C. § 47107(a)(4) by means of land leases to Jet Center Partners (JCP).

Specifically, in its Complaint, JetAway alleges that the Respondent has granted exclusive FBO rights to JCP in conscious and intentional violation of the guidance contained in AC No. 150/5190-6 and FAA Order 5190.6A[19] [FAA Exhibit 1, Item 1, p. 22] JetAway presents nine (9) counts of the granting of an exclusive right. Under *Issue 3*, we examine the allegations associated with the express granting of an exclusive right by the leasing of available property to JCP, counts 1-5, 8 & 9. Counts 6 & 7 are discussed under *Issue 4*.

Express Exclusive Right Count 1

'Identified' on-Airport FBO parcels

In its Complaint, JetAway alleges, "The County has leased all Airport land identified for FBO locations to JCP." [FAA Exhibit 1, Item 1, p. 22]

The County answers that the allegation is untrue, stating, "the Airport has a 418,698 square-foot on-Airport site identified and available." (the "9-acre Site) [FAA Exhibit 1, Item 3, p. 28 and exh. D] Also, in its Answer, the County moves to dismiss the allegation that the County has granted an exclusive right, stating:

> *...as contemplated in the Director's Determination in Docket No. 16-06-01, the County has identified and made available for leasing for FBO operations a 418,698 square foot on-Airport site* [9-acre Site] *which is not adjacent to JetAway's through-the-fence operation. If JetAway wishes to lease this site for FBO operations, the County will issue an RFP.* [FAA Exhibit 1, Item 3, p. 4]

JetAway contradicts its own argument, stating, "At all times relevant there has been and presently is sufficient land available on Airport for a second FBO as the Director noted in his Determination in FAA Docket No. 16-06-01." [FAA Exhibit 1, Item 1, p. 18] JetAway also states:

> *Land is and has been available on the Airport for a second FBO, as the Director noted in his Determination, and the most logical parcel of land for the FBO - now that the County has leased all available land on the west side of Runway 13/31 to*

[19] The Advisory Circulars and Orders do not impose Federal obligations. Rather Federal law, grant assurances and quitclaim deeds impose obligations. FAA Orders provide guidance to FAA employees in carrying out their jobs and responsibilities. Advisory circulars provide advice to a sponsor in complying with the Federal obligations. The Exclusive Rights AC provides basic information pertaining to the Federal Aviation Administration's (FAA's) prohibition on the granting of exclusive rights at federally-obligated airports. This AC provides guidance on how an airport sponsor can comply with the statutory prohibition on the granting of exclusive rights. [See AC 150/5190-6 (1. Purpose)]

JCP, including both FBO Locations One and Two[20] *- is the South Tract* [on-airport parcel adjacent to the through-the-fence access point] *which is adjacent to* [JetAway's off-airport parcel and hangar]. [FAA Exhibit 1, Item 1, p. 43]

Furthermore, as stated above, JetAway submitted evidence with its Complaint and Reply that shows general aviation development consistent with an FBO on or near the 9-acre Site. *See* FAA Exhibit 1, Item 1 exh. 12, p. D.13, exh. 17, p. 2, exh. 26 and Item 5, exh. 43, pp. E.13 & E.17. This alternative location was evident to the Director in the 2006 JetAway DD. [See 2006 JetAway DD, page 35, at fn. 302] See map of Airport at FAA Exhibit 2.

Also JetAway misapplies FAA policy and precedent to the standard of compliance with regard to exclusive rights. As stated above, "identification" of parcels for FBO-use is not necessarily relevant to an allegation of the granting of an exclusive right. As cited above from Pacific Coast, planning documents do not necessarily prevent an airport sponsor from pursuing alternative airport benefits or the public's aeronautical interests. Rather, the County is using its planning process to explicitly identify a site that is fully on the Airport. Also, the County is not simply pointing to its ALP, and no other reason, to not favor JetAway's preferred FBO site that is associated with a through-the-fence access point.

JetAway's citation of its submitted planning evidence is contradictory and its application of the standard of compliance is inapt. Consequently, JetAway's arguments do not survive the County's explicit offering and identification of an alternate FBO site (9-acre Site). To be in compliance with the grant assurances, it is not necessary for the County to accept JetAway's most convenient or "preferred" or "logical" parcel on the airport for JetAway's purposes. Moreover, the County has not leased all land, as recognized by the Director in the 2006 JetAway DD and the parties in various pleadings in this proceeding.

Suitability of identified Airport FBO parcels

The Director notes that JetAway did not raise the issue of the 'suitability' of the 9-acre Site or any other alternative parcel at the Airport in its Complaint. However, the County may have first raised its willingness to offer the specific 9-acre Site for FBO development in its Answer. [FAA Exhibit 1, Item 3, p. 2] Therefore, in order to assist the parties in understanding the role of compliance, the Director will address the extensive argument between the parties over the suitability of the 9-acre Site as opposed to JetAway's preferred FBO location, adjacent to the through-the-fence access point and JetAway's existing off-airport parcel and hangar.

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[20] With regard to the so-called FBO Locations 1 & 2 that comprise JCP's leasehold on the west side of the Airport and cited by JetAway, the County denies specifically that it "designated areas as FBO Location 1 and FBO Location 2. These are designations created by JetAway." [FAA Exhibit 1, Item 3, p. 21] The FAA adds that a draft Master Planning document (Working Paper Three) dated March 2005 and submitted by JetAway in its Complaint depicts both JetAway-designated FBO Locations 1 & 2 as a "Potential **Site** for FBO Facilities (Hangar, Auto Parking, Aircraft Parking, Office, ETC.)," not 'Sites.' Working Paper Three was drafted prior to JetAway's 2006 Complaint. It contemplates that the south end of the west side of runway 13/31 could be one FBO. Currently that is the case. JCP's leasehold is relatively cohesive in the SW quadrant of the Airport. [FAA Exhibit 1, Item 1, exh. 12, p. D.13]

In its Reply, JetAway initially makes an admission about a potential FBO site, which can be described as against its interest, stating:

> *The County has in fact leased all Airport land identified in the Airport Master Plan and Airport Layout Plan for FBO locations to JCP. The County does not deny that fact. The County merely argues that the Master Plan and Airport Layout Plan are not relevant and that it has now identified a new FBO site on the south end of the Airport east of Runway 13/31 (the 9-acre Site). This site is, however,* ***marginally suitable*** *for an FBO at best....*
>
> *But the County cannot seriously deny that it has leased all Airport land to JCP that is suitable for an FBO.* [FAA Exhibit 1, Item 5, p. 21]

JetAway questions the 'credentials and integrity' of one of the County's airport consultants with regard to the County's assertion that the 9-acre Site is a suitable site for an FBO. [FAA Exhibit 1, Item 5, pp. 21-23] In reply, JetAway hires its own consultant, Stantec Consulting, Inc. to compare the 9-acre Site to JetAway's preferred FBO location. [FAA Exhibit 1, Item 5, p. 23]

JetAway characterizes its own consultant's findings in its Reply, stating:

> *Stantec concludes that the 9-acre site* ***is marginally suitable*** *for an FBO, and the proposed JetAway site is clearly the preferred location.... The 9-acre site is* ***truly marginal*** *for FBO operations and would create serious safety issues at the Airport.... The County has indeed leased all of the Airport land that is suitable for an FBO to JCP in violation of its Federal Grant Assurances.* [FAA Exhibit 1, Item 5, pp. 23-24]

In fact the Stantec Report states:

> *The 9-Acre and JetAway FBO Sites have been reviewed for physical capacity, operational and safety-related concerns. Both sites can meet the minimum standards of the airport for an FBO... Based on the overall factors, including safety and operations, the JetAway FBO Site is the preferred location for the following reasons:*
>
> *From an airside access standpoint, the JetAway site is centrally located off the main runway for Montrose Regional Airport with very short taxi distances. The 9-Acre site is currently very poorly located for safe access from Runway 17/35 and for Runway 31 arrivals. Safe access to the airfield is a significant issue for an FBO operation. The JetAway site is far superior in overall airside access.*
>
> *Landside access to the JetAway site is already established and is operational. The 9-Acre site will require a considerable amount of investment to construct the roadway and utility systems to the site, along with clean-up of the entrance for business purposes.* [FAA Exhibit 1, Item 5, exh. 68, p. 10]

In its Rebuttal, the County comments on the Stantec report, stating:

> *The County notes the comments of the Stantec Report on the potential operational issues for the 9.612 acres. There is, however, a protocol for operating on a field with no control tower. Every commercial airliner using Runway 17/35 crosses Runway 13/31. If JetAway fueled the commercial airlines, its fuel trucks would have to cross Runway 13/31. If aircraft crossing Runway 13/31 was a significant safety issue, the FAA would require the Airport to close the runway or build a taxiway around the runway.*
>
> *The Stantec report states that the location designated by JetAway is the preferable FBO location. The County, however, has no intention of relocating Taxiway E*[21]*; the preliminary estimate of the expense is $1,555,000.00... or to otherwise impair the ability to extend Taxiway E to the north, merely to accommodate JetAway's through-the-fence FBO operations. Any accommodation of JetAway's through-the-fence FBO operations would create even more grant assurance issues...* [FAA Exhibit 1, Item 6, pp. 17-18]

Also, Stantec states its preference for the JetAway FBO Site with regard to the 9-acre Site, because the 9-acre Site is not immediately available to accommodate larger aircraft. However, on the same page of the follow-up letter, Stantec characterizes the current JetAway site geometry, stating:

> [the] *distance from the centerline of Taxiway E to the property line or the existing building face* [of JetAway's existing hangar is] *approximately 83 feet, or 46.5 feet short of the required distance for an Airport Design Group IV taxiway OFA* (larger aircraft). *Taxiway E is designated on the signed ALP as a Group IV taxiway. Remedies are to move Taxiway E to preserve Group IV designation, process a modification to standard for a modified Group III designation* (smaller aircraft), or reclassify the taxiway as a Group II taxiway (even smaller). [FAA Exhibit 1, Item 5, exh. 73, p. 2]

Stantec offers a downgrade to a Group II taxiway as an option for the JetAway site for the future, and observes that the 9-acre Site is planned to have Group II standards, as well. [FAA Exhibit 1, Item 5, exh. 73. p. 2] In the case of the 9-acre Site, the Director observes that plans can change and new infrastructure can be built to meet actual needs of the user's aircraft. Also, in the case of the JetAway site, infrastructure can be removed and replaced and enhanced, or downgraded. These are all judgments that an airport sponsor should make to pursue the public's aeronautical interests in its airport and to prudently manage the sponsor's resources and manage risk.

[21] Taxiway E is the taxiway immediately adjacent to JetAway's existing off-airport hangar. Taxiway E provides airport access to all through-the-fence users of the Airport.

The County answers by stating:

> *The County, however, does not have an obligation to grant JetAway an FBO operation at the location dictated by JetAway, on the terms dictated by JetAway and without an RFP process. JetAway does not have the right to substitute its site selection judgment for that of the County. The County's obligation is to ensure that JetAway has access to the Airport to conduct commercial aeronautical activities. The County has satisfied this obligation by designating the 9.612 acre site as a second FBO location.* [FAA Exhibit 1, Item 6, p. 4]

The Part 16 process is not the appropriate venue to redraft or update an ALP. Furthermore, the Complainant, JetAway carries the burden of proof of a grant assurance violation. To succeed in its allegation that the County has granted an express exclusive right, JetAway must show that there is no other available and suitable site for an FBO at the Airport.

Before the County's explicit offering of the 9-acre Site in its Answer, JetAway had stated:

> ***Land is and has been available on the Airport for a second FBO, as the Director noted in his Determination**, and **the most logical parcel of land for the FBO**... is the South Tract* [on-airport parcel adjacent to the through-the-fence access point] *which is adjacent to* [JetAway's off-airport parcel and hangar]. [FAA Exhibit 1, Item 1, p. 43]

With regard to the potential operations of the FBO sites, JetAway questions the safety of the typical route of aircraft from the most active runway to the 9-acre Site, requiring runway crossings. However, here the FAA is unconvinced that the 9-acre Site's location on the airfield is so 'unsafe' as to make the site unsuitable. And in fact, Stantec only makes that statement conditionally and in comparison to the JetAway Site. In a follow-up letter to JetAway, Stantec states, "The 9-acre Site is unsuitable for FBO purposes if the following is considered: The development and operation of the 9-acre Site versus the JetAway FBO Site potentially introduces significant safety and operational issues." [FAA Exhibit 1, Item 5, exh. 73, p. 2] The County equates this taxi route, objected to by JetAway, to the need for JetAway's ground vehicles to cross the same runway to get to the Airport's terminal area, associated with JetAway's preferred site. This also raises the issue of vehicle incursions. The County observes that regular movement of ground vehicles across a runway also potentially introduces significant safety and operational issues. [FAA Exhibit 1, Item 6, pp. 17-18] The FAA is very concerned about the prevalence of vehicle and pedestrian incursions on the airfield.

The County sites Roadhouse Aviation v Tulsa, FAA Docket No. 16-05-08 (June 26, 2007) (Final Decision and Order) (Roadhouse), quoting:

> *The exclusive rights prohibition does not guarantee an airport user the right to acquire a specific piece of private property, or access to a specific location on the airport. It does ensure that airport users have the right to access the airport to conduct commercial aeronautical activities.* [Roadhouse, FAD, p. 23]

The FAA notes that the final FAA-approved ALP, prepared by Barnard Dunkleberg & Co. (the County's existing airport planner/consultant) depicts the 9-acre Site as available for an FBO location. [FAA Exhibit 1, Item 9, exh. VV]

JetAway's argument regarding the County's leasing of all land 'identified' or 'suitable' for an FBO location is inconsistent, unconvincing, and fails to prove that the County's Federal obligation requires it to accept JetAway's preferred location as an FBO site.

Express Exclusive Rights Counts 2-5

JetAway cites circumstances of the Airport and actions of the County to show alleged intent to grant an exclusive right in support of its allegation:

Count 2. *The County has leased more Airport land to JCP than required for it FBO.*
Count 3. *The County has leased Airport land to JCP without any immediate need for the land being demonstrated and documented by JCP, and that JCP will not be able to put into productive use within a reasonable period of time.*
Count 4. *The County executed a lease agreement with JCP that contains an option and right of first refusal.*
Count 5. *The County has manipulated the Minimum Standards to protect JCP's exclusive rights and interests.*

JetAway presents these additional arguments as circumstantial evidence in support of its central allegation that the County has leased all parcels 'identified' for FBO-use to JCP. JetAway cites FAA Order 5190.6A incorrectly, herein. FAA Order 5190.6A is internal FAA guidance. [See Applicable Law and Policy Section, above] It instructs FAA employees as to the ways in which an airport sponsor might intentionally or unintentionally grant an exclusive right. It does not create separate prohibitions. In any case, this circumstantial evidence is belied by the County's offer of the 9-acre Site for FBO use, as discussed above. The FAA does not accept the premise that the County has forfeited its ability to accommodate a second FBO at the Airport.

Counts 2 & 3

With regard to counts 2 and 3, the Director notes that these are not independent allegations of a granting of an exclusive right. JetAway states:

> *The County has leased more Airport land to JCP than required for its FBO.... The County has leased Airport land to JCP without any immediate need for the land being demonstrated and documented by JCP, and that JCP will not be able to put into productive use within a reasonable period of time.* [FAA Exhibit 1, Item 1, pp. 24 & 26]

The County generally denies all of the allegations, stating:

> *JetAway provides no evidence that JCP leases more land than it requires. That is really a subjective determination by JCP..... The County's perception is that JCP needs the land it is leasing. Second JetAway requested 513,513 in its* [2005 FBO Proposal]. *In its identical December 2005 and November 2007 proposals* [FBO proposal and settlement proposal], *it requested 459,903 square feet for the on-Airport site.* [FAA Exhibit 1, Item 3, p. 28]

Also, the County cites FAA Part 16 precedent. In Bisti Aviation v Farmington, FAA Docket No. 16-07-10 (December 4, 2007) (Director's Determination) (Bisti), the Director stated:

> *Respondent correctly identifies that it is not required under the Federal grant obligations to independently assess whether a tenant's proposal for future leased property is factual or immediately needed by the proponent to provide aeronautical services. No grant assurance specifically requires that a demonstrated immediate need be proven before an airport approves an assignment of a lease.* [Bisti, DD, p. 18]

As stated, JetAway's extensive arguments regarding the size, layout, improvements, financing and process of JCP's leasehold are not sufficient to establish the grant of an exclusive right when the County does have the capacity to accommodate a second FBO on the Airport and has offered the 9-acre Site. Even if the FAA accepts the facts regarding JCP's use of its leasehold, the County was not grant-obligated to require JCP to demonstrate an immediate need for the property it was leased for its FBO operations. While JetAway elevates language in Order 5190.6A to a level comparable to the County's grant assurance obligations; this is not accurate. Nonetheless, JetAway has made no showing that the County leased more Airport land to JCP than required for its FBO. JetAway has also failed to show that the County has leased Airport land to JCP without any immediate need for the land being demonstrated and documented by JCP, and that JCP will not be able to put into productive use within a reasonable period of time.

Count 4

With regard to count 4, this right of first refusal is not for additional property that could be used for a competitive FBO, but rather an option for extension of a leasehold for currently occupied property. It does not remove property otherwise currently available for a second FBO. [FAA Exhibit 1, Item 1, exh. 19]

Based upon the Director's analysis in Issue 1, JetAway's allegation that granting an option and right of first refusal to JCP is a prohibited exclusive right is wrong. Even if the FAA accepts the facts regarding JCP's right of first refusal, the FAA cannot conclude that the County has granted an exclusive right. The right of first refusal at issue here is related to future occupancy of a current leasehold and not related to the leasing of all suitable parcels on the airport.

Count 5

JetAway states, "The County has manipulated the Minimum Standards to protect JCP's exclusive rights and interests." [FAA Exhibit 1, Item 1, p. 27]

Again, count 5 does not stand on its own as a grant assurance violation, because as JetAway admits "land is and has been available on the Airport for a second FBO, as the Director noted in his Determination..." [FAA Exhibit 1, Item 1, p. 43] JetAway goes on to opine that, "*the* most logical parcel of land for the FBO - now that the County has leased all available land on the west side of Runway 13/31 to JCP, including both FBO Locations One and Two[22] - is the [on-airport parcel adjacent to the through-the-fence access point] which is adjacent to [JetAway's off-airport parcel]." [FAA Exhibit 1, Item 1, p. 43]

The Respondent goes on to state that, "...the area designated by JetAway as FBO Location 1 does not satisfy even the minimum land area under the old Minimum Standards (125,000 sq. ft). " [FAA Exhibit 1, Item 3, page 21] JetAway's 2005 FBO proposals and its November 2007 settlement offer upon which it is basing this Complaint request no less the 450,000 sq. ft. of on-Airport leasehold. [FAA Exhibit 1, Item 5, p. 30] JCP's successful 2005 FBO proposal requested 300,000 sq. ft. [FAA Exhibit 1, Item 1, exh. 14, p. 10]

The record shows that both FBO proposers requested no less than 300,000 sq. ft. of on-Airport leasehold and up to over 500,000 sq. ft. So, it is reasonable for the County to raise its minimum square footage requirement to a mid-point of 350,000 sq. ft. This is what the County did when it adopted its 2005 Minimum Standards. [FAA Exhibit 1, Item 1, exh. 21] Furthermore, the property on the west side of the south end of runway 13/31 (now occupied by JCP) does not appear to be large enough to accommodate two FBOs of the smallest size requested. JetAway submits evidence in its Complaint that shows the leaseholds in that quadrant to add up to only 436,280 sq. ft. [FAA Exhibit 1, Item 1, exh. 29] It appears prudent that the County, at the time, negotiated with JCP to occupy a reasonably compact and contiguous FBO facility, smaller than any on-airport leasehold that JetAway has ever requested from the County. JetAway's inference, in hindsight, that the southwest quadrant could have been expanded to shoe-horn in two FBOs of 350,000 sq. ft. each is unsupported and rejected. [FAA Exhibit 1, Item 5, exh. 73 & Item 7]

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[22] With regard to the so-called FBO Locations 1 & 2 that comprise JCP's leasehold on the west side of the Airport and cited by JetAway, the County denies specifically that it "designated areas as FBO Location 1 and FBO Location 2. These are designations created by JetAway." [FAA Exhibit 1, Item 3, p. 21] The FAA adds that a draft Master Planning document (Working Paper Three) dated March 2005 and submitted by JetAway in its Complaint depicts both JetAway-designated FBO Locations 1 & 2 as a "Potential **Site** for FBO Facilities (Hangar, Auto Parking, Aircraft Parking, Office, ETC.)," not 'Sites.' Working Paper Three was drafted prior to JetAway's 2006 Complaint. It contemplates that the south end of the west side of runway 13/31 could be one FBO. Currently that is the case. JCP's leasehold is relatively cohesive in the SW quadrant of the Airport. [FAA Exhibit 1, Item 1, exh. 12, p. D.13] In any case, it is JetAway, not the County or the FAA, that applies such importance to the details of draft planning documents. The FAA does not see such importance or relevance.

Even if the Director assumes the facts presented by JetAway under count 5, they do not add up to a grant assurance violation. Rather, the facts show that the County was being responsive to the stated square footage needs of responders under their RFP. At worst, it might reveal an interest to prevent a competing leaseholder from blocking the on-airport FBO's potential contiguous growth in the southwest quadrant of the Airport. In Self Serve Pumps v Chicago Executive Airport, FAA Docket No. 16-07-02 (Director's Determination Issued March 17, 2008), the Director stated, "motive alone is insufficient for a finding of an exclusive right or grant assurance violation." [Self-Serve Pumps, DD, p. 31]

As previously stated, the fact that the County is not providing a parcel to JetAway, which in JetAway's opinion, is the most convenient, logical or preferred does not necessarily mean that the County is manipulating the Minimum Standards to protect JCP.

Other Exclusive Rights Arguments 8 & 9

JetAway makes observations to support its circumstantial case against the County by citing language in Federal law and policy including a specific exception provided by the law.

Count 8. The only exception that would allow JCP to provide exclusive FBO services at the Airport does not apply in these circumstances. [FAA Exhibit 1, Item 1, p. 47]
Count 9. The County's grant of exclusive rights to JCP has enabled JCP to charge inflated prices to the detriment of the public and the County. [FAA Exhibit 1, Item 1, p. 48]

Regarding count 8, as cited by JetAway, Federal law has always provided an exception to the prohibition of the granting of an exclusive right. The law states:

> *A person providing, or intending to provide, aeronautical service to the public will not be given an exclusive right to use the airport, with a right given to only one fixed-base operator to provide services at an airport deemed not to be an exclusive right if—*
> *(A) the right would be unreasonably costly, burdensome, or impractical for more than one fixed-base operator to provide the services; and*
> *(B) allowing more than one fixed-base operator to provide the services would require reducing the space leased under an existing agreement between the one fixed-base operator and the airport owner or operator.* [49 U.S.C 47107(a)(4)]

The County concedes the point to JetAway, stating, "there is no exception that allows [the County] to deny a second FBO... Further, the County has not and will not deny a second FBO operation on that basis." [FAA Exhibit 1, Item 3, pp. 39-40] Accordingly, as to count 8, there is no grant assurance violation as the County has committed to permit a competing FBO to locate on the Airport and specifically on the 9 acre parcel.

Regarding count 9, JetAway states, "One of the many results of the County's ... [alleged] refusal to allow JetAway to compete with JCP at the Airport is that JCP is able to charge inflated fuel prices." [FAA Exhibit 1, Item 1, p. 49] JetAway provides no evidence in its Complaint of high fuel prices at the Airport. The County answers that it "monitors the fuel prices at the regional airports and has not found any facts or evidence to support

JetAway's claim that JCP's fuel prices are higher than all regional airports." [FAA Exhibit 1, Item 3, p. 40] JetAway supplies evidence in its Reply, presenting an Airnav.com internet page showing that jet fuel prices at the Airport in the May-July 2008 timeframe are more expensive than most airports within the 65 miles, but less expensive than, or competitive with, prices at Telluride Regional Airport, Grand Junction Regional Airport and Garfield County Regional Airport. [FAA Exhibit 1, Item 5, exh. 71]

JetAway's evidence of high fuel prices at the Airport does not convince the Director that the County has granted an exclusive right. The evidence is not conclusive with regard to a finding of the granting of an exclusive right. Considering that the evidence shows that Grand Junction's prices are higher and that many of the airports with seemingly lower fuel prices list only one fuel provider at the airport in question undermines the relevancy of the evidence. Also, the FAA has noted the existence of relatively high fuel prices at airports with more than one fuel retailer, and has recognized that an airport sponsor has many options to monitor and address high fuel prices.[23] However, comparatively higher fuel prices may signal to a sponsor that it should pursue competition.

Issue 3 Conclusion

For the reasons discussed herein, the Director finds that the County has not granted an exclusive right by means of its FBO leases, or in the manner by which it has identified FBO locations on the Airport, or by the suitability of those locations. The County is under no obligation to accept JetAway's opinion of the most convenient or "preferred" or "logical" parcel on the Airport for JetAway's business interests. The County has offered a specific 9-acre Site expressly for FBO development. As stated by the County, the County retains the proprietary right and responsibility to plan for the future of the Airport. The County's proprietary rights do include the protection of the County from legal liability, litigation costs, and the loss of rights and powers by means of a problematic through-the-fence agreement. Finally, as stated, JetAway's off-airport business interests are not protected by the County's Federal obligations. JetAway is equivalent to any proponent of a second FBO at the Airport and is subject to the reasonable planning judgments of the County as to where such FBO may be located.

Considering the above, the Director finds that the County is not in violation of grant assurance 23, *Exclusive Rights*, by means of the distribution of Airport parcels suitable for FBO activities.

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[23] Self Serve Pumps states, "*High fuel prices or high profit margin are not sufficient to make a finding that an airport sponsor is non-compliant. The Airport may, justly, choose to take any of several actions to address fuel prices. ... The Complainant's argument that market conditions ... require* [the sponsor] *to accede to the Complainant's specific business plan... is unconvincing.*" [Self Serve Pumps, DD, p. 30]

Issue 4

Whether the County's actions with regard to JetAway's proposal for a FBO business at the Airport constitute the constructive granting of an exclusive right by means of an unreasonable denial in violation of grant assurance 23, Exclusive Rights, 49 U.S.C. § 40103(e) and 49 U.S.C. § 47107(a)(4).

Count 6. The County has imposed unreasonable requirements on JetAway as a condition to any consideration of JetAway's FBO proposals. [FAA Exhibit 1, Item 1, page 30]
Count 7. The County has imposed unreasonable and discriminatory requirements for an FBO agreement with JetAway. [FAA Exhibit 1, Item 1, page 39]

Airport sponsors are prohibited by grant assurance 22 from imposing unreasonable restrictions and from unjust economic discrimination against aeronautical service providers proposing to operate aeronautical businesses. In the past, the FAA has found that unreasonable restrictions, delay or unjust discrimination could constructively grant a prohibited exclusive right. Generally, however, the Director considers these allegations under grant assurance 22 as a test for unreasonable terms, as a prerequisite for the finding of a constructive grant of an exclusive right.[24] Also, as discussed above, these are positions considered by the parties in confidential mediation (some of which JetAway admits had been resolved). As the Director noted above, the confidentiality of the mediation has been breached and the documents, including the proposed settlement agreements are now in the public domain. Nonetheless, the Director will not opine on the parties' conduct, positions, or alleged FBO restrictions because these negotiations were not part of this Part 16 proceeding, but rather involved an ongoing exchange of proposals and counter-proposals in mediation. JetAway admits and acknowledges this. The analysis and discussion, however, under Issue 4 herein, will attempt to provide clarity in regard to the County's obligations under grant assurances 22 and 23.

JetAway states, "the County has never really considered the actual FBO agreements proposed by JetAway, and has insisted on unreasonable conditions and concessions from JetAway, One Creative Place and their individual owners." [FAA Exhibit 1, Item 1, p. 30]

The County states that it does have reasons for declining to pursue JetAway's preferred location of its FBO, stating that the County:

> *wants any JetAway FBO operation* [to be] *on the Airport and it wants the through-the-fence issues of the Off-Airport Agreement created by JetAway, resolved and addressed. The County submits it is acting consistently with the Director's Determination in Docket No. 16-06-01. Based on feasibility studies conducted by the County's expert and the unjustly discriminatory effect of the Off-Airport Agreement for the on-airport commercial aeronautical activities, the County has identified a second FBO location. It is clear from the Director's Determination that an on-airport, non-adjacent site is acceptable.* [FAA Exhibit 1, Item 3, pp. 37-38]

[24] See Self Serve Pumps, FAA Docket No. 16-07-02 p. 28.

As discussed above, the Director finds that the operational and feasibility issues, cited by the County, do not obligate the County to consider JetAway's preferred FBO location to the exclusion of the County's preferred FBO location. But, in addition to the County's legal and FAA compliance concerns, mentioned above, the County also cited financial concerns, stating:

> *The County sought to accommodate JetAway's request by resolving the through-the-fence issues and without exposure for the County's residents and the expense of further litigation. The County was unable to do so. By identifying and making available the 9.612-acre site, the County is confirming its position from the onset: There is no exclusive right.* [FAA Exhibit 1, Item 3, pp. 4-5]

The County's proprietary rights allow it to provide a competitive FBO opportunity in a manner that protects the County from legal liability and cost, and that protects its ability to continue as a going concern.[25] As stated, the County's grant assurances do not require it to accommodate JetAway's preferred location on the Airport. The County has reason to prefer a location that is not adjacent to the through-the-fence access point, like JCP's FBO location. JetAway has demonstrated a record of transgression with regard to fueling, trespassing,[26] adhering to the Minimum Standards, and advertising services it is prohibited from offering. After the Respondent took action to protect its proprietary rights and seek a legal injunction against JetAway, JetAway ignored the Court's temporary restraining Order and was found to be in contempt. [See Montrose Court Order, FAA Exhibit 1, Item 5, exh. 60]

Whether or not JetAway's off-Airport interests are protected by contract, they are not protected by the County's grant assurances. But the County's grant assurances do protect its on-Airport tenants. Admittedly, this affects the County's decision-making with regard to potential airport tenant proposals and JetAway's proposal to be adjacent to its through-the-fence operation and off-Airport customers. Other than the County's original consent to the Off-Airport Agreement, this situation is not of the County's making. Entities wishing to conduct commercial aeronautical activities are wise to make arrangements to lease airport property, reasonably offered by an airport sponsor, and should not seek special access to off-airport operations or customers, since those operations or customers are not protected by the sponsor's grant assurances. The evidence in the record shows that

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[25] In Self Serve Pumps v Chicago Executive Airport, FAA Docket No. 16-07-02 (Director's Determination Issued March 17, 2008), the Director stated, "*In the end, the evidence presented by the Complainant is insufficient to eclipse the Airport's proprietary discretion to make management decisions in the best aeronautical interests of the public, balanced with the best business interests of the Airport as a going concern.*" [SSPumps, DD, p.25]

[26] In late February/early March of 2006, JetAway began excavation on Airport property without the County's permission. At the County's direction, JetAway ceased construction and filled the area that had been excavated. However, JetAway then filed a third lawsuit, seeking an injunction against the County in order to continue construction on the East Ramp Area of the Airport's property. In November of 2006, the District Court of Montrose County denied JetAway's request, concluding that JetAway "*did not have a probability of success on the merits.*" [FAA Exhibit 1, Item 5, exhibit 60, p. 23] In a decision dated June 30, 2008, the District Court of Montrose County found that JetAway trespassed on County property when it directed workers to begin construction without the County's permission. [FAA Exhibit 1, Item 5, exhibit 60, p. 32]

One Creative Place and JetAway have common ownership. The evidence in the record also shows that One Creative Place LLC and KMTJ Fuel LLC, are located at the same location, One Creative Place, Montrose, Colorado. Accordingly, the County may consider JetAway, One Creative Place and KMTJ Fuel as one entity.[27]

JetAway presents 11 sub-counts, alleging that the County has insisted on unreasonable terms or conditions upon JetAway's preferred FBO location, its future construction and operation that is adjacent to its off-airport location, and the through-the-fence access point. [FAA Exhibit 1, Item 1, pp. 30-47]

JetAway's Off-Airport Interests and Entities are not Protected by the Grant Assurances

In sub-counts 6a and 6d, JetAway argues that the County is unreasonably sanctioning its off-Airport interests, stating:

> *The County has adamantly refused to consider any proposal for JetAway to provide FBO services on the Airport unless One Creative Place would agree to unreasonable restrictions on the use of its private property off the Airport, and relinquish some of its rights as a* [off-Airport] *Part Owner under the Off-Airport Agreement.* [FAA Exhibit 1, Item 1, p. 30]
>
> *The County has insisted on a cross-breach provision... whereby a breach of the Off-Airport Agreement by One Creative Place, or any of its affiliated entities or lessees, would constitute a breach of JetAway's FBO Agreement.* [FAA Exhibit 1, Item 1, pp. 35-36]

It is again important to note that as a general principal, the FAA does not support agreements that grant access to the public landing area by aircraft stored and serviced off-site on adjacent property. Through-the-fence arrangements are disfavored by the FAA and can place an encumbrance upon the airport property. Thus reducing the airport's ability to meet its Federal obligations. Accordingly, under its grant assurances, the County is free to act to limit, mitigate, or eliminate the effects of the Off-Airport Agreement. [See 2006 JetAway DD] One way to mitigate the effects of the Off-Airport Agreement is to limit off-Airport commercial activity, such as the leasing of aircraft hangar storage. As stated herein, FAA precedent allows the County to view One Creative Place and JetAway as the same entity. It appears that the County is acting within its proprietary rights, within its Federal obligations and is taking action necessary under grant assurance 5, *Preserving Rights and Powers*.

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[27] In Jack H. Cox v. the City of Dallas, FAA Docket No. 16-97-02, (October 24, 1997) (Record of Determination) the FAA found that "The City of Dallas, by amending its lease with Redbird Development Corp. (RDC) to prohibit Jack H. Cox *or any entity in which he has an interest* from leasing, subleasing or participating in the use of the RDC-leased premises, is not violating its federal obligations" with regard to grant assurance 22, *Economic Nondiscrimination.* [*See* Record of Determination, 16-97-02, page 17] Also, in SeaSands Air Transport, Inc. v. Huntsville-Madison County Airport Authority, FAA Docket No. 16-05-17 (August 28, 2006) (Director's Determination), the FAA found that the actions and behavior of a universal agent, such as the president of a company, are attributable to the business entity over which the universal agent has control." [*See* Director's Determination, 16-05-17, pages 21, 23]

The County May Protect Itself against Legal Liability & the County Does Not Have to Accept Donated Land

- Under sub-counts 6b, 7b(2) and 7c, JetAway raises instances in which the County is reluctant to expose itself to legal jeopardy from JCP. JetAway alleges that it is unreasonable for the County to pay heed to potential legal jeopardy that may pertain to the County if the County were to take actions against the interests of its on-Airport FBO, JCP and that are preferred by JetAway, including acceptance of JetAway's off-Airport parcels.

Sub-count 6b involves the County seeking indemnification from JetAway with regard to claims by JCP. JetAway states:

> *JCP has... among other things, continually threatened the County with escalating civil litigation. JCP sued the County in the Montrose County District Court in March 2006 for breach of the JCP FBO Agreement, and that claim is still pending, but JCP continued to threaten additional claims throughout 2006 and 2007.* [FAA Exhibit 1, Item 1, p. 32]

JetAway appears to admit some degree of legal liability above, even if JetAway presumes it to be small. The County cites its current indemnification with JetAway with regard to the existing Off-Airport Agreement. [FAA Exhibit 1, Item 1, exh. 2, p. 6] JetAway states that this indemnification that the County is requesting is not required of JCP. Clearly, the circumstances are different. The record indicates that the County has considered numerous options to accommodate JetAway, including leasing land adjacent to the through-the-fence access point used by JetAway and its tenants and/or accepting donated land with various leaseholds and encumbrances. [FAA Exhibit 1, Item 1, exhs. 5 & 6] These situations are not similar to the landlord/tenant relationship set out in the JCP Lease. Furthermore, JetAway's rights under the Off-Airport Agreement are not protected by the County's grant assurances, but JCP's use of the Airport is protected.

Also associated with the speculative possibility of donating land, discussed in mediation, is the issue of the Off-Airport Agreement's restrictive covenant running with the land, discussed under sub-count 7b(2). The restrictive covenant in question allows specific activities and could limit activities of through-the-fence operators. [FAA Exhibit 1, Item 1, exh. 2, p. 9] JetAway quotes the County's allegedly unreasonable negotiating position from its last proposed settlement agreement:

> *In no event, however, can JetAway or any of its affiliated or related entities or persons commence any FBO operations... until there has been a final judicial resolution of whether restrictive covenants prohibit FBO use of property donated to the Airport because such property was formerly included in the aerospace park and subject to such restrictive covenants.* [FAA Exhibit 1, Item 1, p. 42]

It appears that the County was reluctant to accept a legal liability from accepting donated land from JetAway that contains a disputed restrictive covenant running with the land that

would be owned by the County.[28] In fact, the Montrose Court Order, discussed above, has determined that the restrictive provision actually prevents the vending of aviation fuel from those properties. This would appear to be a unique 'double-edged' problem for JetAway. But it is rightfully JetAway's liability to bear, even if small. JetAway states that JCP has threatened to sue the County over breaking the restrictive covenant by allowing its newly 'owned' land to be used for purposes actually prohibited by the restrictive covenant running with the land and contained in the Off-Airport Agreement.

As stated above, this idea of donating land is too speculative for the Director to include in a finding of this Part 16 proceeding as it was part of negotiations in mediation and not part of this proceeding. However, the County is permitted to protect the Airport account from financial loss due to legal jeopardy. Such a provision protects the public interest in civil aviation by protecting the Airport's users from having to finance judgments against the County. Indemnification and other protections associated with the acquisition of off-Airport property interests that contain restrictions, including personal guarantees, appear to be acceptable and justifiable.

With regard to sub-count 7c and the various 'land donation' proposals, the County states, "the County would agree that a donation or exchange of land is not feasible in view of VOR, OFA, geographic, environmental and restrictive covenants issues that pertain to such proposal." [FAA Exhibit 1, Item 3, p. 37] The grant assurances do not require that the County alter its property map to accept property as a donation, either as fee-simple or as a long-term lease, in order to accommodate the interests of a party that wishes to preserve its investment in its off-airport facilities. The FAA would be concerned that accepting such a donation, swap, lease-leaseback or other unusual circumstance under the legal circumstance described in this sub-section could impose some significant legal and/or financial liability on the County. Failure to protect itself might be evidence that the County has failed to preserve its rights and powers, as required by its grant assurance 5. As stated, it appears that the County has determined that it is imprudent for it to proceed with such a scenario, choosing, instead to reasonably say 'no' to this specific proposal and to offer an alternative solution.

In some Sub-Counts the Parties have Reached Resolution

JetAway raises issues in sub-counts 6c, 6f and 7d in which the parties appear to have reached resolution in a manner that accommodates JetAway's position or allows for the accommodation at the time of implementation. The Director reminds the parties that the test for compliance is what a sponsor actually does, not what a document may state. Rarely are minimum standards, leases or plans so perfectly crafted as to be above criticism during the life of their applicability. This extant case has illustrated this long-standing principle.[29] As stated, the Director will not make a detailed analysis of each particular

[28] Proposals included a fee simple transfer as well as long term lease. For purposes of Grant Assurance 4, *Good Title,* a long term lease satisfies the good title ownership requirement.

[29] As stated in Self Serve Pumps, "*the FAA does not judge an airport sponsor simply by the plain language of agreements or minimum standards, since such documents are rarely so perfectly crafted as to avoid all possibilities for inconsistency over time, changing circumstances and interpretations. Rather, the FAA*

negotiating stance taken by parties in confidential mediation in hindsight, with imperfect information. While the Director will not opine on these particular issues, he will attempt to provide clarity in regard to the County's obligations under the grant assurances by offering the following observations.

- At sub-count 6c, JetAway raises the issue of FBO management qualifications. [FAA Exhibit 1, Item 1, page 38]

With respect to FBO management qualification requirements to be imposed upon JetAway's proposed FBO, the parties submit identical sections in their respective proposals of November 2007. Both draft settlement agreements state, "JetAway will obtain and maintain professional, experienced FBO management for its FBO, which management will be subject to review and approval of the County, which review and approval will not be unreasonably withheld." [FAA Exhibit 1, Item 1, exh. 5, par. 6 & exh. 6, par. 3] This is not a matter ripe for FAA review, since the County has not exercised any review and has not rejected any FBO management for any reason. The provision appears to be customary, typical and reasonable.

- At sub-count 6f, JetAway re-raises the issue of the Airport UNICOM. [FAA Exhibit 1, Item 1, page 38]

The Director addressed and dismissed this issue in the 2006 JetAway DD. We rely on that finding here. [2006 JetAway DD, pp. 33-34] Again, we observe that JetAway is not similarly situated to JCP. JetAway now has no leasehold presence on the Airport and has not yet had the right to conduct commercial aeronautical activities upon the Airport (See Montrose Court Order). Consequently, the County has no obligation to compel JCP to direct airport users to JetAway's service offered pursuant to the Off-Airport Agreement. Also, it appears that in the confidential mediation, the parties came to a concurrence in November 2007 that appears to accommodate JetAway's concerns going forward, when presumably JetAway could make itself a similarly-situated FBO in relation to the UNICOM. Both draft settlement agreements state, "Pursuant to FAA Order 5190.6A, the County will revoke the existing FBO's right to operate the UNICOM and determine the level of manned service that the County will provide, if any." [FAA Exhibit 1, Item 1, exh. 5, par. 17 & exh. 6, par. 12] In its Reply, JetAway alleges that the County may attempt to make JetAway pay for the cost of the UNICOM, without proving to JetAway that it's also charging JCP, equally. This is a speculative claim. The FAA observes that the County should distribute costs to its FBOs through a comprehensive and reasonable rate structure and cost-allocation.

- At sub-count 7d, JetAway raises the issue of the County's apparent square footage requirement. [FAA Exhibit 1, Item 1, page 45]

JetAway states that the County is requiring JetAway to construct crew and passenger lounge facilities totaling at least 4,000 square feet. It states that this is 1,500 square feet

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judges compliance by an airport sponsor's actions or inactions with respect to those agreements or minimum standards." [Self Serve Pumps, DD, pp. 31-32]

larger than required by the 2005 Minimum Standards, but equivalent to the size facility required in JCP's lease. [FAA Exhibit 1, Item 1, p. 46] In fact, it does appear that the County did include the 4,000 square feet requirement in its November 2007 draft settlement agreement. [FAA Exhibit 1, Item 1, exh. 5, par. 12] Again, the FAA understands that positions taken in negotiations are often fleeting. That appears to be the case here. In its Answer the County concedes the point, stating, "A second FBO will only have to build improvements of a size that is specified in the Minimum Standards. It does not have to match the size of JCP's facilities to the extent those facilities are in excess of the Minimum Standards." [FAA Exhibit 1, Item 3, p. 39. See also FAA Exhibit 1, Item 1, exh. 21, Section Two III B.] In response to this statement by the County, JetAway replies, "That is certainly an appropriate position for the County to take." [FAA Exhibit 1, Item 5, p. 39] Under the circumstances, we agree with JetAway and the County.

In some Sub-Counts JetAway alleges County is *not* required to take specific actions

At sub-count 6e and 7a, JetAway alleges that the County is choosing to take actions that its grant assurances do not require it to take. Such an allegation is not an allegation of the violation of a grant assurance. It ignores an airport sponsor's proprietary rights that may be more comprehensive than the FAA grant assurances.

- At sub-count 6e, JetAway states that it is unnecessary for the County to issue a Request-for-Proposal (RFP) to solicit interest in a second FBO opportunity. [FAA Exhibit 1, Item 1, page 38]

JetAway states, "the County had acknowledged and agreed that an RFP for a second FBO would be 'unnecessary and inappropriate,'" but after JCP threatened to sue the County, the County raised the possibility of issuing an RFP for a second FBO. [FAA Exhibit 1, Item 1, p. 38] The Director addressed this issue specifically in the 2006 JetAway DD. The Director disagreed with JetAway's 2006 assertion that the RFP process for a second FBO is unnecessary and delaying. The Director stated:

> *The grant assurances do not prohibit the County from entering into long-term leases with commercial entities, by negotiation, solicitation, or other means. The County may choose to select FBOs... through an RFP process, and, if it chooses to do so, it can do it each time a new applicant is considered.* [FAA Exhibit 1, Item 3, exh. A, p. 28]

The Director noted in a footnote in the 2006 JetAway DD that RFP's are a common industry practice that provide a widely circulated call for aeronautical interest in airport facilities, and provide an appropriate method of ensuring the highest and best use for limited airport property. [FAA Exhibit 1, Item 3, exh. A, p. 28]

Additionally, the Director has also recognized that an airport sponsor can limit a current Airport FBO tenant from responding to a proposal for a new FBO opportunity in furtherance of compliance with grant assurance 23 *Exclusive Rights*. In Corporate Jets v Scottsdale, the Director upheld the airport sponsor's decision to exclude an incumbent

FBO "*from responding to a request for proposal, based on the sponsor's desire to create competition or add further competition at the airport and to provide more choice and services for the public users.*" (Corporate Jets v City of Scottsdale, FAA Docket No. 16-01-12 (March 15, 2002) (Director's Determination), p. 10)

The precedent in the 2006 JetAway DD and Corporate Jets applies in the extant case.

- At sub-count 7a, JetAway objects to being subject to the same lease term as JCP. [FAA Exhibit 1, Item 1, page 39]

JetAway states that the County appeared flexible on JetAway's proposed lease term of 35 years, but changed its position after pressure from JCP. JetAway states, "... the County ultimately insisted that the term provisions be identical to those in the JCP FBO Agreement- an initial term of twenty years with a ten-year option." [FAA Exhibit 1, Item 1, p. 40] The County answers, "the County doesn't perceive that requiring all FBO's to have the same term is either unreasonable or unjustly discriminatory." [FAA Exhibit 1, Item 3, p. 36]

The FAA agrees with the County. The County's grant assurances may not require the specific action contemplated by the County, but they do not prohibit it. The County has the proprietary right to establish the terms of its FBO leases.[30]

In some Sub-Counts the Parties Differ

- At sub-count 7b(1) JetAway states that it's unreasonable and discriminatory to require JetAway to meet the applicable minimum standards before commencing FBO operations, when JCP was not formally required to demonstrate that it had met the minimum standards before it began operations in 2006.

JetAway states, "... the County was indeed going to impose unreasonable discriminatory requirements on JetAway that it had not imposed on JCP or others." [FAA Exhibit 1, Item 1, p. 41] The County answers, "There is nothing unreasonable or unjustly discriminatory in requiring all FBO's to comply with the same Minimum Standards before FBO operations commence." [FAA Exhibit 1, Item 3, p. 37]

JetAway has not provided evidence that JCP had not met the minimum standards before beginning operations in 2006. However, JetAway focuses its argument in its Reply, stating "But the point is that the County did not require JCP to do anything to *demonstrate* compliance with the Minimum Standards before commencing operations and yet insisted that JetAway would have to do so." [FAA Exhibit 1, Item 5, p. 37]

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[30] The parties should note that in most cases, under a long-term lease, the airport owner transfers the cost of the capital improvement and the risk associated with financing to the tenant. In return, the airport owner gives up a degree of flexibility. Prospective tenants considering a substantial investment in the airport generally seek a lease term sufficiently long to ensure that the tenant gets not only a return *of* its investment, but a return *on* its investment as well. [See Skydance Helicopters v. Sedona Oak-Creek Airport Authority, FAA Docket No. 16-02-02 (March 7, 2003) (Director's Determination) p. 29.

The standard of compliance does not require that airport sponsors enforce minimum standards so rigidly as to require identical tone and posture toward all competitors that have different records and history with the sponsor. [See Rick Aviation v Peninsula Airport Commission, FAA Docket No. 16-05-18 (May 8, 2007) (Director's Determination) p. 16]

JCP and JetAway are not similarly situated. Apart from the differences in location, amenities, circumstances and time, JetAway has access to off-airport facilities that could allow it to operate indefinitely without meeting the Minimum Standards on the Airport. Clearly, this is different from JCP's situation. Further, in this circumstance, it is reasonable for the County to require a second FBO to meet minimum standards before beginning operations and it is reasonable for the County to require JetAway to expeditiously construct its on-Airport facilities and not rely on off-Airport infrastructure.

> At sub-count 7e, JetAway objects to the County's requirement that it pay the same lease rates as JCP despite apparent differences in the quality of the leased properties. [FAA Exhibit 1, Item 1, page 46]

JetAway states, "the County's insistence on identical FBO revenue provisions (rent) until now has been unreasonable and discriminatory under the circumstances.... The County simply insisted that JetAway pay the same rate, or actually a higher rate, for unimproved land on which it would have to construct a ramp at a cost to JetAway." [FAA Exhibit 1, Item 5, pp. 40-41]

The County allows that rates for JetAway's leasehold may be set by market forces, capturing any differential in improvements and location, stating, "If there is an RFP for the identified second FBO and JetAway chooses to bid, it will have the opportunity to address and support in its proposal why it should pay less than JCP." [FAA Exhibit 1, Item 3, p. 39] The Director notes that this mechanism can be used to set rates at either the JetAway-adjacent parcel or the 9-acre Site.

JetAway states, "JetAway does not expect the Director to address any specific revenue provision that would be appropriate, and recognizes that the revenue provisions will be subject to negotiation...." [FAA Exhibit 1, Item 5 p. 40] It is not the responsibility of the Director to establish airport rates, nor does the Director negotiate rates between parties. Specific rate negotiations involves numerous variables. It is acceptable to rely on market-mechanisms to help determine the value of a particular location at an airport. Also, it is customary and reasonable for airport sponsors to have an 'unimproved' and 'improved' rate schedule. Tenants financing improvements may pay a lower initial rental (ground rent) than tenants leasing a facility from an airport sponsor. The former will have debt for the new facility while the latter may not have such debt payments.

Issue 4 Conclusion

As discussed above, the County has not acted unreasonably in regard to declining JetAway's proposals. The County has good reason to attempt to limit legal and financial liability associated with the circumstances of JetAway's site and proposed operation—namely the through-the-fence access point and the Off-Airport Agreement that provide JetAway, its tenants, and customers[31] access to the Airport. The County's alternative to any of the points discussed above was to say 'no' and direct JetAway to an alternative site apart from the through-the-fence access point.

As sincere and determined as JetAway's hope for its leasehold vision may be, it is built on the shaky legal foundation of the Off-Airport Agreement. The County's grant assurances do not limit the County's proprietary right to attempt to minimize its exposure to the legal jeopardy that the Off-Airport Agreement may represent. The County may act to limit, mitigate or eliminate through-the-fence access, including the Off-Airport Agreement. It may act to reduce its exposure to potential financial liability, so that it can avoid passing on such costs to its aeronautical users. Its grant assurances require it to not unjustly discriminate against its fully on-Airport tenants and to retain its rights and powers. Even if the legal jeopardy is small, the Federal obligation is a one-way street, in favor of the on-Airport tenants.

As stated, JetAway has no presence on the Airport apart from its Off-Airport Agreement. As such it is equivalent to any proponent of a second FBO at the Airport and is subject to the reasonable planning judgments of the County as to where such FBO may be located. In addition, it is subject to the County's prerogative to solicit other interested parties in an RFP.

For the reasons discussed herein, the Director finds that the County has not unreasonably denied access to JetAway, nor has the County unjustly discriminated against JetAway. Furthermore, the County has not constructively granted an exclusive right by means of unreasonable treatment of JetAway or through the imposition of unreasonable terms.

Considering the above, the Director finds that the County is not in violation of grant assurance 23, *Exclusive Rights* or grant assurance 22, *Economic Nondiscrimination.*

Issue 5

Whether the County has provided more favorable treatment to JCP with regard to retail aircraft services in a manner that unjustly discriminates against JetAway in violation of Federal grant assurance 22, *Economic Nondiscrimination*, 49 U.S.C. § 47107(a).

JetAway raises several issues (discussed below) under this grant assurance and alleges that the County has unjustly discriminated against JetAway. [FAA Exhibit 1, Item 1, page 49-50]

[31] It is unclear from the record whether JetAway intends to continue commercial aircraft storage services.

The County answers, "The County has not unjustly discriminated against JetAway. On the contrary, if the County granted JetAway's proposal, which is the basis for this Complaint, the County would be unjustly discriminating against the existing tenants on the Airport." [FAA Exhibit, 1, Item 3, p. 40]

Many of JetAway's counts do not contain an allegation including the elements of a claim of unjust economic discrimination. Also, most do not allege any facts that the Director can construe as a denial of access to JetAway, reasonable or unreasonable.

The Director has described the fact elements of an allegation of unjust economic discrimination, in the previously referenced Gate 9 Part 16 case:

> *In order for the Director to sustain an allegation of unjust economic discrimination, the record must show the elements of unjust economic discrimination under grant assurance 22. In a Part 16 proceeding, the Complainant has the burden of proof to establish the elements of unjust discrimination. ..., the record must show that another party similarly situated to the Complainant received preferential treatment denied to the Complainant in similar circumstances. ... The FAA has acknowledged that several factors can distinguish parties that a sponsor can justly treat differently, without violating its Federal obligations. Such factors may be: period of lease, business plan proposed, location of facilities, level of service and amenities, scope of services, investment, market conditions, and reasonable actions by the sponsor to promote and protect its ability to continue to serve the interests of the public in civil aviation, including the enlistment of prudent business practices that may change over time.* [Gate 9, DD, p. 11]

Prudent business practice can and should include protecting the rights and powers of the sponsor to continue as a going concern, including acting to limit, mitigate or eliminate a through-the-fence access right.

In regard to the following allegations, the County repeats that JetAway does not offer any facts to support that its specific claims are unjustly discriminatory against JetAway, nor does it offer any legal support for its claims. [FAA Exhibit 1, Item 3, pp. 41-43] The FAA agrees with the County.

With regard to counts 1-6, the statements all appear to describe instances when the County acted to promptly develop its airport infrastructure in a manner that benefits its on-Airport tenant and FBO service provider, JCP, in some cases by directly improving facilities used by JCP.

1 The County made available and lease the "prime FBO location" to JCP.[32] [FAA Exhibit 1, Item 1, page 50]
2. The Montrose County Building Authority refinanced the Airport's debt structure for the benefit of JCP. [FAA Exhibit 1, Item 1, page 51]

[32] With regard to the leasing and configuration of JCP's leasehold, see Issue 3, above.

3. The County accelerated the construction of improvements for JCP. [FAA Exhibit 1, Item 1, page 51]
4. The County paved a ramp area for JCP's exclusive use. [FAA Exhibit 1, Item 1, page 52]
5. The County constructed an access road to JCP's facilities.[FAA Exhibit 1, Item 1, page 52]
6. The County is relocating taxiways to provide better access to JCP's facilities. [FAA Exhibit 1, Item 1, page 52]

In counts 1-6, JetAway makes no claims or statement of fact that constitutes an allegation of an unreasonable denial of access. JetAway has never been similarly-situated to JCP in that it has never held the rights or met the standard to conduct a commercial aeronautical activity on the Airport. Again, the County's grant assurances do not protect JetAway's off-Airport business interests. Therefore, the actions are not unjustly discriminatory.

Counts 7-10 regard JetAway's claims of discrimination against JetAway's ability to conduct its aeronautical business.

7. The County requires all transient aircraft to park at JCP facilities. [FAA Exhibit 1, Item 1, page 52]
8. The County has given JCP control over all general aviation parking. [FAA Exhibit 1, Item 1, page 53]
9. The County has prohibited JetAway from paving the ramp area authorized and required by the Land Lease Agreement. [FAA Exhibit 1, Item 1, page 53]
10. The County has placed unreasonable restrictions on JetAway. [FAA Exhibit 1, Item 1, page 55]

With regard to counts 7-10, JetAway was not authorized to conduct FBO operations on-Airport under a Land Lease Agreement from a site adjacent to its off-Airport facilities. The 2006 JetAway DD addressed this issue, stating, "The area leased by JetAway pursuant to the Land Lease Agreement was not intended for FBO operations and the use of that leased premises is 'for parking and moving of aircraft and for no other purpose.'" [2006 JetAway DD, p. 29]

Counts 7-10 are moot since the Montrose District Court terminated JetAway's Land Lease Agreement in June 2008.[33] This eliminated the County's landlord-tenant relationship with JetAway and removed any pretense that JetAway's off-Airport commercial business was ever protected by the County's grant assurances. Since JetAway's Land Lease was never for any commercial purpose, including FBO activities, JetAway was never similarly-situated to JCP, so there is no unjust economic discrimination. Even assuming that

[33] The Court stated, "The County also argues that JetAway breached the lease by using the leased area for FBO operations. The Court agrees. It is indisputed that JetAway fueled airplanes on the leased premises after entering into the Land Lease Agreement." [FAA Exhibit 1, Item 5, exh. 60, p. 31]

JetAway was not using the Land Lease ramp to support its FBO business,[34] JetAway provides no evidentiary support that these actions constitute an unreasonable denial of access.

Specifically, with regard to counts 7 & 8, JetAway claims that the County was harming JetAway by limiting parking on its former Land Lease ramp to 1 hour, thus advantaging JCP's dissimilar, on-airport FBO business. [FAA Exhibit 1, Item 1, p. 52] The County denies this, citing a reason for its rule:

> *JetAway ...claims that the County requires all transient aircraft to park at JCP's facilities. That claim is untrue.* [*See* FAA Exhibit 1, Item 31 pp. 2-3] *JetAway can park aircraft on its ramp but it cannot park in the taxilane/taxiway or the OFA. It also cannot park aircraft in the fueling area adjacent to JetAway for more than one hour.* [FAA Exhibit 1, Item 3, p. 42]

The evidence provided by the County supports its position. JetAway provides no counter evidence to refute the County. As stated, in any case, the point is moot, since JetAway lost its Land Lease by the Montrose Court Order in June 2008.

With regard to count 9, JetAway alleges that the County denied it the ability to pave some Airport property adjacent to JetAway's off-Airport hangar. JetAway stated that it wanted to:

> *pave a ramp area for parking and moving aircraft. Some of the aircraft would be parked inside the hangar, as they had been with the County's knowledge, consent and encouragement since December 2004. And some pilots and passengers would use the lounge facilities.* [FAA Exhibit 1, Item 1, p. 53]

The County notes this admission by JetAway, adding, "JetAway continued to use the ramp for FBO purposes in support of its off-Airport, through-the-fence operation." [FAA Exhibit 1, Item 3, p. 44] In fact, the County had stated their opposition to the construction stemmed in part from the County's concern not to support "JetAway's combined through-the-fence /on-the-Airport FBO operations." [FAA Exhibit 1, Item 3, p. 44]

With regard to count 10, JetAway admits its business interests on the Airport, despite having no commercial lease on the Airport. JetAway alleges, "The County has recently placed unreasonable and unnecessary restrictions on JetAway's ability to conduct any business." [FAA Exhibit 1, Item 1, p. 55] As stated, JetAway's off-airport business interests are not protected by the grant assurances and the County is free to limit, mitigate or eliminate commercial or non-commercial through-the-fence access. The County's concern regarding JetAway's commercial-use of Airport property under a non-commercial lease (JetAway Land Lease) is reasonable and well-founded, as discussed in the Montrose Court Order. [FAA Exhibit 1, Item 5, exh. 60, p. 31]

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[34] Of course, the Court found otherwise and terminated JetAway's Land Lease. But also, JetAway admits this in its pleadings, stating under count 10, "The County has recently placed unreasonable and unnecessary restrictions on JetAway's ability to conduct any business." [FAA Exhibit 1, Item 1, p. 55]

Count 11: The County has refused to negotiate with JetAway in good faith for the lease of available premises for an FBO

In its last count, JetAway summarizes its grievances, examined above, and styles them as a violation of FAA Order 5190.6A, stating:

> *FAA Order 5190.6A specifies at Par. 4-15 that the airport owner "has the obligation to make available suitable areas or spaces on reasonable terms to those who are willing and otherwise qualified to offer" FBO services and that "unless it undertakes to provide those services itself, the airport owner has a duty to negotiate in good faith for the lease of such premises.* [FAA Exhibit 1, Item 1, p. 56]

JetAway argues that the County is in violation of the FAA Order because the County has failed to negotiate with JetAway in good faith. As stated, the FAA Order does not impose obligations upon the sponsor.

In its entire Complaint, JetAway refers extensively to the record containing evidence that the County has, in fact, engaged JetAway in negotiations to accommodate JetAway's preferred location for a second FBO on the Airport. For example, the record includes various draft and proposed settlement agreements. [FAA Exhibit 1, Item 1, exhs. 4-8] The County's alternative to negotiating with JetAway for its preferred FBO location, from the beginning, was to simply state that the County wished to avoid the legal, financial and technical obstacles associated with the JetAway location. Instead of saying 'no,' to JetAway's preferred location and issuing an RFP for the 9-acre Site, the County continued negotiating in mediation. The evidence of the County's posture during negotiations more nearly describes defensiveness and concern, than a lack of good faith. As stated above, the FAA sees valid reasons for the County's concerns and notes that the County's grant assurances allow it to limit, mitigate or eliminate the Off-Airport Agreement rights, in favor of its fully-on Airport tenants.

Issue 5 Conclusion

JetAway has failed to establish that it is similarly-situated to JCP in a manner to sustain a finding of unjust economic discrimination. As stated herein and in the 2006 JetAway DD, JetAway's off-Airport interests are not protected under the grant assurances. Rather, the County's grant assurances protect the County's Airport tenants (some of whom may be JetAway's competitors) from JetAway's business interests conducted from an off-Airport location. JetAway is due the consideration of any other seeker of a leasehold at the Airport. Also, as stated above, the County had valid reasons for deciding to close out negotiations with JetAway and to offer an alternative site for a second, competing FBO at the Airport.

The Director finds that the County is not in violation of grant assurance 22, *Economic Nondiscrimination.*

VII. FINDINGS and CONCLUSIONS

It is unfortunate that the parties could not reach agreement to resolve the through-the-fence access issues in a manner that would allow JetAway to become an on-Airport FBO. However, the County's first obligation is to protect its on-Airport tenants from those attempting to conduct commercial FBO activities through-the-fence from an off-Airport location. The County is correct to respectfully consider JetAway's interest in leasing Airport property as it would with any other applicant. Issuing an RFP for the 9-acre Site would be a good way to do provide transparency. Before taking action however, the County took great efforts to negotiate with JetAway to become an on-Airport FBO. These efforts, including mediation, were not successful.

In the end, the evidence presented by the Complainant is insufficient to eclipse the Airport's proprietary responsibility to make decisions that best serve the aeronautical interests of the public and the interests of the Airport as a going concern.

Upon consideration of the submissions and responses by the parties, the record herein, applicable law and policy, and for the reasons stated above, the Director of the FAA Office of Airport Compliance and Field Operations finds and concludes that the County is not currently in violation of grant assurances 5, *Preserving Rights and Powers*; 22, *Economic Nondiscrimination;* 23, *Exclusive Rights; 24, Fee and Rental Structure; or 29, Airport Layout Plan.*

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. 16-08-01, 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.

Randall S. Fiertz
Director, Office of Airport Compliance
and Field Operations

Date: July 2, 2009